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

Case No. : WP(C)/4290/2024

M/S DAIBAKI ENTERPRISE AND ANR
A SOLE PROPRIETORSHIP CONCERN REPRESENTED BY ITS PROPRIETOR
SRI PARESH CHANDRA DEKA AND HAVING ITS REGISTERED OFFICE AT
VILL.- CHAMATA, NALBARI, DIST. NALBARI, ASSAM, PIN- 781306.

2: PARESH CHANDRA DEKA
SOLE PROPRIETOR
SON OF LATE BIJOY CHANDRA DEKA
R/O- VILL. AND P.O. CHAMATA
P.S. BELSOR
DIST.NALBARI
ASSAM
PIN- 781306

VERSUS

THE STATE OF ASSAM AND 12 ORS
REPRESENTED BY THE SECRETARY TO THE DEPARTMENT OF
HANDLOOM, TEXTILES AND SERICULTURE, GOVT. OF ASSAM, DISPUR,
GHY-6, ASSAM

2:THE DIRECTOR OF HANDLOOM AND TEXTILES
ASSAM
GNB ROAD
AMBARI
GHY-781001
ASSAM

3:THE BID EVALUATION COMMITTEE
REPRESENTED BY THE CHAIRMAN
BEING THE DIRECTOR OF HANDLOOM AND TEXTILES
ASSAM
GNB ROAD
AMBARI

GHY-781001
ASSAM

4:M/S ARUNODOI UDYOG

KAIKARA
MANGALDAI
DIST. DARRANG
ASSAM
PIN- 784125.

5:M/S B.R. TEXTILES
DAKARGHAT BYE-PASS
DIST. NAGAON
ASSAM
PIN- 782003.

6:M/S BARUAH TIMBER DEPOT AND SUPPLIERS
KAIKARA
PATIDARRANG
MANGALDAI
DIST. DARRANG
ASSAM
PIN- 784125.

7:M/S JIMACHAYA INDUSTRIES
DAKHINGAON
KAHILIPARA
GUWAHATI
DIST. KAMRUP(M)
ASSAM
PIN- 781019.

8:M/S MAA SLEY HOUSE
CHAMATA
DIST. NALBARI
ASSAM
PIN- 781306.

9:M/S MANOJ BAH BET UDYOG
WARD NO. 12
HAJO ROAD
DIST. NALBARI
ASSAM
PIN- 781102.

10:M/S SIPINI BHANDAR
MUNICIPALITY MARKET

BARPETA ROAD
DIST. BARPETA
ASSAM
PIN- 781315.

11:M/S PALMARIAN ENTERPRISE
DERGAON TOWN
WARD NO. 2
DIST. GOLAGHAT
ASSAM
PIN- 785614.

12:M/S POPULAR FURNITURE AND WEAVING INDUSTRIES
NILBAGAN
DIST. HOJAI
ASSAM
PIN- 782445.

13:M/S RANU INDUSTRIES
RONGAJAN CHARIALI
KURUKA
MORONGI
DIST. GOLAGHAT
ASSAM
PIN- 785613

Advocate for the Petitioner : MR. B SHARMA, MS. L DAS,MR A CHAKRABORTY,MR. D DAS

Advocate for the Respondent : SC, HANDLOOM, TEXTILE AND SERICULTURE, MR. S K BARKATAKI (R-4 TO 13,MR D K NATH (R-4 TO 13

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

Advocate for the petitioners : Mr. B. Sharma, Advocate

Advocate for the respondents : Mr. R. Dhar, Advocate
Mr. D.K. Nath, Advocate

Dates of hearing : 12.11.2024

Date of judgment : 04.12.2024

JUDGMENT AND ORDER (CAV)

Heard Mr. B. Sharma, learned counsel for the petitioners. Also heard Mr. R. Dhar, learned counsel for the State respondents and Mr. D.K. Nath, learned counsel for the private respondents.

2. The grievance of the petitioners is that the petitioners' technical bid has been disqualified by the Technical Bid Evaluation Committee, vide meeting minutes dated 22.02.2024, on the ground that the petitioners had submitted documents, which were not in conformity with Clause 13(i) of the NIT, which is as follows:-

“13(i) Certificate from Registered Chartered Account/ Statutory Auditor indicating annual financial turnover during the last three years should be furnished with UDIN No.”

3. Mr. B. Sharma, learned counsel for the petitioners submits that the petitioners had mistakenly uploaded the documents showing the annual financial turnover for the period 2018-19, 2019-20 and 2020-21, though the petitioners were required to upload the annual financial turnover certificate, as required under Clause 13(i), for the year 2020-2021, 2021-22 and 2022-23.

4. The petitioners' case is that they had participated in e-Tender Notice dated 11.01.2024 (hereinafter referred to as the 'NIT'), for empanelment of manufacturers and suppliers, for supply of handloom and handloom accessories under the various schemes of Government of India and Government of Assam, implemented by the Directorate of Handloom and Textiles, Assam.

5. The petitioners' counsel submits that in terms of Clause 3(b) of the NIT, relating to the eligibility criteria of the bidders, bidders were to have not less than Rs. 50 Lakhs as the average annual financial turnover during the last three years, i.e., 2020-2021, 2021-2022 & 2022-2023 and they were also required to have the experience of supply of handloom and handloom accessories for an aggregated value of a minimum of Rs. 10 Lakh during the last three financial years, in terms of Clause 3(e). He further submits that in terms of Clause 3(e) of the NIT, Micro and Small Enterprises (MSEs) are exempt from submitting prior turnover and experience in all public procurements, subject to meeting the quality and technical specification.

6. The petitioners' counsel submits that as the petitioners were a small enterprise registered as a Micro and Small Enterprise (MSE), they were not required to submit the annual financial turnover, in view of Clause 3(e) of the NIT. However, the petitioners had submitted the required documents in terms of Clause 3(b), 3(c) & 13(i) of the NIT. He accordingly submits that as the petitioners were not required to comply with Clause 13(i) of the NIT, in terms of Clause 3(e) of the NIT, the disqualification of the petitioners' technical bid, on the ground that it's documents were not in conformity with the Clause 13(i) of the NIT, does not arise, inasmuch as, the documents required under Clause 13(i) comes within the ambit of the financial turnovers exempted under Clause 3(e) of the NIT. He further submits that similarly placed bidders as the petitioners, have been empanelled by the State respondents and as such, there is discrimination writ large, in disqualifying the technical bid of the petitioners only.

7. The petitioners' further case is that though the private respondents had

submitted documents showing their experience in handloom and handloom accessories for the aggregate value of minimum Rs.10 Lakhs during the last 3 years, some of the private respondents had not submitted their experience certificates as required under Clause 13(p) and 3(c) of the NIT. He accordingly submits that when the technical bid of the private respondents can be declared responsive, even though they had not complied with certain Clauses of the tender, the filing of the financial turnover documents, with respect to the wrong financial years by the petitioners, should also have been condoned.

8. The petitioners' counsel submits that the respondent Nos.4-6 had submitted expired trade licences, while the respondent No.13 did not submit an undertaking for making his bid valid for 180 days, as required in the NIT. He further submits that the respondent Nos. 9 & 10 did not submit documents regarding their experience for the required years and instead, submitted experience documents for the years 2018-19 and 2019-20. Thus, when the technical bids of the private respondents are declared responsive, even though they failed to fully comply with the tender conditions, the State respondents could not have singled out the petitioners' technical bid for disqualification.

9. The petitioners' counsel submits that the documents required under Clause 13(i) are the same, as is required in Clause 3(b). As there is an exemption for MSEs from submitting turnover documents required under Clause 3(b), the petitioners were also not required to submit the documents required under Clause 13(i). He submits that even though the petitioner No.1 was a Micro Small Enterprise (MSE), which was exempt from submitting documents in terms of Clause 3(b) and 3(c), pertaining to prior turnover and experience in all public procurement, in terms of Clause 3(e) of the NIT, the petitioners had submitted

their turnover for the last 3 years as required under Clause 3(b) of the NIT. He submits that in terms of Clause 13(i) of the NIT, the petitioners were to submit the annual financial turnovers during the last 3 years pertaining to 2020-21, 2021-22 and 2022-23. However, the petitioners had submitted the annual financial turnover for the years 2018-19, 2019-20 and 2020-21. The petitioners' counsel submits that as the petitioners were exempt from filing annual turnover for the last 3 years in terms of Clause 3(b), in view of Clause 3(e) of the NIT, the submission of information pertaining to different years by the petitioners under Clause 13(i), could not have been the basis for disqualification, as the same was a mistake and the petitioners had the required data for the year 2021-22 & 2022-23.

10. Mr. R. Dhar, learned counsel for the State respondents submits that as the petitioners had submitted information for wrong years by way of wrong documents, which was not in consonance with Clause 13(i) of the NIT, there was no infirmity in the rejection of the petitioners' technical bid. He submits that in terms of Clause 13(i), the petitioners were to submit certified annual financial turnover certificate for the last 3 years, i.e., from 2020-21 to 2022-23. However, the petitioners had submitted a certificate, indicating financial turnover for the years 2018-19 to 2020-21. The petitioners did not submit annual financial turnover for the required years, i.e., 2021-22 and 2022-23. He also submits that while the last date for submission of bid documents was 01.02.2024 at 12:00 Noon, the documents submitted by the petitioner with the writ petition viz. Annexure P3 & P4 were issued on 24.02.2024, which was after closing of the last date of submission on 01.02.2024 at 12:00 Noon.

11. The counsel for the State respondents further submits that the writ

petitioner is not entitled to get any relaxation as per clause 3(e), as per OM dated 20.09.2016 issued by the Ministry of Finance, Department of Expenditure Procurement Policy Division, as the Handloom Weaving Accessories products to be manufactured falls within the equipment which needs to meet the safety standards of the end user or the weavers. The products need to pass the safety test conducted by competent experts, before commissioning the looms. A defective Handloom Weaving Accessories/products might create accidents and safety concerns. The bidder, as such, was not given any relaxation under clause 3(e) because of the conditions laid down in Paragraph 3 of the OM dated 20.09.2016.

12. The O.M. dated 20.09.2016 is reproduced hereinbelow, as follows :

“OFFICE MEMORANDUM

Subject Relaxation of Norms for Startups Medium Enterprises in Public Procurement regarding Prior Experience - Prior Turnover criteria.

The undersigned is directed to refer to this Department O.M. of even number dated 25th July, 2016, wherein it was clarified that all Central Ministries/ Departments may relax condition of prior turnover and prior experience in public procurement to all Start-ups [whether Micro & Small Enterprises (MSEs) or otherwise] subject to meeting of quality and technical specifications in accordance with the relevant provisions of GFR, 2005.

2. A doubt has arisen if it makes optional for Central Ministries/ Departments to relax condition of prior experience and prior turnover in public procurement to Startups. In this regard, it is again clarified that normally for all public procurement, the Central Ministries/ Departments have to ensure that criteria of prior turnover and prior experience for all Startups is relaxed subject to their meeting of quality and technical specifications.

3. However, there may be circumstances (like procurement of items

related to public safety, health, critical security operations and equipments, etc.) where procuring entities may prefer the vendors to have prior experience rather than giving orders to new entities. For such procurements, wherever adequate justification exists, the procuring entities may not relax the criteria of prior experience/turnover for the Startups.

4. This issues with the approval of Finance Secretary.”

13. Mr. D.K. Nath, the learned counsel for the private respondents submits that all the private respondents had submitted proper documents in terms of Clause 13(i) of the NIT and as such, the case of the petitioners and the respondents are not similar.

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

15. Though the stand of the State respondents is that Clause 3(e) has not been extended to the NIT in view of the O.M. dated 20.09.2016, the fact remains that Clause 3(e) is a part of the NIT. As such, the O.M. dated 20.09.2016 is not applicable to the facts of this case. Thus, the question to be decided is as to whether the documents to be submitted under Clause 13(i) comes within the ambit of the exemption provided in Clause 3(e).

16. Clause 3(b), 3(c), 3(e), 13 and 13(i) of the NIT states as follows:-

*“3(b) The average annual financial turnovers during the last three years i.e. 2020-21, 2021-22 & 2022-23 should not be less than **Rs. 50.00 Lakh**. The audited/certified balance sheet should be submitted along with IT return files for the years as stated above.*

*3(c) The Manufacturers/Suppliers should have experience of supply of Handlooms & Handloom Accessories of an aggregated value of minimum **Rs. 10.00 Lakh (Rupees Ten Lakh)** only during the last three financial years.*

The supply completion certificate issued by the competent authority should be submitted as proof of experience."

3(e) Relaxation for Micro & Small Enterprises (MSEs):

*As per the Government Policy Circular No.1(2) (1) 2016-MA, dated 10/03/2016 issued by O/o Development Commissioner (MSME), Ministry of Micro, Small & Medium Enterprises, Government of India, **Micro and Small Enterprises (MSEs) are exempted from prior turnover and experience in all public procurements subject to meeting of quality and technical specification.** The bidders need to submit the up-to-date copy of Certificate of registration for Micro or Small Enterprises (Udyam Registration Certificate) issued by Ministry of Micro, Small and Medium Enterprises (MSME), Govt. of India. Moreover, the bidders must be genuine manufacturer of handlooms that clearly mention in the Udyam Registration Certificate. In case of MSE payment of EMD and bid cost are exempted as per Govt. of India OM, No.F.No.1(3)/2018-MA, Pt-III, dt. -27-10-2022.*

13. TECHNICAL BID (Part-I)

Following self-attested documents in hard copy and in online must be submitted in technical bid, without these, the tender will be rejected.

13(i) *Certificate from Registered Chartered Account/ Statutory Auditor indicating annual financial turnover during the last three years should be furnished with UDIN No."*

17. In the case of ***Ramana Dayaram Shetty Vs. International Airport Authority of India***, reported in ***(1979) 3 SCC 489***, the Supreme Court has held that the words used in tender documents cannot be ignored or treated as redundant or superfluous. They must be given meaning and the necessary significance.

18. A perusal of Clause 3(b) and 13(i) of the NIT shows that the document relating to annual financial turnover mentioned in the above two Clauses appear

to be similar, but are not the same.

19. MSEs are exempt under Clause 3(e) from submitting average annual financial turnover of not less than Rs.50 lakhs in terms of Clause 3(b), while under Clause 13(i) a tenderer has to submit the annual financial turnover. The word “average” and “Rs.50 lakhs” is missing in Clause 13(i). Thus, a careful reading of the two Clauses shows that there is a difference. Clause 13(i) does not provide for the average annual financial turnover, but the actual amount of annual financial turnover for the last 3 years, to be certified by a registered Chartered Accountant/Statutory Auditor. Thus, this Court is of the view that while a tenderer, who is an MSE, is exempt from submitting the average annual financial turnover of not less than Rs.50 lakhs for the years 2020-21, 2021-22 and 2022-23 in terms of Clause 3(b), there is an exemption from submitting the annual financial turnover for the last 3 years required under Clause 13(i) also in terms of Clause 3(e). Though the documents required under Clause 13(i) cannot be said to be exactly the same, as required under Clause 3(b), the fact remains that both the clauses pertain to documents relating to prior turnover, which need not be submitted by MSEs as per Clause 3(e).

20. Though the petitioners’ counsel has submitted that the petitioners had mistakenly uploaded the annual financial turnovers for the years 2018-19, 2019-20 and 2020-21, while having the required annual financial turnover certificate for the years 2021-22 and 2022-23, the same is not a part of the writ petition.

21. A perusal of the NIT shows that the last date of submission of the bid is 01.02.2024 at 12:00 Noon. The official records produced by the State respondents show that the petitioners had submitted the certified annual financial turnover for the last 3 years, i.e., 2018-19, 2019-20 and 2020-21, while

in terms of Clause 13(i) of the NIT, the petitioners had to submit the certified annual financial turnovers for the years 2018-19, 2019-20, 2020-21, 2021-22 and 2022-23. Though the petitioners have taken this Court through Annexure-P/3 and P/5 of the writ petition, which is the certified annual financial turnover for 5 years, i.e., from 2018-19 to 2022-23, the said documents show that they had been issued only on 24.02.2024. As such, as on the last date of submission of tenders, which was on 01.02.2024, Annexure-P/3 and P/5 could not have been in existence. Thus, there is nothing to show that the petitioners had the certified annual financial turnovers certified by a registered Chartered Accountant/Statutory Auditor for the years 2021-22 and 2022-23 as on 01.02.2024.

22. It can be said that the petitioners having opted to submit their annual financial turnover in pursuance to Clause 13(i), the said document would have to withstand scrutiny, like any other document of a normal bidder. Normally, once a tenderer, despite being exempted from submitting certain documents/information, submits the same, the Tender Evaluation Committee would have to scrutinize the said documents/information, as was required to be done with the documents/information submitted by the other tenderers, as it can be argued that the bidder has waived the exemption clause. To ignore it may be unreasonable and could cause prejudice to others, as everyone has to be treated equally. In the present case, the petitioners have not only submitted documents under Clause 3(b), but also under Clause 13(i).

23. The above being said, a close reading of Clause 3(e) of the NIT shows that MSEs are exempt from prior turnover and experience in all public procurements. Though it appears that the petitioners were trying to improve

their case in terms of Annexure P/3 and P/5, the fact remains that MSEs were exempt from submitting turnover documents. As such, even if the MSEs submit or do not submit documents pertaining to turnover, they being exempt from having any prior turnover and experience in all public procurements, the tenders submitted by MSEs with or without turnover, would have to be considered to be valid, subject to the MSEs meeting the quality and technical specifications and submitting up to date copy of certificate of registration/UDIN number for the MSE. In the view of this Court, the submission of the wrong annual financial turnovers for the years 2018-19, 2019-20 and 2020-21, cannot be a ground to disqualify the petitioners' technical bid, as they would have to be treated as additional documents which are not required for scrutiny in view of Clause 3(e).

24. With regard to the petitioners' case that some of the private respondents did not submit documents as was required in the NIT, it is noticed that the case of the private respondents and the petitioners herein is not similar, inasmuch as, all the private respondents have submitted their annual financial turnover in conformity with Clause 13(i) of the NIT.

25. It is again reiterated that Clause 13(i) is a certificate to be issued by the registered Chartered Accountant/Statutory Auditor, indicating the financial turnover during the last 3 years. However, as there is an exemption from submitting prior turnover in terms of Clause 3(e) of the NIT, this Court is of the view that the exemption clause under Clause 3(e) also encompasses within its fold, the requirement of bidders submitting prior turnover as per Clause 13(i) of the NIT. In fact, it appears that MSEs do not require to have any prior turnover or experience to participate in the NIT, which would be in tune with Government

Policy to give a fillip to small start-ups and new business to flourish. As MSEs are not required to submit any prior turnover or experience, the disqualification of the technical bid of the petitioners, on the ground that prior turnover documents was not correct is not sustainable.

26. In view of the reasons stated above the disqualification of the technical bid of the petitioners, on the ground that the petitioners had submitted wrong documents pertaining to prior financial turnover, is set aside. The State respondents are directed to open the petitioners' financial bid and consider the case of the petitioners for empanelment, for supply of handloom and handloom accessories in terms of the e-tender notice dated 11.01.2024, if the petitioners are not ineligible on other grounds.

27. The writ petition is accordingly allowed and disposed of.

JUDGE

Comparing Assistant