GAHC010071902020

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

**Case No. : WP(C) 2168/2020**

1:M/S. MATLEBUDDIN AHMED
A REGD. SOLE PROPRIETORSHIP FIRM HAVING ITS REGD. OFFICE AT R/O H.NO. 2, SEWALI PATH, F.A. AHMED NAGAR, 6TH MILE, GHY-22, REP. BY ITS SOLE PROPRIETOR MD. MATLEBUDDIN AHMED, S/O- MD. GIASUDDIN AHMED

VERSUS

1:THE UNION OF INDIA AND 4 ORS.
MINISTRY OF ROAD TRANSPORT AND HIGHWAYS, NEW DELHI

2:THE NATIONAL HIGH WAY AUTHORITY OF INDIA
REP. BY THE REGIONAL OFFICER
NORTH EAST
NEDFI HOUSE
4TH FLOOR
G.S.ROAD
GHY-06

3:THE REGIONAL OFFICER
NORTH EAST
NEDFI HOUSE
4TH FLOOR
G.S.ROAD
GHY-06

4:M/S BASANTA KUMAR KAKOTI
C/O- REGIONAL OFFICER
NORTH EAST
NEDFI HOUSE
4TH FLOOR
G.S.ROAD

GHY-06

5:M/S LAXMI MOTORS
C/O- REGIONAL OFFICER
NORTH EAST
NEDFI HOUSE
4TH FLOOR
G.S.ROAD
GHY-0

**Advocate for the Petitioner** : MR. D SAIKIA

**Advocate for the Respondent** : ASSTT.S.G.I.

**BEFORE**
**HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**

**JUDGMENT**

**Date : 18-05-2020**

Heard Mr. D Saikia, learned senior counsel for the petitioner. Also heard Mrs. R Bora, learned counsel for the respondent, National Highway Authority of India (for short, NHAI) and Mr. BD Konwar, learned senior counsel for the respondent No.4 M/s. Basanta Kumar Kakoti.

2. The petitioner being a registered Class I (A) contractor under the Public Works Department, (for short, PWD) Assam had participated in a e-tender bearing NIT PIU/GHY/03/2019-20 (O & M) for work 'Maintenance and safety of road section from chainage km. 1093.000 to km. 1119.814 of NH-31 in Assam under Package EW-II (AS-04)

3. It is stated that the estimated cost of the work is provided to be Rs.9,68,74,768/- One of the requirements of the terms and conditions of the NIT was that the tenderers are required to have either of the following experiences:

"*(i). Three similar completed works costing not less than amount equal to 40% each of estimated cost,*

*(ii). Two similar completed works costing not less than amount equals to 50% each of*

*estimated cost,*

*(iii). One similar completed work costing not less than amount equals to 80% each of estimated cost.*

*(i. Similar work constitutes experience in operation and maintenance/construction of 4/6 laned highway for O & M contracts).*

4. Be that as it may, the respondent authorities after considering the tendered bids of the various contractors issued the office order dated 23.04.2020 which provided a remark in respect of the five tenderers whose bids were given a consideration. The provisions of the office order is as follows:

| Sl. No. | Name of Firms | Eligibility Status | Remarks (Subject to submission of document) |
|---|---|---|---|
| 1. | M/s Basanta Kumar Kakati | Responsive | |
| 2. | M/s Laxmi Motors | Responsive | Subject to submission of work Completion certificates |
| 3. | BK Sons Infrastructure Pvt. Ltd | Non Responsive | In accordance with clause 4.4B (b) (ii)<br><br>The CV of keys personnel uploaded in the tender has already been engaged in NHAI project AS-20, henceforth, CV could not be considered. As per certificate provided by the keys personnel that I am willing to work on the project and I will be available for entire duration of the project assignment and I will not engage myself in any other assignment during the currency of this assignment on the project. |

| | | | |
|---|---|---|---|
| 4. | Matlebuddin Ahmed | Non responsive | On scrutiny, it is observed that only NH 2 lane completion certificates have been uploaded. As per RPF, it is stipulated that similar work constitutes experience in operation and maintenance/construction of 4/6 (lane highway for O&M contracts. |
| 5. | Rana construction & Engineers Pvt. Ltd | Non Responsive | On scrutiny, it is observed that only NH 2 lane completion certificate have been uploaded. As per RFP it is stipulated that similar work constitutes experience in operation and maintenance /construction of 4/6 lane highway for O & M contracts. |

5. The office order further provided that any representation related to the status of the tenderers as provided may be submitted on or before 29.04.2020 through e-mail/hard copy and thereafter no claim shall be entertained. Accordingly, by the office order dated 29.04.2020 the final status of the tenderers were provided which showed that the tender of M/s. Basanta Kumar Kakati was responsive, tender of M/s. Laxmi Motors was responsive, whereas tenders of BK Sons Infrastructure Pvt Ltd. and Matlebuddin Ahmed and Rana Constitution & Engineering Pvt. Ltd., were shown to be non-responsive. Matlebuddin Ahmed being aggrieved has instituted this writ petition.

6. One of the grounds taken and urged upon is that the office order dated 23.04.2020 requiring any representation to be submitted on or before 29.04.2020 was received by the petitioner Matlebuddin Ahmed on 01.05.2020. As 02.05.2020 and 03.05.2020 were Saturday and Sunday respectively, therefore, he responded by filing a representation on 04.05.2020. The specific stand taken in the representation is that the email pertaining to the office order of 23.04.2020 was received by him on 01.05.2020 and 02.05.2020 and 03.05.2020 being holidays he had immediately responded. Further stand has been taken by the petitioner in the representation amongst others included a certificate dated 05.05.2020 from the Executive Engineer, PWD, Rangia NH Division certifying that

M/s. GLA-MA(JV) had successfully completed the work of "Strengthening with paved shoulder in Km under the Annual Plan 2016-17 under Rangia NH Division in the State of Assam. By referring to the said certificate a stand is taken that the said work pertains to a four lane highway and, therefore, on the strength of such certificate, the petitioner meets the eligibility requirement of the NIT.

7. It is further pointed out that the certificate provides that the work concerned was completed on 15.03.2020 and, therefore, when the NIT was issued on 27.03.2020, the petitioner did have the requisite eligibility, but because of the prevailing circumstances, the petitioner could not procure the certificate earlier. Be that as it may, the requirement of having an experience being available with the petitioner as on 15.03.2020, therefore, being not able to procure the certificate and also not being able to submit the same along with the tendered bid would be a curable defect.

8. Mr. BD Konwar, learned senior counsel for the respondent No.4 by referring to the certificate dated 05.05.2020 raised an objection that the said certificate has been issued to M/s. GLA-MA(JV), which is a joint venture comprising of the present petitioner and, therefore, a certificate issued to a joint venture would not meet the requirement of the eligibility criteria.

9. The objection raised by Mr. BD Konwar, learned senior counsel in our view touches upon the merit assessment of the certificate relied upon by the petitioner and we are of the view that under Article 226 of the Constitution of India, this Court would not be competent enough to decide on the same, but, however, what we have noticed is that although the order dated 23.04.2020 is stated to have been sent by email, but the petitioner claims to have received it on 01.05.2020 and, therefore, the provision enabling any representation to be filed would have to be construed in respect of the petitioner from the said date.

10. Ms. R Bora, learned counsel for the respondent, NHAI has produced the record showing that the email was transferred by the office of NHAI on 23.04.2020 itself. But the records on its own do not reveal as to when it was delivered to the petitioner. In the resultant situation a determination would be required to be made as to what would be the appropriate understanding in respect of an email as regards its delivery in the destination as because the records of NHAI merely speaks that it was sent from their office.

11. At this stage, the learned senior counsel for the petitioner as well as the respondent No.4 and Ms. R Bora, learned counsel for the NHAI arrive at an agreement amongst themselves that without going into the question as to what would constitute under the law as regards the date when the email was delivered, the respondent authorities would consider the representation made by the petitioner on 04.05.2020 and along with it also consider any further documents that the petitioner would like to

rely upon.

12. In view of such agreement, we dispose of this writ petition by providing that the respondent NHAI shall give a consideration to the representation of the petitioner dated 04.05.2020 and also take into consideration the documents that may have been filed and relied upon. It is stated that in the meantime, work order has already been issued in favour of the respondent No.4. As the work order has already been issued, we are of the view that for a fair procedure to be adopted, both the petitioner as well as the respondent No.4 be given an opportunity of hearing by the respondent, NHAI authorities and after hearing the parties, the authorities would pass a reasoned order on the claim of the writ petitioner regarding his claim of having satisfied the eligibility criteria in the NIT and the respondent No.4 on the other hand may make a presentation of their view against the same. After conducting the hearing the respondent authorities shall pass a reasoned order. In the event, the nature of the reasoned order requires any interference as regards the work order allotted in favour of the respondent No.4, the same be consequentially done or on the other hand if the reasoned order does not require any such consequential order, the matter would rest at that.

13. A copy of the reasoned order to be passed be provided to both the petitioner as well as the respondent No.4.

14. In course of the hearing both the petitioner as well as the respondent No.4 would be at liberty to produce any further document that they may desire to rely upon.

15. Considering the nature of the work involved in the NIT, it is provided that the exercise to give an opportunity of hearing to the petitioner and the respondent No.4 be done by the Regional Officer, NHAI at 4$^{th}$ Floor NEDFI House, Guwahati on or before 20.05.2020 and both the petitioner and the respondent No.4 shall be informed about the date, time and venue of the hearing. After the hearing is being conducted, the reasoned order be passed within a period of 5(five) days thereafter.

16. Writ petition stands disposed of in the above terms.

**JUDGE**

**Comparing Assistant**