



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

**Case No. : WP(C)/51/2024**

Bamang Pacho  
proprietor of M/s Pacho Enterprises, S/o Shri Bamang Tabang, Langbong Village, PO  
Parsi Parlo, Kurung Kumey District, Arunachal Pradesh

VERSUS

The State of AP and 7 Ors  
represented by the Chief Secretary, Govt of AP, Itanagar    2:The Director

Age: 0

Occupation :

Rural Development Department

Itanagar

Arunachal Pradesh

3:The Joint Director (RE)

Age: 0

Occupation :

Department of Rural Development

Govt of AP

Itanagar

4:The Block Development Officer

Age: 0

Occupation :

CD Block Parsi Parlo

Koloriang

Kurung Kumey District

Arunachal Pradesh

5:The Project Director (PD)

Age: 0

Occupation :

District Rural Development Agency (DRDA) Kurung Kumey District

Arunachal Pradesh

6:Tender Evolutoin Board cum Tender Evaluation Authority

Age: 0  
Occupation :  
represented by its Chairman  
DRDA  
Koloriang Kurung Kumey District  
Arunachal Pradesh

7:Nodal Officer  
MGNREGA  
Age: 0  
Occupation :  
DRDA  
Koloriang  
Kurung Kumey District  
Arunachal Pradesh

8:M/s N K Enterpries  
Age: 0  
Occupation :  
represented by its proprietor Shri Nangram Kali  
Nangram Village  
PO Koloriang  
Kurung Kumey District  
Arunachal Pradesh

**Advocate for the Petitioner** : Teto Taba

**Advocate for the Respondent** : GA (AP)

## **BEFORE**

**HON'BLE MR. JUSTICE KALYAN RAI SURANA**

### **JUDGMENT AND ORDER (Oral)**

**24.05.2024**

Heard Mr. T. Taba, learned counsel for the petitioner. Also heard Ms. P. Pangu, learned Government Advocate for the respondent no. 1 and Mr. B. Picha, learned Standing counsel for the Rural Works Department, representing the respondent nos. 2 to 7 as well as Ms. N. Danggen, learned counsel for the respondent no. 8.

2. The petitioner and the respondent no. 8 had both participated in the NIT/IOB, published on 21.08.2023 for supply and procurement of materials pertaining to MGNREGA works-2023-24 for CD Block, Polosang under Kurung Kumey District being, Package No. VIII. The said tender was issued by the Office of the Project Director, District Rural Development Agency, Koloriang, Kurung Kumey District. As per the comparative statements of the tabulation, the firm of the petitioner, namely, M/s. Pacho Enterprise had submitted a bid amount of Rs. 1,45,11,061.00/-, and was adjudged as L1 bidder. The NIT amount was Rs. 1,61,24,194/-. Accordingly, the bid quoted by the petitioner was (-) 10.00443 % less than the NIT amount. The respondent no. 8 i.e. M/s. N. K. Enterprise had quoted the bid amount of Rs. 1,41,89,286/- which was (-) 12.00003% less than the NIT amount and accordingly, the respondent no. 8 was adjudged as bidder no. L4.

3. On a query of the Court, the learned counsel for the petitioner has submitted that there is nothing in the NIT which refers to negative bidding being permissible. However, it is only from reading of Clause 8 (xxiii) of the terms and conditions of the tender, where it is provided that variation up to 10% may be allowed for peculiar situations and in special circumstances and therefore, it appears to the Court that on reading of clause 8 (xxiii) of the terms and conditions of the tender, there can either be a positive bidding or a negative bidding with acceptable variance of upto 10%.

4. The Tender Evaluation Board, in a memorandum drawn on 30.11.2023, reiterated the firm of the petitioner to be L1 and against the respondent no. 8 firm, there was a remark of the observation that "Section 6 form of bid not submitted" and therefore, the respondent no. 8 does not find place in the list of successful bidder in the Board Proceeding Minutes drawn-up on 30.11.2023.

However, the Director, Rural Development Department (respondent no. 2) by a communication dated 08.01.2024, which is impugned in this writ petition has adjudged the respondent no. 8 for issuance of Letter of Intent (LOI). Accordingly, the present writ petition has been filed under Article 226 of the Constitution of India.

5. The stand of the respondent nos. 2 to 7 is contained in the affidavit-in-opposition filed on 19.02.2024 as well as additional-affidavit filed on 14.03.2024.

6. The learned Standing counsel for the State respondents has submitted that the Tender Evaluation Board-cum-Tender Evaluation Authority (respondent no. 6) and the Project Director (PD), District Rural Development Agency (DRDA), Kurung Kumey District, Koloriang (respondent no. 5) had flouted the conditions contained in *the CPWD Works Manual, 2014*, specifically Clause 20.2 of Section 20 of the said Manual, which is mentioned in Clause-8 (xxiii) of the terms and conditions of the tender and in this regard, it is submitted that as per Clause 20.4.3 of the CPWD manual, 2014, the description was regarding reasonability of the rates.

7. Clause 20.04.3 of *the CPWD Works Manual, 2014* is quoted hereinbelow:

*“...**20.4.3** Reasonability and competitiveness of rates the tender accepting authority shall satisfy himself about the reasonability of rates before acceptance of the tenders. Reasonability of rates shall primarily be assessed on the basis of justified rates. The mode of preparation of justified rates is detailed in the following para 20.4.3.1 Permissible variations over the justified rates are given in para 20.4.3. 2. (Modified vide DG/MAN/254 dt. 07.12.2012).*

***20.4.3.1 Justification of tenders***

***Justification statement shall be prepared for checking***

**the reasonability of rates.** (Modified vide DG/MAN/254 dt. 07.12.2012).

*The method consists of preparing detailed analysis of rates by taking market rates of labour, materials, cartage etc. The method of analyzing item is the same as given in the standard CPWD Analysis of Rates. The major items on the whole costing at least 90% of the estimated cost put to tender are analyzed, to work out the justified percentage on this basis. The items to be considered should be so selected that have higher estimated cost and amount. One should start with the items having the highest estimated amount, and then the next lower amount in the descending order and so on, till at least 90% of the estimated amount is reached. Stipulation of material for the works falling in North Eastern States have been allowed and for other areas of the Country ADG of the concerned region is empowered to take a decision on case to case basis based on merits. (Modified as per OM/MAN/152). While preparing the justification for tender in these areas handling charges @ 2.5% are to be allowed on the cost of stipulated materials. (Added as per OM/ MAN/195)*

*Any other suitable method may also be adopted, depending upon the kind and complexity of work. The adoption of a particular method should be decided judiciously by the authority competent to accept the tenders. The justification of tenders should be prepared based on prevailing marked rates only and the items used are of specified quantity and conform to standards/ specification laid down in the Tender document. (Added as per OM/MAN/159) In case of tenders to be accepted by the Central Works Board, the adoption of a particular method should be decided by the concerned Chief Engineer. For the justification of tenders, the issue rate (and not the market rate) of stipulated materials shall be considered for items stipulated for issue, irrespective of the quantity of stipulated materials stated in the draft NIT/tender documents. For justification of tenders for the materials for which the base rates have been specified under clause 10 CA, the base rates of the material stipulated under clause 10 CA shall be considered for justification statement. (Added as per OM/MAN/187).*

**Wherever the work of Flyovers, Bridges, Grade Separators and Highways/Hill Roads/Major Roads are involved, the justification shall be prepared on the basis of analysis of rates adopted in MORTH standard data book. The contractors profit and overheads shall also be followed as provided in MORTH standard data book.**

*(Added vide OM DG/MAN/311 dt. 02.07.2014)*

*Effect of following taxes is to be added:-*

*(i) Building and other construction workers cess as applicable in the state / union territory.*

*(ii) VAT @ 2% applicable on works contract drawn under the jurisdiction of Govt. of Delhi. The effect of these two taxes shall be added as under on :-*

*(a) Justification of tenders: To be added at the end of justified cost worked out on the basis of net prevailing market rates inclusive of all taxes i/c VAT on each material considered in justification.*

*(b) Sanction of extra item, substituted item and rate for the quantity deviated beyond deviation limit specified under clause 12 of the contract: To be added at the end of analysis of rate after adding contractors profit & over heads.*

*But nothing shall be added in analysis of rates for service Tax since being reimbursed to the contractor separately.*

*The rate of VAT is different in different states / Union territories. Therefore, for other states / union territories, the ADG of the region shall notify the rate of VAT to be considered.*

*The element of VAT will not be applicable in following cases:*

*(1) Purchase of materials through supply orders or tenders or through DGS&D rate contracts.*

*(2) Contracts / Work orders for Hiring of vehicles.*

*(3) Contracts / Work orders for Watch and ward.*

*(4) Contract/work orders for all kind of Horticulture works.*

*(5) Contracts / Work orders for miscellaneous services such as running / maintenance of computer services, running of vehicles etc.*

*(6) And other similar contracts / Work orders having no involvement of materials.*

*The element of building and other construction workers cess as applicable in the state / union territory will not be applicable for purchase of materials.*

***EPF & ESI contribution paid to the contract workers shall not be added in the analysis of rates while preparing market rate justification. It shall be reimbursed on actual basis for all contracts. (Modified***

*vide OM DG/MAN/252 dt. 08.11.2013).*

*At the time of increasing contractor's profit and overheads from 10 to 15% no change has been made in the contractor's profit @ 7.5 % as applicable earlier whereas the contractor's overhead has been increased from 2.5 to 7.5 % on account of following factors :-*

- (1) Cost of Engineering establishment deployed by the contractor.*
- (2) Cost of effort in arranging T&P and heavy machinery which have not been considered in the analysis of rates for the items included in the BOQ of the work. (Modified vide OM DG/MAN/ 254 and 270 dt. 01.05.2013).*
- (3) Cost of cleaner environment at site & labour welfare facilities.*
- (4) Cost of Quality Assurance set up enhancing testing lab.*
- (5) Cost of office set up including engagement of necessary staff for computerized billing etc.*
- (6) Cost of Earnest Money/Performance Guarantee/ Security Deposits.*

***Therefore no extra cost is to be added in justification on account of various factors mentioned above. However, special conditions having financial bearing incorporated in NIT, or any other factor having financial bearing, which are not covered or considered above and in the analysis of the rate of the items included in the BOQ of the work, are to be added on actual basis or by a rough approximation although not with so much exactitude if actual analysis is not possible. (Added vide OM DG/MAN/270, 297 and 311 dt. 02.07.2014)***

*No extra cost for T&P @2% is to be added in Standard Analysis of Rates prepared either to work out estimated cost of item or market rate justification of the item for E&M works. (Added as per OM/MAN/184)*

*CP & OH @ 15% shall be followed for analysis of all items of work both Schedule & Non Schedule pertaining to Civil, Electrical and Horticulture works etc. for the purpose of estimation, justification and to the additional/substituted items/deviated quantities of items to the sanctioned on market rates beyond deviation limit etc. carried out under the contract wherever applicable.*

**20.4.3.2 Acceptance of tenders at justified rates with allowable variations**

*Apropos provisions under para 20.4.3 variation up to 5% over the justified rates may be ignored. Variation up to 10% may be allowed for peculiar situations and in special circumstances. Reasons for doing so shall be placed on record. Tenders above this limit should not be accepted."*

8. It is also submitted that the Tender Evaluation Board was required to give a justification statement which is required to be prepared for checking the reasonability of rates for which provision is made in Clause 20.4.1 of Section 20 of *the CPWD Works Manual 2014*. Accordingly, it is submitted that the Director, Rural Development Department, who is the competent authority in approving of the tenders had given his approval for the selection and appointment of the respondent no. 8 as the L1 bidder and accordingly, an order dated 05.01.2024 was passed by the Joint Director (RE), Rural Development Department, Itanagar, with a comparative statement attached thereto, wherein the respondent no. 8 was declared to be the L1 bidder and the petitioner was adjudged as the L2 bidder.

9. Mr. Picha, learned Standing counsel, Rural Development Department submits that in the Board Proceeding Minutes on 30.11.2023, although against the respondent no. 8, there is a remark that "Section 6 form of the bid is not submitted", by producing the original tender documents, it is submitted that the said document is quite available in the envelope of technical bid. It is submitted that insofar as the tender of the petitioner is concerned, there also the said document is kept not in the financial bid envelope but in the technical bid envelope. Accordingly, it is submitted that the Board Proceeding Minutes is not correctly drawn up because in the comparative statement, the document was found to be available.

10. The learned counsel for the respondent no. 8 has submitted that the Board Proceedings of the Tender Committee which is annexed to the writ petition as Annexure-5, cannot be accepted because of the fact that the Minutes was drawn up on 30.11.2023, whereas, members of the Board has signed on 30.10.2023. Hence, it is submitted that the said document is unreliable. The learned counsel for the respondent no. 8 has adopted the submissions made by the learned Standing counsel for the respondent nos. 2 to 7.

11. The learned counsel for the respondent nos. 2 to 7 has referred to the following case:

(i). *M/s. N. G. Projects Limited vs. M/s. Vinod Kumar Jain*, reported in (2022) 6 SCC 127.

(ii). *Arunachal Trade and Commercial Agency vs. State of Arunachal Pradesh and Ors.*, reported in 2010 (2) GLT 102.

(iii). *Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India and Ors.* reported in (2006) 10 SCC 1.

(iv). *Montecarlo Ltd. Vs. National Thermal Power Corporate Ltd.*, reported in (2016) 15 SCC 272.

12. Ms. Danggen, the learned counsel for the respondent no. 8 has referred to the following case:

(i). *Rishi Kiran Logistics Pvt. Ltd. Vs. Board of Trustees of Kandla Port Trust & Ors.*, reported in (2013) 13 SCC 233.

13. The learned Standing counsel for the respondent nos. 2 to 7 has also produced the records of scrutiny of tender documents under MGNREGA 2023-24 against Kurung Kumey District. On perusal of the said record, the Office of the Rural Development Department has not raised any question and has not flagged the correctness of the Board Proceedings Minutes dated 30.11.2023 although the members have purportedly signed on 30.10.2023. Apparently, in the said Minutes, the bids submitted by the respondent no. 8 is not a qualified bid and only 2 (two) bidders are evaluated as L1 and L2 bidders. Accordingly, the petitioner is the L1 bidder. Therefore, it appears the respondent no. 8 was ousted from consideration on the ground that Section 6 form of bid was not submitted.

14. In the comparative statements of the tabulation as well as in the Board Proceeding Minutes dated 30.11.2023 of the Office of the Project Director, District Rural Development Agency, Kurung Kumey District, the bid of the petitioner was -10.00443% lower than the NIT amount and that of the respondent no. 8 was less than -12.00003% of the NIT amount. The Office of the Director, Department of Rural Development has not made any Office note in the file produced, to show that in the comparative statement and the Board Proceedings sent by the Project Director, DRDA, Kurung Kumey District, the said authority had committed a wrong by not identifying that no justified rate was prepared. In the note sheet dated 05.01.2024 and e-note no. 1 generated on 06.01.2024, which are the only 2(two) note sheets available for this particular work, it does not contain the justifiable rates. Therefore, the Office of the Director, Rural Development Department has not given any reason to reject the comparative statement/tabulation and the Board Proceeding Minutes of the Office of the Project Director, DRDA, Kurung Kumey District. The said file has also not dealt with Clause no. 8 (xxiii) of the terms and conditions of the tender,

which having regard to the provisions of Clause 20.4.3 of *the CPWD Works Manual, 2014*, has provided that the variation up to 10% may be allowed for peculiar situations and in special circumstances further prescribing that the tender above this limit should not be accepted.

15. Therefore, in the absence of any justifiable rates being pre-determined, the Project Director, Rural Development Department could not have brushed aside the comparative statement as well as the Board Proceeding Minutes, dated 30.11.2023 of the Project Director, DRDA, Kurung Kumey District along with affidavit-in-opposition filed by the respondent nos. 2 to 7 (a copy of the NIT has been annexed). The manner of awarding of supply work is contained in terms and conditions no. 15, the Clause is quoted below:

***15. Awarding of Supply Work Order:***

- i. The tender shall be evaluated by the boards constituted by PD-Cum-ADPC at district level and recommended at least three firms L1, L2 and L3 to competent authority for acceptance along with all relevant documents.*
- ii. The Director RD, Engineer Wing shall further scrutiny the tender documents recommend by ADPC. The Lol will be issued to the L1 Firms duly recommended by the ADPC.*
- iii. The Project Director will issue supply order to successful bidder on the basis of Lol issue by the acceptance authority after necessary contract agreement/MoU signed between Project Director & successful bidders.*

16. Therefore, from 15(iii), it appears that the Director, Rural Development Department, Engineering Wing, is merely authorized to make scrutiny of the tender documents recommended by the ADPC (Additional District Programme Coordinator) and that it is prescribed that the Letter of Intent(LOI) will be issued to the L1 firm duly recommended by the ADPC and that the Project Director is required to issue supply order to the successful bidder on the basis of LOI issued by the accepting authority. Therefore, it is not found as to how the Director, Rural Development Department, has the authority of summarily rejecting the recommendation made by the Project Director-cum-ADPC.

17. While rejecting the proposal sent by the Project Director, DRDA, Kurung Kumey District, the Director, Rural Development Department could have disclosed in the decisions making process, the reasons for not accepting the recommendation and to recommend the bid submitted by the respondent no. 8. In the absence of any such note in the office file of the Office of the Rural Development Department, produced by the learned Standing counsel for the respondent nos. 2 to 7, the Court is inclined to hold that the stand taken by the said respondents in their affidavit-in-opposition and in their additional-affidavit is not in conformity with the materials available on record. It is too well settled that the decision must be examined on the basis of the contents of the document itself and not on the basis of explanation tendered thereafter.

18. In the absence of any finding by the Director, Rural Development Department, about justifiable rates available on record, the selection of the bid of the respondent no. 8 is hit by Sub-Clause xxiii of Clause 8 of the terms and conditions of the tender as there was a prohibition to accept tenders which are in variation of more than 10%.

19. We also find from the documents annexed to the writ petition that the Project Director, DRDA, Kurung Kumey District, by letter dated 29.01.2024, had requested the Director, Rural Development Department to issue a clarification. In response to the statement made in the writ petition, in the affidavit-in-opposition filed on behalf of the respondent nos. 2 to 7, it is seen that a stand is taken that the act of the Project Director was an act of subordination. We are unable to accept the same in view of the mandate contained in Clause-8 (xxiii) of the terms and conditions of the tender.

20. The manner in which the approving authority which is the Director, Rural

Development Authority has usurped the power of the tendering authority by substituting his view upon the discussion available to the Project Director, DRDA, Kurung Kumey District, this Court does not find any justification of the superior authority to do so. Therefore, when the Court finds that the tender is being settled with the respondent no. 8 at a rate which is less than -12% below than the NIT rate, the Court is unable to hold that this was an aberration of the procedure, this is clearly a case of illegality and the Director, Rural Development Department has not disclosed any justifiable rate. It has to be presumed that the NIT rate is the justifiable rate and therefore, the selection of a tenderer whose tender is (-) 12%, which is prohibited, amounts to illegality and cannot be treated as mere aberration of the rules. None of the decisions cited at the Bar by the learned counsel for the respondent nos. 2 to 7 and respondent no. 8 permit any illegality to be perpetrated in the selection of a tenderer. Therefore, this Court does not find any reason to burden this order with discussion on the cases cited in the Bar.

21. In this case, when the matter was moved, by an order dated 05.02.2024, this Court had granted an interim order directing the respondent authorities not to finalise the tender and the said interim order was extended from time to time.

22. Although, submission was made by the learned counsel for the respondent nos. 2 to 7 that this being a MGNREGA contract, a large amount of public element is involved and that it would be a public projects, which are for the benefit of the citizens. Though we accept the said stand that these are public projects, yet the approving authority i.e. the Director of Rural Development Department did not arrive at a finding that the evaluation of tender done in the Office of the Project Director, DRDA, Kurung Kumey District

and the Tender Evaluation Committee constituted by the said authority had acted illegally. Hence, the Court is of the view that it was not open for the said authority to substitute its view taken by the Project Director, DRDA, Kurung Kumey District, without any justifiable reasons being disclosed either in the order dated 05.01.2024 or in the note sheet of 05.01.2024 and the e-note sheet no. 1 generated on 06.01.2024, which are the only 2 (two) note sheets available on record of this particular file, produced by the learned departmental counsel. Therefore, the Court is inclined to set aside the impugned order bearing no. DRD-13013(15)/1/2024-DRD-RD, dated 08.01.2024 issued by the Director, Rural Development Department, in favour of the respondent no. 8.

23. Accordingly, we remand the matter back to the Director, Rural Development Department to undertake the exercise of approval of the recommendation made by the Project Director, DRDA, Kurung Kumey District, in respect of tender/NIT dated 21.08.2023 for procurement of materials pertaining to MGNREGA works, 2023-24 for CD Block, Polosang under Package No. VIII. The said exercise shall be done within a period of 2 (two) weeks from the date of receipt of certified copy of this order.

24. File produced by the learned Standing counsel, Rural Development for the respondent nos. 2 to 7 is returned.

**JUDGE**

**Comparing Assistant**