

GAHC010225472023



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

Case No. : WP(C)/5903/2023

SAMEER GAIKWAD
(PARTNER) OF M/S OM CONSTRUCTION, SR NO. 47/1, HOUSE NO. 1240,
SUNITA NAGAR, WADGAON SHERI, PUNE-411014, MAHARASHTRA.

VERSUS

THE UNION OF INDIA AND 3 ORS.
REPRESENTED BY THE SECRETARY, MINISTRY OF HOME AFFAIRS,
NORTH BLOCK, NEW DELHI.

2:THE CHIEF ENGINEER (AF) SHILLONG ZONE SHILLONG
MEGHALAYA.

3:THE ADDL. DIRECTOR GENERAL (NEI)
GUWAHATI
ASSAM

4:THE T.O.A CWE (AF)
JORHAT
ASSA

For the Petitioner(s) : Mr. M. Miah, Advocate

For the Respondent(s) : None appears.

Date of Hearing : 18.11.2023

Date of Judgment : 18.11.2023

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

1. The instant writ petition has been filed by the Petitioner challenging the order of rejection dated 04.09.2023 issued by the T.O.A. CWE (AF), Jorhat and seeking a further direction that the Respondent Authorities should permit the Petitioner to participate in the next stage of financial opening of bid of the above tender or to stop the process of opening of the next stage of the bid of the above tender work pending disposal of the writ petition. The Petitioner has also sought for a mandamus directing the Respondent Authorities for settlement of the said work in favour of the Petitioner in respect of the tender bid.

2. It reveals that the Petitioner herein is a partner of M/s OM Construction which is an enlisted contractor with HQ CESC and vide 80000/D217/58/E8 dated 22.03.2022. A tender process was initiated for Removal & Re-Installation of Approach Lights at Station Jorhat under GE(AF) Jorhat vide CA No.CWE(AF)JOR/ /2023-24 dated May, 2023 for an estimated cost of Rs.124.66 Lakhs to be completed in 8 months. The Petitioner who claims to be eligible, experienced and qualified, participated in the said bidding for the subject tender and as per the T-Bid report dated 04.09.2023, the Respondent No.4 had rejected the tender bid of the Petitioner in the subject tender by citing reasons "No remarks in WLRQE Mar, 2023 of ADG (NEI) and neither has submitted MoU in affidavit form". The Petitioner is aggrieved with the said rejection of the bid of the Petitioner and therefore has approached this Court seeking the relief as above stated.

3. Taking into account the reasons for which the tender of the Petitioner was rejected, this Court finds it relevant to take note of Appendix-A to the Notice of Tender (NIT) and more particularly Clause-8(a) which stipulates that for MES enlisted contractors, it was the requirement as per the tender that such contractors who are enlisted with MES in Class "B" and above and category "b(i)" subject to satisfactory remarks WRT performance in respect of works in hand as reflected in the Work Load Return (WLR) or any other report circulated by the competent engineer authority.

4. It further seen from Clause-8(c) that all contractors whether they are MES enlisted contractors or not, there is a requirement to have a MoU between one Agency and the bidder binding for the tender. This Court further finds it relevant that there was an amendment made to the Appendix-A to the Notice Inviting Tender whereby Clause-8(c) for all contractors was amended. For the sake of convenience, this Court finds it relevant to quote Clause-8(c) as it stood prior to the amendment and post the amendment.

"Prior amendment – MoU between only one Agency and bidder bidding for the tender will be permitted.

Post amendment – MoU between only one Agency and the bidder bidding for the tender will be permitted. Refer Schedule "A" Notes Para 13 to 17 on serial page No.15 of the Tender Documents."

5. This Court further finds it relevant to take note of Clauses 13 to 17 of the Schedule-A Notes which are reproduced hereinbelow:

"13. Contractor has to obtain affidavit of agreement with the specialist Agency through whom the work shall be got executed. The affidavit has to be uploaded at the time of submission of tender. If the bidder's fail to upload the affidavit, his/her

bid shall be rejected for Financial Evaluation. If the contractor desires to change the specialist Agency during execution of the work, prior approval of change has to be taken from Accepting Officer.

14. The complete scope of the related work shall be got executed under guidance/ supervision of USERS. The contractor shall ensure that the operational requirement of USERS are not affected during execution and the hardware and software is integrated with the existing system.

15. Contractor shall ensure that complete Air Field lighting work including DGPS Survey shall be got executed through the specialist agency namely M/s. TATA POWER SED/ M/s AMA Pvt. Ltd/ M/s Honeywell Automation Ltd/ M/s Three D Integrated Solutions Ltd/ M/s YPR Engineering Solutions Pvt. Ltd/ M/s Vardhaman Airports Solutions and any other agency approved by E-in-C's Branch/ Air Field having experience of execution of three similar works in past and approval obtained from GE/ USERS.

16. Post Re-installation of Lights, CAMC warranty benefits would be applicable and contractor shall submit an undertaking in this regard."

17. The contractor in consultation with specialist agency shall submit a layout plan of conduits with consideration of future expansion and approval obtained from GE/USERS before laying conduits during the resurfacing of runway."

6. From a perusal of above clauses and more particularly Clause-13, it reveals that the contractor has to obtain affidavit of agreement with the specialist Agency through whom the work shall be got executed. It further mentioned that the affidavit has to be uploaded at the time of submission of tender and if bidder failed to upload the affidavit, his/her bid shall be rejected for Financial Evaluation. It is also mentioned that if the contractor desires to change the specialist Agency during execution of the work, prior approval of change has to be taken from Accepting Officer. The said clause therefore

mandates that the arrangement between the contractor and the specialist Agency has to be put in the form of an affidavit. It further reveals that as the said specialist agency would be executing the work, importance have been given that the said aspect of agreement be put on affidavit so that at the later stage, the specialist Agency through whom the work would be executed cannot wriggle out. It is also seen that great importance have been given to the said affidavit inasmuch as if the bidders fails to upload the affidavit, his/her bid shall be rejected for Financial Evaluation.

7. This Court further finds it relevant herein to take note of that the said agreement between the specialist Agency and the Petitioner's firm has not been enclosed to the writ petition. Be that as it may, during the course of hearing, the learned counsel appearing on behalf of the Petitioner has placed before this Court the Memorandum of Understanding which was filed before the Authority. The said Memorandum of Understanding is kept on record and marked with the letter "X". From the said document, it would be seen that it is merely a Memorandum of Understanding and not an affidavit even the said Memorandum of Understanding is not stamped.

8. In the backdrop of the above, therefore the question arises as to whether this Court under Article 226 of the Constitution should interfere with the decision of the authorities who had rejected the tender of the Petitioner on the ground that the said agreement between the Petitioner's firm and the specialist Agency and was not in the form of affidavit.

9. Before further proceeding, this Court at this stage finds relevant to take note of the recent judgment of the Supreme Court in the case of ***TATA Motors Ltd. Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and***

Others reported in 2023 SCC OnLine SC 671 wherein the Supreme Court observed that ordinarily a Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. It was further observed that the Court ordinarily should not interfere in matters relating to tender or contract. Further, the Supreme Court in the aforesaid judgment referred to the case of ***Jagdish Mandal Vs. State of Orissa reported in (2007) 14 SCC 517*** and had observed that while invoking the power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind and that evaluations of tenders and awarding of contracts are essential commercial functions and principles of equity and natural justice stay at a distance in such matters. It was further mentioned that if the decision relating to the award of the contract is bonafide and is in public interest, Courts will not interfere by exercising the powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. Further to that, the Supreme Court in the case of ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. and Another reported in (2016) 16 SCC 818*** had observed at Paragraph No.15 that the owner or employer of a project having authored the tender documents is the best person to understand and appreciate its requirements and interpret documents. It was observed that the Constitutional Courts must defer to this understanding and appreciation of the tender documents unless there is a malafide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. Further to that, the Supreme Court in ***Afcons Infrastructure Ltd. (supra)*** observed that it is possible that the owner or employer of a project may give an interpretation to the tender documents that

is not acceptable to the Constitutional Courts but that by itself is not a reason for interfering with the interpretation so given. The said ratio in ***Afcons Infrastructure Ltd. (supra)*** was again reiterated by the Supreme Court in the case of ***Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers Vs. New J. K. Roadways Fleet Owners and Transport Contractors and Others reported in (2021) 16 SCC 808.***

10. In the backdrop of the above propositions of law as settled by the Supreme Court and taking into account Paragraph 13 of the Schedule-A Notes which was a part of the tender conditions stipulating the manner in which the agreement between the implementing Agency and the contractor was required to be submitted in the form of an affidavit, it is the opinion of this Court that the rejection of the Petitioner's firms bid on the ground that the said agreement between the Petitioner's firm and the implementing Agency was not in the form of an affidavit cannot be interfered with under Article 226 of the Constitution. The rationale behind the said opinion is also based upon the observations made in Paragraph No.6 hereinabove wherein this Court observed the importance of the requirement that the MoU shall be on Affidavit.

11. Accordingly, this Court finds no merit in the instant writ petition for which the instant writ petition stands dismissed.

12. Before parting with the records, this Court expresses its displeasure that the Respondents have failed to appear in the matter in spite of their names being shown in the Cause List.

JUDGE

Comparing Assistant