

GAHC010150152024



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

Case No. : WP(C) 3519/2024

M/S RAMA K GUPTA AND CO.
A CHARTERED ACCOUNTANTS FIRM
HAVING ITS HEAD OFFICE AT 201
BLOCK 3A
GANESH GALAXY CITY
AYODHYA BY-PASS ROAD
BHOPAL- 462022 (M.P.). REP. BY ITS GUWAHATI BRANCH IN CHARGE R.K.
AGARWAL
PARTNER 4TH FLOOR
ESTHER ENCLAVE
S.J. ROAD CHABIPOOL
GUWAHATI- 781001
ASSAM.

VERSUS

THE PANCHAYAT AND RURAL DEVELOPMENT DEPARTMENT AND 2 ORS.
GOVT. OF ASSAM
REP. BY THE PRINCIPAL SECRETARY
PANCHAYAT AND RURAL DEVELOPMENT DEPTT. JANATA BHAWAN
BLOCK C 1ST FLOOR DISPUR
GUWAHATI- 781006.

2:THE ASSAM STATE RURAL LIVELIHOOD MISSION SOCIETY
REP. BY THE STATE MISSION DIRECTOR
SIVA NATH GOGOI PATH
PANJABARI
GUWAHATI- 781037.

3:M/S H.K. AGARWALA AND ASSOCIATES
2ND FLOOR
SABITRI LALIT BHARALI BUILDING M.N. ROAD
PANBAZAR

GUWAHATI- 781001.

Advocate for : MR. B J GHOSH

Advocate for : SC

P AND R.D. appearing for THE PANCHAYAT AND RURAL DEVELOPMENT
DEPARTMENT AND 2 ORS.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

Date : 05.08.2024

Heard Mr. M. K. Choudhury, learned Senior Counsel, assisted by Mr. R. Goswami, learned counsel for the petitioner. Also heard Mr. S. Dutta, learned Standing Counsel, P&RD for the respondent Nos. 1 & 2 and Mr. G. N. Sahewalla, learned Senior Counsel, assisted by Ms. K. Bhattacharya, learned counsel for the respondent No. 3.

2. The case of the petitioner is that the petitioner had participated in the 'Request For Proposal' (hereinafter referred to as the 'RFP') dated 25.01.2024, for submitting a proposal for financial audit services. In terms of the RFP, the minimum estimated bid value was to be Rs. 16 Lakhs for the entire assignment, as per Clause 12 of the RFP, excluding taxes. The petitioner however could not submit his bid in one part amounting to Rs. 16 Lakh, as the bid proposal to be submitted by all the bidders, had been bifurcated in the GeM portal into two parts. Further, the GeM portal did not accept the figure '0', as support fees for the post audit service charges. As such, the petitioner submitted his bid of Rs. 16 Lakhs into two parts, with Rs.3/- being put in one part consisting of the post audit support charge, while Rs. 16 Lakhs minus Rs.3/- was put as the bid

amount in the other part.

3. The petitioner's counsel submits that when the bids were opened on 10.06.2024, the petitioner's bid was found to be the lowest (L1) and as such, the petitioner should have been awarded the consultancy assignment. However, on 26.06.2024, the petitioner's bid was declared disqualified by the Bid Evaluation Committee and subsequently the Bid Evaluation Committee decision was released in the GeM portal on 27.06.2024. The respondent No. 3, being the lowest bidder, after the disqualification of the bid of the petitioner, was awarded the contract/consultancy assignment.

4. The petitioner's counsel submits that in terms of Clause 30, 31 & 33 of the RFP, the State respondents were required to transmit to all the bidders/consultants, whose financial proposals were opened, the decision of the State respondents to award the contract to the successful consultant, i.e., the respondent No. 3, by giving the information as required under Clause 31 of the RFP. The State respondents were also to give an opportunity of debriefing to the unsuccessful consultants, if the unsuccessful consultants made a request to the State respondents for debriefing, in terms of Clause 33 of the RFP. In the present case, the same has not been done. He accordingly submits that as the State respondents have not followed the terms and conditions, which have been authored by them in the RFP, the award of the contract to the respondent No. 3 is arbitrary and should be set aside. Further, as the bid of the petitioner is the lowest, as per the declaration made by the State respondent on 10.06.2024, the petitioner should be awarded the contract/consultancy assignment.

5. Mr. S. Dutta, learned counsel for the respondent Nos. 1 & 2 submits that the petitioner has misunderstood the NIT Clause. He submits that though the bidders were to submit their bid amounts in one part for the entire assignment, a default was created by the GeM portal, by which the bidders were also required to submit post audit charges. He however submits that the said issue was clarified in a pre-bid meeting held on 05.02.2024, wherein a representative of the petitioner had also participated. In the pre-bid meeting, it was clarified that the minimum prescribed audit fees for the entire assignment would be Rs. 16 Lakhs (excluding taxes) and the post audit fees would be payable for providing post audit service for three months, as mentioned in the bid documents. The bidders were thus required to submit the minimum prescribed fees/bid not below Rs. 16 Lakhs on one part and the post audit charges on the other part. He submits that in view of the petitioner having participated in the pre-bid meeting held on 05.02.2024, the petitioner was in the knowledge that he had to make his minimum bid amount of Rs. 16 Lakh on the one part for the entire assignment and Rs.3/- could not be included within the minimum prescribed fees required for the entire consultancy assignment. He submits that Clause 30, 31 & 33 are an integral part of the RFP. However, as the petitioner's bid amount has been disqualified, the issuance of the notification of intention to award the contract to the respondent No. 3, in terms of Clause 31 of the RFP would be a meaningless exercise. He submits that no prejudice has been caused to the petitioner, as the petitioner was disqualified for not submitting the minimum prescribed fees. He accordingly submits that the writ petition should be dismissed.

6. Mr. S. Dutta further submits that in terms of the judgment of the Supreme

Court in the case of ***Jagadish Mandal vs. State of Odissa***, reported in ***(2007) 14 scc 517***, judicial review of an administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether the choice or decision is made 'lawfully' and not to check whether the choice or decision is 'sound'. Further, in the case of ***N.G. Projects Limited Vs. Vinod Kumar Jain***, reported in ***(2022) 6 SCC 127***, the Supreme Court has held that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. He also submits that in terms of the judgment of the Division Bench of this Court in the case of ***Sibaram Deka vs. State of Assam and 7 others*** in ***WA 395/2022***, wherein it has been held that when a tenderer participates in a tender process without objection and he is subsequently found to be not successful, a challenge to the selection process is precluded. Such a tenderer cannot be allowed to turn around and contend that the process was unfair, by virtue of the existence of a Clause in the NIT. He also submits that the petitioner has not made a challenge to the Bid Evaluation Committee decision dated 26.06.2024, by which the petitioner's bid was declared disqualified.

7. The petitioner's counsel submits that the pre-bid meeting dated 05.02.2024 was never uploaded in the GeM portal and it was uploaded in the Departmental Website on 18.07.2024.

8. Mr. G. N. Sahewalla, learned Senior Counsel for the respondent No. 3 submits that as the intention of the respondents to award the contract to the respondent No. 3 was uploaded in the GeM portal on 27.06.2024, the same amounted to substantial compliance with Clause 30 & 31. He submits that the

contract had been awarded to the respondent No. 3 and the agreement signed on 10.07.2024, i.e., two days prior to the issuance of the interim order by this Court. Further, the contract work has already been started by the respondent No. 3. He accordingly submits that the writ petition should be dismissed.

9. As can be seen from the averments made by the learned counsels for the parties and the pleadings on record, the minimum prescribed bid for the consultancy assignment was to be Rs. 16 Lakhs. Due to a default in the GeM portal, the petitioner could not submit his bid in one part. He submitted his bid of Rs. 16 Lakhs minus Rs. 3/- for the entire assignment on one part, while submitting Rs.3/- as his bid for the post audit service fees. The same was done due to bifurcation of the bid amount in the GeM portal, as the bid could not be submitted in one part only. However, the pre-bid meeting held on 05.02.2024, which was attended by the petitioner's representation, shows that a clarification as to the requirement of submitting the minimum bid amount of Rs. 16 Lakhs for one part, i.e., the consultancy assignment, had been made.

10. On considering as to whether the bid submitted by the petitioner, due to a default created by GeM portal, could come in the way of the petitioner being the lowest bidder, the issue would have to be decided by the State respondents. However, with regard to Clause 30, 31 and 33 of the RFP, the same provides that a Standstill period would have to be applied, when the State respondent transmits to its consultants, including the petitioner, whose financial proposals were opened, the notification of intention to award the contract to the successful consultant. The unsuccessful consultants are thereafter allowed to make a written request for debriefing. On the request of the unsuccessful

consultants for debriefing, the State respondent/client is to provide debriefing within five business days thereafter.

11. In the present case, there is nothing to show that a notification of intention to award the contract to the respondent No. 3 had been made to the petitioner, in terms of Clause 31.1 of the RFP. Though, it has been the submission of the counsel for the respondent No. 3 that there has been substantial compliance of Clause 31 of the RFP, due to the fact that the intention to award the contract to the respondent No. 3 had been uploaded in the GeM portal, the respondents have not been able to show that all the information required under Sub-Clause (a) to (i) of Clause 31.1, had been issued, in terms of Clause 31 of the RFP. Further, the communication of the respondents' intention to award the contract to the unsuccessful consultants has not been done individually, by addressing the consultants specifically. It is also seen that despite the petitioner's representation dated 28.06.2024 to the State Mission Director, Assam State Rural Livelihoods Mission, requesting for debriefing, no debriefing time has been given to the petitioner even till today.

12. Clause 30, 31 & 33 of the RFP is reproduced below as follows:-

“30. Standstill Period.

30.1 The Contract shall be awarded not earlier than the expiry of the Standstill Period. The duration of the Standstill Period is specified in the Data Sheet. Where only one Proposal is submitted, the Standstill Period shall not apply.

31. Notice of Intention to Award

31.1 When a Standstill Period applies, it shall commence when the Client has transmitted to each Consultant whose financial proposal was opened, the

Notification of Intention to Award the Contract to the successful Consultant as per instructions in the Data Sheet. The Notification of Intention to Award shall contain, at a minimum, the following information:

- (a) the name and address of the Consultant with whom the client successfully negotiated a contract;*
- (b) the contract price of the successful Proposal;*
- (c) the names of all Consultants included in the short list, indicating those that submitted Proposals;*
- (d) where the selection method requires, the price offered by each Consultant as read out and as evaluated;*
- (e) the overall technical scores and scores assigned for each criterion and sub-criterion to each Consultant;*
- (f) the final combined scores and the final ranking of the Consultants;*
- (g) a statement of the reason(s) why the recipient's Proposal was unsuccessful, unless the combined score in (f) above already reveals the reason;*
- (h) the expiry date of the Standstill Period; and*
- (i) instructions on how to request a debriefing and/or submit a complaint during the Standstill Period.*

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33. Debriefing by the Client

33.1 On receipt of the Client's Notification of Intention to Award referred to in ITB 31.1, an unsuccessful Consultant has three (3) Business Days to make a written request to the Client for a debriefing. The Client shall provide a debriefing to all unsuccessful Consultants whose request is received within this deadline.

33.2 Where a request for debriefing is received within the deadline, the Client shall provide a debriefing within five (5) Business Days, unless the Client decides, for justifiable reasons, to provide the debriefing outside this timeframe. In that case, the standstill period shall automatically be extended until five (5) Business Days after such debriefing is provided. If more than one debriefing is so delayed, the standstill period shall not end earlier than five (5) Business Days after the last debriefing takes place. The Client shall promptly inform, by the quickest means available, all Consultants of the extended standstill period.

33.3 Where a request for debriefing is received by the Client later than the three (3)-Business Day deadline, the Client should provide the debriefing as soon as practicable, and normally no later than fifteen (15) Business Days from the date of publication of Public Notice of Award of contract. Requests for debriefing received outside the three (3)-day deadline shall not lead to extension of the standstill period.

33.4 Debriefings of unsuccessful Consultants may be done in writing or verbally. The Consultant shall bear their own costs of attending such a debriefing meeting.”

13. In the case of ***R.D. Shetty Vs. International Airport Authority***, reported in ***(1979) 3 SCC 489***, the Supreme Court has held that executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those Standards on pain of invalidation of an act in violation of them.

In the case of ***Vidarbha Irrigation Development Corporation and Ors. Vs. Anoj Kumar Agarwala and Ors.***, reported in ***(2020) 17 SCC 577***, the

Supreme Court has held that the word used in the tender documents cannot be ignored or treated as redundant or superfluous and they must be given meaning and their necessary significance. Para 16 of the decision of the Supreme Court in **Vidarbha Irrigation Development Corporation and Ors. Vs. (supra)** is reproduced herein below as follows:-

“It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional Court.”

14. On considering the fact that Clauses in a tender cannot be said to be superfluous or redundant and as it is not the case of the respondents that the Clauses in the RFP had been put there only for show, it was the duty of the respondents to act upon the Clause provided therein, specifically when Clause 31 and 33 pertains to giving information to the unsuccessful bidders, that the contract is going to be awarded to somebody else. As such, debriefing is required to be given to the unsuccessful tenderers, if they make a prayer for the same, as it was an essential condition of the RFP.

15. In the case of **Pune Municipal Corporation and another vs. Harakchand Minirimal Solanki**, reported in **(2014) 3 SCC 183**, the Supreme Court has held that it is a settled proposition of law that where a

power is given to do a certain thing in a certain way, the thing must be done in that way or not at all other methods of performance are necessarily forbidden.

16. In the present case, a procedure has been laid down by the State respondents for communicating the intention of the State respondents to award the contract to the successful bidder. However, prior to the actual awarding of the contract to the successful bidder, the provisions of Clause 30, 31 and 33 etc. has to be followed. These Clauses are meant for the unsuccessful bidders and when a procedure has been made by the State respondents, which cannot be said to be superfluous or redundant, the same would have to be followed. Further, there is nothing in the above Clauses to suggest that the said Clauses would not apply to a bidder, whose bid has been disqualified. The only requirement for its application is that the consultant/bidder's financial bid/proposal was to be opened by the respondent.

17. In view of the reasons stated above, this Court is of the view that as the provisions of Clause 30, 31 & 33 have not been followed, the award of the contract to the respondent No. 3 has been made in violation of the above Clauses Also, in terms of the judgment of the Supreme Court, the terms and conditions of a tender cannot be held to be superfluous or redundant. Further, as the provisions of Clause 31 have not been followed, which was required to be done, the respondents would have to perform the same.

17. Accordingly, in view of the reasons stated above, though this Court is not inclined to set aside the award of the contract given to the respondent No. 3, as he has allegedly started the contract work, the same will be subject to the decision to be taken by the State respondents after following the provisions of

Clause 30, 31 & 33 of the RFP. The State respondents shall accordingly transmit to the petitioner and all other unsuccessful consultants, the notification of intention to award the contract to the respondent No. 3, as per instructions in the Data Sheet. Consequently, the Standstill period shall apply from the date the communication is made by the State respondents to the petitioner and the other unsuccessful consultants, regarding the intention of the State respondents to award the assignments to the respondent No. 3. Thereafter, the provisions of Clause 33 will be applied, if the petitioner and other unsuccessful consultants make a representation for debriefing. The award of the contract to the respondent No. 3 will be subject to the decision of the State respondents, after the provisions of Clause 30, 31 & 33 are complied with.

18. Till the provisions of Clause 30, 31 & 33 are followed and a decision is taken by the State respondents, the contract awarded to the respondent No. 3 shall be kept in abeyance.

19. The writ petition is accordingly disposed of.

JUDGE

Comparing Assistant