

GAHC010215002024



2024:GAU-AS:12931

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

Case No. : WP(C)/5276/2024

M/S VIVEK TRANSPORT AGENCY
A PROPRIETORSHIP FIRM WITH ITS OFFICE AT MURGI FARM, SOHSARAI
BICH BAZAR, BIHAR SARIF, DIST. NALANDA, BIHAR WHICH IS
REPRESENTED BY ITS PROPRIETOR SRI KUMAR VIVEK, S/O- ANIL
KUMAR, PRESENTLY RESIDING AT VILLAGE- JHAGRARPAR PT-III,
KHALILPUR OF DISTRICT- DHUBRI, ASSAM

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, FOOD, CIVIL SUPPLY AND CONSUMER AFFAIRS DEPARTMENT,
DISPUR, GUWAHATI-5.

2:THE COMMISSIONER

FOOD
PUBLIC DISTRIBUTION
CONSUMER AFFAIRS AND LEGAL METROLOGY
R.K. MISSION ROAD
ULUBARI
GUWAHATI-7.

3:THE DISTRICT COMMISSIONER
DHUBRI AND CHAIRMAN
E-TENDER COMMITTEE
DHUBRI.

4:THE E-TENDER COMMITTEE
REPRESENTED BY THE DISTRICT COMMISSIONER
DHUBRI AND CHAIRMAN
E-TENDER COMMITTEE

DHUBRI.

5:HAREN MAHANTA
HOUSE NO. 6A
GOPINATH NAGAR
P.O. GOPINATH NAGAR
P.S. FATASIL
GUWAHATI-16

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

Advocate for the petitioner	:Mr. RP Sarmah, Sr. Advocate Ms. R Devi, Advocate
Advocate for the respondent 5	:Mr. J Roy, Sr. Advocate Mr. PK Munir, Advocate
Advocate for the respondent 1 to 4	: Mr. SR Boruah, Advocate
Dates of hearing	: 16.12.2024
Date of judgment	: 19.12.2024

JUDGMENT AND ORDER (CAV)

1. Heard Mr. RP Sarmah, learned senior counsel assisted by Ms. R Devi, learned counsel for the petitioner. Also heard Mr. J Roy, learned senior counsel assisted by Mr. PK Munir, learned counsel for the respondent No. 5 as well as Mr. SR Boruah, learned counsel for the respondent Nos. 1 to 4.

2. The petitioner's grievance is that his bid has been rejected on the ground that the same was not in conformity with Clause 10, 21 and 24 of the terms and conditions of the Notice dated 03.09.2024, hereinafter referred to as the "NIT". The case of the petitioner is that he had submitted his bid for selection/appointment of Handling and Transport Contractor for transportation

of foodgrains under NFSA- 2013 of Dhubri district, in pursuance to the NIT. However, the petitioner's technical bid was rejected by the Technical Bid Evaluation Committee as per para 3 of the meeting minutes dated 16.09.2024, which is as follows:-

“VIVEK TRANSPORT AGENCY: The Tender paper/Bid submitted/uploaded by Vivek Transport Agency, Mohalla Bich Bazar, P.O. & P.S.- Sohsaral, Dist.- Nalanda (Bihar) were placed before the Tender committed for scrutiny. After careful examination of all the documents uploaded by the bidder it is found that the bidder is Class-4 registered under Road Construction Department, Bihar. The bidder has submitted the Tender Fees for Rs.5000.00 in online mode instead of Demand Draft mode as per NIT terms and conditions. Again the Earnest Money of Rs.25,00,000.00 received in favour of Vivek Transport Agency but not in favour of the District Commissioner as per Terms and Conditions of the NIT. Again the Solvency Certificate of the bidder is not found in original and no char areas experience certificate is found and hence rejected.”

3. The petitioner's counsel submits that once the petitioner has paid his tender fee in online mode, there is no requirement of paying the same by way of a demand draft. In respect of the 2nd ground for rejection of the petitioner's tender, i.e., earnest money in the form of fixed deposit was not made in favour of the District Commissioner, the petitioner has relied upon the certificate dated 19.10.2024 issued by the Chief Manager, Mauryalok Branch, Bank of Baroda, which states as follows”

“TO WHOM SO IT MAY CONCERN

This is certify that M/S Vivek Transport Agency is having a TDR of Rs. 25,00,000.00, TDR No. 80530300065897 in our bank which was issued on 23.08.2024. Further, as per party request the same TDR was pledged in the name of District Commissioner, Dhubri (Assam).

This certificate is issued on the specific request of customer.”

4. The petitioner’s counsel also submits that fixed deposit of Rs.25,00,000/- which had been made in favour of the District Commissioner, Dhubri in terms of Clause 10 of the NIT annexed as Annexure-D to the writ petition shows that the fixed deposit had been made in favour of the District Commissioner, Dhubri. He submits that the same is proved by the word “Pledge to District Commissioner, Dhubri (Assam)” which is a hand written pledge in the fixed deposit certificate. He submits that though the name of the petitioner, Vivek Transport Agency, has been typed out in the fixed deposit, the handwritten pledge is proof that the same had been made in favour of the District Commissioner, Dhubri.

5. The petitioner’s counsel submits that though the Technical Bid Evaluation Committee has taken a stand that the original bank solvency certificate has not been found, the petitioner had submitted the original Bank solvency certificate along with its bid. She however submits that the petitioner does not have char area experience. In any event Clause 21 of the NIT does not require the submission of char area experience certificate.

6. The petitioner’s counsel further submits that the respondent No. 5 has been selected, despite the respondent No. 5 not having submitted a solvency certificate from a nationalized Bank, as was required under Clause 24 of the NIT. Further, negotiation had taken place between the State respondents and the

respondent No. 5 after the selection process, as a result of which the rate of the respondent No. 5 had been reduced from Rs. 148.91 per quintal to Rs. 142.92 per quintal. The petitioner's counsel also submits that the petitioner did not have sufficient numbers of goods vehicles or goods carrying boats as required under Clause 14 of the NIT, inasmuch as, the respondent No. 5 had only dumpers and passenger boats. As such, the selection of the respondent No. 5 as a successful bidder should be set aside and a fresh NIT should be issued.

7. Mr. J Roy, learned counsel for the respondent No. 5 submits that the documents on record clearly shows that the petitioner had not complied with Clause 10, 14, 21 and 24 of the NIT. He further submits that though there is no express words stating that "char area experience certificate" needs to be submitted, the fact remains that unless a certificate/s to that effect are submitted, there is no way for the State respondents to know whether a particular bidder has char (riverine) area experience. He further submits that Clause 3 of the NIT requires the bidder to be financially sound and to have a thorough knowledge about the transportation route covering all GPSS & F.P shops, riverine area, char area etc. of Dhubri District, as above 84% of the beneficiaries are living in rural areas.

8. Mr. J Roy, learned counsel for the respondent No. 5 submits that Clause 21 of the NIT further provides that priority should be given to the State bidder having adequate knowledge in char areas. He submits that the respondent No. 5 is a State bidder having adequate knowledge of the char area, while the petitioner is not a State bidder and does not have any knowledge of the char area. He also submits that a contract agreement has already been executed between the respondent No. 5 and the State respondents on 16.10.2024, which is to expire on 31.03.2025.

9. Mr. SR Boruah, learned counsel for the respondent Nos. 1 to 4 submits that the earnest money of Rs. 25,00,000/-, which was to be deposited in the shape of a fixed deposit in favour of the District Commissioner, Dhubri was not done by the petitioner. The fixed deposit had been made in the name of the petitioner itself, which was in violation of Clause 10 of the NIT. Further, the petitioner had paid tender document fees of Rs. 5,000/- in online mode and not in the shape of a demand draft payable in favour of the District Commissioner, Dhubri. The petitioner also did not have any char area experience and it also did not submit the original solvency certificate. As the petitioner's technical bid was declared non-responsive, the petitioner cannot make a challenge to the subsequent negotiation of rates made between the State Government and the respondent No. 5, which was made in public interest.

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

11. Clause 3, 10, 21 and 24 of the NIT states as follows:-

“**3.** The Bidder shall be financially sound and shall have thorough knowledge about the transportation route covering all GPSS & F.P shops, riverine area, char area etc. of Dhubri District as above 84% beneficiaries are living in rural areas.

10. The Bidder shall pay the Tender Documents fees of Rs.5000.00 (Rupees Five Thousand) only to be deposited in the shape of Demand Draft payable in favour of the District Commissioner, Dhubri and the Earnest Money of Rs. 25,00,000.00 (Rupees Twenty Five Lakh) only to be deposited in the shape of Fixed Deposit at least for the period of 1(One) year in favour of the District Commissioner, Dhubri.

21. The bidder should have experienced in transportation of rice under

NPSA,2013 in Tier-1 & Tier-II system. Experience certificate shall be obtained from the DC/ADC i/e FPD & CA/SDO(C)/DD, FPD & CA/AD,FPD & CA is required and to be uploaded. Priority should be given to the state bidder and having adequate knowledge in Char areas for smooth functioning of transportation of Rice under NFSA 13 in Tier-I & Tier-II.

24. The bidder should have to upload the copy of solvency certificate with minimum an amount of Rs.1,50,00,000.00 (Rupees One Crore Fifty Lakh) only per annum as per work value received from any nationalized Bank as per bank prescribed format along with the copy of authenticate bank transaction statement for the last 1(One) year. The bidder should not be bank defaulter.”

12. The technical bid of the petitioner had been rejected on the following grounds by the Technical Bid Evaluation Committee:-

i. Tender fee was paid in online mode, but not by way of a demand draft in favour of the District Commissioner, Dhubri.

ii. Earnest money of Rs. 25,00,000.00 in the form of a fixed deposit was not made in favour of the District Commissioner, Dhubri, but in the name of the petitioner itself.

iii. The petitioner did not submit the original bank solvency certificate and,

iv. The petitioner did not submit any char area experience certificate.

13. Clause 10 of the NIT does not speak of the tender document fee of Rs. 5,000/-, being required to be submitted by online mode. It only speaks of deposit of the tender document fee, in the shape of a demand draft, payable in

favour of the District Commissioner (DC in short), Dhubri. The above makes it clear that the petitioner has not acted in consonance with the first part of the requirement of Clause 10 of the NIT.

14. The 2nd part of Clause 10 of the NIT provides that the earnest money of Rs. 25,00,000.00 should be in the shape of a fixed deposit in favour of the District Commissioner, Dhubri. A perusal of the fixed deposit No. 030065897 shows that the same has been made in the name of the petitioner. On the top of the fixed deposit certificate of Rs. 25,00,000.00, the following has been written by hand "Pledge to District Commissioner, Dhubri (Assam)". There is no signature or seal of the person/authority of the Bank certifying the handwritten pledge. In fact, the petitioner has admitted in Paragraph 9(II) of the writ petition that the pledge was written by hand by the petitioner. The fact that the fixed deposit was not pledged with anybody on the date it was issued, i.e. on 23.08.2024, is clear from the fact that the lien on the fixed deposit has not been marked/made in favour of anybody. If the lien on the fixed deposit had been made in favour of the District Commissioner, the same would have been reflected in the fixed deposit itself, i.e. in the column "Lien Marked". In this fixed deposit, the word "N" is written against the column "Lien Marked". The word "N" means "No" and as such, when the fixed deposit was made, the lien on the fixed deposit was not marked in favour of the DC. Otherwise the system used by the Bank would have generated words that showed that the lien on the fixed deposit of Rs.25,00,000/- had been made in favour of the DC against the column "Lien Marked". Though the petitioner has tried to convince this Court that the certificate dated 19.10.2024 issued by the Chief Manager, Mauryalok Branch, Bank of Baroda proved that the fixed deposit of Rs.25,00,000.00 had been pledged/made in favour of the DC, Dhubri, there is nothing to show that

the lien on the fixed deposit was pledged/marked in favour of the DC on the last date of submission of the tender. The last date of submission of the tender was 13.09.2024 and the Technical Bid Evaluation Committee held its meeting on 16.09.2024. The certificate made by the Chief Manager, Bank of Baroda was on 19.10.2024.

15. The letter dated 19.10.2024 does not state that the fixed deposit was made in favour of the DC, Dhubri. It only states that it was pledged in the name of the DC, Dhubri, without clarifying the date when the same was pledged. It is thus clear that the pledge has been made on a subsequent date, if actually done. This can only be clarified by the Bank issuing the fixed deposit, as the certificate dated 19.10.2024 issued by the Chief Manager is silent with regard to the date the pledge had allegedly been made. However, the Bank of Baroda has not been made a party in the present case. As such, the term and condition No. 10 of the NIT, requiring the fixed deposit to be made in favour of the DC, Dhubri, has not been fulfilled, as per the contents of the fixed deposit certificate, which is annexed to the writ petition. As stated earlier, the handwritten note made in the fixed deposit stating that the fixed deposit has been pledged to the DC, Dhubri has not been signed by any person or authority of the Bank and no seal has been affixed to prove its authenticity. No date has also been affixed. As such, there is no proof that a pledge/lien was made in favour of the DC on the fixed deposit, which is at Annexure-D to the writ petition.

16. The fixed deposit made by the petitioner only carries the name of the petitioner and the said fact makes it clear that the fixed deposit was made in the name of the petitioner itself.

17. With respect to whether it was necessary for the bidders to submit char

area experience certificate, this Court finds that though it has not been stated in the terms and conditions of the NIT that char area experience certificate should be submitted by the bidders, the authorities would not be able to know whether a bidder has char area experience, unless char area experience document/certificate was submitted by the bidders.

18. Clause 3 of the NIT requires that a bidder should have thorough knowledge about the transportation route covering all GPSS & F.P shops, riverine area, char area etc. of Dhubri District as above 84% of the beneficiaries are living in rural areas. Clause 21 provides that priority should be given to the State bidder having adequate knowledge in char areas. The requirement of having knowledge of char areas has been spelt out in 2 clauses of the NIT. To enable the respondent authorities to come to a finding that the bidder has adequate knowledge of char areas, the bidders would have to submit statements/certificates to that effect. Be that as it may, Clause 21 of the NIT only states that priority should be given to bidders having char area experience. The above clearly shows that the bids of bidders cannot be disqualified, only because a bidder does not have char area experience.

19. Clause 24 of the NIT requires that a copy of the solvency certificate was required to be submitted and it does not state that the original copy of the solvency certificate was required to be submitted. It only states that a copy of the solvency certificate is to be submitted. Accordingly, in this respect, this Court is of the view that the rejection of the petitioner's technical bid on the ground that he did not submit copy of the original solvency certificate is not sustainable, keeping in view the fact that Clause 24 of the NIT does not insist upon bidders submitting original solvency certificates.

20. In the case of ***Reliance Energy Ltd. and Anr. Vs. Maharashtra State***

Road Development Corpn. Ltd. and Ors., reported in **(2007) 8 SCC 1**, the Supreme Court referred to another Supreme Court judgment in the case of **Reliance Airport Developers (P) Ltd. Vs Airport Authority of India**, reported in **(2006) 10 SCC 1** and held that in matters of judicial review, the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. It further held that the principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. It further held that one of the most important principles laid down in **Reliance Airport Developers (P) Ltd.** was that whenever a norm/benchmark was prescribed in the tender process in order to provide certainty, that norm/standard should be clear. It further held that that grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety.

21. In the case of **Ramana Dayaram Shetty vs. International Airport Authority of India & Others**, reported in **(1979) 3 SCC 489**, the Supreme Court has held that it is a well settled rule of administrative law that an 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.

22. In the present case, in terms of Clause 10 of the NIT, the bidders were to pay the tender document fees of Rs.5,000/- in the form of demand draft payable in favour of the District Commissioner. The same has not been adhered to by the petitioner. In respect to the stand taken by the petitioner that the earnest money of Rs.25,00,000.00 in the form of a fixed deposit had been

pledged to the District Commissioner, the same is not supported by the contents of the fixed deposit, inasmuch as, the column requiring “Lien Marked” shows that the lien of Rs.25,00,000.00 had not been made in favour of the District Commissioner, at the time the fixed deposit was made. The handwritten pledge written on the top of the fixed deposit had also not been written by the Bank officials. The late clarification allegedly made by the Bank, to the effect that the TDR was pledged in the name of the District Commissioner, does not specify the date when the pledge was made. As such, there is nothing to prove that the fixed deposit had been pledged in favour of the DC at the time the petitioner submitted his bid, while the fixed deposit itself proves that the lien on the same remained with the petitioner.

23. As stated earlier, this Court is of the view that Clause 24 of the NIT does not require a bidder to submit the original copy of the solvency certificate. It only requires the bidders to upload a copy of the solvency certificate. Further Clause 21 of the NIT only provides that priority should be given to a State bidder having adequate knowledge of char areas. The non-compliance with Clause 21 of the NIT, in so far as it requires that priority should be given to the State bidders having adequate knowledge in char areas, cannot be a ground to disqualify a bidder. Having stated the above, the issue to be decided is whether Clause 10 of the NIT is an essential or ancillary condition of the NIT.

24. In the case of ***N.G. Projects Ltd. (supra)***, the Supreme Court held that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. If the view of the Technical Evaluation Committee is not to the liking of the bidder, such decision does not warrant for interference in a grant of contract for a successful

bidder. The Court further held that the Writ Court should refrain itself from imposing its decision over the decision of the employer, as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present- day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues, as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be, not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is made after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender, but instead relegate the parties to seek damages for the wrongful exclusion, rather than to injunct the execution of the contract.

25. In the case of ***Central Coalfields Limited & Another vs. SLL-SML (Joint Venture Consortium) & Others***, reported in ***(2016) 8 SCC 622***, the Supreme Court has held that it is not for the employer or the Court to scrutinize every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. Once a format has been prescribed, there was no reason not to adhere to it. The goalposts cannot be re-arranged or asked to be re-arranged during the bidding process, to affect the right of some or deny a privilege to some.

26. In the case of ***G.J. Fernandez vs. State of Karnataka & Others***, reported in ***(1990) 2 SCC 488***, the Supreme Court has held that the party issuing the tender has the right to punctiliously and rigidly enforce the terms of the tender. If a party approaches a Court for an order restraining the employer

from strict enforcement of the terms of the tender, the Court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable." Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination.

27. In the case of ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Another***, reported in ***(2016) 16 SCC 818***, the Supreme Court has held as follows-

"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."

28. In view of the fact that the petitioner has not complied with Clause 10 of the NIT, which is an essential condition of the NIT as per the State respondents, this Court does not find any infirmity with the decision of the State respondents in disqualifying the bid of the petitioner under Clause 10, though the petitioner's bid could not have been disqualified under Clause 21 and 24 of the NIT.

29. The next issue to be decided is with regard to the stand taken by the petitioner that the respondent No. 5 could not have been selected as a successful tenderer, as the respondent No. 5 had not submitted a solvency certificate from a nationalised Bank in terms of Clause 24 of the NIT, besides the respondent No. 5 having only dumpers and passenger boats, while the contract in question required a tenderer to have vehicle and boats which could be utilised for carrying goods.

30. This Court is not inclined to go into the above issues, as the same has to

be gone into by the Tender Evaluation Committee. Suffice to say that the petitioner's bid having been found to be non-responsive, the petitioner cannot be allowed to challenge the bid of the private respondent, whose bid was found to be responsive by the Bid Evaluation Committee, in terms of the judgment of the Supreme Court in the case of ***Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and Ors.***, reported in ***(1999) 1 SCC 492***. In the above case, the Supreme Court has held that any judicial relief at the instance of a party which does not fulfil the requisite criteria seems to be misplaced.

31. The Supreme Court in the case of ***TATA Motors Limited Vs. the Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Others*** in ***Civil Appeal No. 3897/2023***, has affirmed the view of the High Court that once the bid of the TATA Motors had been declared as non responsive and having stood disqualified from the tender process, it could not have entered into the fray of investigating into the decision of BEST to declare the successful bidder.

32. In view of the reasons stated above, this Court does not find any ground to exercise it's discretion in this case. The writ petition stands dismissed.

JUDGE

Comparing Assistant