

GAHC010087492024



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

Case No. : WP(C)/2309/2024

VINAYAK SALES CORPORATION
HAVING ITS REGISTERED OFFICE AT OLD STATION ROAD, WARD NO. 9,
NALBARI, DIST. NALBARI, ASSAM-781335, REPRESENTED BY ITS
AUTHORIZED REPRESENTATIVE SRI BIKASH JALAN.

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO GOVT. OF
ASSAM, AGRICULTURE DEPARTMENT, DISPUR, GHY-781006.

2:THE DIRECTOR OF AGRICULTURE
ASSAM
KHANAPARA
GHY-22

3:THE ASSAM SEED CORPORATION LTD.
REP. BY ITS MANAGING DIRECTOR
KHANAPARA
GHY
ASSAM-781022.

4:THE MANAGING DIRECTOR

ASSAM SEED CORPORATION LTD.
KHANAPARA
GHY
ASSAM-781022

Advocate for the Petitioner : MR. M K CHOUDHURY

Advocate for the Respondent : SC. AGRICULTURE

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER

02.05.2024

1. Heard Mr. M.K. Choudhury, learned Senior Counsel assisted by Mr. M. Sarma, learned counsel for the petitioner. Also heard Mr. S. Chamaria, learned counsel for the respondent nos.3 & 4. Mr. B. Choudhury, learned counsel appears for the respondent nos.1 & 2.

2. The grievance of the petitioner is with regard to Clause 4.2.1 and Clause 4.2.2 of the NIT dated 08.03.2024, wherein tenderers are to give their experience in supplying the certified seeds, besides their annual turnover @ 20% of the seeds to be supplied.

3. Clause 4.2.1 and Clause 4.2.2 of the NIT dated 08.03.2024 for procurement of fresh certified seeds of different crop varieties for the year 2024-2025 states as follows :

“4.2.1 Required Minimum Experience

(i) The bidder must have experience of supplying certified seeds to the Government departments / undertaking/entities/ PSUs to the extent at least 20% of estimated quantity for schedule of item (i.e. against each particular crop) in the certified seed business during 2019-20, 2020-21, 2021-22, 2022-23 and 2023-24 (till last date of submission of Bid)

The bidder participating for multiple items should not exceed to the total quantity of supply experience in supply of certified seeds during years mentioned above.

(ii) *The bidder must have experience of supplying TL seeds to the Government departments / undertaking/entities / PSUs to the extent at least 20% of estimated quantity for schedule of item (i.e. against each particular crop) in the TL seed business during 2019-20, 2020-21, 2021-22, 2022-23 and 2023-24 (till last date of submission of Bid)*

The bidder participating for multiple items should not exceed to the total quantity of supply experience in supply of TL seeds for during the years mentioned above.

The bidder for documentary proof must furnish copy of work order / completion certificate etc.

<i>Crop</i>	<i>Experience</i>
	<i>(20% against estimated quantity for each particular crop during the years (2019-20, 2020-21, 2021-22, 2022-23 and 2023-24(till last date of submission of bid) from certified seed business in case of certified seed and TL business in case TL seed)</i>
<i>Black Gram</i>	<i>3800</i>
<i>Green Gram</i>	<i>2500</i>
<i>HYV Paddy (Sali)</i>	<i>12268</i>
<i>HYV Paddy (Boro)</i>	<i>5000</i>
<i>Traditional variety Paddy</i>	<i>2600</i>

<i>Mustard</i>	<i>4275</i>
<i>Pea</i>	<i>2023</i>
<i>Onion Seed</i>	<i>160</i>
<i>Lentil Seed</i>	<i>3800</i>
<i>Groundnut</i>	<i>4200</i>
<i>Soyabean</i>	<i>1540</i>
<i>Garlic</i>	<i>1100</i>
<i>Potato</i>	<i>16000</i>
<i>Rajmah</i>	<i>800</i>
<i>Wheat</i>	<i>2224</i>
<i>Chick Pea</i>	<i>1150</i>
<i>Linseed</i>	<i>580</i>
<i>Sugarcane</i>	<i>6000</i>
<i>Maize Fodder</i>	<i>800</i>
<i>Jute</i>	<i>200</i>
<i>Arhar</i>	<i>200</i>
<i>Finger Millet</i>	<i>460</i>
<i>Sesamum</i>	<i>900</i>

<i>Foxtail Millet</i>	<i>400</i>
<i>Sorghum</i>	<i>400</i>
<i>Pearl Millet</i>	<i>400</i>
<i>Cow Pea</i>	<i>600</i>

4.2.2 Financial Standing

(i) The bidder should have at least an average annual turnover of Rupees [as mentioned in the table below, 20% of the quantity for schedule of item (i.e. against each crop during last three financial years Le. 2020-21, 2021-22 & 2022-23 ending on 31 March 2023 from any business.

<i>Sl. No.</i>	<i>Crop</i>	<i>Annual Turnover</i>
<i>1</i>	<i>Black Gram</i>	<i>64220000</i>
<i>2</i>	<i>Green Gram</i>	<i>42500000</i>
<i>3</i>	<i>HYV Paddy (Sali)</i>	<i>61340000</i>
<i>4</i>	<i>HYV Paddy (Boro)</i>	<i>25000000</i>
<i>5</i>	<i>Traditional variety Paddy</i>	<i>31200000</i>
<i>6</i>	<i>Mustard</i>	<i>64122000</i>
<i>7</i>	<i>Pea</i>	<i>30348000</i>

8	Onion Seed	52800000
9	Lentil Seed	64600000
10	Groundnut	60900000
11	Soyabean	26186800
12	Garlic	33000000
13	Potato	76800000
14	Rajmah	17200000
15	Wheat	15568000
16	Chick Pea	16677900
17	Linseed	9860000
18	Sugarcane	7800000
19	Maize Fodder	10000000
20	Jute	4600000
21	Arhar	3100000
22	Finger Millet	6900000
23	Sesamum	16200000
24	Foxtail Millet	6000000
25	Sorghum	5600000

26	Pearl Millet	6800000
27	Cow Pea	12000000

(i) *The bidder participating for multiple items should satisfy the cumulative sum of the Avg. Annual turnover requirement as stated in the above table. Failing to which may result in disqualification of the entire bid submitted by the bidder.*

(ii) *Financial Soundness Certificate from Bank."*

4. The petitioner's counsel submits that there is no justification for requiring tenderers to have experience in supplying 20% of the estimated quantity of seeds required to be supplied, besides requiring the bidder to have an average annual turnover of 20% of the quantity of the schedule of items to be supplied for the last 3 (three) financial years ending 31.03.2023, as the said conditions are restrictive in nature. By putting the restrictive conditions, competition for the supply of seeds has been lessened and has in fact been tailor-made for the blue eyed boys who are going to be favoured by the State respondents.

5. The learned Senior Counsel for the petitioner further submits that Clause 4.2.1 and Clause 4.2.2 of the NIT is in violation of the Assam Public Procurement Act, 2017 and the Assam Public Procurement Rules, 2020, as the said Clauses are unnecessarily restrictive and tailor-made to discourage wide competition, by excluding certain categories of prospective bidders from participation. He submits that the impugned conditions do not have any nexus

with the purpose to be achieved by the supply of certified seeds in terms of the NIT.

6. The learned Senior Counsel for the petitioner submits that the petitioner has the experience of supply of seeds to the Government and its instrumentalities. However, the experience for supply is not for 5 (five) years. He also submits that he does not have the financial turnover, in terms of Clause 4.2.2 of the NIT for 20% of all the items to be supplied, as mentioned in the NIT. He submits that the impugned Clauses are not essential conditions for the purpose of supply of seeds in terms of the NIT and as such the impugned Clauses should be set aside. He also submits that two other similar tenders were issued by the State respondents on 08.03.2024 and 11.03.2024, which do not contain the above two impugned Clauses. As such, there is no justification for including the two impugned Clauses in the present NIT.

7. The petitioner's counsel also submits that the Departmental Bid Committee (DBC) meeting held on 10.04.2024 considered various representatives submitted to the authorities with regard to Clauses 4.2.1 & 4.2.2 of the present NIT. Though the petitioner was aware of the meeting of the DBC on 10.04.2024, the petitioner did not submit any representation to the respondents for deletion of the Clauses 4.2.1 & 4.2.2 of the NIT at the meeting of the DBC on 10.04.2024. After the DBC meeting was held on 10.04.2024, wherein a change was made with regard to the quantity of seeds to be supplied in terms of the NIT, which is reflected in the 3rd Corrigendum dated 16.04.2024 issued by the respondent authorities, no change with regard to the other conditions of the NIT was made.

8. In support of his submission that a Court can interfere with a tender clause, if the same is unfair or unreasonable, he has relied upon the judgments of the Supreme Court in the case of (i) ***Michigan Rubber (India) Ltd. vs. State of Karnataka & Others***, reported in ***(2012) 8 SCC 216*** and (ii) ***Mr. B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. & Others***, reported in ***(2006) 11 SCC 548***.

9. Mr. S. Chamaria, learned counsel for the Assam Seeds Corporation submits that the insertion of the two impugned Clauses in the NIT, is to ensure that the bidder can smoothly perform the supply work and has the financial capacity to do so, which is to be done within a specific time frame. He further submits that the other NITs issued by the respondents pertain to other types of seeds, while the present tender pertains to certified seeds. He submits that there is a difference between certified seeds and hybrid seeds. Hybrid seeds are cross pollinated and genetically modified seeds which are developed under high class research and development facility, established by Big MNCs under expert supervision. However, in case of certified seeds there are no R&D facility, as the farmers grow the seeds and hence the experience of procuring and supplying the seeds is required. He also submits that the terms of a tender can be changed by the author of the tender and the requirements of a procuring authority cannot be subject to judicial review. He accordingly submits that no case for setting aside the impugned Clauses have been made out by the petitioner.

10. Mr. B. Choudhury, learned counsel for the respondent nos.1 & 2 submits

that he has got no comments to make at his stage.

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

12. As it is apparent from Clause 4.2.1 and Clause 4.2.2 of the NIT, the bidder has to have experience of supplying at least 20% of the estimated quantity of the seeds for the years 2019 - 2020 to 2023 - 2024. Further, the bidders have to have at the least, an average annual turnover of 20% of the quantity of the items to be supplied during the three financial years, i.e. 2020- 2021, 2021 – 2022 and 2022 – 2023.

13. Before going into the question of the validity of the Clause 4.2.1 and Clause 4.2.2, it would be worthwhile to note that the State respondents had issued a 3rd Corrigendum dated 16.04.2024 in respect of the NIT, wherein it has considerably reduced the quantity of seeds to be procured by the Assam Seeds Corporation (respondent nos.3 & 4). Thus, in terms of the 3rd Corrigendum dated 16.04.2024, the experience for supply of 20% of the seeds to be supplied and the 20% annual turnover of the items to be supplied, required to be submitted by a bidder, would also become proportionately less.

14. In the case of ***Tata Cellular vs. Union of India***, reported in ***(1994) 6 SCC 651***, the Supreme Court has held that there must be judicial restraint in interfering with an administrative action. Ordinarily the soundness of the decision taken by the employer ought not to be questioned, but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned, if it is irrational or malafide or intended to favour

someone or a decision that no responsible authority acting reasonably and in accordance with the relevant law could have reached.

15. In the case of ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Another***, reported in **(2016) 16 SCC 818**, the Supreme Court has held as follows-

“The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents.”

16. In the case of ***Jagdish Mandal vs. State of Orissa & Others***, reported in **(2007) 14 SCC 517**, the Supreme Court has held that Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. *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 black-listing 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.

17. In ***Michigan Rubber (India) Ltd (supra)***, the Supreme Court has laid down the following principles while considering the conditions of a tender at paragraph-23, which is as follows :

“(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in

public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

18. In the case of ***Mr. B.S.N. Joshi & Sons Ltd.(supra)***, the Supreme Court has held that if there are essential conditions, the same should be adhered to and that when a decision has been made purely on public interest, the Court ordinarily should exercise its discretion.

19. In the present case, there is nothing to show that the impugned Clauses of the NIT have not made in public interest. Further, the Supreme Court in the case of ***Michigan Rubber (India) Ltd (supra)***, has held that certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. It also held that in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted.

20. As can be seen from the contents of the impugned Clauses 4.2.1 & 4.2.2 of the NIT, there is nothing to show that the same has been made to favour a particular person, inasmuch as, the petitioner has nowhere specifically named any person as a blue eyed boy. The blanket allegation without any specifics cannot be the basis for issuing a writ. There is nothing to show that the said impugned Clauses is arbitrary or irrational or made mala fide. As has been stated

by the learned counsel for the respondent nos.3 & 4, the same has only been made to ensure that the bidder is having past experience in supplying the certified seeds and has the financial capacity to do so. As held by the Supreme Court in the case of ***Afcons Infrastructure Ltd. (supra)***, the State respondents are the best person to understand and appreciate the tender documents, as they are the authors of the NIT.

21. A perusal of the DBC meeting minutes dated 10.04.2024 shows that the DBC had considered a wide range of requests/grievances submitted by many persons/would be tenderers, in respect of the NIT, while the petitioner herein had not submitted any representation with regard to the impugned Clauses in the NIT to the respondent authorities. The DBC had to consider requests which called for increase/decrease in the minimum experience required for supply of the seeds ranging from 10% to 50% to 100% of the items to be supplied. Further, while Clause 4.2.1 required the bidders to have experience of supply for last 5 (five) years, there were requests for minimum experience to be for five years and not be confined "only" to the last five years. With regard to Clause 4.2.2, the DBC had to consider requests regarding the tenderer requiring to have an average annual turnover of at least 20% of the quantity of the items to be supplied. Some of the requests of persons was that the annual turnover should be enhanced to 50% and 100% of the items to be supplied, while some persons had requested for reduction of the percentage to 10% and 15% instead of 20%. Some others, on the other hand, prayed that the annual financial turnover should also include the financial year 2023 – 2024, as the last financial year required in the NIT was 2022 – 2023.

22. As can be seen from the above facts which is part of the writ petition, the DBC had considered various options with regard to Clauses 4.2.1 and 4.2.2 of the NIT. The terms and condition of a tender notice is the sole prerogative of the procuring authority and as such, the author of the tender would be best suited to know the requirements of the procuring authority. As the respondents required that the supply to be made should run smoothly, this Court is of the view that the conditions put forth by the author of the tender cannot be put to challenge under Article 226 of the Constitution, as there is nothing to show that the impugned Clauses are arbitrary, illegal or irrational.

23. In any event, there is always a first time for everything. Just because the impugned Clauses had not been put in the other NITs cannot be a bar for the respondents to put the said impugned Clauses in the present NIT. It should also be noted that there is no bar for issuance of a restricted tender. This is apparent from the CPWD Manual, which provides for issuance of tenders which have clauses requiring the tenderer to show their ability to do certain works. Unless the petitioner is able to show that the same is illegal, arbitrary or malafide, there can be no ground to set aside the impugned Clauses.

24. With regard to the contention of the petitioner's counsel that the other two tenders for supply of seeds does not contain the offending Clauses, this Court finds that other two tenders pertain to procurement of hybrid seeds and not for certified seeds which are different in nature. Accordingly, in view of the reasons stated above, this Court does not find any ground to interfere with the NIT dated 08.03.2024.

25. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant