

GAHC010074892024



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

Case No. : WP(C)/2055/2024

M/S NOVO COMPUTING

A REGISTERED PARTNERSHIP CONCERN HAVING ITS REGISTERED OFFICE AT 1ST FLOOR, BORAH COMMERCIAL COMPLEX, BELTOLA ROAD, SURVEY, BELTOLA, GUWAHATI, ASSAM- 781028 AND PRINCIPAL PLACE OF BUSINESS AT 202, 2ND FLOOR, GOLDEN WOODS CONVENIENT, OPPOSITE JANAMBHUMI PRESS, MANIK NAGAR, RGB ROAD, GUWAHATI- 781005 THROUGH ITS PARTNER AND AUTHORIZED SIGNATORY, MR. JAYANTA KALITA, AGED ABOUT 42 YEARS, S/O- ASWINI KUMAR KALITA, R/O- MIRZAPUR, NEAR MIRZAPUR SABHAGHAR, P.O.- AZARA, KAMRUP(M), ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR
THROUGH THE SECRETARY TO THE GOVERNMENT OF ASSAM,
SKILL, EMPLOYMENT AND ENTREPRENEURSHIP DEPARTMENT,
BLOCK- D, 1ST FLOOR, ASSAM SECRETARIAT,
DISPUR, GUWAHATI- 781006.

2:ASSAM SKILL DEVELOPMENT MISSION
THROUGH ITS MISSION DIRECTOR

REPRESENTED BY ITS MISSION DIRECTOR

KATABARI
DPS ROAD
NH-37
GARCHUK

GUWAHATI- 781035
ASSAM

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the petitioner : Shri Shri K. Khanna, Advocate.

Advocate for the respondents : Shri B. Goswami, learned Additional Advocate General, Assam.

Date of hearing : **10.09.2024**

Date of Judgment : **17.09.2024**

JUDGMENT & ORDER

The present petition under Article 226 of the Constitution of India has been filed in connection with a tender process initiated vide an NIT dated 05.03.2024 issued by the Government of Assam, Assam Skill Development Mission for selection of implementing agency for upgradation and customization of IT and MIS system of Assam Skill Development Mission. The grievance of the petitioner is mainly in connection with the deprivation from the benefits under the preferential policy and orders which according to the petitioner, it is entitled to.

2. As per the facts projected, the petitioner is a registered partnership firm having registration as Micro Enterprise (Udyam). The Assam Skill Development Mission (hereinafter Mission) had floated the aforesaid NIT dated 05.03.2004 with which the petitioner was interested. It is the case of the petitioner that being registered as a micro enterprise, it is entitled to the benefits of the provisions of the ***Assam Procurement Preference Policy, 2021*** and ***The Procurement Preferential Order, 2017*** of the Government of India as well as the ***Assam Public Procurement Act, 2017***. It is projected that the terms incorporated in the tender notice are in violation of the aforesaid preferential provisions and have been termed as arbitrary and unreasonable. It is also the

case of the petitioner that there is an obligation on the part of the respondent authorities to ensure that the eligibility conditions do not result in unreasonable exclusion of local suppliers. However, the conditions have been set up to selectively exclude the petitioner from the participation in the tender process.

3. I have heard Shri K. Khanna, learned counsel for the petitioner. I have also heard Shri B. Goswami, learned Additional Advocate General, Assam appearing for the respondents.

4. Shri Khanna, learned counsel for the petitioner has submitted that the petitioner was incorporated in the year 2019 and is covered under the ***Micro, Small & Medium Enterprises Development Act, 2006*** (hereinafter MSME Act). He has also submitted that the petitioner gets benefits under the ***Assam Public Procurement Act of 2021***. He has drawn the attention of this Court to the said Act of 2021 wherein the various benefits are to be granted to micro industries. As per Section 4 (3), the aspect of Udyam Registration has been laid down which shall be eligible under the policy. Under section 4 (9), it has been laid down that the policy will not be applicable for procurement under the externally aided projects. It is submitted that the present tender process would not be covered by the aforesaid Section 4 (9).

5. Attention of this Court has also been drawn to Section 7 which is in connection with the mandatory procurement from small and micro enterprise and in Section 9, the purchase preference has been laid down. It is submitted that as per the said purchase preference, a micro and small enterprise or startup who quotes the price lowest to the L1 who is not a micro and small enterprise or startup will be given the price preference and supply order of 25% of the total quantity of the items.

6. Under Section 13, the action for non-compliance of the provisions of the Act

has been laid down and under Section 15, the annual plan for procurement from small and micro enterprise has been laid down. The powers to grant exemption and to reduce minimum local content is laid down in paragraph Section 17. It is submitted that since consequence of non-compliance has been laid down, the provisions are mandatory in nature.

7. The learned counsel has also submitted that as per Rule 23 (14), there is a scope to seek for clarification of bids which was not explored. It is also submitted that the law provides for the petitioner which is a small and micro industry to have concession of 50% for the earnest money deposit. It is also submitted that if the bid of the petitioner is found to be closest to the bid offered by the lowest bidder, the petitioner would be entitled to have 25% of the supply works.

8. He has also drawn the attention of this Court to the Office Memorandum dated 20.12.2022 of the Government of India. Under the said Office Memorandum, it has been laid down that adherence to excessive past experience requirement which is not commensurate with the proven experience from bidder for successful execution of contract would be one of the examples of restrictive and discriminatory conditions against local suppliers. Reference has also been made to an Office Memorandum dated 08.11.2016 as well as a Memorandum dated 10.03.2016 of the Government of India. It is submitted that vide the later Office Memorandum dated 10.03.2016, clarification has been given regarding relaxation of condition of prior turnover and prior experience for micro and small enterprise. He has submitted that for the NIT in question dated 05.03.2024, there were three eligibility criteria for the bidders out of which SL. No. 2 is concerning a past experience of 10 years. Since the petitioner did not have past experience of 10 years, the petitioner was not in a position to submit

its bid. Under those conditions, this Court had passed an order dated 10.04.2024 whereby physical submission of bids was allowed which was accordingly done. It is submitted that after such submission, it was incumbent upon the authorities to treat the bid of the petitioner at par. It is also submitted that regarding the requirement of experience, the petitioner has experience of similar nature as it was previously allotted works which were of similar nature.

9. This Court has also been informed that on 03.05.2024, an order was passed by this Court to open the technical and financial bids. Subsequent there to the bids were opened wherein the petitioner was disqualified on two counts, namely, failing to have 10 years experience on similar fields and secondly, the petitioner could not produce the requirement of having done work of similar nature for Rs.1crore. It is submitted that on 29.07.2024, the financial bids were opened when three bidders were found to be eligible.

10. The learned counsel has also relied upon a decision of the Hon'ble Calcutta High Court dated 07.07.2023 in WPA/12837/2023, (Thermax Babcock Vs SAIL) wherein the aspect of allotting 25% of the work in question to a Micro & Small Enterprise who quotes its price within 15% of the L1 has been highlighted. In the said case, there was a specific clause being Clause-6 of the Procurement Policy.

11. *Per contra*, Shri B. Goswami, learned Additional Advocate General, Assam, submits that the writ petition itself is not maintainable as the petitioner had failed to act in terms of the various clauses of the tender notice. By referring to the tender notice dated 05.03.2024, he submits that under Serial 7, there is a provision for pre-bid queries. However, in spite of availability of such provisions, no queries were made by the petitioner seeking any clarification.

12. It is submitted that a further notice was issued on 27.03.2024 in the form

of a corrigendum as no bids were offered. The same was followed by a second corrigendum which was after the order of the Court on 10.04.2024. In response thereto, three numbers of bids were received. It is emphasized that the petitioner does not have any experience on the field of the present work, namely as service provider. The experience of the petitioner according to the State is only to run a Call Centre whereas the job in question is of skill development. The learned AAG has also submitted that the *bona fide* of the petitioner is questionable.

13. He submits that the petitioner did not opt to submit online on the excuse of lack of experience and the only intention was to avoid payment of the required Earnest Money Deposit of Rs. 5,40,000/ (Rupees Five Lakhs Forty Thousand) only. He submits that the petitioner is not eligible to be held to be technically responsive and only when a bidder is held to be technically responsive he would get the benefits under the preferential act and orders.

14. It is submitted that under Clause 2 of the NIT, there is a requirement of 10 years experience and under Clause 8, there is a requirement to have done similar nature of work for Rs. 1 Crore and both these conditions are not met by the petitioner. It is submitted that to get the preferential benefit a bidder has to first fulfill the eligibility criteria.

15. The learned State Counsel disputes that the petitioner was doing similar nature of work and asserts that the past experience was only of running a Call Centre. It is also informed that the earlier work of running a Call Centre was completed in September, 2023. Though the learned AAG does not dispute the registration of the petitioner as "Udyam", so far as the experience is concerned which the petitioner has tried to bring on record by way of a rejoinder affidavit, it is submitted that such experience has got nothing to do with the software

whereas the present work is of software.

16. In support of his submission, the learned AAG has relied upon the following decisions:

i. Michigan Rubber (India) Ltd. v. State of Karnataka reported in **(2012) 8 SCC 216,**

ii. N.G. Projects Ltd. v. Vinod Kumar Jain reported in **(2022) 6 SCC 127,**

iii. Silppi Constructions Contractors v. Union of India reported in **(2020) 16 SCC 489,**

iv. Tata Motors Limited Vs Brihan Mumbai Electric Supply & Transport Undertaking (Best) and ors. reported in **AIR 2023 SC 2717.**

17. In the case of *Michigan Rubber (supra)* the limited role of a Writ Court in matters of tender has been reiterated. A similar approach has been laid down in the case of *Silppi Construction* (supra) as well as *Tata Motors* (supra). It has been laid down 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. The court ordinarily should not interfere in matters relating to tender or contract and to set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest.

18. In the case of *N. G. Projects* (supra) the restrained to be maintained in passing interim orders in tender matters has been reiterated. The said observation however was made after the amendment of the *Specific Relief Act, 1963* whereby Section 41 (ha) has been incorporated in connection with infrastructure projects.

19. In his rejoinder, Shri Khanna the learned counsel for the petitioner has referred to the affidavit-in-reply filed on 05.09.2024. By drawing the attention of this Court to the chart regarding past works, it is submitted that under Sl. No. 2, the work done with the Assam Legislative Assembly, Secretariat is of Rs. 8 Crore. Further under Sl. No. 10, the work which has been relied upon is of a value of Rs. 1.78 Crores which was done with the AGCL.

20. So far as the concession of EMD is concerned, it is submitted that 50% concession is permitted by the Act itself and therefore the State is not entitled to raise any issues. He has also submitted that on 04.05.2024, a communication was made by the petitioner to the Mission Director seeking clarification which was not responded to. He has also relied upon Rule 23 (16) (v) of the ***Assam Public Procurement Rules, 2020*** wherein it has been laid down that in the financial evaluation of a tender process there should be minimum three numbers of bidders. It is submitted that in the instant case since the petitioner has been held to be technically non-responsive only two bidders would be considered at the financial stage which is not permissible.

21. The rival submissions have been duly considered and the materials placed before this Court including the original records have been carefully perused.

22. The issue involved is regarding rejection of the bid of the petitioner. To examine the said issue it would be required to look into the concerned Clauses of the NIT dated 05.03.2024. Such examination would require keeping in mind the status of the petitioner which is registered as "Udyam". The eligibility criteria has been laid down in Clause-3. Under Sl. No. 2 thereof, there is a requirement that the bidder should be a registered company/firm and should have existence for at least 10 years as on opening of the bid. There are other clauses regarding having an office at Guwahati, not to have a history of black listing or corrupt

practices, having GST registration minimum average annual turn-over etc. In Sl. No. 8, there is a requirement of having implemented at least one project in Central Government/State Government/PSU/Public listed Companies with a project value of Rs. 1 Crore or more in software development, implementation with maintenance in *DevOps*.

23. As observed above the registration of the petitioner as “Udyam” is not disputed and accordingly, the petitioner would get the benefits available under the statutes and policies meant for Micro & Small Enterprise. The provisions of the Policy of 2021 which have been relied upon namely, Clause-7 concerning mandatory procurement, Clause- 9 concerning purchase preference read with the mandatory nature as would appear from Clause-13 are on the aspect that the entity in question is otherwise held to be technically responsive. In the instant case, admittedly, it is the aspect of the technical responsiveness as stipulated by the tender condition which is the subject matter of challenge. The relief sought for in this petition is to interfere with the provision requiring existence of the bidder for a minimum of 10 years. In this connection, the reliance of the petitioner is upon an Office Memorandum dated 20.12.2022 wherein certain examples on restrictive conditions have been laid down and one such condition is with regard to the requirement of excessive past experience. For ready reference, the said clause is extracted herein below:

“e) Excessive past experience requirement, not commensurate with the proven experience expected from bidders for successful execution of contract.”

24. On careful examination, this Court has noticed that the clause of the contract requires **existence** of the bidder for the past 10 years and the same is not on the aspect of **experience**. The example as laid down in the OM dated 20.12.2022 is apparently not covering the aforesaid aspect.

25. The petitioner, in the instant case has been registered admittedly on 17.04.2021 as would appear from Annexure-A2 of the writ petition. Therefore, it would not make the requirement of existence for the past 10 years. Incorporating clauses in the tenders are matters which are exclusively within the domain of the owner and unless such clauses are *ex facie* arbitrary and unreasonable or that the same has been incorporated to suit a vested interested party, the scope of interference by a Writ Court is extremely limited.

26. In the case of ***Jagdish Mandal vs State of Orissa*** reported in **(2007) 14 SCC 517** the Hon'ble Supreme Court has been laid down:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project

cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

27. The aforesaid observation has been reiterated in the subsequent decision of ***Michigan Rubber*** (supra).

28. A clause requiring a bidder to be in existence for 10 years for a work of high value may not appear to be unreasonable or arbitrary. Ultimately, the credentials and antecedents of the bidder is of paramount importance in the public interest.

29. Though the petitioner being registered as "Udyam" would get benefits regarding concession in the EMD as well as certain percentage of the work if the bid quoted by it is closest to the lowest bidder, such eventuality would occur only when the petitioner is held to be technically responsive and eligible. Though the petitioner has given a chart to demonstrate the works done by him with the contention that the same are of similar nature which is however

disputed by the State, this Court is not required to delve into that aspect of the matter as the decision to hold the petitioner not to be eligible for not meeting the clause regarding existence of 10 years is not interfered with.

30. Writ petition accordingly stands dismissed. The interim order passed earlier stands vacated.

31. Records handed over back to the learned State Counsel.

JUDGE

Comparing Assistant