

GAHC010169362024



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

Case No. : WP(C)/4206/2024

PUNJAB ENGINEERING COMPANY
A COMPANY REGISTERED UNDER THE COMPANIES ACT, 1956 HAVING ITS
REGISTERED OFFICE AT RAJABARI, GAR ALI, JORHAT-14, REPRESENTED
BY ITS MANAGING DIRECTOR- SRI JASMEET SINGH, AGED ABOUT- 46
YEARS, S/O- S. GYAN SINGH, R/O- MARIANI ROAD, RAJABARI JORHAT,
DIST.- JORHAT, ASSAM, PIN- 785014

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM, HOUSING AND URBAN AFFAIRS DEPARTMENT,
DISPUR, GUWAHATI- 781006

2:THE DIRECTOR OF MUNICIPAL ADMINISTRATION
HOUSING AND URBAN AFFAIRS DEPARTMENT
DISPUR GUWAHATI- 781006

3:THE JORHAT MUNICIPAL BOARD
REPRESENTED BY ITS CHAIRPERSON
JORHAT ASSAM- 785001

4:THE CHAIRPERSON
JORHAT MUNICIPAL BOARD
JORHAT ASSAM- 785001

5:THE EXECUTIVE OFFICER
JORHAT MUNICIPAL BOARD
JORHAT ASSAM- 78500

Advocate for the Petitioner : MR. D BARUAH, MR. P K BORDOLOI

Advocate for the Respondent : SC, J M B, GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER

Date : 20.08.2024

Heard Mr. D. Baruah, learned counsel for the petitioner, who submits that the petitioner is aggrieved by the State respondents not taking any decision on the clarification sought for by the petitioner in respect of the Press Notice Inviting E-Tender dated 30.07.2024, hereinafter referred to as the "NIT" dated 30.07.2024. He submits that though the petitioner had participated in the pre-bid meeting dated 07.08.2024 and had also submitted a representation dated 11.08.2024, the State respondents have not made any decision with regard to the clarifications sought for by the petitioner in the pre-bid meeting and in the representation.

2. The petitioner's case in brief is that pursuant to an NIT dated 30.07.2024, which required the "Establishment, construction, supply & procurement, fabrication, erection of machineries, trial run & commissioning of Material Recovery Facility (MRF) and Waste to Compost (W2C) plant at Kakodunga, Jorhat as per SWM Rules, 2016 under SBM (U) on Engineering, Procurement and Construction and Construction (EPC) Mode-1 Basis under Jorhat Municipal Board on two Bid system", for an amount of Rs. 9 Crore, the petitioner, being desirous of participating in the tender process, had attended the pre-bid meeting held on 07.08.2024 and sought for clarifications on two issues. Firstly, the requirement of a bidder, having a minimum financial turnover (gross) of Rs. 15 Crore in any one year for the last three consecutive years, ending March, 2024, when the approximate value of the work in question, in terms of the NIT

dated 30.07.2024, was only Rs.9 Crore. Secondly, with regard to the work experience required of a bidder, in terms of the NIT dated 30.07.2024, wherein similar work meant "Construction of Scientific Fresh Waste Processing Plant/Waste to Compost Processing Plant/Material Recovery Facility (MRF)". He submits that the same is not in consonance with Sl. No. 3 of the Technical Corrigendum dated 23.02.2024 made in pursuance to a pre-bid meeting in respect of the cancelled NIT dated 13.02.2024, wherein it is stated as follows:-

“3. "Similar work" means Construction of Processing of Municipal Solid Waste (Both Legacy or Regular), Treatment of Legacy Waste, Construction of Scientific Dump Yard/Waste Processing Unit, Different Civil Work & Mechanical Work.”

3. The petitioner's counsel submits that the NIT dated 30.07.2024 provides for construction of Waste to Compost Processing Plant amongst other works. However, the said requirement of a bidder to have similar work experience of construction of "Waste to Compost Processing Plant" does not arise, when the same is not a requirement as per the earlier cancelled NIT dated 13.02.2024, which has been clarified in the Technical Corrigendum dated 23.02.2024. He also submits that a perusal of the schedule of quantities in respect of the NIT dated 13.02.2024 does not provide for construction of "Waste to Compost Processing Plant". As such, the petitioner's counsel submits, the inclusion of the construction of "Waste to Compost Processing Plant" under the similar work experience clause required of a bidder cannot be insisted upon, in terms of the NIT dated 30.07.2024.

4. The petitioner's counsel submits that prior to the issuance of the NIT dated 30.07.2024, an NIT dated 13.02.2024 had been issued by the State respondents

for the same work, as required under the NIT dated 30.07.2024, which is “establishment, construction, supply & procurement, fabrication, erection of machineries, trial run & commissioning of Material Recovery Facility (MRF) and Waste to Compost (W2C) Plant at Jorhat as per SWM Rules, 2016 under SBM (U) on Engineering, Procurement and Construction and Construction (EPC) Mode-1 Basis”.

5. In terms of the NIT dated 13.02.2024, “Similar Work” in the work experience clause did not require a bidder to do construction of a Waste to Compost Processing Plant. However, the first page of the NIT dated 13.02.2024 required a bidder to construct a Waste to Compost (W2C) Plant. “Similar Work” in the work experience clause was defined in the NIT dated 13.02.2024 as follows:-

“Similar Work means construction of Processing of Municipal Solid Waste (Both Legacy or Regular), Treatment of Legacy Waste, Construction of Scientific Dump yard/Waste Processing Unit.”

6. Further, while the tender value for the contract work in the NIT dated 13.02.2024 was also Rs. 9 Crore, the bidder was to have a minimum average annual turnover (gross) of Rs.5 Crore of construction work only, during the last three consecutive years, ending March, 2023. The petitioner’s counsel also submits that subsequent to the pre-bid meeting held in relation to the NIT dated 13.02.2024, a Technical Corrigendum had been issued on 23.02.2024, which clarified the following, amongst others:-

“3. *‘Similar work’ means Processing of Municipal Solid Waste (Both Legacy or Regular), Treatment of Legacy Waste, Construction of*

Scientific Dump Yard / Waste Processing Unit, Different Civil Work & Mechanical Work.

- 4. Civil Work experience amounting to Rs. 4.00 Crores (Minimum) and Mechanical Work experience amounting to Rs. 1.00 Crore (minimum) can be treated as similar nature of work.*
- 6. The Minimum annual turnover should be 75% of the work value in any one year of the last five years.”*

7. The petitioner’s counsel submits that three bids had been submitted pursuant to the NIT dated 13.02.2024, wherein the petitioner was one of the three bidders. As the technical bid/tenders of the two other bidders had been rejected at the Technical Bid Evaluation Stage, the Tender Evaluation Committee had recommended the cancellation of the NIT dated 13.02.2024, in terms of Section 26 of the Assam Public Procurement Act, 2017 (hereinafter referred to as “2017 Act”) and Rule 23(20) of the Assam Public Procurement Rules, 2020 (hereinafter referred to as “2020 Rules”).

8. In view of the recommendation made by the Tender Evaluation Committee in its meeting dated 11.03.2024 for cancellation of the NIT dated 13.02.2024, the same was cancelled. A subsequent NIT that had been issued on 15.03.2024 was again cancelled by the respondent authorities, due to the general election held in the year 2024.

9. The petitioner’s counsel submits that the State respondents are duty bound to respond to the request for clarification made by a bidder in respect of the tender documents, in terms of Section 22 of the 2017 Act. However, the State respondents have not done the same in the present case.

10. The petitioner's counsel submits that if the respondents make a clarification with regard to the meaning of "Similar Work" as reflected in the NIT dated 30.07.2024, in terms of Serial Nos. 3 & 4 of the Technical Corrigendum dated 23.02.2024 and if the financial eligibility criteria in respect of the minimum financial annual turnover (gross) of a bidder for any one year, is brought down to 75% of the work value, the petitioner can participate in the tender process.

11. Mr. B. D. Das, learned Senior counsel appearing for the respondent Nos. 3, 4 & 5 submits that he has obtained instructions and as per his instructions, the respondents are willing to lower the minimum annual turnover (gross) required of a bidder for any one year in the last three consecutive years, ending March, 2024 to 75% of the work value, which would amount to Rs.6.75 Crore, instead of Rs. 15 Crores. He further submits that Clause 3 of the Technical Corrigendum dated 23.02.2024, made in pursuance to the pre-bid meeting relating to the NIT dated 13.02.2024, cannot be inserted into the meaning of "Similar Work" required of a bidder, in terms of the NIT dated 30.07.2024, as the NIT dated 30.07.2024 requires the construction of a waste to compost plant. He further submits that as the author/employer of the contract work is the best person to understand the needs of the employer, the petitioner cannot demand insertion of a Clause only for his benefit. He submits that no prejudice is caused to the petitioner by the meaning given to "Similar Work" under Work Experience, as provided in the NIT dated 30.07.2024. Mr. B. D. Das submits that a Corrigendum with regard to the clarifications to be made will be issued within two days.

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

13. The submissions made by the counsels for the parties have narrowed down the issues to be decided by this Court. The first issue is as to whether the financial eligibility criteria of a bidder requiring annual financial turnover (gross) of Rs. 15 Crore in one year, out of last three consecutive years, ending March, 2024, should be lowered to 75% of the work value. As Mr. B. D. Das has submitted upon instructions that a bidder will be required to have minimum financial annual turnover (gross) of 75% of the work value for one year in any of the last 3 financial years, ending March, 2024, one prayer of the petitioner in terms of the NIT dated 30.07.2024, has been redressed. However, the respondents may clarify as to the minimum amount of civil and mechanical work required to be done by a bidder so that the bid can be treated as similar kind of work, similar to para 4 of the Technical Corrigendum dated 23.02.2024, inasmuch as the minimum financial eligibility criteria has been reduced from Rs. 15 Crore to 75% of the work value.

14. The remaining issue to be decided is as to whether the meaning of "Similar Work" in the work experience clause, in terms of the NIT dated 30.07.2024, should be in terms of Serial No. 3 of the Technical Corrigendum dated 23.02.2024, made in pursuance to a pre-bid meeting relating to the cancelled NIT dated 13.02.2024. The work experience clause required of a bidder, in terms of Clause 1(A)(i) of the Information and Instruction for contractor for E-bidding, pursuant to the NIT dated 30.07.2024 states as follows.

“1. Contractors who fulfil the following requirements shall be eligible to apply. Joint ventures/Consortium and special purpose vehicles are not accepted.

A. Work Experience:

The bidder should be a Class I PWD Contractor and should have satisfactorily completed ongoing 3(Three) similar works under Central Govt./State Govt. organization/ PUC ULB Central Public Sector Undertaking within the state of Assam as mentioned below during the last 3 (Three) years ending last day of submission of bids for which applications are invited. For this purpose, cost of work shall mean gross value of the completed ongoing work including cost of material supplied by the Government/client but excluding those supplied free of cost:

i) *Experience of having successfully completed/ongoing similar works during the last 3 years ending previous day of last date of submission of tenders.*

a. *Three similar works each costing not less than 50% of the estimated cost of the project.*

“Similar Work” means Construction of Scientific Fresh Waste Processing Plant/Waste to Compost Processing Plant/Material Recovery Facility (MRF).”

15. Serial No. 3 of the Technical Corrigendum dated 23.02.2024 made in pursuance to a pre-bid meeting relating to the NIT dated 13.02.2024 states as follows:-

“3. *‘Similar work’ means Processing of Municipal Solid Waste (Both Legacy or Regular), Treatment of Legacy Waste, Construction of Scientific Dump Yard / Waste Processing Unit, Different Civil Work & Mechanical Work.*

16. As can be seen from the position taken by the counsels for the parties, the respondents have taken the view that the meaning of “Similar Work” in the work experience clause, in terms of the NIT dated 30.07.2024, cannot be altered, as had been reflected in Serial No. 3 of the Technical Corrigendum dated 23.02.2024. On considering the above issue, this Court finds that the NIT dated

30.07.2024 required the construction of waste to compost plant. Further, the schedule of Quantities regarding the Solid Waste Management Plant in relation to the NIT dated 30.07.2024 speaks of a Compost Plant at Serial No. 7. In view of the reasons stated above, this Court fails to understand as to why the petitioner is adamant that the meaning of "Similar Work" in the work experience clause required of a bidder should not include "Waste to Compost Processing Plant." In any event, as held by the Supreme Court in various decisions, the lawfulness of a decision taken in contract matters can be questioned only on limited grounds. The soundness of the decision cannot be put to challenge.

17. In the case of ***Agmatel India Private Limited Vs. Resoursys Telecom and Ors.,*** reported in ***(2022) 5 SCC 362,*** the Supreme Court has held that technical evaluation or comparison by the Court is impermissible and if the interpretation of the author of the document is manifestly in consonance with the language of the tender document or subserving the purpose of the tender, the Court would prefer to keep restraint.

18. 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 referred to the judgment in ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.,*** reported in ***(2016) 16 SCC 818,*** which is to the effect 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 Court must defer to this understanding and appreciation of the tender documents, unless there is mala-fides or perversity in the understanding or appreciation or in the application of the terms of the tender conditions.

19. In the case of ***Central Coalfields Ltd. and Anr. Vs. SLL-SML (Joint Venture Consortium) and Ors.,*** reported in ***(2016) 8 SCC 622***, the Supreme Court has reiterated its earlier view that the decision taken by the employer as to whether a term of the NIT is essential or not should be respected. Further, while the lawfulness of a decision can be questioned on a very limited ground, the soundness of a decision cannot be questioned.

20. In the case of ***Om Gurusai Construction Company Vs. V.N. Reddy and Ors.,*** reported in ***2023 SCC OnLine SC 1051***, the Supreme Court has reiterated the decision passed in ***Afcons Infrastructure Ltd. (supra)***, whereby it was stated that the owner of the employer of a project, having authored the tender document, is the best person to understand and appreciate its requirement and interpret its document, unless there was mala-fide or perversity in the understanding or appreciation of the documents.

21. In the case of ***N.G. Projects Limited Vs. Vinod Kumar Jain***, reported in ***(2022) 6 SCC 127*** and in the case of ***Uflex Ltd. Vs. Government of T.N.***, reported in ***(2022) 1 SCC 165***, the Supreme Court has held that judicial review of contractual matters has its own limitations. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties have to be governed by principles of commercial prudence. To that extent, the principles of equity and natural justice have to stay at a distance.

22. In view of the fact that the respondents are the owner/employer of the project and having authored the tender documents, they are the best person to understand and appreciate its requirement and interpret its documents. This

Court does not find any mala-fides or perversity or unreasonableness in the respondents not deciding to change the meaning of "Similar Work" in the work experience clause to the NIT dated 30.07.2024 for the reasons stated in the foregoing paragraphs. Accordingly, this Court is of the view that the challenge made to give new a meaning to the word "Similar Work" in the work experience clause cannot succeed. The said challenge is accordingly dismissed.

23. The above being said, liberty is given to the petitioner to participate in the NIT dated 30.07.2024, as the respondents have agreed to lower the minimum financial eligibility criteria of a bidder to have a minimum annual financial turnover (gross) of Rs.6.5 Crore in any one year for the last three years, ending March, 2024. However, as the last date for submission of tenders is tomorrow, i.e. 21.08.2024, this Court is of the view that the petitioner should be given additional time till 5 P.M. of 22.08.2024 for submission of his tender.

24. The writ petition is accordingly disposed of.

JUDGE

Comparing Assistant