



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

Case No. : WP(C) 442/2022

1:M/s Lingi Trading Agency
Having its registered office at Mayu 1, Roing, Dist. Lower Dibang Valley, Arunachal Pradesh represented by its Power of Attorney holder Sri Unti Umbrey.

VERSUS

1:THE STATE OF AP and 4 Ors.
Represented by the Secretary to the Govt. of Arunachal Pradesh, Department of Power, Civil Secretariat, Itanagar 791111

2:The Chief Engineer (Power)
Eastern Electrical Zone
Itanagar
791111

3:The Superintending Engineer (E)
A.P Electrical Circle VII
Department of Power
Tezu 792001

4:The Executive Engineer (E)
Roing Electrical Division
Department of Power
Roing 792110

5:M/s J.R. Enterprises
Having its registered office at Mayu 1
Roing
Dist. Lower Dibang Valley
Arunachal Pradesh

Advocate for the Petitioner : Gimi Tarak

Advocate for the Respondent : Lissing Perme

**BEFORE
HONBLE MR. JUSTICE SONGKHUPCHUNG SERTO**

JUDGMENT & ORDER (CAV)

Date : 01-02-2023

Heard Mr. I. Choudhury, learned senior counsel assisted by Mr. T. Garam on behalf of the petitioner, Mr. R. Saikia, learned counsel appearing for respondent Nos. 1 to 4, and Mr. Apang, learned senior counsel appearing for respondent no. 5.

2. The Executive Engineer (Electrical), Roing Electrical Division (respondent No. 4) issued an NIT dated 20.10.2022 inviting bids for "Electrification of Tourist destination in Lower Dibang Valley District [Eze Breeze Tower (Jawaharlal Nehru Van Udyan) and Sally Lake (at 4km point at Roing – Hunli Road)], Arunachal Pradesh" for an estimated cost of Rs. 3,22,46,000/- to be submitted in a two-bid system i.e. technical and financial, wherein the last date for submission was given as 02.11.2022, and the time for completion of the work was given as 12 months. The NIT also mentioned that the bids should be submitted physically and, the time and date for opening were given as 2:30 P.M. of 03.11.2022. Three firms including the petitioner's participated in the tender and the amounts quoted by the three firms were as follows:

- (I) The petitioner's firm i.e. M/s Lingi Trading Agency, Roing – 277,74,130.26.
- (II) The private respondent M/s G.R. Enterprises, Roing – 310,87,532.00.
- (III) M/s R.R. Traders, Roing – 225,20,405.45.

The bids were opened and evaluated by the duly appointed Tender Opening Board headed by the Executive Engineer (ERED) cum Chairman, Tender Opening Board. The result of the evaluation as given in the Recommendation Report/minutes of the Tender Opening Process dated 3.11.2022 was as follows:

"Bidder 1: M/s R.R. Project has entered into joint venture with M/s Gaurav Electrical having its registration office at Opposite FCI Godown Makum Road Tinsukia Assam. Whereas, this firm has fulfilled all the eligibility criteria but fails to satisfy the conditions of SBD under Volume-I Section-II (ITB) Clause-2.0 (Eligibility of Bidder) Sl. No.: 1.0.

Bidder 2: M/s Lingi Trading Agency also fulfilled all the valid laid down eligibility criteria except for conditions of SBD under Volume-I Section-II (ITB) Clause- 2.0 Sl. No.: 2.1.8 at Page No. 4 wherein Kids and Kin are barred to participate in the standard process. The proprietor has appointed PA to Shri Unti Umbrey but this PA holder hasn't produced Electrical License in his name which is pre-requisite criteria for participating in the bidding.

Bidder 3: M/s J.R. Enterprises has participated in the bidding making joint ventures with M/s Hene Agency. All the criteria have been fulfilled with joint portfolios. As remarked in the Technical Eligibility Criteria Evaluation sheet, bidding competitor objected to Electrical License of M/s J.R. Enterprise with reference to SBD Volume-I: Annexure-A of Section-III Clause-1.02 Sl. No.: 1.02.1 and Sl. No.: 1.02 (I), this condition are fulfilled by Joint Venture partner firm (M/s Hene Agency), M/s J.R. Enterprise have a new Electrical License which is new but valid and satisfies the bidding criteria."

3. The Superintending Engineer (E), A.P Electrical Circle – VII, Department of Power, Lohit District, Tezu approved the Evaluation Report and instructed the Executive Engineer (E), Roing, Electrical Division, Department of Power vide letter dated 07.11.2022 to take necessary action for awarding the work to the private respondent. Aggrieved by the Evaluation Report and the approval of the Superintending Engineer (E), the petitioner is before this Court through his Power of Attorney holder, Shri Unti Umbrey challenging both the documents.

4. Mr. I. Choudhury, learned senior counsel appearing for the petitioner submitted that, because of lack of qualified and competent Contractors to carry

out Government contract works, young and budding businessmen in the State have been allowed to participate in tenders by using the names of recognized and reputed firms through Power of Attorney so that they may be groomed as good contractors and at the same time are gainfully employed for their own good and also for the State, and this practice has gained acceptance and it is still going on in the State. Therefore, when the NIT in question was published, the petitioner also submitted his bid in the name of M/s Lingi Trading Agency, which is a registered firm, under duly signed Power of Attorney given by the firm and his bid was accepted and as per the assessment the amount quoted by him was lower than the private respondent No. 5. i.e., M/s G.R. Enterprises. But by rejecting his bid on flimsy ground such as given in the Assessment Report of the Tender Opening Committee, the bid of the respondent No. 5 was recommended and it was approved by the competent authority for granting the work order. The ground or grounds of rejecting his bid are not sustainable in law, therefore, they are required to be quashed and set aside. Mr. I. Choudhury, by referring to the contents of Clause 2.1.8 of the Volume –I: Section II of the Instruction to Bidders submitted that since none of the kith and kin of the petitioner are employed in the Department of Power, he cannot be barred from participating in the tender process. The learned counsel also submitted that though it is true that the husband of the proprietor of the firm is the Chief Engineer in the Department of Power, his given responsibility in that position is not related at all with the project for which the NIT was issued. Therefore, either way, the bid of the petitioner could not have been rejected on the ground of having kith and kin in the Department of Power. Mr. I. Choudhury by citing examples of practicing Advocates who have kith and kin on the Bench submitted that just because they have kith and kin in the Bench, their right to livelihood cannot be taken away, as such, such Advocates are allowed to continue to practise with certain restrictions/guidelines. Likewise, in this case also though

the husband of the Proprietor of the registered firm is one of the Chief Engineers in the Department of Power, since his official duty or duties is not connected at all with the project concerned, it would amount to denying right of livelihood to her if by stringent application of the provisions of 2.1.8, her bid is rejected.

5. Mr. Choudhury further submitted that it appears from the Recommendation Report/minutes of the Tender Opening Process that the second reason or ground for rejecting the bid of the petitioner was because the petitioner did not produce a valid Electrical License in his name, which is a pre-requisite criterion for participating in the bidding. If the bid of the petitioner was considered in his name then the first ground of rejection of his bid could not have been a ground for rejecting his bid, because once it is accepted that it is the petitioner who actually is the one that participated in the tender, it is his credentials which should be considered by the Tender Committee and not by that of the firm who gave him the Power of Attorney. Mr. Choudhury, after having made the submission urged that in such circumstances, the Court can see and decide as to who actually is the bidder.

6. The learned Senior counsel also submitted that since the bid amount quoted by the respondent No.5 was higher than that of the petitioner, accepting the same would lead to more spending from the public coffer, therefore, that would be against public interest.

7. Mr. R. Saikia, learned counsel appearing for the respondent No. 4 submitted that the terms of NIT is to be strictly adhered to, as any deviation from that would invite adverse consequences. The learned counsel further submitted that Clause 2.1.8 of the Volume –I: Section II of the Instruction to Bidders, should be strictly adhered to so as to maintain free and fairness tender

process, therefore, since it is an admitted fact that the husband of the Proprietor of the Firm, Lingi Trading Agency, is a Chief Engineer in the Department of Power, rejection of the bid of the petitioner is not illegal. As such, there is nothing wrong in the impugned Report or Recommendation and the impugned Approval Order of the Superintending Engineer (E). He also submitted that the terms of the NIT cannot be open to judicial scrutiny; therefore, when the bid of the petitioner has been rejected in terms of the NIT, this Court may not interfere in the decision taken based on the same. In support of his submission, Mr. R. Saikia, referred to paragraph 16 of the judgment passed by the Hon'ble Supreme Court in the case of ***Tejas Constructions and Infrastructure (Pvt.) Ltd. Versus Municipal Council, Sendhwa And Another*** reported in **(2012) 6SCC 464**. The learned counsel particularly referred to Clause (4) of the paragraph. The contents of the paragraph are given herein below:

"16. In Tata Cellular v. Union of India (1994) 6 SCC 651, this Court emphasized the need to find the right balance between administrative discretion to decide matters on the one hand and the need to remedy any unfairness on the other and observed:

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative, decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative or quasi- administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

Mr. R. Saikia, further referred to paragraph 14 of another judgment of the Hon'ble Supreme Court passed in the case of ***Bakshi Security and Personnel***

Services Private Limited Versus Devkishan Computed Private Limited and Others, reported in **(2016) 8 SCC 446**. The relevant paragraph is reproduced herein below:

"14. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn.v. Ganesh Engineering Works, (1991) 3 SCC 273, this Court held as under:-

"6. ... The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases..." "

Lastly, Mr. R. Saikia, referred to paragraph 50 of the judgment of the Hon'ble Supreme Court in the case of ***Uflex Limited Versus Government of Tamil Nadu and Others***, reported in **(2002) 1 SCC 165**. The contents of the relevant paragraph are reproduced herein below:

"50. We have also noticed the submissions based on the fact that repeated endeavours of Alpha and Kumbhat have failed not only before the Madras High Court but before different High Courts based on a similar challenge. Broadly, similar tender conditions have been upheld. It cannot be that every time a tender is floated, Kumbhat and Alpha would be permitted to seek a toehold on one pretext or the other. As noticed, it is not really the function of the Court to vet the terms of the NIT, as it is the decision-making process which can be reviewed in judicial scrutiny."

8. Mr. R. Saikia, also submitted that debarment of kith and kin of an employee employed in the Department which issues the NIT does not violate Article 21; it is to maintain fairness in tender process. In any case, the petitioner has not challenged the provision of Instruction to Bidders.

9. Mr. Apang, learned Senior counsel appearing for the private respondent, while adopting the submission made by Mr. R. Saikia submitted that since the work order was issued, the respondent started executing the same earnestly and has completed at least 40% of the work; therefore, in the public

interest and for the sake of fairness and equity, the decision of the Tender Committee may not be interfered with at this stage.

10. The records have been perused and I have also considered the submissions of the learned counsels. By reading of the recommendation of the Tender Opening Board, it is clear that the bid of the petitioner was rejected mainly on the ground that the husband of the Proprietor of the firm is a Chief Engineer in the Power Department and this violates the provisions of 2.1.8 of Volume –I: Section II of the Instruction to Bidders. The provision is produced here below:

"To execute free and fair process, for the purpose of these kids and kin of bidder employed under the Department of Power and banned from participating in the tender process."

11. The words "to execute free and fair tender process" makes it amply clear that the kith and kin of those who are employed under the Department of Power are barred from participating in the tender process to ensure free and fairness in such process. A tender process where there is no free and fairness would be meaningless; at best, it would amount to an eyewash which will not serve the purpose. The purpose of tender process is to ensure free and fairness while selecting competent and suitable contractors in the interest of the public. When free and fairness is maintained, not only a competent and suitable contractor is selected but equal opportunity is given to all eligible citizens which in turn ensures equitable distribution of national wealth. Therefore, not to follow such terms and conditions would make the whole tender process meaningless. Such terms and conditions are mandatory which should be strictly adhered to. Admittedly, the husband of the proprietor of the firm is a Chief Engineer in Power Department, which is the Department who floated the tender. Therefore, to allow the firm (the petitioner) to participate in the tender process, which proprietor is none other than his wife, would definitely be in violation of the

provisions of 2.1.8 of Clause 2.0 of the Volume-I: Section-II of Instruction to Bidders, which is mandatory. To say that the real intending contractor is the bidder under the cover of the firm namely M/s Lingi Trading Agency, who has no kith and kin is employed in the Department of Power, therefore, the bid is to be considered as that of the Attorney holder does not appear to be a plausible and acceptable argument. Because, in case the contract is granted it would be in the name of the firm and not in the name of the Attorney holder. Therefore, there would always be some element of business between the proprietor of the firm and the Attorney Holder which would naturally lead to flow of some gain to the coffer of the proprietor of the firm. And for that reason one cannot rule out the possibility of anything or something having been done by the husband of the proprietor of the firm, who is not less than a Chief Engineer in the Department. Therefore, to prevent or rule out such possibilities, the provision of Clause 2.1.8 was added in the Volume-I: Section- II of the Instruction to Bidders. For this reason this Court is not inclined to accept the submission of the learned counsel, Mr. I. Choudhury.

12. Secondly, the argument that the second ground of rejection of the bid annuls the first is at best a nice argument since the fate of the whole case depends on the validity or non-validity of the first ground of rejection. The first ground on which the bid of the petitioner was rejected having been found to be legally good, I am of the view that, the need for any further discussion on it does not arise.

13. Lastly, the argument that the petitioner's bid amount being the lowest, acceptance of the bid of respondent No. 5, which was higher would lead to escalation in the expenditure of public money, therefore, it would be against public interest is not acceptable because, the bid amount quoted by the respondent No. 5 is still below the tender amount given for the work. It is upto

the tendering authority to see the workability and reasonableness of the bid amount quoted. They need to have certain amount of latitude to decide on this since they are the one who prepared the work programme and is also responsible for executing the same.

In view of the conclusions drawn, and the observations made hereinabove, I find no merit in the writ petition, therefore, it is dismissed.

JUDGE

Comparing Assistant