

GAHC010162762024



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

Case No. : WP(C)/4089/2024

M/S TANOR ENGINEERING AND ANR
A PROPRIETORSHIP CONCERN FIRM HAVING ITS REGISTERED OFFICE AT
P SECTOR, ITANAGAR,
P.O AND P.S- ITANAGAR, DIST- PAPIMPARE, PIN-791111, ARUNACHAL
PRADESH, REP. BY ITS PROPRIETOR DILING TATAK, THAT IS THE PET. NO-
2

2: DILING TATAK
S/O- TAGOM TATAK

.
R/O- P SECTOR
ITANAGAR

P.O AND P.S- ITANAGAR
DIST- PAPIMPARE
PIN-791111
ARUNACHAL PRADESH

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
PUBLIC WORKS DEPARTMENT,
DISPUR, GUWAHATI-781006, ASSAM

2: THE CHIEF ENGINEER
PUBLIC WORKS DEPARTMENT (NH WORKS)
ASSAM
CHANDMARI
GUWAHATI- 781003

3: BID EVALUATION COMMITTEE
REP. BY THE CHIEF ENGINEER

PUBLIC WORKS DEPARTMENT (NH WORKS)
ASSAM
CHANDMARI
GUWAHATI- 781003

4:THE MINISTRY OF ROAD TRANSPORT AND HIGHWAYS
REP. BY CHIEF ENGINEER (NATIONAL HIGHWAYS) PUBLIC WORKS
DEPARTMENT

CHANDMARI
GUWAHATI- 781003
ASSA

Advocate for the Petitioner : MR K J SAIKIA, MS N BURAGOHAIN,MR. P J SAIKIA, SR. ADV

Advocate for the Respondent : SC, PWD,

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

08.11.2024

1. Heard Mr. P.J. Saikia, learned Senior Counsel for the petitioner. Also heard Mr. B. Gogoi, learned counsel for the PWD.
2. The petitioner is aggrieved with the rejection of his Technical Bid at the Technical Bid Evaluation Stage, in terms of the Meeting Minutes of the Technical Bid Evaluation Committee held on 05.08.2024, wherein it was stated that the petitioner, who was a sub-contractor in respect of a contract work undertaken in the State of Arunachal Pradesh under the Arunachal Pradesh Package of Roads and Highways of SARDP-NE, had neither been approved by the authority as a sub-contractor and as such, could not have been done a part of the contract work as a sub-contractor.

3. The petitioner's counsel submits that the petitioner had worked as a sub-contractor in respect of 49% of the contract work in Arunachal Pradesh pertaining to "Construction of 2-Lane road of Potin-Pangin section of NH-13 from Km 163.50 to Km. 206.66 (Package-5) in the State of Arunachal Pradesh under Arunachal Pradesh Package of Roads and Highways of SARDP-NE", as allowed in the contract agreement executed between the Principal Contractor "VOZROZHDENIE" and the PWD, Arunachal Pradesh.

4. The petitioner had undertaken 49% of the sub-contract work in respect of the above construction work for a value of Rs.164 crores approximately, out of the total estimated cost of Rs.334,98,51,050/-. The petitioner thereafter participated in the present Notice Inviting Bid dated 18.06.2024 for "Construction of New Bridge over River Gariajan (Br.No.416/1) on NH-15 under Annual Plan 2023-24 under PWD NH Dibrugarh NH Division in the State of Assam under EPC-Mode. (Job No. Br./15/2023-24/264" (hereinafter referred to as the "NIB").

5. Clause 2.2.2.2(ii) of the NIB pertaining to the technical capacity of a bidder, required that the bidder was to have done at least one similar work of 20% of the estimated project cost (Rs.1.32 crores), which was to have been completed from the eligible projects in Category 1 and/or Category 3 specified in Clause 2.2.2.5. The petitioner accordingly submitted documents, including the experience certificate, showing that he had completed 49% of the contract work in Arunachal Pradesh at the approximate cost of Rs.164 crores, as a sub-contractor in terms of Clause 2.2.2.2(ii). The petitioner's technical bid was

however rejected on the ground that prior approval of the Government of Arunachal Pradesh had not been taken by the petitioner for doing the sub-contract work under the Principal Contractor, i.e. VOZROZHDENIE.

6. The petitioner's counsel submits that the petitioner was not aware about the requirements of taking approval from the PWD, Arunachal Pradesh, while doing the work as a sub-contractor and had accordingly not taken any such documents/approval from the authorities or the Principal Contractor. Further, the petitioner was also not informed of the requirement of the same by anybody. However, the petitioner had subsequently approached the PWD, Government of Arunachal Pradesh, who issued the approval letter dated 23.11.2023, for being a sub-contractor, in respect of 49% of the contract work allotted to VOZROZHDENIE (principal contractor), i.e. in respect of "C/o 2-Lane road of Potin-Pangin section of NH-13 from Km 163.500 to Km 206.660 (Package-5) in the state of Arunachal Pradesh under Arunachal Pradesh Package of Roads and Highways of SARDP-NE."

7. The petitioner's counsel submits that Experience Certificates were also issued on 15.05.2023 and 04.12.2023 by the Executive Engineer, Ziro Highway Division, P.W.D., Government of Arunachal Pradesh. He further submits that the petitioner's approval letter and work order experience certificates have been accepted by the National Highways & Infrastructure Development Corporation Limited (NHIDCL) and PWD (Roads) Assam for other contract works, such as, (1)"Construction of Balance Work of the 4-laning of the Section from Jhanji to Demow of NH-37 (Old): PKg-I: Road Works from Km 490+800 to Km 501+800

(11.000 Km), under SARDP-NE, under EPC Mode”, which had an estimated amount of Rs.72.56 crores and (2) “Construction of Balance Work of the 4-laning of the Section from Jhanji to Demow of NH-37 (Old): PKg-II: Road Works from Km 501+800 to Km 514+800 (13.000 Km), under SARDP-NE, under EPC Mode”.

8. The petitioner’s counsel further submits that the petitioner has also been selected as the successful tenderer in respect of “Construction/improvement/widening of road Taliha-Nacho from Km. 23.400 to Km 42.790 & Km 64.641 to Km 67.205 (net length 21.954 Kms.) under Package-2 from CL-09 to NHDL specifications through EPC mode under 77 RCC/23 BRTF/Project Arunank in Arunachal Pradesh (Job No. D-BR-I/02/ARK/2022-23)”, which is having an estimated value of Rs.181.6848 crores and the petitioner has been executing the said work. He submits that in all the above tenders, the petitioner’s sub-contract work under the Arunachal Pradesh Government, as indicated in the foregoing paragraphs, has been accepted by the PWD (Roads), Government of Assam, NHIDCL and Border Roads Organization (BRO) as an experience certificate. As such, there is no justification for disqualifying the petitioner’s Technical Bid with respect to the present NIB, because of the absence of the approval certificate as a sub-contractor, when there is no dispute to the fact that the petitioner had worked as a sub-contractor for 49% of the contract work under the PWD, Government of Arunachal Pradesh. He also submits that as the financial bids of the other tenderers have been opened, the petitioner knows that the petitioner’s bid was L2.

9. Mr. B. Gogoi, learned counsel for the PWD submits that a clarification had

been sought for by the Chief Engineer, PWD (NH Works), Assam from the Chief Engineer (HW Zone), PWD, Arunachal Pradesh, with regard to whether any approval for the sub-contract work had been given to the petitioner, in respect of the "Construction of 2-Lane road of Potin-Pangin of NH-13 from Km 163.59 to Km. 206.66 (Pkg-5) on EPC mode in the State of Arunachal Pradesh under Arunachal Pradesh Package of Roads and Highways of SARDP-NE". A query had also been made with regard to the physical and financial progress of the sub-contract work allegedly done by the petitioner with regard to the above work. The Chief Engineer (HW Zone), PWD, Arunachal Pradesh thereafter wrote a letter dated 04.10.2023 to the Chief Engineer, PWD (NH Works), Assam stating that no approval had been given for the sub-contract work in favour of the petitioner and as such, there could be no physical and financial progress of the sub-contract work. He submits that it was due to the above letter dated 04.10.2023 issued by the Chief Engineer (HW Zone), PWD, Arunachal Pradesh that the petitioner's claim that he had undertaken a similar sub-contract work in Arunachal Pradesh, had not been accepted under Clause 2.2.2.2(ii) of the NIB.

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

11. The facts of the case shows that the only reason that the petitioner's Technical Bid has been disqualified by the State respondents, was due to the fact that the Arunachal Pradesh PWD had not issued any approval for the sub-contract work undertaken by the petitioner, in respect of the contract work done by the petitioner in Arunachal Pradesh under the principal contractor, VOZROZHDENIE. However, the said fact has been subsequently clarified by way of a subsequent approval given by the Chief Engineer (HW Zone), PWD,

Arunachal Pradesh, vide letter dated 23.11.2023 on the said contract work, which states as follows :

*“Sub:- C/o 2-Lane road of Potin-Pangin section of NH-13 from Km 163.500 to Km 206.660 (Package-5) in the state of Arunachal Pradesh under Arunachal Pradesh Package of Roads and Highways of SARDP-NE- **Approval for Sub-Contract in terms of Article- 4 of Contract Agreement thereof.***

*Ref:- 1) Agreement No. CEAP(HW)/2020-21/06 dated 09th October' 2020 for Rs. 334,98,51,050/-
2) M/s Joint Stock Company letter No. Ptop Pkg.05-No-0020a dated 24.01.2023
3) M/s Tanor Engineering letter No. Nil dated 20.11.2023*

Dear Sir,

The EPC Contractor M/s Joint Stock Company Industrial Association "Vozrozhdenie", New Delhi vide their letter cited at reference (2) above has requested and recommended to engage M/s Tanor Engineering, Itanagar as Sub-Contractor for 49% (Forty Nine percent) for the subjected Contract work.

*The credentials of M/s Tanor Engineering as enclosed therein has been examined in detail by the Competent Authority and meets the authentication criteria for Sub-Contract as per Clause-4.2 (i) & (ii) under Article-4 of the Contract Agreement. Hence, approval for Sub-Contracting of **49% (Forty Nine percent) of the subjected Contract Work for an amount of Rs. 164,14,27,000/- (Rupees One Sixty Four Crore Forteen Lakh Twenty Seven Thousand only)** is hereby accorded to **M/s Tanor Engineering, Itanagar** as Sub-Contractor as requested and recommended by M/s Joint Stock Company Industrial Association "Vozrozhdenie", New Delhi*

However, M/s Joint Stock Company Industrial Association "Vozrozhdenie", New Delhi is informed that all the obligations and liabilities under the Contract Agreement signed on 09.10.2020 shall remain with M/s Joint Stock Company as per Clause-4.2(iv) of the

Contract Agreement and PWD Highways would not have any legal binding with the Sub-Contractor M/s Tanor Engineering, Itanagar."

12. The extract of Clause 2.2.2.2 (i) & (ii) of the Instructions to Bidders (ITB) is reproduced hereinbelow as follows:-

"Technical Capacity

(i) For demonstrating technical capacity and experience (the "Technical Capacity"), the Bidder shall, over the past [05 (Five)] financial years preceding the Bid Due Date, have received payments for construction of Eligible Project(s), or has undertaken construction works by itself in a PPP project, such that the sum total thereof, as further adjusted in accordance with clause 2.2.2.5 (i) & (ii), is more than [Rs. 4.94 crore (Rs. Four crores Ninety-Four Lakhs)] (the "Threshold Technical Capacity").

(ii) For normal Highway projects (including Major Bridges/ROB/Flyovers/Tunnels):

Provided that at least one similar work of 20% of Estimated Project Cost [Rs. 1.32 crore (Rs. One crore Thirty-Two Lakhs)] shall have been completed from the Eligible Projects in Category 1 and/or Category 3 specified in Clause 2.2.2.5. For this purpose, a project shall be considered to be completed, if more than 90% of the value of work has been completed and such completed value of work is equal to or more than 20% of the estimated project cost."

13. The rejection of the petitioner's technical bid has been made only on the ground that no approval had been given by the employer to the petitioner, for being a sub-contractor for the contract work done in Arunachal Pradesh under the Principal Contractor "VOZROZHDENIE". No other ground has been taken by the State respondents for rejection of the petitioner's technical bid. Thus, this Court is not entering into other issues/aspects of Clause 2.2.2.2 (ii) of the NIB. This Court is only going to decide the issue, as to whether the subsequent approval of the petitioner's contract work in Arunachal Pradesh as a sub-contractor, would allow him to overcome the rejection of his technical bid by the

Technical Bid Evaluation Committee.

14. As can be seen from Clause 2.2.2.2 (ii) of the ITB, the said provision does not state that approval of the petitioner as a sub-contractor by the concerned authority, is to be submitted along with the tender documents. The facts of the case show that the petitioner has submitted an experience certificate showing that he had the required qualification, as provided under Clause 2.2.2.2(ii) of the NIB, as he had done sub-contract work beyond 20% of the estimated project cost, i.e., Rs.1.32 Crores. As Clause 2.2.2.2(ii) did not specify that the sub-contract work of the petitioner was required to be accompanied by an approval order issued by the competent authority and as the same had been rectified/clarified vide letter dated 23.11.2023 issued by the Chief Engineer, Highway Zone, PWD, Government of Arunachal Pradesh, the same made it amply clear that there was no denial of the fact that the petitioner had the experience by doing similar work amounting to 20% of the estimated project cost, though as a sub-contractor. As no issue has been raised by the respondents with regard to the requirement of Clause 2.2.2.2(ii) being confined only to a Principal Contractor and not to the sub-contractor, this Court is of the view that the petitioner's technical bid should be considered to be responsive, when the approval of the petitioner as a sub-contractor had been subsequently issued by the PWD, Arunachal Pradesh. The requirement for submitting an approval order, though not provided in the NIB, the petitioner's technical bid would have to be considered as responsive. For the sake of repetition, it may be again stated that the only question that is being decided in this writ petition, is with regard to the petitioner's technical bid being disqualified, only on the ground that the employer did not issue any approval to the petitioner as a sub-contractor in the contract work done in Arunachal Pradesh. The issue has been

rectified/clarified in favour of the petitioner. However, in view of the submission made by the petitioner's counsel that the petitioner's bid would be L2, as the other financial bids of the tenderers had been opened by the State respondents, the present writ petition is infructuous, due to the contract being awarded to the tenderer, whose bid was L1.

15. The writ petition is accordingly disposed of as infructuous. Interim order passed earlier stands vacated.

JUDGE

Comparing Assistant