

GAHC010124812024



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

Case No. : WP(C)/3049/2024

M/S SINGH RANJEET AND CO
A PARTNERSHIP FIRM REGISTERED UNDER THE INSTITUTION OF THE
COST ACCOUNTANTS OF INDIA
HAVING ITS REGISTERED OFFICE AT 27-II
FIRST FLOOR
GOKHALE MARG
LUCKNOW
UTTAR PRADESH
PIN- 226001
REPRESENTED BY ITS PARTNER- SRI RANJEET SINGH
SON OF SURINDER SINGH
R/O- 12/10
MALVIYA NAGAR
AISHBAGH
RAJENDRA NAGAR
LUCKNOW
UTTAR PRADESH
PIN- 226004.

VERSUS

THE UNION OF INDIA AND 6 ORS
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA
MINISTRY OF COMMUNICATION
DEPARTMENT OF TELECOMMUNICATION
SANCHAR BHAWAN
ASHOKA ROAD
NEW DELHI-110001.

2:THE BHARAT SANCHAR NIGAM LIMITED (BSNL)

A GOVERNMENT OF INDIA UNDERTAKING
MINISTRY OF COMMUNICATION
DEPARTMENT OF TELECOMMUNICATIONS
REPRESENTED BY THE CHIEF GENERAL MANAGER TELECOM
BSNL ASSAM CIRCLE
BSNL BHAWAN
PANBAZAR
GUWAHATI-781001
KAMRUP(M)
ASSAM

3:THE TENDER EVALUATION COMMITTEE
REPRESENTED BY THE CHIEF GENERAL MANAGER TELECOM
BSNL ASSAM CIRCLE
BSNL BHAWAN
PANBAZAR
GHY-781001
KAMRUP(M)
ASSAM

4:THE CHIEF GENERAL MANAGER TELECOM
BSNL ASSAM CIRCLE
BSNL BHAWAN
PANBAZAR
GHY-781001
KAMRUP(M)
ASSAM

5:THE ASSISTANT GENERAL MANAGER (MM)
BSNL ASSAM CIRCLE
3RD FLOOR
BSNL BHAWAN
PANBAZAR
GHY-781001
KAMRUP(M)
ASSAM

6:THE ACCOUNTS OFFICER (A AND P)
(COLLECTION)
OFFICE OF THE CHIEF GENERAL MANAGER TELECOM
BSNL ASSAM CIRCLE
4TH FLOOR
BSNL BHAWAN
PANBAZAR
GUWAHATI-781001
KAMRUP(M)
ASSAM

7:GOVERNMENT E MARKETING

NODAL AGENCY HANDLING HE BIDDING PROCESS
REPRESENTED BY THE CHIEF EXECUTIVE OFFICER
3RD FLOOR TOWER-II

JEEVAN BHARTI BUILDING
CONNAUGHT PLACE
NEW DELHI-110001.

Advocate for the Petitioner : Mr. A. Kalita

Advocate for the Respondent : Mr. B. Pathak
Ms. B. Sarma (R1 to R7)
Mr. M. Mahanta

Date of Hearing and Judgment : 15.07.2024

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGEMENT AND ORDER (ORAL)

Heard Mr. A. Kalita, learned counsel appearing on behalf of the petitioner also heard Mr. B. Pathak, learned counsel appearing on behalf of the respondent Nos. 2 to 6 and Ms. B. Sarma, learned counsel appearing on behalf of the respondent Nos. 1 and 7.

2. The instant writ petition listed before this Court for consideration of an application for vacation and modification of the order dated 12.06.2024 passed by this Court whereby there was a status quo given on the GEM dated 14.05.2024 to be maintained till the next returnable date.

3. Taking into account that any decision in the said Interlocutory Application would involve a decision on merits, this Court takes up the entire writ petition for disposal at this stage. The respondent Nos. 2 to 6 issued the bid document bearing bid No. GEM/2024/B/4798396 for hiring of consultants – Milestone/Deliverable Based-Subject Matter Experts; Finance & Accounts; No.; Hybrid (as specified in the scope of the work) for a period of two years. In the said bid document, the documents which were required from the seller were

duly mentioned. Further to that, there was eligibility qualifications also mentioned. In addition to that, in the form of a PDF document the Pre-Qualification Criteria was attached. The print out of the said Pre-Qualification Criteria which is in the PDF document is enclosed to the instant writ petition as Annexure-5 at page 64. The various Pre Qualification Criteria have been mentioned at Sl. Nos. 1 to 16. Relevant for the purpose of the adjudication of the instant proceedings is Pre Qualification Criterion No. 6 being that the bidder should have at least one office located in the Circle for which the bidder intends to apply and the corresponding document to be submitted would be in the Bidder's Profile provided. The Bidder's Profile enclosed at page 70 of the writ petition wherein at Clause No. 10, it has been mentioned "whether the firm has Office/works.....(Name of the City where Circle office situated) if so state its address"

4. The petitioner herein along with 16 others submitted their bids in pursuance to the said bid document. The petitioner was informed that its technical evaluation was completed and there upon its bid was moved to the financial bid evaluation stage on the Government E-Market/place on 13th May, 2024. Subsequent there to, it was also mentioned that amongst the various works mentioned in Schedule 1 to 5, the petitioner was the L1 seller in Schedule 1, Schedule 3, Schedule 4 and Schedule 5.

5. It is the case of the petitioner that petitioner was expecting that the petitioner would be awarded the contracts in question. However to its surprise on 15th of May, 2024, at 4:31 p.m., the petitioner received an email stating inter-alia that a fresh bid document was issued for internal auditors for various locations for which the petitioner had earlier bided. Immediately there upon the petitioner at 6.27 p.m. of the same date issued an email stating inter alia that the petitioner was the qualified as L1 in the financial evaluation which was opened on 13.05.2024 and therefore requested that the bid be awarded to the petitioner as per the procurement rules of the Government of India. There upon, it is the case of the petitioner there was no further information provided to the petitioner. Be as it may, it is relevant to observe that on 15th May, 2024 at 4:31 p.m., the bid document for the new bid bearing Bid No. GEM/2024/B/4942324 was uploaded and was available to be seen in the GEM portal. The said bid document have enclosed as Annexure-14 to the writ petition and from a perusal of the said bid document, it reveals that the bid end

date was 24.05.2024 and the bid opening date was 24.05.2024 itself.

6. It is not known why the petitioner immediately did not approach this Court. Rather the petitioner filed this writ petition on 10.06.2024 and on 12.06.2024, this Court issued notice and passed the order of status quo in respect to the GEM Bid No. GEM/2024/B/4942324 dated 14.05.2024.

7. Pursuant thereto, the respondent Nos. 2 to 6 filed an affidavit-in-opposition on 19th June, 2024. In the said affidavit-in-opposition, it was mentioned the necessity of incorporation of Clause No. 6 in the Pre-qualification bid. To buttress the same, the respondent Nos. 2 to 6 have enclosed a document as Annexure-R4 which stipulates as to why the tender for appointment of Chartered Accountant/ Cost Accountant firms for conducting internal audit of BSNL for financial year 2024-2025 and 2025-2026 was issued. From a perusal of the said document, more particularly, at Clauses 6, 7, and 8, it reveals that the firms which shall be selected and entrusted the work of internal audit has to conduct internal audit of the units on quarterly basis. Clause 7 stipulated as regards the zone-wise list of internal audit circle which were specifically mentioned in Annexure-C to the said document. Clause No. 8 stipulated that the appointed firm will depute their audit claim at the circle office MBS/SSH of the circles assigned to them. A perusal of Annexure-C shows that in respect to the circle zone East Zone B which is the Zone for which the tender was invited and the subject matter of the instant writ petition, it has five circles being Assam Telecom, Core Network -NE, North East Telecom – I (NE) – I, North East Telecom – II (NE) II and Sikkim Telecom and its Circle Head Quarter locations were Guwahati, Shillong, Dimapur and Gangtok respectively.

8. A further perusal of the said affidavit-in-opposition reveals that it was duly admitted that the petitioners technical bid was held to be technically responsive which would be seen from the copy of the minutes of the tender evaluation committee dated 08.05.2024 enclosed as Annexure Nos.R5 and R6. Thereupon on 13.05.2024, the financial bid was opened wherein the petitioner bid was found to be L1 in respect to Schedule 1, 3, 4 and 5. However the Technical Evaluation Committee again met on 14.05.2024 to evaluate the financial bids and to take a decision on the finalization of tender. During the process, it was observed by the Committee that the petitioner failed to meet the Pre-Qualification Criterion No. 6 which required that at least one office of the

bidder should be located in the circle for which the bidder intended to apply. This aspect of the matter was however overlooked during the initial technical evaluation. It was also found from the bid documents so submitted by the petitioner that the petitioner's Head Office was at Lucknow, Uttar Pradesh and had seven branch offices at Mumbai, Chennai, Srinagar, Dehradun, Amabala and Farukabad. A conjoint reading of Paragraph No. 11 of the affidavit-in-opposition with the Paragraph No. 8 of the petitioner's Bidder Profile which was uploaded by the petitioner enclosed as Annexure-R7 and the minutes of the tender Evaluation Committee dated 14.05.2024 enclosed as Annexure-R8 would apparently show that the petitioner had no office within the circles in question.

9. It is further seen that from a perusal of the said affidavit-in-opposition that in view of the fact that the petitioner was held to be L1 in respect of Schedule 1, 3, 4 and 5 overlooking the prescription contained in Clause 6 of the Pre-qualification bid, the authorities took a decision to cancel the entire tender process and to refloat a fresh bid. The reasons therefore have been categorically mentioned in the tender Evaluation Committee's Minutes dated 14.05.2024 and enclosed as Annexure-R8. It has also been mentioned that the report of the said Tender Evaluation Committee was put up in the Office File in the afternoon of 14.05.2024 and by note No.89 to 97, the decision to re-tender was approved. It was also mentioned that the cancellation of the tender for technical reasons was communicated through the GEM portal from which individual emails were also generated to all bidders.

10. In the backdrop of the above pleadings, let this Court consider the respective submissions of the learned counsel for the parties.

11. Mr. A. Kalita, the learned counsel appearing on behalf of the petitioners submits that though Clause 6 stipulated that the bidder should have at least one office located in the circle for which the bidder intended to apply, but taking into account the Clause 10 of the Bidder's Profile, it is apparent that the said Bidder having an office/ works within the circle is not mandatory and it is under such circumstances that the Tender Evaluation Committee had initially taken a decision to hold the technical bid of the petitioner to be responsive. He

further submitted that the petitioner being the L1 bidder for the contracts in reference to Schedule 1, 3, 4 and 5 has a right to be informed as to what was the reason behind cancellation of the tender and not doing so is in violation of Article 14 of the Constitution and in that regard had referred to the judgement of the Supreme Court in case of ***M/S Star Enterprise and Ors Vs. City and Industrial Development Co-operation of Maharashtra Ltd. and Ors***, reported in ***(1993) 3 SCC 280*** and made specific reference to paragraph Nos. 9 and 10 of the said judgement. In addition to that, the learned counsel for the petitioner had also submitted that Clause 6 was not mandatory rather was directory and the same would be also clear from the fact that in the subsequently floated tender, the said Clause 6 have been made a mandatory condition.

12. Per Contra Mr. B. Pathak, the learned counsel appearing on behalf of the respondent Nos. 2 to 6 submitted that the bid document was issued for the purpose of hiring of consultants for carrying out internal audits within respective circles. For the purpose of the North-East eastern Zone circle which had been specifically mentioned in Annexure-C, it would show that various circle offices have been mentioned. The learned counsel further referring to Clause 6, 7 and 8 of the Annexure-R4 submitted that if the bidders do not have offices within the Circle, it would be difficult for the purpose of carrying out of the works intended to be carried out by the internal auditors. It is for that reason, the said Clause 6 has been prescribed. The learned counsel further submitted that taking into account that the technical evaluation initially done was without considering Clause 6 which was mandatory and was very pertinent for the purpose of the tender, the Technical Evaluation Committee thereafter took a decision on 14.05.2024 to go for a fresh tender.

The learned counsel further submitted that the respondents herein are the employers and they are in the best know of what are the tender requirements. Referring to the judgement of the Supreme Court in the case of ***Afcons Infrastructure Ltd. vs Nagpur Metro Rail Corporation Ltd. & Anr***,

reported **(2016) 16 SCC 818** more particularly paragraph No. 15 of the said judgement, the learned counsel submitted that the respondent authorities could have very well rejected the tender and gone ahead. However, as it was earlier mentioned that the petitioner was the L1 in respect to the contracts pertaining to Schedule 1, 3, 4 & 5, the Respondent Authorities took a decision to go for re-tendering.

13. Mr. A. Kalita, the learned counsel appearing on behalf of the petitioner rejoining to his earlier submission submitted that if Clause 6 of the Pre-Qualification Criteria was a mandatory condition, the respondent authorities would have definitely asked the petitioner to produce those documents rather from the date of submission of the bid till the completion of the Tender Evaluation on five days various clarification were sought for but there was no clarification sought for in respect to Clause 6 of the Pre-qualification bid criteria.

14. I have the learned counsel appearing on behalf of the parties and had given due consideration to their respective submissions. The pleadings as well as the records have been perused.

15. From a perusal of the Pre-Qualification Bid Criteria, it is apparent that amongst the various Clauses one of such Clause was that the bidder should have at least one office located in the circle for which the bidder intended to apply. In the Bidder's Profile, the bidder has to mention as to whether the bidder has any office/works in the city where the circle offices is situated and if there is any office, it has to state its address.

16. In the opinion of this Court, Clause 10 of the Bidder's Profile does not in any manner reduce the effect of what is stipulated in Clause 6 of the Pre-Qualification Criteria cum check-list for the bidders. The materials of record including the affidavit-in-opposition submitted by the respondent Nos. 2 to 6 categorically admits that there was an initial lapse in considering Clause No. 6

by the Technical Evaluation Committee. Subsequently, the same was rectified. This lapse on the part of the Technical Evaluation Committee, in the opinion of this Court, would not confer any vested right upon the petitioner to be granted the tender in question being the L1 bidder. In this regard this Court finds it relevant to refer to the judgement of the Supreme Court rendered in the case of ***Afcons Infrastructure Ltd.*** (supra) and more particularly referred to paragraph No.15 which is reproduced herein under:-

"15. We may add that 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. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. 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 given."

17. From the above paragraph, it would be seen that the owner or the employer of the project having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The Tender Evaluation Committee in its meeting held on 14.05.2024 upon an evaluation and taking into account the intention behind appointment of internal auditors having offices within the circle opined that it

was necessary that the bidders should have an office within the circle office as stipulated in Annexure-C to the bid document. This Court under Article 226 of the Constitution or in exercise of the powers of judicial review cannot sit over the said judgement of the Tender Evaluation Committee as the same by no manner is illegal, arbitrary or unreasonable.

18. The learned counsel appearing on behalf of the petitioner though strenuously argued that in the impugned tender, Clause 6 was made mandatory specifically unlike in the tender wherein the petitioner was adjudged as L1. The above aspect in the opinion of this Court does not change the situation inasmuch as, the concerned respondents being authors of the document were justified in coming to its opinion that Clause 6 of the Pre-qualification bid criteria was mandatory and as already observed the same was not malafide as arbitrary.

19. This Court now takes up the next contention made by Mr. A. Kalita, the learned counsel for the petitioner to the effect that the reason for cancellation of the tender was not made known to the petitioner and has laid stress on the judgement of the Supreme Court in the case of ***M/S Star Enterprise*** (supra). From a perusal of the said judgement more particularly in paragraph Nos. 9 and 10, it reveals that there is a requirement that the respondent authorities should have good reasons to cancel a tender process, and ordinarily, the said reason ought to be communicated to the concerned parties unless there be any specific justification not to do so. This proposition of law is well settled. However, the question arises as to whether the same can be applied to present facts in as much as, a perusal of Annexure-R8 categorically shows that the reasons have been duly assigned as to why the respondent authorities took the decision to cancel. Regarding information to the petitioner, it has been submitted that the same was duly uploaded in the portal and could

have been very well seen in the portal itself, the screenshot of which has been enclosed as Annexure- R10 to the affidavit-in-opposition. Under such circumstances, this Court finds no ground to interfere with the issuance of the fresh tender bearing Bid No. GEM/2024/B/4942324 dated 14.05.2024.

20. This Court in addition to the above also finds it relevant to take into consideration that on 15.05.2024, the petitioner very well knew about the issuance of the fresh tender. In the said tender document, it was categorically mentioned that the bid end date was 24.05.2024 and the bid open date was 24.05.2024. However, the petitioner approached this Court only on 10.06.2024. The delayed approach by the petitioner by way of the instant writ petition also disentitles the petitioner to any relief under Article 226 of the Constitution.

21. Mr. A. Kalita, the counsel for the petitioner before parting with the record submitted that the petitioner be permitted to participate in the said tender process.

22. This Court had duly observed supra that the fresh tender was issued on 14.05.2024 and the bid document was opened on 24.05.2024 and the petitioner approached on 10.06.2024. Under such circumstances, it would not be proper on the part of this Court to issue any direction in that regard as sought for. This Court would not like to comment as to whether the petitioner can approach the respondent authorities and whether the respondent authorities should or should not permit the petitioner to participate in the tender ongoing process. It is left to the wisdom of the Respondent Authority.

23. In view of the above, the instant writ petition stands dismissed. No costs. Interim order if any, shall vacated.

JUDGE

Comparing Assistant