

GAHC010256082023



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

Case No. : WP(C)/6588/2023

PRABHAT FERTILIZER AND CHEMICAL WORKS
REPRESENTED BY ITS ASSISTANT VICE- PRESIDENT, MR. SANJAY
AMBARDAR, VILLAGE KURALI, INDRI ROAD, KARNAL-132001,
HARYANA, INDIA

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF ASSAM,
DEPARTMENT OF AGRICULTURE AND HORTICULTURE, E-BLOCK, 1ST
FLOOR, ASSAM SECRETARIAT, G.S.ROAD, GUWAHATI- 781006

2:THE DIRECTOR OF AGRICULTURE
DIRECTORATE OF AGRICULTURE
G.S.ROAD
KHANAPARA
GUWAHATI 781022
ASSAM

3:DEPARTMENTAL BID COMMITTEE
REPRESENTED BY THE CHAIRMAN
CONSTITUTED FOR EVALUATING TENDERS PERTAINING TO TENDER
DOCUMENT BEARING NO. AGRI/IPMU/E-BID/MICRONUTRIENT/2023-24/01
FOR SUPPLY OF MICRONUTRIENTS AND AGRICULTURAL LIME FOR THE
YEAR 2023-2

Advocate for the Petitioner : MR. M K CHOUDHURY

Advocate for the Respondent : SC, AGRI. DEPARTMENT

Linked Case : WP(C)/6589/2023

PRABHAT FERTILIZER AND CHEMICAL WORKS
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MR. SANJAY AMBARDAR
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REPRESENTED BY THE CHAIRMAN
CONSTITUTED FOR EVALUATING TENDERS PERTAINING TO TENDER
DOCUMENT BEARING NO. AGRI/IPMU/E-BID/BIOFERT/2023-24/01 FOR
SUPPLY OF BIO-FERTILIZER FOR THE YEAR 2023-24

Advocate for : MR. M K CHOUDHURY
Advocate for : SC
AGRI. DEPARTMENT appearing for THE STATE OF ASSAM AND 2 ORS.

Linked Case : WP(C)/6591/2023

MD BIOCOALS PVT LTD
REPRESENTED BY ITS MARKETING MANGER
SRI ANIL KUMAR WADHWA

AGED ABOUT 51 YEARS
ERA GALLERIA
SCO-6
2ND FLOOR
NEAR JCD VIDYAPEETH
BARNALA ROAD
SIRSA
HARYANA-125055

VERSUS

THE STATE OF ASSAM AND 2 ORS.
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DEPARTMENT OF AGRICULTURE AND HORTICULTURE
E-BLOCK
1ST FLOOR
ASSAM SECRETARIAT
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3:DEPARTMENTAL BID COMMITTEE
REPRESENTED BY THE CHAIRMAN
CONSTITUTED FOR EVALUATING TENDERS PERTAINING TO TENDER
DOCUMENT BEARING NO. AGRI/IPMU/E-BID/PESTICIDES/2023-24/01 FOR
SUPPLY OF PESTICIDES AND WEEDICIDES FOR THE YEAR 2023-24

Advocate for : MR. M K CHOUDHURY
Advocate for : SC

AGRI. DEPARTMENT appearing for THE STATE OF ASSAM AND 2 ORS.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

08.02.2024

1. Heard Mr. M.K. Choudhury, learned Sr. Counsel appearing for the petitioners as well as Mr. B. Choudhury, learned Standing Counsel, Agriculture

Department.

2. These three writ petitions are being taken up for disposal together, inasmuch as, the issue raised by all the three writ petitioners are similar in nature.

3. The petitioners, who are manufacturers, are aggrieved by the Corrigendum-I dated 19.10.2023, by which a condition has been added to the terms and conditions of the E-Procurement Notice/Notice Inviting Bid(NIB) dated 29.09.2023, wherein manufacturers of the goods offered are to have experience in the supply of the quoted goods, for at least 30% quantity of the quoted items, to any government departments/undertaking/ entities/PSUs, within the last five financial years, i.e., 2018-19 to 2022-23. The stand of the petitioners is that they being the manufacturers of goods, the subsequent requirement of having experience in the supply of materials to government departments is arbitrary, as the first line of contact of the manufacturers is usually their distributors/stockiest/dealers etc. and not the end user/ consumer.

4. The facts relating to the three cases is that E-Procurement Notice/NIBs dated 29.09.2023 were issued by the Agriculture Department for supply of various items. In WP(C) No.6588/2023, the NIB dated 29.09.2023 was with regard to the supply of micronutrients and agricultural lime for the year 2023-24. In WP(C) 6589/2023, the NIB dated 29.09.2023 was with regard to supply of bio fertilizer for the year 2023-24. In WP(C) 6591/2023, the NIB dated 29.09.2023 was with regard to supply of pesticides (chemical bio and botanical) and weedicides for the year 2023-24.

5. Clause 2.5.2 of the Instructions to Bidders (ITB) required the bidders to be

one of the following three entities, to be eligible to participate in the bidding process- (i) manufacturer of the goods; or (ii) authorized dealer or distributors of the manufacturer of the goods; or (iii) authorized importer of the manufacturer of the goods.

6. Clause 4.2.1 of the ITB in the NIBs dated 29.09.2023 required the bidders, excluding the manufacturer of the goods offered, to have experience in supplying goods of similar nature of at least 20% quantity to any government departments/ undertaking/entities/PSUs during the last three financial years, i.e., 2020-21, 2021-22 and 2022-23, ending on the last date of bid submission.

7. Thereafter, the respondents issued the impugned Corrigendum-I dated 19.10.2023, wherein a condition was inserted into the NIBs dated 29.09.2023, which required all the bidders including the manufacturers, to have the experience in supply of at least 30% quantity of the quoted items to any government department/undertaking/ entities/PSUs within the last five financial years, i.e., 2018-19, 2019-20, 2020-21, 2021-22 and 2022-23.

8. The learned Senior Counsel for the petitioners submits that reason given by the State respondents in issuing the Corrigendum, requiring manufacturers to have experience in supplying materials to the government, had been done in consonance with the Standard Bidding Document (SBD), which had been alleged to have been inadvertently missed out at the time of issuance of the NIBs. However, the requirement for manufacturers to have experience in supplying materials to government departments is absent in the SBD. He submits that as the very basis for making the Corrigendum, incorporating the additional condition on the manufacturers, to have experience in supplying the quoted items to government departments was absent in SBD, the insertion of

the additional condition was unreasonable.

9. The learned Senior Counsel for the petitioners also submits that the condition incorporated by way of the Corrigendum is only an ancillary condition and not an essential condition and as such, the State respondents would have to consider the bids of the petitioners. He also submits that the decision of the respondent authorities to incorporate the subsequent condition in the Corrigendum being arbitrary and without any basis, the same should be set aside. He also submits that the manufacturers would be having the best competitive rates in a competitive bidding process and the attempt by the State respondents to oust the manufacturers from competing in the tender process, gives rise to an inference that the same has been made with a view to favour selected dealers and distributors, who would be submitting higher bids, keeping in view the commissions/profits to be made by them. In support of his submission, the learned counsel for the petitioners has relied upon the judgments of the Apex Court in the case of ***Om Prakash Sharma Vs. Ramesh Chand Prashar & Ors.***, reported in ***(2016) 12 SCC 632*** and ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.***, reported in ***(2016) 16 SCC 818***.

10. Mr. B. Choudhury, learned Standing Counsel, Agricultural Department submits that the Corrigendum has been made, as the experience required of a manufacturer for supply of quoted items in a tender to government departments, had been inadvertently omitted, at the time of issuance of the NIBs dated 29.09.2023. The unintentional omission was accordingly corrected after suggestions for the same had been brought to the notice of the Department Bid Committee. He submits that Clause 4.2.1(ii) of the Standard

Bidding Document (SBD) required the manufacturer of quoted items/goods to have a valid manufacturing licence and the experience of manufacturing and supply, for at least three financial years. However, the period of experience for supply of materials was relaxed to five years, so that more bidders could participate in the bidding process. The learned counsel also submits that the petitioners are required to have the experience of manufacturing and supplying of the materials for at least three financial years. He submits that although the requirement of having experience of supply of items to government department etc. is not specifically mentioned in respect of manufacturers, yet the spirit of the entire Clause 4.2.1 of ITB would have a bearing on this case, as it indicates the need for experience of supplying goods to government departments. As the Departmental Bid Committee had to choose between "supply experience to government departments" and "supply experience to private agencies", Clause 4.2.1 when considered in its entirety, required manufacturers to have "supply experience to government departments." Thus, like in the case of other bidders, a manufacturer was also required to have "supply experience" with a minimum quantity of supply being stipulated. Otherwise, it would not be possible to gauge the supply experience and capability of a manufacturer. The "supply experience" in respect of both the other bidders and manufacturer have thus been kept at par, at 30% quantity of the quoted items. In support of his submission that judicial review of the terms of a tender cannot be undertaken by a Writ Court, he has relied upon the judgment of the Hon'ble Supreme Court in ***Directorate of Education & Ors. Vs. Educomp Datamatics Ltd. & Ors.***, reported in ***(2004) 4 SCC 19***. He also submits that the Courts should not use a magnifying glass while looking into the terms and conditions of a tender notice and that Courts should not substitute the decision of experts with its own decision,

regarding interpretation of the clauses of a tender notice. In regard to the above submissions, he has relied upon judgments of the Hon'ble Supreme Court in the case of ***The Silppi Constructions Contractors Vs. Union of India and Anr., reported in (2020) 16 SCC 489*** and ***M/s Agmatel India Pvt. Ltd. Vs.M/s Resoursys Telecom & Ors., reported in (2022) 5 SCC 362***. He also submits that a judicial review cannot be resorted to, when there is no arbitrariness in the making of the tender notice and the Corrigendum and in this regard, he has relied upon the judgment of the Hon'ble Supreme Court in the case of ***Tata Motors Ltd. Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Ors., reported in (2023) SCC OnLine SC 671***. He accordingly submits that the writ petition should be dismissed, as the petitioners do not have the qualification of experience in supplying the quoted items in the NIB to government departments.

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

12. In a series of judgments, one of them being ***Afcons Infrastructure Limited (Supra)***, the Supreme Court has held that the author of the tender document is the best person to understand and appreciate it's requirements and thus, it's interpretation should not be second guessed by a Court in judicial review. Further, in the case of ***Silppi Constructions Contractors (supra)***, the Supreme Court has held that the Court should give way to the opinion of the experts in matters of contract, unless the decision is totally arbitrary or unreasonable. The Court does not sit like a Court of appeal over the appropriate authority. If two interpretations are possible, then the interpretation of the author of the tender document must be accepted. The Courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

13. In the case of ***Om Prakash Sarma (Supra)***, the Supreme Court reiterated the law laid down by the Supreme Court in another case, i.e., ***M/s Poddar Steel Corporation vs. M/s Ganesh Engineering Works & Others***, reported in ***(1991) 3 SCC 273***, wherein it has held that essential conditions of eligibility may be required to be enforced rigidly. However, ancillary conditions of a tender must be open to the authority to deviate from and not insist upon the strict literal compliance of the condition in an appropriate case.

14. In the case of ***Educomp Datamatics Limited (supra)***, the Supreme Court has held that the Government must have a free hand in setting the terms of the tender and they are not open to judicial scrutiny. However, the Court would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias.

15. In the case of ***AGMATEL India Private Limited (Supra)***, the Supreme Court disapproved the interference by the High Court in the interpretation of the tender inviting authority, with regard to the eligibility terms, relating to the category of vehicles required to be held by the bidders.

16. In the case of ***Tata Motors Limited (Supra)***, the Supreme Court has held that the Courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the Courts must give "fair play in the joints" to the Government and Public Sector Undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the Public Exchequer.

17. Now coming to the case in hand, it is seen that while the requirement of having experience in the supply of the quoted items was not necessary for manufacturers, unlike authorized dealers/distributors and authorized importers

of the manufacturers of the goods, as per the ITB, the impugned Corrigendum requires the manufacturers to have experience in the supply of at least 30% of the quoted items to any Government Departments/Undertaking /Entities/PSUs. The reasoning given by the State respondents in their affidavit for issuing the Corrigendum is on the ground that the experience of supply of quoted items of the manufacturers was required under SBD. As the E-Procurement Notice and NIB dated 29.09.2023 had inadvertently omitted the criteria provided in the SBD requiring manufactures to have the experience of supply of the quoted items, the same had been incorporated into the NIB, vide the impugned Corrigendum-I dated 19.10.2023.

18. A perusal of the contents of the SBD at Clause 4.2.1, which has been reproduced in the earlier paragraphs shows that there is no condition which states that the manufacturer is required to have the experience of supply of the quoted items to the Government Departments/ Undertaking/Entities/PSUs. Thus, the basis for making the Corrigendum is not in existence in the SBD. As such, the requirement of manufacturers to have the experience of supply of the quoted items to the Government Departments/Undertaking/Entities/PSUs, as per the Corrigendum appears to hold no basis. As stated earlier, there is nothing in the E-Procurement Notice and NIB dated 29.09.2023, requiring the manufacturers to have the experience of supplying quoted items to the Government Departments/Undertaking/Entities/PSUs. At the cost of repetition, it is also seen the SBD does not contain any clause requiring the manufacturers to have the experience of supplying the quoted items to the Government Departments/Undertaking/Entities/PSUs. When there is no condition in the Standard Bidding Document (SBD) requiring manufacturers to have the experience of supplying quoted items to the Government Departments, the very

basis for issuing the Corrigendum on the basis of a non-existent condition does not arise. As such the issuance of the Corrigendum to that effect is arbitrary.

19. The above being said, the manufacturers do not, in the normal course of business sell their manufactured goods to end-users/consumers directly. They are usually sold through distributors/stockiest/dealers/retailers etc. The participation of the manufactures in the tender process would in all probability make for a more competitive bidding process, inasmuch as, they would be able to give the lowest possible rates, as the quoted items go directly from the manufacturers to the end-user. This would be in the best interest of the Public Exchequer. On the other hand, the rates quoted by the distributors/dealers etc., would in probability, include the profit/commission of the distributors/dealers. The above being said, there is another aspect of the matter which has been brought to the notice of this Court. Tech Business India Pvt. Ltd., having its address at VIP road, Sixmile, Guwahati-22 is the authorized dealer for the petitioner in WP(C) 6591/2023 and it has the eligibility criteria to participate in the tender, as it has got the experience for supplying the quoted items to Government Departments. Interestingly, the petitioner manufacturer i.e., MD Biocoal Pvt. Ltd. who supplies the items to Tech Business India Pvt. Ltd, is not able to participate in the said tender process giving rise to a piquant situation. Thus, while the petitioner in WP(C) 6591/2023 cannot participate in the tender process because of the condition put forth in the impugned Corrigendum-I, the authorized dealer of the petitioner can participate in the tender process, for supply of the quoted items manufactured by the petitioner in WP(C) 6591/2023.

20. In the present case, this Court is not interpreting the terms of the Tender Notice or the Corrigendum. It is not examining the decision of the respondents made in the Corrigendum, but only examining the decision making process, for

issuing the impugned Corrigendum.

21. In the case of ***Madan Mohan Sharma & Another vs. State of Rajasthan & Others***, reported in ***(2008) 3 SCC 724***, the Supreme Court while deciding the issue regarding the appointment of primary school teachers had held that once an advertisement has been issued on the basis of a circular applicable at that particular time, the effect would be the selection process should continue on the basis of the criteria which were laid down and it cannot be on the basis of the criteria which has been subsequently made. In the above case, the eligibility criteria had been changed and it was in that context that Supreme Court had stated that the selection process for appointment of primary school teachers should be done as per the criteria laid down in the relevant circular issued at the time of issuing the advertisement. Taking a cue from the above, E-Procurement Notice/NIBs was apparently made on the basis of the SBD. However, the impugned Corrigendum has inserted the additional requirement for manufacturers, on the ground that the “supply experience to Government Departments”, which was in the SBD had been inadvertently left out in the E-Procurement Notice/NIBs dated 29.09.2023. In the SBD, there is no requirement for a manufacturer to have experience for supplying the quoted items to Government Departments/Undertaking/Entities /PSUs. As such, the corrigendum, in so far as it relates to the requirement of the manufacturers to have experience in supplying the quoted items to Government department is without any basis. Every State action not informed by reason cannot be protected from the charge of being arbitrary. As such, the condition made, by way of the impugned Corrigendum, pursuant to a non-existent condition in the SBD is arbitrary. As, the E-Procurement Notice, the NIBS and the SBD did not have the condition requiring manufacturers to have experience of supply to

Government departments, the same cannot be inserted by the impugned Corrigendum, on the basis of a non-existent condition in the SBD. Thus, this Court is interfering with the impugned Corrigendum to prevent arbitrariness, as the basis for issuing the same holds no water, in so far as it relates to manufacturers.

22. In view of the reasons stated above, this Court is of the view that the State respondents could not have issued the Corrigendum on the pretext that experience required for manufacturers, for supply of the quoted items to the Government was present in the SBD, when it was not in existence at all.

23. In view of the reasons stated above, the impugned Corrigendum dated 19.10.2023, to the extent that it requires manufacturers to have experience in supplying at least 30% quantity of the quoted items to the Government Departments/Undertaking/Entities/PSUs within the last financial years i.e., 2018-2019 to 2022-2023, is set aside. The State respondents shall accordingly consider the case of the petitioners in the selection process for the quoted items, in terms of the E-Procurement Notice/NIBs dated 29.09.2023. This decision will be applicable only to those manufacturers who have taken part in the tender process and the same will not be applicable to fence sitters, i.e., manufacturers who have not participated in the tender process.

24. The writ petitions are accordingly allowed.

JUDGE

Comparing Assistant