

GAHC010142882023



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

Case No. : WP(C)/3800/2023

M/S RSM INFRA PROJECTS
AN ASSOCIATION OF PERSONS (AOP) HAVING ITS HEAD OFFICE AT 3RD
MILE, SEVOKE ROAD,
P.S.- BHAKTINAGAR, P.O.- SILIGURI,
DISTRICT- JALPAIGURI, PIN- 734001,
WEST BENGAL
AND BRANCH OFFICE AT SINGTAM BAZAR, P.O. AND P.S.- SINGTAM,
DISTRICT- EAST SIKKIM (SIKKIM), PIN- 787134 AND
SITE OFFICE AT RSM INFRA BASE CAMP, VILLAGE- NAPAM, DARRANG,
DISTRICT- SONITPUR, ASSAM- 784028.
REPRESENTED BY ITS AUTHORIZED SIGNATORY, SRI VARUN GARG,
AGED ABOUT 24 YEARS.

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SPECIAL SECRETARY TO
THE GOVERNMENT OF ASSAM,
PWRD, DISPUR, GUWAHATI- 781006,
ASSAM.

2:THE SPECIAL SECRETARY TO THE GOVERNMENT OF ASSAM
PWRD
DISPUR
GUWAHATI- 781006
ASSAM.

3:THE CHIEF ENGINEER
PWD (ROADS)
ASSAM
CHANDMARI
GUWAHATI- 781003

ASSAM.

4:THE SUPERINTENDING ENGINEER
PWRD
CITY ROAD CIRCLE
GUWAHATI- 781021
ASSAM

Advocate for the Petitioner : MR. A DHAR

Advocate for the Respondent : SC, PWD

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 28.06.2023

Heard Mr. A. Dhar, learned counsel for the petitioner. Also heard Mr. D. Sakia, learned Advocate General, assisted by Mr. B. Gogoi, learned standing counsel for the PWD.

2. In view of the order proposed to be passed, issuance of notice on the respondents is dispensed with.

3. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed certain clauses in the NIT dated 12.05.2023 on the ground that those clauses are restrictive clauses which would limit the participation of the bidders and accordingly, the petitioner has also prayed for quashing of the tender process and all subsequent actions pursuant thereto.

4. The Assam Public Works Department (Roads) had issued a tender for construction of 4-Lane elevated Corridor on GNB Road for near Dighalipukhuri towards Noonmati near FCI Godown with 2-Lane Extended Arm

towards Rajgarh Road in Guwahati City under SOPD for the year 2022-23 for an amount of Rs.68998.01 lakh (approx). The date of e-publication of the tender was 13.06.2023 and the downloading of the bid document was permitted from 10.30 hours of 13.06.2023 to 14.00 hours of 04.07.2023. Clarification if any could be sought for between 13.06.2023 up to 14.00 hours of 04.07.2023. The submission of bid commenced from 10.30 hours of 13.06.2023 to 14.00 hours of 04.07.2023 and in the two bid system, the technical bid opening was scheduled at 10.00 hours of 06.07.2023.

5. The grievance of the petitioner is that in the bid document issued by the Chief Engineer, PWD (Roads), Assam (respondent no.3), the relevant particulars of the tender, which included the design and the drawings were not provided. Referring to the pre-qualification of the bidder, it is submitted that the same are restrictive clauses because the pre-requisite of a bidder was that he should have satisfactorily executed/ produced/ casted in any one year, during the last five years a UHPFRC (Ultra High Performance Fiber Reinforced Concrete) work for bridge of at least 100 meter length and production of ultra high performance concrete not less than 1000 cum previous year or bidder must have duly executed agreement of association with UHPFRC design and manufacturing company which has all the three qualifications mentioned in the bid document under clause 4.5.(A)(e). It is the grievance of the petitioner that insufficient time for getting clarification and submitting of the bid was provided for because the clarification period ended at 14.00 hours of 04.07.2023 whereas the closing date of the bid submission was also 14.00 hours of 04.07.2023.

6. The learned counsel for the petitioner has also submitted that in respect of requirement of UHPFRC, there is only manufacturer in the Country

and that as per his instructions, there are only three known manufacturer in the globe and accordingly, it is submitted that if the said infrastructure was insisted upon, it would not only be violative of section 3 of the Competition Act, 2002, but it would also run contrary to the provisions of the Assam Public Procurement Act, 2017 and the Assam Public Procurement Rules, 2020 framed thereunder, as it would encourage monopoly for the supplier of the technology and product. It is also submitted that one of the requirement of the bid is that the prospective bidders should be registered with the Assam PWD (Roads), which according to the learned counsel for the petitioner is again a restrictive clause as it would prevent participation from experienced bidders who are otherwise engaged in the road building projects in the National Highways but may not be registered with the Assam PWD, but still could be working on creating highway infrastructure within the State of Assam. It is also submitted that the absence of technical specifications, plans and drawings in the bid document is also contrary to the provisions of Assam Public Procurement Rules, 2020. It is also submitted that as the technology is not readily available there is only one manufacturer/supplier in the Country, a reasonable time is required to make arrangement with the sole supplier in the Country or to have the negotiations with the other two suppliers situated outside the country.

7. It was also submitted that the petitioner had submitted letters dated 21.06.2023, 22.06.2023 and 23.06.2023, thereby seeking clarifications, which was not responded to.

8. Per contra, the learned Advocate General has submitted that pursuant to order dated 27.06.2023, he has obtained specific instructions from the concerned authority of the PWD and it was submitted that before filing of this writ petition, the authorities of the Assam PWD (Roads) had already taken a

decision to issue a corrigendum so as to provide for extension of 14 days time after the publication of corrigendum to submit the bid online. Accordingly, it is submitted that the queries if any, by the prospective bidder can be made online within 30.06.2023 and the extended time for submitting the bid would be 14 days beyond 30.06.2023. In respect of the UHPFRC technology, it is submitted that the Govt. of India, Ministry of Road Transport and Highways had issued a circular dated 22.02.2022 for adoption of a new technology which has certain superior characteristics and is about 4-6 times stronger than the normal concrete (in compressive strength) and much more durable having a longer service life which would leave lower carbon foot print and that the span length between two pillar of the bridge can be increased up to 60 metres, which would be conducive for use in the congested city like Guwahati. It is also submitted that if the usual/ regular technology is used, public in general in Guwahati would suffer. In respect of the technical specifications, plans and drawings is concerned, it has been submitted that the same are available for inspection in the office of the Chief Engineer PWRD, Assam and also in the office of the Executive Engineer, PWRD, East Guwahati Territorial Road Division, during office hours upto the last date of the bid submission.

9. It is submitted that as many as eight prospective bidders have participated in the pre-bid meeting held on 22.06.2023, but the petitioner had not participated in the said pre-bid meeting and therefore, the learned Advocate General questions the intention of the petitioner to challenge the tender in the Court without making any endeavour to find out the reasons from the authorities in the pre-bid meeting. Accordingly, it is submitted that as the technology sought to be introduced is more durable than the usual manner of construction, the State PWD (Roads) has taken a decision to have the elevated

road built in the city of Guwahati as per latest and durable the new technology available.

10. On a consideration of the issues raised by the learned counsel for the petitioner and the response thereto by the learned Advocate General, the Court finds that in respect of the issue of insufficient time given to respond to the bid is concerned, we take note of the stand of the State through the submissions made by the learned Advocate General that the last date of bid submission would be extended to the date of 14 days after the date of publication of the corrigendum/ addendum/ replies to the pre-bid queries online by providing that the tentative date of publication of the corrigendum/ addendum/ replies to the pre-bid queries online would be deferred to 30.06.2023, the Court finds that the time schedule given in the detailed tender notice, where the end date for seeking clarification was 04.07.2023 at 14.00 hours, as per the stand of the learned Advocate General, the replies would be provided online on 14.06.2023, which would appears to mean that the date for seeking clarification has been preponed and therefore, in this regard the competent authority of the PWD (Roads) will have to take a decision as to whether the preponement of the clarification date would amount to curtailing of the time for the bidders to seek clarification.

11. Be that as it may, as the last date of bid submission is proposed to be extended for 14 days after the publication of corrigendum, the Court taken note of the submissions made by the learned Advocate General that the grievance with regard to the insufficiency of time would be addressed by the respondent authority issuing a corrigendum as proposed by the learned Advocate General.

12. The second grievance of the petitioner is that the bid can be

submitted only by the contractor registered under APWD (Roads) and in this regard, the learned Advocate General has submitted that the State PWD (Roads) is contemplating to add in the corrigendum so as to enable the contractor registered under CPWD or any State Government or semi Government organization, Central or State Public Sector undertakings to participate in the bidding process. Thus, the Court is of the considered opinion that the other grievance of the petitioner would also be redressed, if such a corrigendum is issued.

13. Insofar as the third grievance raised in this writ petition about use of UHPFRC technology is concerned, although it appears that use of such technology would give an advantage to the sole supplier in the Country, but in view of the benefits projected, the Court is of the considered opinion that the use of a better technology would come within the scope of a policy decision, which is within the decision making process of the State and as the National Highways Authority of India has accepted the said technology and has communicated such use to the various "works" agencies including Assam PWD (Roads), the Court is disinclined to adjudicate upon the policy decision of the State. As per the bid condition, a bidder can have an experience of satisfactorily executing UHPFRC work for bridge at least 100 meters of length or production of such high performance concrete would not be less than 1000 cubic meter previous year or if the prospective bidder has an agreement of association with the said technology design and manufacturing company. Therefore, the Court finds that notwithstanding that the technology is available with only one manufacturer in the Country, but the technology can still be procured and used by any bidder.

14. Therefore, the Court is refraining from entering into the arena of

policy decision of the State. In this regard, the Court may cite an example, where if an appropriate authority may take a decision to issue a tender for a particular product which has a design and patent in favour of a particular manufacturer, but if the said product is found suitable for the purpose of the State, interference with the tendering process, may not be beneficial for public purposes, although it may give an advantage to a particular manufacture/supplier.

15. Insofar as the fourth issues raised by the petitioner is concerned to the effect that his three representations of 21.06.2023, 22.06.2023 and 23.06.2023 were not redressed. In the said regard, the Court finds that the respondent authorities had convened a pre-bid meeting, the petitioner could have attended the pre-bid meeting to have its query clarified, which was not done in the present case in hand. As the Court finds that the pre-bid meeting was already envisaged in the bid document, non-responding to the representation of the petitioner cannot be held to be so bad which would affect the right of the petitioner in the tendering process. Therefore, on the said ground, the Court is disinclined to interfere with the tendering process.

16. On the same ground, fifth grievance of the petitioner regarding non-inclusion of technical specifications, plans and drawings of the bid document is concerned, the same is not found to be a good reason to interfere with the tendering process as access to the same could have been made by attending the pre-bid meeting. Nonetheless, as the learned Advocate General has submitted that the technical specifications, plans and drawings of the tendered work are available for inspection with the office of the Chief Engineer, PWRD, Assam and Executive Engineer, PWRD East Guwahati Territorial Road Division during office hours up to the last date of bid submission, the Court finds

that the petitioner can inspect the said document to its satisfaction. Therefore, in this regard, the Court finds that there may be a possibility that someone inspecting the technical specifications, plans and drawings may require copies before submitting of the bids. In such an eventuality, the PWD authorities will have to take a decision as to the manner in which they would give access to the prospective bidders to those documents.

17. Nonetheless, as the petitioner has submitted a written request for clarification, it would be appropriate that the respondent authorities would respond to it within the time prescribed for clarification end date.

18. This order is passed on the basis of submission made by the learned Advocate General for the State that the Assam PWD (Roads) authorities are contemplating to issue a corrigendum. Therefore, in the event such a corrigendum is not made for any reason by the authority, the petitioner is given liberty to re-agitate the issue again, if so advised.

19. With the observations as indicated above, this writ petition stands closed.

20. Instruction produced by the learned Advocate General is made a part of record.

JUDGE

Comparing Assistant