

GAHC030000012023



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

Case No. : WP(C)/1/2023

M/S Tanor Engineering and Anr.
P-Sector, Itanagar, Papumpare District, Arunachal Pradesh 2: Mr. Diling Tata

VERSUS

The State of Mizoram and 3 Ors.
Aizawl2:The Additional Chief Secretary to Govt. of Mizoram
P.W.D.

3:The Engineer-in-Chief
P.W.D.
Mizoram

4:The Chief Engineer
Highways
P.W.D.
Mizora

Advocate for the Petitioner : Ms. Monica Kechii

Advocate for the Respondent : Mr C Zoramchhana, Addl. AG, Mizoram for R1 to R4

B E F O R E
THE HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

Date of hearing : 19.01.2023.

Date of Judgment : 25.01.2023.

J U D G M E N T & O R D E R (CAV)

Heard Mrs. M. Kechii, learned counsel for the petitioners. Also heard Mr. C. Zoramchhana, learned Addl. Advocate General for the State of Mizoram.

2. The petitioner has prayed for setting aside the Notification dated 28.07.2020, issued by the Chief Engineer, Highways, PWD, Mizoram, by which the petitioner had been debarred from participating in any future tenders under Chief Engineer, Highways, PWD, Mizoram, for fraudulent practices, for a period of three (3) years w.e.f. the date of issue of the notification, by allegedly invoking Appendix VI Article 3(2) of the Integrity Pact Format (IPF). The basic ground of challenge to the above Notification dated 28.07.2020 is that while Section 4 of the Request for Proposal (RFP) deals with Fraud and Corrupt practices, Clause 4.2 of the said Section 4 provides the maximum period of debarment for 2 years only, for fraudulent practices.

3. The petitioner's counsel thus submits that as the petitioner had been illegally debarred for 3 years for resorting to fraudulent practices, the impugned Notification dated 28.07.2022 should be set aside, as it loses its validity after two years, i.e. on 28.07.2022, in terms of Clause 4.2 of Section 4 of the RPF. She submits that Appendix VI Article 3(2) could not be invoked/applied by the respondent No. 4.

4. The petitioner's counsel submits that the impugned Notification dated 28.07.2022 was challenged by the petitioner in appeal. However, the petitioner's appeal was rejected by the respondent No. 4 vide letter dated 19.08.2020.

5. The petitioner's counsel submits that the reason the petitioner has now approached this Court is that the petitioner had participated in the tender process issued by the Chief Engineer, PWD(N.H Works), Assam vide NIT dated 05.09.2022. However, the petitioner's technical bid was rejected on 29.12.2022, by the Assam State Level Evaluation Committee by observing that the petitioner had been debarred from participating in the tender process under the respondent No. 4 for a period of

three years w.e.f. 28.07.2020.

6. The petitioners' counsel submits that Section 4.2 of the RFP provides the maximum period of debarment of the Contractor for fraudulent practice for a period of 2 years only. However, by illegality applying Appendix VI Article 3 and Article 2, the respondent No. 4 has barred the petitioners for participate in the tender process for three years.

7. The further contention of the petitioners' counsel is that Appendix VI Article 3(2) of the IPF can only be applied, if there has been a violation of Article 2. As Appendix-VI Article 2 is limited to preventing corruption and is not relatable to fraudulent practices, Appendix VI Article 3(2), by which debarment can be made for three years cannot be applied for the petitioners' case.

8. Mr. C. Zoramchhana, learned Addl. Advocate General, Mizoram appearing on behalf of the respondent Nos. 1 to 4 submits that there has been no infirmity with the debarment of the petitioners from participating in the tender process for three years in terms of Appendix VI Article 3(2). He further submits that as the petitioners had given false information which would amount to an attempt to cheat, the same was covered by the provision of Appendix VI Article 2(c), as the same was in violation of the Indian Penal Code. Accordingly, the exercise of Article 3 was not in proper or illegal.

9. I have heard the learned counsels for the parties.

10. The question to be decided is as to whether punishment/penalty can be imposed upon Contractor for fraudulent practices under Article 3(2) of the Appendix VI of the IPF or under Clause 4.2 of the RPF.

11. Clause 4.2 of the RFP states as follows:-

“4.2. Without prejudice to the rights of the Authority under Clause 4.1 hereinabove and the rights and remedies which the Authority may have under the LOA or the Agreement, or otherwise if a Bidder or Contractor, as the case may be, is

found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Bidding Process, or after the issue of the LOA or the execution of the Agreement, such Bidder shall not be eligible to participate in any tender or RFP issued by the Authority during a period of 2 (two) years from the date such Bidder, or Contractor as the case may be, is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practices, as the case may be."

As per Clause 4.2 of the RPF, it is clear that a bidder can be debarred from participating in any tender for two years due to any corrupt practices, fraudulent practice etc. In the present case, there is no denial of the fact that the petitioners has been found guilty of fraudulent practice as had been defined in Section 4.2 (b), as against corrupt practice as defined in Section 4.3(a) of the RFP.

12. Section 4.3 (a) and (b) are reproduced below:-

"4.3 For the purposes of this Section 4, the following terms shall have the meaning hereinafter respectively assigned to them:

(a) "corrupt practice" means the offering, giving, receiving or soliciting of anything of value, pressurizing to influence the action of a public official in the process of tendering and execution of the project;

(b) "fraudulent practice" means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;"

13. Appendix VI Article 2 and Article 3 (1) and (2) of the IPF are reproduced below:-

"Article-2: Commitments of the Bidder(s)/ Contractor(s)/ Concessionaire(s)/ Consultant(s).

The Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) commit himself to take all measures necessary to prevent corruption. He commits himself to observe the following principles during his participation in the tender process and during the contract execution.

(a) The Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) will not, directly or through any other person or firm, offer, promise or give to any of the Principal's employees involved in the tender process or the execution of the contract or to any third person any material or other benefit which he/she is not legally entitled to, in order to obtain in exchange any advantage of any kind whatsoever during the tender process or during the execution of the contract.

(b) The Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) will not enter with other Bidders into any undisclosed agreement or understanding, whether formal or informal. This applies in particular to prices, specifications, certifications, subsidiary contract, submission or non-submission or bids or any other actions to restrict competitiveness or to introduce cartelization in the bidding process.

(c) The Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) will not commit any offence under the relevant IPC/PC Act and other Statutory Acts; further the Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) will not use improperly, for purposes of completion or personal gain, or pass on to others, any information or document provided by the Principal as part of the business relationship, regarding plans, technical proposals and business details, including information contained or transmitted electronically.

(d) The Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) of foreign origin shall disclose the name and address of the Agents/Representatives in India, if any. Similarly, the Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) of Indian Nationality shall furnish the name and address of the foreign principle, if any.

(e) The Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) will, when presenting his bid, disclose any and all payments he has made, is committed to or intends to

make to agents, brokers or any other intermediaries in connection with the award of the contract. He shall also disclose the details of services agreed upon for such payments.

(f) The Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) will not instigate third persons to commit offences outlined above or be an accessory to such offences.

(g) The Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) will not bring any outside influence through any Govt. bodies/quarters directly or indirectly on the bidding process in furtherance of his bid.

Article – 3 Disqualification from tender process and exclusion from future contracts.

(1) If the Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s), before award or during execution has committed a transgression through a violation of any provision of Article-2, above or in any other form such as to put his reliability or credibility in question, the Principal is entitled to disqualify the Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) from the tender process.

(2) If the Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) has committed a transgression through a violation of Article-2 such as to put his reliability or credibility into question, the Principal shall be entitled to exclude including blacklist and put on holiday the Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) for any future tenders/contract award process. The imposition and duration of the exclusion will be determined by the severity of the transgression. The severity will be determined by the Principal taking into consideration the full facts and circumstances of each case particularly taking into account the number of transgressions, the position of the transgressors within the company hierarchy of the Bidder(s)/Contractor(s)/Concessionaire(s)/Consultant(s) and the amount of the damage. The exclusion will be imposed for a maximum of 3 years.”

14. Appendix VI Article 2 speaks of the measures necessary to be taken to be prevent corruption by the bidders/contractors etc. The principles to be followed during the bidders/contractors participation in the tender process and during the execution of the contractor is also laid down in Article 2. Article 2 (c) provides that the

bidders/contractors will not commit any offence under the relevant IPC/PC Act and another Acts.

In the present case, the petitioners had given false statement for personal gain so that the contract was awarded to them. Though the petitioners' counsel has tried to impress upon this Court that Article 2 is confined only to corrupt practices as defined in Section 4.3(a) of the RFP, this Court is of the view that Article 2 cannot be confined only to prevention of corrupt practices, inasmuch as, Article 2(c) would also embrace within its fold offences under the Indian Penal Code, which includes an attempt to cheat, keeping in view Sections 415, 420 read with Section 511 IPC.

15. Article 3(1) provides that the State respondents are entitled to disqualify bidders/contractors from the tender process, if the bidders/contractors has committed a transgression before award of the contract or during execution, through a violation of any provision of Article 2 OR in any other form, so as to put his reliability or credibility in question. A consideration of the same shows that Article 3(1) only provides for disqualifying a bidder/contractor from the tender process that he participates in and not from any future tender process. As such, Article 3(1) is not applicable to the facts of this case.

16. A bare perusal of the provision of Article 3(2) & 2(c) clearly goes to show that bidders/tenderers can be debarred under Article 3(2), if any offence has been committed under the Indian Penal Code. As such, the question that has to be decided is as to whether the false statements made by the petitioners in the tender process relating to NIT dated 10.02.2020 would amount an offence under the IPC.

17. Section 415 IPC deals with cheating and the explanation to the same provides that a dishonest concealment of facts is a deception within the meaning of Section 415 IPC. Section 420 IPC deals with cheating and dishonestly inducing delivery of property.

18. In the present case, the petitioners had been debarred for 3 years for making

false statement/s which amounts to dishonest concealment of facts, for the purpose of inducing the authorities/persons deceived to deliver any property to any person. However, the authorities have not been misled by the false statement/s made by the petitioners in their tender bids. An offence of attempt to cheat can be said to be committed, even though the person attempted to be deceived did not believe the false statement/s. The attempt to bag the contract work on the basis of false statement/s i.e., dishonest concealment of facts and the consequential profits are an attempt to commit the offence of cheating, which is an offence under the IPC.

19. As Article 3(2) provides that bidders/ contractors can be barred from participating in any future tender process for a maximum of three years, if transgression has been committed through a violation of Article 2, this Court is of the view that the offence of attempting to cheat being a transgression/offence under the IPC, there is no infirmity with the decision of the respondents in barring the petitioners from participating in future tenders for three years under Appendix VI Article 3(2) of the IPF.

20. In that view of the matter, this Court does not find any ground to interfere with the Notification dated 28.07.2020 issued by the respondent No. 4.

The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant