

GAHC010088032023



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

Case No. : WP(C)/2215/2023

M/S AARHI TRADERS
A PROPRIETORSHIP FIRM,
HAVING ITS REGISTERED OFFICE AT BYLANE NO. 2, AJANTA PATH,
BELTOLA, GUWAHATI- 28,
REPRESENTED BY SRI JYOTIBAN SAIKIA,
ITS SOLE PROPRIETOR OF M/S AARHI TRADERS, AGED ABOUT 41 YEARS,
SON OF SRI PREMADHAR SAIKIA,
RESIDENT OF PRAKRITI RESIDENCY,
1ST FLOOR, FLAT-A, BELTOLA,
GUWAHATI- 28.

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM,
DEPARTMENT OF AGRICULTURE AND HORTICULTURE,
DISPUR, GUWAHATI- 781006, ASSAM.

2:THE SECRETARY
DEPARTMENT OF AGRICULTURE
GOVERNMENT OF ASSAM
DEPARTMENT OF AGRICULTURE AND HORTICULTURE

DISPUR
GUWAHATI- 781006
ASSAM.

3:THE DIRECTOR OF AGRICULTURE
GOVERNMENT OF ASSAM
AGRICULTURAL COMPLEX
KHANAPARA

G.S. ROAD
GUWAHATI
PIN- 781022

Advocate for the Petitioner : MR. H. BURAGOHAIN

Advocate for the Respondent : SC, AGRI. DEPARTMENT

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 20.06.2023

Heard Mr. K.N. Choudhury, learned senior counsel, assisted by Mr. H. Buragohain, learned counsel for the petitioner. Also heard Mr. D. Saikia, learned Advocate General, Assam assisted by Mr. V. Choudhury, learned standing counsel for the respondents.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has prayed for setting aside and quashing of point no.10 included vide corrigendum dated 30.03.2023 under Section III, Clause 1.1 of the Invitation For Bids (IFB for short) bearing IFB no. AGRI/APART/ AFM-Napier slips/ 2023-24/75/07 issued by the Director of Agriculture, Assam (respondent no.3) as well as corrigendum bearing no. AGRI/APART/AFM-NAPIER SLIPS/75/2022-23 dated 30.03.2023. The petitioner is also seeking a direction on the Director of Agriculture, Assam (respondent no.3) to formulate a new provision/ scheme for reducing the annual average turnover from Rs.4.00 crore as inserted in the corrigendum dated 30.03.2023 to a reasonable amount.

3. In brief, the case of the petitioner is that it is a registered sole proprietorship firm M/s. Aarhi Traders concerned of Jyotiban Saikia and is an

authorized supplier/ contractor of the Agriculture Department, Govt. of Assam. It is projected that the petitioner has been supplying seeds to the Agriculture Department and having experience in the said field, the petitioner was eligible and keen to participate in the tender process floated by the respondent no.3 by inviting eligible bidder to supply Napier slips. The date of commencement of sale of bidding document was on 27.03.2023 from 2.00 PM onwards; last date for sale of bidding document was on 27.04.2023 at 3.30 PM; last date and time for receipt of bids was on 27.04.2023 at 3.30 PM; time and date of opening of bids (Technical Part) was on 27.04.2023 at 4.00 PM; and date and time of pre-bid meeting was held on 10.04.2023 at 3.30 PM in the office of the Directorate of Agriculture, Govt. of Assam. It is projected that in the bid document, there was no clause prescribing qualification to the criteria that the bidder should have an annual average turnover of Rs.4.00 crores in the last three financial years i.e. 2019-20, 2020-21 and 2021-22. However, the same got incorporated by way of a corrigendum dated 30.03.2023.

4. The learned senior counsel for the petitioner has submitted that the estimated amount of the work in question was not provided in the national bidding process, but the average annual turnover criteria of Rs.4.00 crore was provided for last three financial years, which is highly exorbitant and would make the petitioner ineligible to participate. It is submitted that the turnover criteria was not in the previous tendering process for a different item. It is also submitted that it is unheard of that new criteria is introduced by way of a corrigendum whereas the appropriate procedure would have been to cancel the tender process and to issue a fresh tender for the same work. It is also submitted that for the purpose of supplying Napier slips, the respondent authorities especially the respondent no.3 ought to have kept the turnover

criteria at a reasonable figure so as to invite more competitions. Hence, it is submitted that there is no relation of the turnover criteria with the purpose served to be achieved and that there was no objectivity of having a turnover clause.

5. It is also submitted that as per the policy document of the World Bank on procurement regulations for IPF borrowers, it was projected that the national open competitive procurement should be structured to invite more participation by the bidders, which will be frustrated if a high turnover criteria is prescribed which would restrain the competition amongst limited persons/bidders.

6. In respect of his submission, the learned senior counsel for the petitioner has referred to the Assam Public Procurement Act, 2017 as well as Assam Procurement Rules, 2020 and it is submitted that as per the object of the said Act, the purpose of the said Act is to provide fair and equitable treatment of bidders and to ensure that there is equality towards its bidders. By referring to Section 4(1)(b) of the said Act, it was submitted that the fundamental policies of public procurement is to ensure responsibility and accountability of procuring entity and for maintenance of transparency (including consistency, objectivity, predictability, openness), fairness (including appeal rights), equality (including non-discrimination) in relations with the bidders. By referring to Section 6(1) of the said Act, it is submitted that the purpose of the said provision is to ensure wider participation of the bidders as the said provision required that the procuring entity shall not establish any requirement aimed at limiting participation of bidders in the procurement process that discriminates against or amongst bidders or against any category thereof, except when authorized or required to do so by the said Act or the Rules or guidelines framed from time to

time.

7. Per contra, the learned Advocate General has submitted that the respondent no.3 had invited bids for supply of 3,90,00,000 Napier slips required to be delivered within a period of three days from the date of issue of supply orders as per schedule to be provided by the Directorate of Agriculture, to the successful bidders. Hence, it is submitted that as the entire supplies were required to be made within three days, unless the suppliers meets the financial criteria including the turnover criteria, the purpose of procuring Napier slips would be frustrated in view of the requirement of meeting of timely supply. By referring to the statement made in affidavit-in-opposition filed by the respondent no.3 and documents appended thereto, it was submitted that as the bidding process is financed by World Bank, the bid document was prepared and sent to Arias Society. It has been submitted that Arias Society is an autonomous body of the Govt. of Assam for the purpose of project coordination/ management unit for World Bank financed Assam Agri Business and Rural Transformation Project (APART) and Assam Citizen-Centric Service Delivery Project (ACCSDP). Accordingly, it is submitted that the said society is the authorized agency for coordination and management for World Bank financed project. Accordingly, it is submitted that the draft tender/ notice inviting bid was sent for approval to the Project Director, Arias Society, which contained the turnover criteria. However, it was noticed that in the bid document, the said clause somehow got deleted and the same was approved by the Arias Society on 22.03.2023 and thereafter, the sale of tender/ bid document was commenced on 27.03.2023. However, as it was noticed that the bid document did not contain the turnover criteria, within three days a subsequent corrigendum dated 30.03.2023 was issued to incorporate the turnover criteria.

8. By referring to the clause 8 of Section I, instructions to bidders, it is submitted that the tendering authorities has reserved right to amend the bid document by issuing addendum which is envisaged to be made a part of bid/ bidding documents and it was also envisaged to give prospective bidders reasonable time to take an addendum into account in preparing their bids, the respondent authorities at its discretion had reserved their right to extend the deadline for the submission of bids. Accordingly, it is submitted that as the sale of bid documents was commenced on 27.03.2023 and the corrigendum was issued on 30.03.2023, if the last date of submission of bids was on 27.04.2023, the petitioner as well as other bidders had sufficient time and therefore, no prejudice was caused with the issuance of corrigendum to include the turnover criteria clause. In support of his submissions, the learned Advocate General has cited the following cases of (1) *Maa Binda Express Carrier & Anr. Vs. Northeast Frontier Railway & Ors.*, (2014) 3 SCC 760, (2) *Directorate of Education and Ors. Vs. Educomp Datamatics Ltd. and Ors.*, (2004) 4 SCC 19, (3) *Agmatel India Pvt. Ltd. Vs. Resousys Telecom & Ors.*, (2022) 5 SCC 362, (4) *Uflex Ltd. Vs. Government of Tamil Nadu & Ors.*, (2022) 1 SCC 165, (5) *National High Speed Rail Corpn. Ltd. Vs. Montecarlo Ltd. & Anr.* (2022) 6 SCC 401.

9. At the outset, the Court takes note of the fact that the work in question is a World Bank funded procurement which is aimed to provide Napier slips as a part of Assam Fodder Mission. As only three days time is found to be granted to the successful bidder from the date of issue of the supply order, it must be understood that the Napier slips which is an agriculture product would have a limited life span. Although, in the bid document, the estimated amount of tender has not been mentioned, but in the affidavit-in-opposition filed by the

respondent no.3, it appears that the estimated amount has been quantified at Rs.11.70 crores.

10. The learned Advocate General has *prima facie* been able to satisfy the Court that from the contents of the communication dated 16.03.2023 by which draft of the bid document was sent for approval as well as the response by Arias Society on 22.03.2023 of approving the draft bid that the bidding document has been finally vetted by the Arias Society, who is a monitoring authority as well as coordination and management unit for the World Bank Finance Project. The Court is reminded of the observations of the Supreme Court of India in the case of *National High Speed Rail Corporation Ltd. (supra)* cited by the learned Advocate General that the scope of judicial review in such foreign funded contract should be far much less than the ordinary government funded contracts. Said paragraph 37 is quoted hereinbelow:

“37. The scope of judicial review in such foreign funded contract should be far much less than the ordinary Government funded contracts funded from Consolidated Fund of India. The scope of judicial review in such foreign funded contracts/projects would be restricted and minimal. In such foreign funded contracts, the only ground for judicial review ought to be on a limited aspect, i.e., the action of the executing authority does not suffer from favouritism or nepotism and based on the grounds which have been concealed from the foreign financing authority, if disclosed, would have persuaded the financing authority to cancel the contract.”

11. The present notice inviting tender is for procurement of Napier slips which is required under the Assam Fodder Mission. Being an agricultural plant input, the Napier slips have a life span for which timely delivery date of three days is envisaged. To have a plant grown, it requires a conducive weather and other factors. Therefore, if the present tender is cancelled only because of the

corrigendum dated 30.03.2023 by directing the respondent authorities to incorporate the said clause in the tender itself, would merely postpone the procurement process, which is not beneficial either to the beneficiaries or to the Directorate of Agriculture, Govt. of Assam.

12. The tendering authority is the ultimate master of the tender document and the requirement of having turnover criteria cannot be said to be so absurd that it is in violation of Section 4 and 6 of the Assam Public Procurement Act, 2017. The corrigendum was issued on 30.03.2023 while the last date of the application of the bid was 27.04.2023. Therefore, this is not a case where after the petitioner had submitted its bid the tendering authority had altered the eligibility criteria of prescribing turnover. Therefore, it is not acceptable for the Court that the insertion of the said clause was to oust the petitioner from the competition. It is not the case of the petitioner that its bid was submitted prior to the issuance of the corrigendum dated 30.03.2023. Therefore, the Court is unable to accept the insertion of eligibility criteria in form of turnover criteria to be arbitrary or discriminatory or its aim was to oust the petitioner out of the competition.

13. The learned Advocate General has demonstrated from the stand taken in the affidavit-in-opposition filed by the respondent no.3 that the respondent no.3 envisaged the supply to have estimated cost of Rs.11,70,00,000/-. Therefore, the petitioner is required to mobilize funds to the extent of Rs.11.70 crores to procure and to supply 3,90,00,000 Napier slips within three days.

14. The petitioner is not been able to satisfy the Court that if he did not have an average turnover of Rs.4.00 crores for last three years, how it would be meeting the finances to make supply to the said extent. Therefore, for the State to include a clause for turnover criteria cannot be said to be absurd and

therefore, the Court is unable to hold that merely because a turnover criteria has been incorporated in the tender by way of corrigendum, the respondent no.3 had acted arbitrarily or in a mala fide manner. It cannot be said that the inclusion of turnover criteria is irrational or irrelevant or discriminatory and has no nexus for the purpose sought to be achieved. The Court is unable to accept that if a intending bidder does not have a certain turnover every year he would be able to make supplies worth Rs.11.70 crores in three days.

15. The learned senior counsel for the petitioner has projected that assuming that the supply was for a value of Rs.11.70 crores, insisting on an average annual turnover of Rs.4.00 crores for three years would amount to requiring turnover criteria of Rs.12.00 crore rupees. The Court does not find any merit in the said submission because the turnover criteria cannot be read to mean that the tendering authority is requiring turnover worth Rs.12.00 crore annually, it merely says that the turnover of the intending bidder should be on an average of Rs.4.00 crore annually. This would also achieved assurance to the tendering authority that the prospective bidder has its existence for last three years and has been having a steady turnover which would indicate that the business of the intending bidder is consistent and dependable.

16. Therefore, this is not found to be a fit case where the Court would subsist its own wisdom over the decision taken by the tendering authority to incorporate the turnover criteria.

17. As the learned Advocate General for the State has demonstrated that under Section I, instructions to bidders at clause 8 thereof, it was envisaged that the tendering authority may issue a corrigendum/ addendum which would form a part of the bid document, merely because there was no clause in the initial tender document requiring turnover criteria would not dismay and cannot

prevent the tendering authority from adding the said criteria by way of a corrigendum. The said decision has its basis as the bid documents, which contain such a clause was approved by the Arias Society vide their communication dated 22.03.2023. Therefore, the decision of the tendering authority to incorporate such a clause by way of addendum cannot be a subject matter of judicial review as the decision making process cannot be said to be vitiated merely because a clause has been inserted by way of a corrigendum moreso when clause 8 of Section I of the bid document confers power on the tendering authority to issue a corrigendum/ addendum.

18. Accordingly, challenge made in this present writ petition fails and the writ petition stands dismissed.
19. The parties are left to bear their own cost.
20. Interim order passed by order dated 26.04.2023 stands vacated.

JUDGE

Comparing Assistant