

GAHC010162062024



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

Case No. : WP(C)/4093/2024

M/S KHUSHI CONSTRUCTIONS
A PROPRIETORSHIP FIRM
HAVING ITS OFFICE AT BAJAJ COMPLEX,
N.T. ROAD, WARD NO. 10 NORTH LAKHIMPUR,
P.O. AND PS- NORTH LAKHIMPUR,
DISTRICT- LAKHIMPUR, ASSAM,
REPRESENTED BY ITS SOLE PROPRIETOR SRI VISHAL BAJAJ,
31 YEARS

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SPECIAL SECRETARY TO
THE GOVERNMENT OF ASSAM, PUBLIC WORKS (BUILDING AND
NATIONAL HIGHWAYS) DEPARTMENT, DISPUR, GUWAHATI-6

2:CHIEF ENGINEER
PUBLIC WORKS DEPARTMENT (NH WORKS)
ASSAM CHANDMARI
GUWAHATI-3

3:SUPERINTENDING ENGINEER
PWD GUWAHATI NH CIRCLE
CHANDMARI
GUWAHATI-3

4:EXECUTIVE ENGINEER
PWD NAGAON NH DIVISION
NAGAO

Advocate for the Petitioner : MR. D P BORAH,

Advocate for the Respondent : SC, PWD (NH),

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER

Date : 14.08.2024

1. Heard Mr. D. P. Borah, learned counsel for the petitioner, who submits that the impugned letter dated 02.08.2024 issued by the Chief Engineer, PWD (NH Works), Assam, rejecting the petitioner's prayer for pre-qualification credential for completing the contract work of "Construction of Proposed North Lakhimpur By-Pass from existing km 338/924.00 to km 349/213 of NH-52" should be set aside. He submits that the only reason for rejecting the petitioner's prayer is on the ground that no supplementary agreement had been executed between the petitioner and the employer (PWD) and neither was any Joint Project Account (JPA) created between the petitioner and the principal contractor, i.e., M/s DRA-TKEE(JV), in terms of the Government of Assam letter dated 28.12.2020.

2. The petitioner's counsel submits that the above two reasons, for rejecting the petitioner's prayer for giving pre-qualification credentials for completing the contract work, had been unintentionally overlooked by the petitioner, the employer and the principal contractor, as the focus at the relevant time, was for completion of the contract work. He submits that the petitioner having completed the contract work with the knowledge of the employer and as the completion certificate in that regard had been issued by the concerned Executive Engineer (respondent No. 4), the State respondents should give the pre-qualification credentials to the petitioner for completion of the balance contract work. He accordingly prays that a direction should be issued to the respondent authorities to re-consider the case of the petitioner.

3. Mr. P. Nayak, learned counsel for the PWD submits that the petitioner may submit a fresh representation for reconsideration of his prayer for being given pre-qualification credential and the same would be considered a fresh by the concerned authority.

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

5. The case of the petitioner is that M/s DRA-TKEE(JV) was awarded the contract for execution of the contract work of "Construction of Proposed North Lakhimpur By-Pass from existing km 338/924.00 to km 349/213 of NH-52". As M/s DRA-TKEE(JV), who was the principal contractor, could not complete the work, the contract work was terminated by the PWD (employer).

6. The principal contractor, being aggrieved with the termination of the contract, filed WP(C) 3214/2020. This Court, vide order dated 28.08.2020 passed in WP(C) 3214/2020, recorded the undertaking given by the principal contractor that if some further reasonable time was given, they could complete the entire work within 128 days. The employer thereafter, vide communication dated 27.08.2020, mentioned the works to be completed by the principal contractor. This Court had also asked the engineers of the employer as to what would be the reasonable period for completing the work, to which they stated that 21 days would be appropriate to complete the balance work. This Court thereafter allowed the principal contractor a period of 30 days to complete all the balance work, which remained incomplete and which would be a part of the contract between the employer and the principal contractor.

7. The employer thereafter wrote a letter dated 11.12.2020 to the Secretariat

of the PWD, Assam with a proposal for revoking the termination order, in view of the observation of this Court in the order dated 28.08.2020 and in view of the communication made by the principal contractor, proposing to complete the work by 30.04.2021. The Under Secretary to the Government of Assam, PWD (Highway) thereafter issued a letter to the Chief Engineer, PWD, NH Works dated 28.12.2020, stating that the proposal for revocation of the termination order, in view of the observation of this Court and the communication from the principal contractor, proposing to complete the work by 30.04.2021, had been accepted, as a last chance to the contractor, in the interest of completing the balance work. The letter however stated that the approval was subject to the principal contractor engaging a credible/willing working partner, capable of infusing adequate resources into the project with demonstration of satisfactory proportionate progress. The letter also stated that a supplementary agreement between the concerned parties as to the modalities for completion of the balance work was to be executed and opening of a Joint Project Account for ensuring financial control over the contractor in the matter of release of payment to the working partner, with clauses of indemnity to the Department. The letter further stated that the proposal for opening of JPA had been accepted in principle, but would require concurrence from the Finance Department, which would be communicated on receipt of the approval.

8. The Chief Engineer, PWD, NH Works thereafter wrote a letter dated 29.12.2020 to the Principal Contractor, informing him that the proposal for special arrangements towards completion of the balance work by 31.04.2021 had been accepted by the Government, subject to the engagement of a credible/willing working partner. The letter also stated that the principal

contractor was required to furnish a Power of Attorney authorizing the proposed working partner to represent the principal contractor in implementation of the special arrangement for completion of the work. Further, the principal contractor was to attend the Chief Engineer's office at the earliest, to finalize the draft of supplementary agreement to be drawn between the contractor and the employer, in respect of finalizing the modalities for completion of the balance work through the special arrangement and ensuring financial control of the Department on release of the payments. Further, one Joint Project Account by the petitioner and the employer was to be created.

9. The contents of the letter dated 29.12.2020 issued by the Chief Engineer, PWD, NH Works is reproduced herein below as follows:-

“Sub - Construction of Proposed North Lakhimpur By-pass from existing km 338/924.00 to km 349/213 of NH-52 in the state of Assam (Job No.052-AS-2011-12-099) for completion of balance work Regd Proposat for special arrangement

Ref: Your letter No.DRA-TKEE(IVYNH-52/PWD-NH/2020-21/248, 2009.12.2020
Sir,

With reference to the above, it is to inform that your proposal for special arrangements towards completion of the balance work by 31.04.2021 has been accepted by the Government in the interest of completion of the work, subject to the condition of engagements credible willing working partner capable of infusing adequate resources in the project and demonstration of satisfactory proportionate progress.

In this connection, you are requested to furnish & Power of Attorney authorising the proposed working implementation of the special arrangement for completion of the work.

Further to represent the Contractor in you requested to attend this office at the earliest to finalise the draft of the Supplementary agreement to be drawn between the contractor and the employer in respect of finalising the modalities for completion of the balance work through the special arrangement and ensuring of finalising the modalities and ensuring financial control of the

Department on release of the payments.

Further, in this regard, one Joint Project Account (JPA) by the duly authorised representative of the Contractor and the concerned Executive Engineer i.e. Executive Engineer, PWD, Nagaon NH Division is to be created and details may be intimated to this end at the earliest.

This special arrangement including opening of JPA is subject to concurrence of State Finance Department your urgent action in compliance to the above is requested in the interest of smooth progress and timely completion of the work.”

10. Subsequent to the above facts, a Power of Attorney was executed by the principal contractor, nominating the petitioner as its work partner for completion of the project.

11. To cut a long story short, the remaining work was completed by the petitioner and the employer issued a completion certificate in this regard. All payments that were due to the contractor/petitioner had also been released by the employer.

12. The only issue is with regard to the issuance of pre-qualification credentials to the petitioner, to acknowledge that the petitioner had completed the balance work for the principal contractor. The reasons for rejecting the petitioner's prayer to be issued a pre-qualification credential, as per the letter dated 02.08.2024, is on the ground that no supplementary agreement was executed between the petitioner and the employer and that no JPA had been created. With regard to the execution of a supplementary agreement, the letter dated 29.12.2020, issued by the Chief Engineer, PWD, NH Works, which is addressed to the Principal Contractor, clearly shows in para 2 that the supplementary agreement was to be executed by the principal contractor and the employer. The supplementary agreement was not to be executed by the

petitioner with the employer. Though the word contractor is used in the letter and not the word "principal contractor", a reading of the letter and the fact that it is addressed to the principal contractor clearly goes to show that the supplementary agreement is to be executed by the principal contractor and not the petitioner. As such, this Court is of the view that first reason for rejecting the petitioner's prayer for issuance of pre-qualification credentials is not sustainable and as such, the same is hereby set aside. However, it is not disputed by the petitioner that a Joint Project Account (JPA) had not been created by the petitioner (working partner) and the principal contractor/partner. However, this Court does not find that any prejudice has been caused to the employer or to any of the other parties, only because the JPA had not been created. The fact that the work has been completed and all payments have been made by the employer clearly goes to show that no prejudice is caused to any of the other parties.

13. It is not the case of any of the parties that the JPA was intentionally not created. As stated by the petitioner's counsel, it appears that the same was an unintentional mistake and the blame for the same cannot be fastened solely on the petitioner, as it was also a requirement of the principal contractor to have insisted for creation of a JPA. In fact, it was in the interest of the petitioner to have a JPA, instead of being at the mercy of the principal contractor, for getting payment for his contractual dues.

14. In view of the above reasons, this Court is of the view that the rejection of the petitioner's request for being issued pre-qualification credential, in respect of the balance contract work executed by it should be re-considered by the authority. Consequently, the letter dated 02.08.2024 is hereby set aside. The

petitioner shall submit a fresh representation to the respondent No. 2, for grant of pre-qualification credential within a week from today. The respondent authority shall accordingly take a decision on the same, within a period of two weeks from the date of receipt of a certified copy of this order and the representation, keeping in view the observations made by this Court.

15. This writ petition is accordingly disposed of.

JUDGE

Comparing Assistant