

GAHC010200422022



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

Case No. : WA/317/2022

PABITRA BORO
S/O LATE GALENDRA BORO,
PERMANENT RESIDENT OF-
TANGLA TOWN, WARD NO. 3,
P.O. AND P.S.- TANGLA,
DIST.- UDALGIRI, PIN- 784521, ASSAM.

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
PUBLIC WORKS ROADS DEPTT., DISPUR, GUWAHATI- 781006, ASSAM.

2:THE CHIEF ENGINEER
PUBLIC WORKS (ROADS) DEPARTMENT
CHANDMARI
GUWAHATI- 781003
ASSAM.

3:THE SUPERINTENDING ENGINEER
PUBLIC WORKS DEPARTMENT
KOKRAJHAR (R AND B) CIRCLE
KOKRAJHAR- 783370.

4:THE EXECUTIVE ENGINEER
PUBLIC WORKS ROADS DEPARTMENT
UDALGURI (R AND B) CIRCLE
KOKRAJHAR- 783370.

5:THE BODOLAND TERRITORIAL COUNCIL
REPRESENTED BY ITS PRINCIPAL SECRETARY
BTAD KOKRAJHAR- 783370.

6:BHABA DEV MAHANTA
S/O LATE RAGHU RAM MAHANTA
RESIDENT OF FASHIA NO. 1
VILLAGE HARISINGA
P.S.- PANERI
DIST.- UDALGURI (BTR)- 784570

– B E F O R E –

**HON'BLE THE CHIEF JUSTICE
HON'BLE MRS. JUSTICE MITALI THAKURIA**

For the appellant : Mr. H. Betala, Advocate

For the respondents : Mr. D. Saikia, Advocate General, Assam
Assisted by Mr. R. Dhar,
Standing Counsel, PWD,
: Ms. R.B. Bora,
Standing Counsel, BTC

: Mr. U.K. Nair, senior Advocate
Assisted by Mr. A. Boro
Mr. R. Singha,
Advocates for respondent No.6

Date of Hearing : 04.05.2023

Date of Judgment : 25.07.2023

JUDGMENT & ORDER

S. Mehta, C.J.

The instant intra-Court writ appeal is preferred by the appellant herein for challenging the judgment dated 25.08.2022 passed by the learned Single Bench in WP(C) 2924/2021, accepting the writ petition preferred by the respondent no.6 herein/writ petitioner.

Brief facts:

1. A Notice Inviting Tender (NIT) dated 21.12.2020 was issued by the Chief Engineer, PWD (Roads Division), Assam, for construction of roads in the Bodoland Territorial Council (BTC) area under State Owned Priority Development-G (SOPD-G) for the year 2019-2020. The appellant Pabitra Boro as well as the respondent no.6 Bhaba Dev Mahanta, the writ petitioner and so also a few other bidders claiming to be qualified in all aspects participated in the bidding process for construction of the roads in question under package No. SOPD-G-19-20-47. The bids of the writ petitioner Bhaba Dev Mahanta as well as the appellant were declared to be technically responsive. The bids of the appellant and the writ petitioner were equal on financial aspects and both were equally placed on the price quoted. The bid of the appellant was accepted by the Chief Engineer.

Being aggrieved, the writ petitioner Bhaba Dev Mahanta filed the afore-stated writ petition claiming that the bid of the respondent no. 6 in the writ petition, Pabitra Boro, was defective/incomplete as the same did not meet the

mandatory requirements of Clauses 4.3(f) and 19.2(a)(iii) of the tender conditions but in spite thereof bid of the appellant was declared to be technically responsive and a Letter of Acceptance (LoA) dated 26.02.2021 was issued in his favour though the financial bids of the writ petitioner and the respondent no.6/appellant herein were equally placed. Accordingly, Bhaba Dev Mahanta filed the writ petition questioning the award of LoA to the respondent no.6/appellant herein, namely, Shri Pabitra Boro.

2. The learned Single Bench while entertaining the writ petition, directed maintenance of *status quo*, which was extended from time to time. After receiving the pleadings of the parties, hearing the arguments advanced at the Bar and appreciating the material available on record, the learned Single Bench went to hold that the bid of Pabitra Boro, i.e. appellant herein, was not compliant of the tender conditions on the ground that the same was in violation of Clause 4.3 of the tender documents, which required the bidders to state their financial standing for the last five years. As the bid of Pabitra Boro was incomplete on that aspect and the same was declared to be technically non-responsive. Accordingly, the decision of the tendering authorities to hold the bid of the respondent no.6/appellant herein responsive and the Letter of Acceptance dated 26.02.2021 issued in favour of the said respondent were quashed while accepting the writ petition by the impugned judgment. Shri Pabitra Boro (respondent no.6 in the writ petition) has preferred the instant intra-Court writ appeal challenging the impugned judgment dated 25.08.2022.

3. During pendency of the writ appeal and while hearing the arguments advanced at the Bar, this Court received a suggestion from learned Advocate

General, Assam, Mr. D. Saikia that the State Government was prepared to re-examine the matter keeping in view the financial bids and other associated documents submitted by the equally placed bidders and to take an objective decision regarding allotment of the works in question. The authorities were permitted to undertake this exercise vide order dated 28.02.2023. Accordingly, the matter was re-examined at the end of the authorities and after giving due consideration to the facts and figures submitted by the equally placed L-1 bidders, i.e. the writ petitioner and the appellant herein, a speaking order dated 09.03.2023 was passed concluding that since all the L-1 bidders were financially stable as per their submitted documents, past experience became the key factor and, taking note of the past performance in completion of similar projects, it was deemed proper to allot the tendered work invited under NIT No.CE/DEV/TB/504/2019-20/41 dated 21.12.2020 to Sri Pabitra Boro. An Interlocutory Application No.800/2023 has been filed by the respondent No.6/writ petitioner Bhaba Dev Mahanta seeking to assail the speaking order dated 09.03.2023. An affidavit-in-opposition has been filed on behalf of the writ appellant for controverting the averments made in the said application.

4. Addressing the Court on behalf of the appellant, learned counsel Mr. H. Betala vehemently and fervently contended that the decision to award the work to the appellant was taken by the employer PWRD holding his bid to be complete on all aspects after due consideration of the tender conditions. It was urged that the learned Single Bench was unjustified in holding that the bid of the appellant (respondent No.6 in the writ petition) was technically non-responsive. It was contended that the employer, after due consideration of the complete record, held the bid of the appellant herein technically qualified and

thus, the decision to award the work in question to the appellant on the basis of his past experience was absolutely justified. It was urged that there are some anomalies in the Condition Nos.4.3.(f) and 4.5.(A) sub-clause (a) and Clause 19.2 of the tender document and thus, the matter was objectively re-considered by the employer pursuant to permission granted by the Court and the bid of the appellant was again held to be technically responsive vide speaking order dated 09.03.2023.

Attention of the Court was drawn to the qualification information provided in Section 2 of the tender document wherein details about Volume of Civil Engineering Construction Work for the last 5 years have been sought for the years 2014-2015 to 2018-2019. In Qualification Information Clause 1.3.2, quantity of work executed has been sought for the years 2015-2016 to 2019-2020. Attention of the Court was further drawn to the Qualification Information Clause 4.3 in Section 2 of the tender document wherein information about financial turnover has been sought for the years 2014-2015 to 2018-2019 whereas the total value of Civil Engineering Construction Work performed has been sought for the years 2015-2016 to 2019-2020. It was contended that the financial status of the contesting two bidders, i.e. the appellant herein and the respondent No.6, Bhaba Dev Mahanta was comparatively examined and the abstract sheet is attached in the affidavit-in-opposition filed by the respondent No.2, Chief Engineer, PWRD, Assam, which clearly indicates that the appellant has completed 24 numbers of works whereas the respondent No.6/writ petitioner has completed only 13 works. The appellant has executed 9 works worth Rs.5 Crores and above whereas the respondent No.6/writ petitioner has been awarded only one such work. The detailed chart of works performed by the appellant during the last five years has also been annexed to this affidavit

and it is buttressed on the basis thereof that the appellant has undertaken and completed substantial number of works, the quantum and number whereof is much more as compared to the respondent No.6/writ petitioner.

It was submitted by Mr. Betala that the view taken by the learned Single Judge that as the appellant did not provide the annual turnover for the year 2019-2020, his bid could not have been held to be technically responsive, is absolutely unjust and unsustainable on facts and in law. He urged that the Clause 4.3(f) of the tender document has to be read with Clause 4.5(A) sub-clause (a) and if both are seen together, the bid of the appellant is responsive on the technical aspects. It was further submitted that as per Clause 31.1 sub-clause (i) of the bid document, the bidder whose bidding documents are found to be substantially responsive and who has offered the lowest evaluated bid price, is to be awarded the contract. Reliance was placed by the appellant's counsel on the affidavit of the employer wherein it has been asserted that the bid of the appellant was substantially responsive. Learned counsel for the appellant also urged that even though the price bids of the appellant herein and the respondent No.6/writ petitioner were at par, on thorough evaluation of past performance, execution and completion of larger number of similar projects, the appellant was rated higher than the respondent no.6.

5. Mr. Betala, learned counsel for the appellant placed reliance on the Supreme Court judgment in the case of ***Central Coal Fields Ltd. & Anr. Vs. SLL-SML (Joint Venture Consortium) & Ors***, reported in ***(2016) 8 SCC 622*** and urged that the deviation in the technical qualification is permissible if the decision taken for such deviation is not arbitrary, irrational, unreasonable, *mala fide* or biased. It was further submitted by Mr. Betala that the technical

bids were opened on 08.01.2021 and the Letter of Acceptance was issued in favour of the appellant on 26.02.2021 whereas the writ petition came to be filed on 27.04.2021 and thus the challenge laid by the writ petitioner was highly belated. It was thus contended by learned counsel Mr. H. Betala representing the appellant that the learned Single Bench committed error apparent on the face of record in accepting the writ petition by the impugned order dated 25.08.2022 which deserves to be reversed by accepting this writ appeal.

6. *Per contra* Mr. U.K. Nair, learned senior counsel representing the respondent No.6/writ petitioner, supported the judgment of the learned Single Judge and urged that the deviation from the conditions of technical qualification is impermissible. Admittedly, the appellant herein did not furnish the financial standing statement and the auditor's report for the past 5 years in terms of Clause 4.3.(f) which is a mandatory requirement, and thus, the appellant's bid was on the face of it, non-compliant on this material aspect. Regarding the argument advanced on behalf of the appellant that clause 4.3.(f) has to be read with Clause 4.5.(A) sub-clause (a) of the tender conditions, it was urged that the said argument is totally fallacious because both clauses operate at different stages of evaluation process. Mr. Nair thus implored the Court to dismiss the writ appeal and direct the authorities to award the LoA to the writ petitioner/respondent No.6 herein.

7. Mr. D. Saikia, learned Advocate General supported the arguments advanced by the appellant's counsel and urged that by taking recourse to Clause 31.1.(i) of the tender conditions, the bid of the appellant herein has been found to be substantially compliant. During pendency of the writ appeal, an exercise

was undertaken for fresh comparative examination of the bids of the two equally placed L1 bidders, i.e. the appellant herein and the writ respondent No.6/writ petitioner, namely, Bhaba Dev Mahanta and after thorough analysis, a speaking order dated 09.03.2023 was passed whereby bid of the appellant has again been found to be responsive and looking to his better past experience, it has been decided to award the work to the appellant. On these grounds, Mr. Saikia also implored the Court to reverse the impugned judgment and affirm the decision of the State in awarding the work to the appellant herein.

8. We have given our thoughtful consideration to the submissions advanced at Bar and have gone through the material available on record. The learned Single Judge held the bid of the appellant herein technically non-responsive on the ground that he did not meet the requirements of Clause 4.3.(f) of the tender document which reads as below:-

“4.3 If the employer has not undertaken prequalification of potential bidders, all bidders shall furnish the following information and documents with their bids in Section 2:

(a) ...

(b)

(f) Reports of the financial standing of the Bidder, such as profit and loss statements and auditor's report for the past five years.”

The appellant in the appeal as well as the State, being the tendering authority, in its affidavit have questioned the justification behind the said

observation of the learned Single Judge referring to the Clause 4.5.A sub-clause (a) of the document, which reads as below:-

“4.5 (A) To qualify for award of the contract, each bidder in its name should have in the last five years as referred to in Appendix.

(a) Achieved a minimum annual financial turnover (in all classes of civil engineering construction works only) of 60% of the estimated cost of the package for works of value upto Rs.200 lakhs and 75% of the estimate cost of the package for works of value more than Rs.200 lakhs (Cost of completed works of previous years shall be given weightage of 10% per year base on rupee value to bring them to present price level) in any one year.”

The five years referred to in the appendix are 2015-2016 to 2019-2020.

9. The view taken by the learned Single Judge, though on the face of it, is attractive but the same does not stand to scrutiny when we consider that there is some vagueness in the terms and conditions stipulated in the bid document. It is true that the pre-qualification information required by clause 4.3 of the tender document, mandated the bidder to provide the financial standing reports for the past 5 years. However, in Section 2 of the tender document where a chart of financial turnover is mentioned, the financial years in question are indicated as 2014-2015 to 2018-2019. Hence, there is definitely some uncertainty in the tender document.

However, it is only to address such a situation creeping into the evaluation process that the employer has been given discretion under Clause 31.1.(i) to award the work to the substantially responsive bidder. The term “substantially responsive” by itself indicates that in case of anomaly, the discretion to decide the substance in a bid has been left to the employer but such a decision must be arrived at after objective consideration and evaluation and exercise of such

discretion if not found to be arbitrary, *mala fide*, irrational, unreasonable or bias, cannot be interfered with by the Court while exercising the powers of judicial review as has been held by Hon'ble the Supreme Court in the case of ***Central Coal Fields Ltd.*** (supra).

In the case of ***M/s. N.G. Projects Ltd. vs. M/s. Vinod Kumar Jain***, reported in ***(2022) 4 Supreme 177***, the Hon'ble Supreme Court held that the satisfaction whether a bidder qualifies the tender conditions is primarily upon the authority inviting the bids.

10. In the present case, not only once but even during pendency of the writ appeal, a second evaluation exercise was undertaken by the tendering authority pursuant to the permission granted by this Court whereafter once again a conscious decision has been taken that the bid of the appellant herein was responsive. Both the qualified bidders were placed at L1 but the past experience of the appellant tilted the scales in his favour vide speaking order dated 09.03.2023. In wake of the above discussion, the contention of the learned counsel representing the respondent No.6/writ petitioner that the bid of the appellant was non-responsive on the ground that the basic qualification requirement was not met is *per se* not tenable.

11. Having given respectful consideration to the judgment relied upon by the learned counsel representing the respondent No.6/writ petitioner in the case of ***Rashmi Metaliks Limited & Anr. vs. Kolkata Metropolitan Development Authority & Ors.***, reported in ***(2013) 10 SCC 95***, we are of the firm view that the financial criterion as mentioned in Clause 4.3(f) of the tender document cannot be read in isolation and is required to be considered along with Clause 4.5(A)(a). When both are read in conjunction, the appellant definitely meets the

required criterion. Thus, we are of the firm view that the interference made by the learned Single Judge in the decision of the employer to award the work to the appellant herein is not based on sound and justified reasoning. Consequently, the impugned judgment and order dated 25.08.2022 passed in WP(C) 2924/2021 is hereby reversed.

12. The appeal is allowed in these terms. All pending applications are disposed of.

No order as to cost.

JUDGE

CHIEF JUSTICE

Comparing Assistant