

GAHC040016052023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : WA/29/2023

M/s Asean Agencies

Age: 0

Occupation :

Address:PO/PS- Itanagar

Papum Pare district

Arunachal Pradesh represented by its Proprietor Shri Tarik Talom

resident of Village Jomo

PO/PS- Rumgong

Siang district

Arunachal Pradesh. Contact no. 9706090000

VERSUS

The State of AP and 3 Others

Age: 0

Occupation :

Address:represented by the Chief Secretary

Govt. of Arunachal Pradesh

Itanagar.

2:The Commissioner

Age: 0

Occupation :

Address:Public Works Department

Govt. of Arunachal Pradesh

Itanagar.

3:The Chief Engineer

Age: 0

Occupation :

Address:Central Zone- B

Public Works Department

Pasighat

East Siang District

Arunachal Pradesh.

4:The Executive Engineer

Age: 0

Occupation :

Address:Public Works Department

Rumgong Division

Siang district

Arunachal Pradesh.

Advocate for : Duge Soki

Advocate for : GA (AP) appearing for The State of AP and 3 Others: Advocate ,

,

, appearing for 2,

3,

4, respectively.

BEFORE

HONBLE MR. JUSTICE KALYAN RAI SURANA

HONBLE MR. JUSTICE BUDI HABUNG

ORDER

Date : 05.12.2023

(K.R. Surana, J)

Heard Mr. Duge Soki, learned counsel for the appellant. Also heard Mr. Subu Tapin, learned Senior Government Advocate representing all the respondents.

2. Aggrieved by the judgment and order dated 22.08.2023, passed by the learned Single Judge in WP(C)238(AP)2022, this intra Court appeal has been preferred by the appellant.

3. In the writ petition no. WP(C)238(AP)2022, the appellant, who is a Class-IA (B&R) category contractor in PWD and 'SS' category contractor

under Border Road Organization (BRO), and whose tender was rejected by the respondent authorities upon technical evaluation, has prayed for setting aside of the order, dated 31.05.2022, by which the technical bid of the appellant was found non-responsive due to non-fulfillment of Clauses 4.5.4, 4.5.9 & 4.5.10, under Section 1 of the Standard Bidding Document (SBD). The appellant has also prayed for a direction to the respondent authorities to give him an opportunity to clarify or modify his technical bids as provided under Clause 23.4 (ii) of the Invitation For Bids (IFB) and for a direction to the respondent authorities to award the work order to the appellant for the work mentioned in the IFB dated 21.07.2019.

4. The learned Single Judge on evaluation of the materials available on record, arrived at the finding to the effect that in terms of clause 4.5.4, instead of having 3(three) minimum Key Personnel for the project, the appellant had provided only 2(two) such Key Personnel. Accordingly, it was held to the effect that the short fall refers during the subsistence of the contract period and not a short fall at the time of initial tender process.

5. In connection with Clause 4.5.9 of the ITB, it was held to the effect that the appellant had declared NIL on the information regarding the ongoing commitments, which was not correct and therefore, it was held that there was no compulsion for the respondent authorities to seek for clarification from the appellant before coming to a finding that the tender of the appellant is not responsive.

6. In the said context, the learned Single Judge had arrived at the finding that the relevant Clauses mentioned in the impugned order dated 31.05.2022, being a part of the technical bid cannot be considered to be

ancillary or subsidiary with the main object to be achieved in a tender, which has a value of work amounting to Rs. 39.10 Crores. Accordingly, it was held that the case of *Oryx Fisheries Private Limited V. Union of India & Ors., (2010) 13 SCC 427*, has no application to the case and accordingly, the writ petition was dismissed.

7. The learned counsel for the appellant, by referring to paragraph-16 of the writ petition has submitted that with regard to non-mentioning of the existing commitment in respect of the work "*C/o Pasighat-Ledum-Tene Road (20.00 km - 40.00 km)*" was due to the reason that at the time of submission of the present tender bids in question, the execution of the said work had not commenced because of non-approval of the DPR. It is also submitted that the BRO, where the applicant is a 'SS' Class contractor has tendering limit up to "No Limit" and the appellant has the capacity of tendering with no upper limit and as such non-mentioning of the existing commitment under the State organization as Class I contractor and not as 'SS' category contractor would not affect the appellant's bidding capacity. Accordingly, it was denied that the petitioner had submitted any misleading/false declaration or suppressed any information of works in hand and hence, it was submitted that the bid of the appellant was illegally rejected under Clause 4.5.9 and 4.5.10 of the SBD.

8. It was also submitted that the bids of the appellant was evaluated on 3 occasions. On the first occasion, the bid of the appellant was found to be non-responsive. On the second occasion, it was due to the objection raised by the Chief-Engineer (SID & P) the bid of the applicant was re-evaluated

and once again found to be non-responsive. However, on the third occasion, a complaint was made by the local MLA, which was on the same ground on which the Chief-Engineer (SID & P) had raised objections and this time with a malafide intention and on the influence by the local MLA, the authorities found the bid of the appellant as non-responsive. It is submitted that it was only because of the political interference that the respondent authorities have changed their view and therefore, it is submitted that the appellant has merit in the writ petition and prays for allowing the writ petition by interfering with the judgment and order passed by the learned Single Judge.

9. Per contra, the learned Senior Government Advocate has supported the impugned judgment and order dated 22.08.2023, passed by the learned Single Judge.

10. The point of consideration which arises for the decision of this appeal is as to whether the finding of the learned Single Judge in the matter of upholding the rejection of the bid of the petitioner as non-responsive due to non-fulfillment of the requirements under Clause 4.5.4, 4.5.9 and 4.5.10 was sustainable or whether it requires interference in this intra Court appeal?

11. It is not in dispute that the appellant has provided particulars of 2 nos. of key technical personnel in his bid against the requirement in the tender of having 3 nos. of key technical personnel.

12. Moreover, the appellant was accused of suppressing one ongoing work and that the submission of the learned counsel for the appellant is that the respondent authorities ought to given him an opportunity to rectify or modify

his bid, for which, there are provisions under Clause 23.4 (ii) in the ITB.

13. In the said context, the learned counsel for the appellant had referred to a copy of the agreement (Annexure-E) to the affidavit-in-opposition filed by the respondents no. 2, 3 & 4 in the writ petition project that the said contract work was not in respect of the 'SS' class but, it was contract with the State Government, wherein the appellant has projected himself as Class I contractor. The mere fact that the appellant has not submitted the tender in the 'SS' category but in the capacity of Class I category, does not create any dent in the findings of the learned Single Judge because the essential facts remains unaltered to the effect that the appellant has not disclosed on the said ongoing commitment in connection with the present tender.

14. Therefore, the facts remain unaltered that the correct assessment of the financial capability of the appellant cannot be assessed due to non-disclosure of the existing commitments. Hence, the findings of the learned Single Judge on the non-disclosure of the existing commitments by the appellant do not require any interference in this intra Court appeal.

15. Insofar as the lack of key technical personnel, this Court is of the considered opinion that the learned Single Judge had rightly appreciated the fact that the requirement of key technical personnel as per the tender were 3, whereas the appellant has provided particulars of 2 key personnel and therefore, notwithstanding that the tender conditions entitled the respondent authorities for deduction to be made per month from the tenderer on pro rata basis but the said clause was not envisaged shortfall of manpower at the time of initial tender process. On this ground also the finding of the

learned Single Judge warrants no interference.

16. Insofar as the non-invocation of the Clause 23.4 (ii) in the ITB is concerned, in the considered opinion of the Court, the view taken by the learned Single Judge that there was no compulsion for the respondent authorities to seek clarification from the appellant before coming to finding that his tender was not responsive cannot be held to be erroneous. The provisions in the tender document which permits the tendering authorities to seek a particular clarification and explanation would not mean that in every case the respondent authorities are bound to seek clarification before declaring a particular tender as non-responsive.

17. In view of the above, the Court does not find any perversity in the judgment of the learned Single Judge, which is impugned in the present appeal and that the reasoning cannot be held to be hit by the Wednesbury principles of reasonableness. The point of determination is answered in the negative and against the appellant.

18. Accordingly, the writ appeal fails and stands dismissed at the admission stage without issuing notice on the parties.

19. There shall be no order as to cost.

JUDGE

JUDGE

Comparing Assistant