GAHC010162092020

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

**Case No. : WP(C)/4776/2020**

M/S PANESAR AGRICULTURE INDUSTRIES
A PROPRIETORSHIP FIRM HAVING ITS OFFICE AT BATHINDA ROAD, NEAR HANDIAYA CHOWK, BARNALA, DIST.- BARNALA, PUNJAB, PIN- 148101
REP. BY ITS AUTHORIZED PERSON NAMELY RISHI SUREKA, S/O- SRI MADHUSUDAN SUREKA, AGED ABOUT 30 YEARS, R/O- H.NO. 11, LICHUBAGAN NO. 1 NIJORAPUR PATH, HENGERABARI, GHY, DIST.- KAMRUP (M), ASSAM, PIN- 781036

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE COMM. AND SECY., DEPTT. OF AGRICULTURE, GOVT. OF ASSAM, DISPUR, GHY-06

2:THE DIRECTOR OF AGRICULTURE
KHANAPARA
GHY
ASSAM
PIN- 781022

3:THE BID COMMITTEE
REP. BY THE CHAIRMAN
COMM. AND SECY.
DEPTT. OF AGRICULTURE
GOVT. OF ASSAM
DISPUR
GHY
PIN- 781006

4:M/S TIRTH AGRO TECHNOLOGY PVT. LTD.
SHAKTIMAN
SURVEY NO. 108/1

PLOT NO. B
NH-27
NEAR BHARUDI TOLL PLAZA
BHUNAVA VILLAGE
TALUKA- GONDAL
DIST.- RAJKOT
GUJRAT
PIN- 36031

**Advocate for the Petitioner** : MR A D CHOUDHURY

**Advocate for the Respondent** : SC, AGRI. DEPARTMENT

Linked Case : WP(C)/5067/2020

M/S TIRTH AGRO TECHNOLOGY PVT LTD
A REGD. PVT. LTD. COMPANY HAVING ITS REGD. OFFICE AT SHAKTIMAN
SURVEY NO.108/1
PLOT NO.B NH-27
NEAR BHARUDI TOLL PLAZA
BHUNAVA VILLAGE
TALUKA GONDAL
DIST. RAJKOT
GUJARAT
PIN-360311
REP. BY ITS AUTHORIZED REPRESENTATIVE SRI BINAY KUMAR SRIVASTAVA
S/O. SRI SURESH KUMAR SRIVASTAVA
R/O. AMAR ENCLAVE
D-43
SURVEY
BELTOLA
GUWAHATI-28
KAMRUP (M)
ASSAM.

VERSUS

THE STATE OF ASSAM AND 5 ORS
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
AGRICULTURE DEPTT.
DISPUR

GHY.-06
KAMRUP (M)
ASSAM.

2:THE DIRECTOR OF AGRICULTURE

ASSAM
KHANAPARA
GUWAHATI-22
KAMRUP (M)
ASSAM.
3:THE TENDER/BID COMMITTEE

REP. BY THE CHAIRMAN
COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM
DEPTT. OF AGRICULTURE
DISPUR
GUWAHATI-06
KAMRUP (M)
ASSAM.
4:M/S PANESAR AGRICULTURE INDUSTRIES

A PROPRIETORSHIP FIRM HAVING ITS OFFICE AT BATHINDA ROAD
NEAR HANDIYA CHOWK
BARNALA
DIST. BARNALA
PUNJAB
PIN-148101.
5:STATE BANK OF INDIA

DISPUR BRANCH
GUWAHATI-06
KAMRUP (M)
ASSAM REP. BY THE BRANCH MANAGER.
6:STATE BANK OF INDIA

GS ROAD
CHRISTIAN BASTI
GUWAHATI-06
KAMRUP (M)
ASSAM
REP. BY THE BRANCH MANAGER.
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Advocate for : MR. D DAS SR. ADV
Advocate for : SC
AGRI. DEPARTMENT appearing for THE STATE OF ASSAM AND 5 ORS

**BEFORE**
**HONOURABLE MR. JUSTICE SUMAN SHYAM**

**JUDGMENT & ORDER (CAV)**

**Date : 16-12-2020**

Heard Mr. A.D. Choudhury, learned counsel assisted by Mr. T. Chakraborty, learned counsel appearing for the writ petitioner in W.P.(C) No. 4776/2020. Also heard Mr. D. Saikia, learned Sr. counsel assisted by Mr. B. Choudhury, learned counsel for the official respondent Nos. 1 to 3. I have also heard Mr. D. Das, learned Sr. counsel assisted by Ms. T. Parasar, appearing for the respondent No. 4 which is also the writ petitioner in the connected W.P.(C) No. 5067/2020. For the sake of convenience, the facts involved in W.P.(C) No 4476 of 2020 is being referred to for the purpose of disposal of these writ petitions.

2. The facts of the case, in a nutshell, are that the Director of Agriculture, Assam, i.e. the respondent No. 2 herein had issued e-tender notice dated 06-10-2020 inviting bids, in two parts, for procurement of combine harvester under "CMSGUY" scheme from the manufacturers whose products are enlisted in the list circulated by the Govt. of India, Ministry of Agriculture and Farmers Welfare vide letter dated 18-02-2019. As per the NIT dated 06-10-2020, only those manufacturers possessing a valid Digital Signature Certificate (DSC) and who have registered in the e-procurement portal of the Government of Assam http://assamtenders.gov.in would be allowed to participate in the tender process. As per the schedule provided in the NIT, the start dated for downloading of bid document was fixed on 07-10-2020 at 10:00 a.m. which would remain open till 19-10-2020 till 01:00 p.m. The online submission of bids was allowed upto 01:00 p.m. on 19-10-

2020. The bidders were also required to submit hard copy of the bid, the start date and time of which was 19-10-2020 at 11:00 a.m. and the end time for the same was fixed at 01:00 p.m. on the same day.

3. The writ petitioner herein being eligible to participate in the tender process had submitted its bid in two part i.e. technical and financial bid. Besides the writ petitioner, there were two other bidders *viz,* the respondent No. 4 (writ petitioner in W.P.(C) No. 5067/ 2020) and M/s Action Construction Equipment Ltd., who had submitted their tenders. During evaluation of the technical bids, it was found that the writ petitioner had uploaded its online bid by using the registration and DSC of it authorized dealer *viz.* M/s J.K. Engineering and Agro services. Taking note of the same, the Bid Evaluation Committee had held that the technical bid submitted by the writ petitioner was non-responsive and accordingly, rejected the same. The bid submitted by M/s Action Construction Equipment Ltd was also held to be technically non-responsive and hence, rejected. Aggrieved by the decision of the authorities in rejecting the technical bid of the writ petitioner, the present petition has been filed assailing the impugned decision of the Bid Evaluation Committee recorded in the Minutes of Meeting (MoM) dated 03-11-2020.

4. The respondent No. 2 has filed counter-affidavit *inter alia* contending that not only had the petitioner uploaded its bid by using the registration and DSC of its authorized dealer but even the scanned copy of the Treasury Challan of Bid Cost as well as the Bid Security were not uploaded in the e-portal, as a result of which, the technical bid submitted by the petitioner was found to be non-responsive. It is also the pleaded stand of the respondent No. 2 that as per Clause- 4 of the NIT, every bidder was compulsorily

required to register in the e-procurement portal and possess a valid DSC. According to the respondent No. 2 the petitioner did not have a valid registration in the e-procurement portal of the Government of Assam as a result of which, it did not qualify to participate in the tender process.

5. The respondent No. 4 has also filed counter-affidavit raising similar objection pertaining to the validity of the technical bid submitted by the petitioner and accordingly, has prayed for dismissal of the writ petition. Besides the above, the respondent No. 4 has also instituted the connected W.P.(C) No. 5067/2020 wherein, the present petitioner has been impleaded as respondent No. 4. In the said writ petition, a prayer has been made to direct the authorities to reject the technical bid of the petitioner on the additional grounds *viz.* non-furnishing of scanned copy of the Treasury Challan of Bid Cost as well as the Bid Security.

6. Mr. A.D. Choudhury, learned counsel for the writ petitioner has argued that the writ petitioner had not only registered with the specified e-procurement portal of the Government of Assam but it was also in possession of a Valid DSC on the date of submission of the bids. However, due to a technical glitch faced by the petitioner with its DSC while uploading the online bid on 19-10-2020, his client was left with no option but to upload the online bid by using the registration of its authorized dealer M/S J.K. Engineering and Agro Services since time was running out for uploading online bids. Mr. Choudhury has further argued that there is no other issue regarding eligibility of the petitioner to participate in the tender process. Moreover, as required by the NIT, the petitioner had also submitted the hard copy of the bid, complete in all respect, before the

close time for submission of tenders. Since, the technical glitch was beyond the control of the petitioner, hence, the learned counsel submits, the rejection of its technical bid on such count was totally un-justified, more so, since it will leave only the respondent No. 4 as the single bidder in contention for bagging the contract.

7. Mr. A.D. Choudhury has further argued that the technical bid of the petitioner did not contravene any of the essential conditions of the NIT and as such, the same was not liable to be rejected on the ground reflected in the MoM dated 03-11-2020. In so far as failure on the part of his client to upload the scanned copies of the Treasury Challan of Bid Cost and Bid Security is concerned, the learned counsel submits that the hard copy of both these documents had been submitted by his client which were also accepted by the respondent No. 2. Mr. Choudhury, however, contends that since those were not the grounds for rejection of the technical bid submitted by the petitioner, the respondents cannot be permitted to take such plea at this belated stage. To sum up his arguments, Mr. Choudhury submits that assuming that uploading the online bid of the writ petitioner by using the registration of its authorized dealer was in deviation of the NIT condition, then also, the same can at best be treated as a deficiency in form and not in substance. Therefore, there was not a fatal defect in the bid submitted by the petitioner. In support of his above arguments, Mr. Choudhury has relied upon an un-reported decision of this Court rendered in the case of ***Action Contraction Equipment Ltd. Vs. The State of Assam & Ors. [W.P.(C) No. 2678/2019]***.

8. By referring to Section 14 of the Assam Public Procurement Act, 2017 and Rule 15 of the rules framed there-under, Mr. Choudhury has further argued that in matters of

Government procurement, the evaluation criteria should relate to the subject matter of the procurement. It is also the submission of the learned counsel for the petitioner that as per the Assam Public Procurement Rules, 2020, price ought to be the main criteria for evaluation and to that extent, the approach of the Bid Evaluation Committee in rejecting the technical bid of the petitioner is completely untenable in the eye of law. By referring to the decision of the Supreme Court rendered in the case of ***ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Ltd. & Ors.*** reported in ***(2004) 3 SCC 553*** the learned counsel for the petitioner has argued that State or it instrumentality would have an obligation in law to act fairly and reasonably in the matters of government contract so as to ensure that requirement of Article 14 of the Constitution of India is complied with.

9. Responding to the petitioner's case, Mr. D. Saikia, learned Sr. counsel appearing for the respondent Nos. 1 to 3 has argued that the petitioner did not have a valid registration in the e-procurement portal of the Govt. of Assam nor did it possess a valid DSC and encryption key which are essential for uploading online bids. According to Mr. Saikia, that was the only reason why the petitioner had to use the registration of its authorized dealer to upload the bid. By referring to Clause- 4 of the NIT dated 06-10-2020, Mr. Saikia submits that no bidder can be permitted to upload its bids online by using the digital signature and online registration of another entity. Therefore, he submits, the Bid Evaluation Committee has rightly rejected the technical bid of the petitioner.

10. By referring to the minutes of the Bid Evaluation Committee meeting dated 03-11-2020, Mr. Saikia has further argued that besides using the registration of another party to

upload its bid, the petitioner had also failed to upload the scanned copy of the Treasury Challan of Bid Cost and Bid Security. Mr. Saika also submits that as per the NIT condition, every bidder must submit Bid Security in its own name but the writ petitioner had even failed to comply with the said norm and instead, had tendered Bid Security offered by its dealer, *viz.* M/s J.K. Engineering and Agro Service. According to Mr. Saikia, over and above the grounds mentioned in the resolution dated 03-11-2020 of the meeting of the Bid Evaluation Committee, the technical bid of the petitioner was liable to be rejected on such additional grounds as well.

11. By referring to the recent decision of this court in the case of ***Megha Engineering and Infrastructure Ltd. Vs Oil India Ltd. [in W.P.(C) No. 9193/2019]*** Mr. Saikia has argued that failure to upload online bid within time on the ground of technical glitch cannot be a valid ground for the authorities to condone the defect in the tender as the same would amount to giving a second chance to the petitioner, which was not permissible in law. Placing reliance on the decision of the Supreme Court in the case of ***Central Coal Fields Ltd. & Anr. Vs. SLL-SML (Joint Venture Consortium & Ors.)*** reported in ***(2016) 8 SCC 622***, Mr. Saikia has further argued that rejection of the technical bid due to non-compliance of essential conditions of the NIT cannot be termed as arbitrary.

12. Mr. D. Das, learned Sr. counsel appearing for the respondent No. 4 has also argued on similar lines as the departmental counsel and has added that as many as two other important grounds such as failure to upload scanned copy of the Treasury Challan of Bid Cost and the Bid Security was available for rejection of the technical bid of the petitioner

but the Bid Evaluation Committee had erroneously ignored those deficiencies despite having noticed the same. Mr. Das has submitted that viewed from any angle, the technical bid submitted by the writ petitioner cannot be accepted as valid and therefore, the writ petition is liable to be dismissed.

13. I have considered the arguments advanced by the learned counsel for all the parties and have also carefully gone through the materials available on record.

14. The basic facts in this case are not in dispute. It is the admitted position of fact that the writ petitioner is a manufacturer of combine harvester and in such capacity, it was eligible to participate in the tender process. It is also not in dispute that the technical bid of the petitioner was held to be non-responsive only on one ground i.e. for using the registration and DSC of its authorized dealer. The learned departmental counsel has made an endeavour to convince this court that the petitioner did not at all have a registration with the e-procurement portal of the Government of Assam nor did it hold a valid DSC/ Encryption key as required under Clause- 4 of the NIT conditions. However, I find from the record that the petitioner has annexed a copy of print out of the relevant page of the web portal "assamtenders.gov.in". A perusal of the print out goes to show that the writ petitioner was not only registered with the e-portal of the Assam Government bearing registration number- 03271124862, having a login id and password in the name of the company, but it was also holding a valid DSC during the relevant period. The said document, annexed as Annexure- 1 to the rejoinder affidavit filed by the petitioner, also demonstrates that the registration was done on 13-09-2020 at 5:35 p.m. and that the DSC held by the writ petitioner was valid till 19-10-2022.

15. The document (Annexure-1 to rejoinder) relied upon the petitioner also reflects that the profile of the petitioner was last updated in the official web-portal on 11-11-2020 at 9:35 am. The respondents have neither disputed the genuiness of the aforesaid document relied upon the writ petitioner nor have they laid any material before this court to dispute the said claim of the writ petitioner. It would be significant to note here-in that even the Bid Evaluation Committee has not observed that the writ petitioner did not have registration and a valid DSC. In view of the above, this Court is left with no option but to hold that the writ petitioner did have a valid registration in the e-procurement portal of the Govt. of Assam and also held a valid DSC enabling it to participate in the tender process. Therefore, writ petitioner had evidently met the requirement of Clause- 4 of the NIT conditions.

16. It is apparent from the materials on record that on 19-10-2020, the petitioner had addressed a letter to the respondent No. 2 informing him that it was unable to submit online bid due to problem in its DSC in the last minute and that is why the bid documents were uploaded by using the registration of its authorized dealer. The authorities had received this communication dated 19-10-2020 but did not raise any objection at that point of time. Thereafter, the technical bids of the three bidders were evaluated.

17. From the above discussions, the questions, that would arise for consideration of this Court is as to whether, the writ petitioner fulfilled the eligibility conditions prescribed by the NIT and if so, whether the technical bid submitted by it was liable to be rejected merely on the ground that it had uploaded the online bid by using the registration and DSC of its authorized dealer. In order to answer the said questions, it would be necessary

to refer to some of the relevant conditions of the NIT dated 06-10-2020.

18. Clause 3 of the Terms and Conditions of the NIT dated 06-10-2020 lays down the eligibility conditions, according to which, the bidder must be a manufacturer of combine harvester with its model enlisted in the list dated 18-02-2019 circulated by the Government of India, Ministry of Agriculture and Farm Welfare and should not have been declared by any Government Department of being involved in any corrupt or fraudulent practice. As per Clause- 4 of the NIT, the bidder must have a valid DSC and would have to be registered in the e-procurement portal http://assamtenders.gov.in so as to participate in the bidding process.

19. Clause- 10 of the NIT lays down the guidelines for submission of "online technical bid" by providing the list of documents in respect of which, scanned copies were to be uploaded. Clause- 10 is reproduced here-in below for ready reference:-

*"10. Submission of "online Technical Bid":- Bidders shall submit scanned copies of the following documents, formats (duly filled up), certificates etc. as "Online Technical Bid" in the e-procurement Portal: https://assamtenders.gov.in before the expiry of the deadline as stated in the activity schedule (Table-1):*

*i) Covering Letter with General Particulars of the bidder as per prescribed format in Annexure-2;*

*ii) Declaration from the bidder, Annexure- 3;*

*iii) copy of this bidding document as specified at clause No. 7 of Terms & Conditions;*

*iv) Copy of Letter of Authorization, Annexure-1;*

*v) Copy of Treasury Challan as specified at clause No. 5 of Terms & Conditions;*

*vi) Copy Bid Security in the form of Original Bank Guarantee/ FDR as per clause No. 21 of Terms & Conditions;*

*vii) "Questionnaires on Technical Specifications" at Annexure- 6.*

*viii) Copy of PAN Card in the name of bidder;*

*ix) Copy of GST registration certificate in the name of bidder;*

*x) Copy of Udyog Adhar*

*xi) All other documents, certificates etc. as specified in the bidding document."*

20. Clause 12 of the NIT provides for submission of "Hard Copy" which reads as follows :-

"*12. Submission of Hard copies: The Bidders will also submit hard copies before the expiry of the deadline as stated in the activity schedule (Table- 1) of all the above documents except Annexure-7 along with original hard copies of the following documents in a sealed cover addressing to the Director of Agriculture, Assam, Khanapara, Guwahati-22 super scribing "Bid for Procurement of Combine Harvesters under CMSGUY" with bidder's name and address, otherwise the bid shall be considered as non-responsive.*

*i) Bid Security in the form of Original Bank Gurantee/ FDR as specified at clause No. 5 of Terms & Conditions;*

*ii) Cost of Bid document in the form of Original copy of Treasury Challan as per clause No. 21 of Terms & Conditions;"*

21. Clause 21 of the NIT deals with Bid Security which reads as follows:-

"*21. <u>Bid Security</u>:*

*(a) The bidder shall submit, as part of its bid, Bid Security for an amount of Rs. 34.00 Lakh (Rupees Thirty Four Lakh only)*

*(b) The bid security, in Indian Rupees, shall be in the form of Fixed Deposit Receipt or Bank Guarantee (as per format given in Annexure-5) from any Nationalized or Schedule Bank duly pledged in favour of "Director of Agriculture, Assam, Khanapara, Guwahati- 22, payable at Guwahati.*

*(c) The Bid Security must remain valid for a period 45 days beyond the original validity period of bids, or beyond any period of extension subsequently requested by the purchaser.*

*(d) Bid shall be summarily rejected including bid submitted by MSME on non-submission of bid security in accordance with this clause.*

*(e) Unsuccessful bidder's bid security will be discharged/ returned not later than 30 days after the expiration of the period of bid validity. The successful bidder's bid security will be discharged upon the bidder signing the Contract Agreement and furnishing the Performance Bank Guarantee.*

*(f) The bid security may be forfeited if a bidder withdraws its bid during the period of bid validity. In case of successful Bidder, bid security may be forfeited if the Bidder fails to*

*furnish Performance Bank Guarantee in accordance with clause No. 22 of this Section."*

22. There is no controversy in this case that the petitioner was a manufacturer of combine harvester with its product included in the relevant list published by the Government of India. It has also been found on the basis of cogent material brought on record that the writ petitioner did have a valid registration in the departmental web-portal. From a plain reading of the relevant clauses of the NIT, it would further be apparent that the tender process in question did not envisage submission of bids only by online method but submission of "Hard Copy" of the bid was also one of the conditions of the NIT.

23. In this case, the writ petitioner had admittedly uploaded its bid online and also submitted hard copy of the same. While Clause- 4 of the NIT requires the bidder to have registration with the e-portal and a valid DSC, respondents have failed to point out any condition in the NIT that prohibits a bidder from uploading the online bid by using the registration and DSC of its authorized agent. On the contrary, Clause-7 of the NIT permits the authorized signatory of the bidder to put its seal and signature in the bidding document on behalf of the bidder. Clause- 7 of the NIT is reproduced here-in below for ready reference:-

> "*7. Signing of Bid: Bidder or his authorized signatory must put his seal & signature in each & every pages of this bidding document as token of acceptance. All formats, annexure provided in the bidding document must be completely filled (wherever required) and duly signed by bidder or his authorized signatory with seal, failing which the bid will be rejected. Bidder shall issue a Letter of Authorization in case of authorized signatory as per prescribed format in Annexure-1, "Covering Letter along with Format of Bid" as per Annexure- 2 and "Questionnaires on Technical Specifications" as per Annexure- 6, must be completely filled (wherever required) and duly signed by bidder or his authorized*

*signatory with seal, failing which the bid may not be considered."*

24. Authentic literature available in the public domain indicates that a Digital Signature Certificate (DSC) is a secure digital key that certifies the identity of the holder. A DSC is the digital equivalent of physical or paper certificate and the same can be presented electronically to prove ones identity. DSC is issued by authorized Certifying Authority and remains valid for a specified time.

25. The materials available on record go to show that the respondent authorities were duly intimated by the writ petitioner that M/s J.K. Engineering and Agro Services was its authorized dealer. Even the Bid Security of Rs. 34,00,000/- (Thirty Four Lakhs) was submitted by the authorized dealer on behalf of the writ petitioner vide letter dated 17-10-2020, and the same was accepted by the authorities. It is not the opinion of the Technical Committee or the Bid Evaluation Committee that the Bid Security submitted by the writ petitioner was defective. From the above transactions, it is also established that there was no confusion in the mind of the respondent authorities as regards the true identity and authority of M/s J.K. Engineering and Agro Services to act as the authorized agent of the petitioner.

26. As noticed above, Clause- 7 of the NIT permits authorized signatory to sign all documents on behalf of the bidder. Although Clause- 7 apparently refers to physical signing of document without mentioning about digital signature, yet, it appears that there is no separate provision in the NIT dealing with digital signing of documents. Since, there was never any doubt or dispute as regard the true identity of the bidder or its authorized agent, I am of the considered opinion that the present case would come within the sweep

of Clause- 7 of the NIT, which permits usage of seal and signature of authorized signatory of the bidder. Viewed from that perspective, it is possible that since the writ petitioner was using the DSC of its authorized agent M/s J.K. Engineering and Agro Services, using the registration of its authorized agent was also inevitable due to technical reasons.

27. In the above context, it would also be significant to note here-in that the respondent No. 2 has also failed to allege or convince this Court that the writ petitioner had deliberately used the registration and DSC of its agent with some oblique motive. There is also nothing on record to indicate as to what material difference would ensue in the bidding process if, under compelling circumstances, the bidder uploads its online bid by using the registration and DSC of its authorized agent/ dealer. Under the circumstances, I am of the un-hesitant view that the decision of the Bid Evaluation Committee in declaring the technical bid of the petitioner as non-responsive on the sole ground mentioned in the MoM dated 03-11-2020 was wholly arbitrary, illegal and hence, un-sustainable in law.

28. Having held as above, this Court is conscious of the fact that the official respondents are pressing two other grounds to urge that the technical bid submitted by the petitioner was defective on other counts as well. The respondent No. 4, as writ petitioner, has also instituted W.P.(C) No. 5067/2020 with a prayer to direct the Bid Evaluation Committee to reject the technical bid of the petitioner on those additional grounds. Since, in the MoM dated 03-11-2020 only one ground for rejection of the technical bid of the petitioner has been mentioned, ordinarily, it would not have been necessary for this Court to go beyond the ground of rejection stated in the minutes dated

03-11-2020. However, this Court cannot be oblivious of the fact that the petitioner is seeking a writ of mandamus directing the authorities to open its price bid whereas there is a formal challenge made to the validity of its technical bid by invoking certain additional grounds which were evidently not pressed into service by the Bid Evaluation Committee. A writ of mandamus, as prayed for by the writ petitioner, can be issued only if this Court is satisfied that the petitioner's bid did not suffer from any technical defect. As such, let me now consider the validity of the plea raised in W.P.(C) No. 5067/2020.

29. During the course of arguments, Mr. Saikia had urged that the Bid Security submitted by the petitioner ought to have been submitted in the name of the writ petitioner and not by its agent. However, as noticed above, I find that there is no such observation in the minutes dated 03-11-2020. The only finding of the Technical Committee is to the effect that the petitioner had failed to upload the scanned copy of the Bid Security and the Treasury Challan against Bid Cost which are the grounds urged in W.P.(C) No. 5067/2020.

30. Clause- 21 of the NIT deals with Bid Security which *inter-alia* provides that bid security of Rs. 34,00,000/- would have to be submitted, as part of the bid, which can be in the form of Fixed Deposit receipts or Bank Guarantee from a Nationalized Bank, pledged in favour of the respondent No. 2. The NIT condition nowhere provides that the fixed deposit receipts must be in the name of the bidder. In his counter-affidavit, the respondent No. 2 has also not raised any objection pertaining to the validity of the Bid Security furnished by the writ petitioner. Therefore, in the absence any pleaded impeachment of the Bid Security submitted by the petitioner, this Court is not inclined to

entertain the plea raised by the learned senior counsel for the official respondents that the Bid Security submitted by the petitioner was invalid.

31. Now coming to the other objections raised by the respondents on account of failure on the part of the petitioner to upload the scanned copy of the Treasury Challan of the Bid Cost and Bid Security, it is to be noted here-in that it is not the case of the respondents that the petitioner did not furnish Bid Cost or Bid Security. The only objection of the respondents is on account of its failure to upload the scanned copy of those documents in the departmental web portal.

32. From a perusal of the minutes of the meeting held on 03-11-2020, I find that the Bid Evaluation Committee was well aware that scanned copy of Treasury Challan of Bid Cost and Bid Security had not been uploaded by the writ petitioner. Notwithstanding the same, the Bid Evaluation Committee did not reject the technical bid of the petitioner on any of those grounds. Having done so, the respondent No. 2 has now pressed those grounds into service before this Court, virtually assailing the decision of the Bid Evaluation Committee which was presided over by none other than the respondent No. 2 himself.

33. The petitioner has not denied that scanned copy of the Bid Cost and Bid Security were not uploaded in the official web portal. The requirements for uploading the scanned copies of those documents are prescribed by Clause- 10 of the NIT. Therefore, there can hardly be any doubt about the fact that if Clause- 10 is held to be essential condition of the NIT, then in that event, the petitioner's bid would have to be held to be defective on the ground of contravening the essential tender condition.

34. The effect of non-compliance of manadatory pre-condition by intending tenderers was one of the issues that arose for consideration before the Hon'ble Supreme Court in the case of ***G.J. Fernandez Vs State of Karnataka & Ors.*** reported in ***(1990) 2 SCC 488*** wherein it was observed that the minimum qualifying requirement laid down by the Tender Notice should not be read in isolation but the NIT should be read harmoniously. It was also observed that minimum qualifying requirements should be strictly observed.

35. In the case of ***Podder Steel Corporation Vs. Ganesh Engineering Works & Ors.*** reported in ***(1991) 3 SCC 273,*** the Hon'ble Supreme Court had held that as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous details and is not entitled to waive even a technical irregularity of little or no significance. It was further held that requirements in a tender notice can be classified in two categories- those which lay down the essential conditions of eligibility and the others which were merely ancillary or subsidiary with regard to the main object to be achieved by the conditions. From the above, it is clear that an ancillary or subsidiary condition of the NIT can be deviated from but not an essential condition.

36. In the case of ***Kanhaiya Lal Agarwal Vs. Union of India & Ors.*** reported in ***(2002) 6 SCC 315*** the Supreme Court has held that when essential condition of tender is not complied with, the bid was liable to be rejected. Addressing the issue as to whether a condition is essential or collateral, the following observations were made in paragraph 6, which is reproduced herein-below:

> "*6. It is settled law that when an essential condition of tender is not complied*

*with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfillment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in G.J. Fernandez Vs. State of Karnataka."*

37. In the case of ***Bakshi Security & Personnel Services Pvt. Ltd. Vs. Devkishan Computed Pvt. Ltd. & Ors.*** reported in ***(2016) 8 SCC 446***, the Supreme Court while quoting with approval, some of the previous decisions, had observed that essential condition of the tender cannot be relaxed.

38. Following the decision in the case of ***G.J. Fernandez (Supra)*** and ***Poddar Steel (Supra)*** and a number of other related decisions the Supreme Court has held in ***Central Coal Fields Ltd. (Supra)*** that any condition being ancillary or subsidiary to the main object to be achieved by the employer can be waived. The Apex Court has also held that essential conditions of the tender cannot be deviated from. However, in paragraph 48 of the judgment, it has been observed that even if the term was essential, the employer would have the authority to deviate there-from, if the deviation is made applicable to all the potential bidders.

39. It may be noted here that Clause- 10 of the NIT lays down the procedure for submitting "Online Technical Bid" by uploading scanned copies of documents, a list whereof, has been furnished therein. Clauses- 10(v) and (vi) of the NIT respectively provides that the scanned copies of the Treasury Challan of Bid Cost and Bid Security were required to be uploaded by the bidder. Clause- 11 provides for submission of "Online Price Bid". However, significantly enough, Clauses- 10 and 11 do not indicate any

consequences in case of failure to upload such documents in the e-procurement portal.

40. Clause- 12 of the NIT, on the other hand, deals with submission of "Hard Copy" of the bid by laying down consequences that would ensue if the bidder fails to adhere to the said condition. Therefore, by applying the ratio laid down in the case of ***Kanhaiya Lal Agarwal (Supra)*** it can be safely concluded that while Clause- 12 of the NIT was an essential condition the same cannot be said in case of Clauses- 10 and 11.

41. Moreover, from the scheme of the NIT, it appears that the present is not exclusively an e-tender process but the employer had adopted a "hybrid system" by insisting on both "soft copy" as well as "hard copy" of the bid. It has not been mentioned in the NIT that only online bid uploaded in the e-procurement portal shall be accepted. Therefore, having regard to the different conditions of the NIT, I am of the view that the instant tender process is essentially one involving submission of bids physically with the additional requirement to upload the bids online. As such, Clauses- 10 and 11, in the opinion of this Court are ancillary or directory conditions whereas Clause- 12 of the NIT was a mandatory tender condition. This interpretation of the terms and conditions of the NIT also explains as to why the Bid Evaluation Committee did not reject the petitioner's technical bid on the grounds of contravention of Clauses- 10(v) and (vi) despite the observation of the Technical Committee that it had failed to upload the scanned copies of those two documents.

42. In the case of ***Maharashtra Housing Development Authority Vs. Shapoorji Palonji & Company Pvt. Ltd. & Ors.*** reported in ***(2018) 3 SCC 13*** relied upon by Mr. Saikia, the online bid submitted by the bidder (R-1) was not acknowledged in the web

portal after it had pressed "freeze button" and therefore, a question arose as to whether the data uploaded by the R-1 bidder could be retrieved, which was answered in the negative by NIC. It was in those fact situation that the Bombay High Court had directed the NIC to access the files containing bid documents and make the same available to the employer so as to consider the bid submitted by the R-1. It appears that it was an e-tender process with no option to submit hard copies of the bid. Allowing the SLP preferred by the MHDA, the Supreme Court had held that the direction of the High Court virtually conferred a second opportunity to the respondent which was not permissible in law.

43. In the case of ***Megha Engineering and Infrastructure Limited (Supra)*** also the writ petitioner had commenced uploading its online bid in response to the e-tender notice floated by the Oil India Ltd. and after uploading its technical bid, when "submit" button was pressed, there was no response from the portal. Alleging technical glitch in the web portal, the petitioner had approached this court seeking a direction to consider its bid. Be it noted that, here also, the tender condition had categorically provided that only the bid submitted through the e-procurement portal would be accepted. By relying on the decision rendered in the case of ***Maharashtra Housing Development Authority (Supra)*** relief was declined to the bidder by the learned Single Judge.

44. This is not a case where the writ petitioner is seeking a second chance to upload its online bid. This also not a case where the employer had notified that only online bids would be accepted. The respondents have not alleged that the hard copy of the bid submitted by the writ petitioner was defective on any count. Moreover, this court has already held that there has been no violation of the essential tender conditions by the

petitioner. In view of the above, the decisions, relied upon by the learned counsel for the respondents, in the opinion of this Court, would not have any application in the facts and circumstances of the present case.

45. Materials available on record indicates that the respondent No. 2 had on an earlier occasion floated the same tender but the same did not reach to its logical end since the tender process had to be abandoned on the ground that there was a single tenderer. Even on this occasion, if the decision of the Bid Evaluation Committee to reject the technical bid of the petitioner is upheld by this Court, then also, it will be a case of single tenderer since the respondent No. 4 alone would remain in contention for bagging the contract. Such an outcome would obviously mean that there would be no competition on price component amongst the bidders.

46. The Assam Public Procurement Act, 2017 (for short "Act of 2017") was enacted by the Assam Legislative Assembly so as to establish a transparent procedure for procurement by public entities so as to ensure timely delivery of intended outcomes with efficiency, economy, integrity and accountability. The Act of 2017 received the assent of the Governor on 06-04-2017 and was notified in the Official Gazette on 11-04-2017. The Act lays down certain fundamental principles to be followed by the authorities while making public procurements. Section 14(1) *inter-alia* prescribes that the evaluation criteria must relate to the subject matter of procurement and may include relevant facts such as price. Sub-section 3 of section 14 lays down that all non-price evaluation criteria should be objective and quantifiable. Rule 15 of the Rules framed under the Act of 2017 also lays sufficient emphasis on price as the main criteria for evaluation of bids.

47. It is trite law that the price would be relevant only when the technical bids are found to be valid. However, if the tender is not found to be in deviation of any of the essential conditions of the tender, in view of the mandate of Section 14 of the Assam Public Procurement Act 2017 read with Rule 15 of the Rules framed there-under, the respondents would be duty bound to consider the price bid of the bidders whose technical bid does not suffer from any fatal defect. Such an approach of the procuring agency would not only be in consonance with the Act of 2017 but would also be in public interest.

48. In the case of ***Action Construction Equipment Ltd. (Supra)*** sole ground for rejection of the technical bid was that the bidder was not registered in the e-procurement portal. While interfering with the decision of the Bid Evaluation Committee, the learned Single Judge had held that the objection was more in form than in substances. It was also observed that the ultimate objective of the State or its Instrumentality should be to ensure that public revenue is saved by a competitive bidding process.

49. In the case of ***Jagadish Mandal Vs. State of Orissa & Ors.*** reported in ***(2007) 14 SCC 517***, the Supreme Court has laid down the criteria for the Court to interfere in tender or contractual matters in exercise of power of judicial review. Paragraph 22 of the said decision will be relevant for the purpose of this case and therefore, is reproduced herein-below for ready reference:-

> "*22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a*

*distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:*

- *Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;*

*OR*

*Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with r elevant law could have reached".*

- *Whether public interest is affected.*

*If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.*

50. From the above, it is clear that public interest is one of the important criteria which should be born in mind by the Court while exercising the power of judicial review in matters of government tender. In the present case, as noticed above, there can be no doubt about the fact that public interest would be served better if the eligible bidders are allowed to compete even on the price component, which would not be possible if only a single bidder remains in contention. Therefore, applying the test laid down in the case of

***Jagadish Mandal (Supra)*** I find sufficient force in the submission of Mr. Choudhury that there is no justifiable ground in this case for the respondent Nos. 1 and 2 to not consider the price bid of the petitioner.

For the reasons stated above, W.P.(C) No. 4776 of 2020 succeeds and is hereby allowed.

Consequently, W.P.(C) No. 5067/ 2020 is found to be devoid of any merit and is accordingly dismissed.

It appears that the third tenderer, i.e. M/s Action Construction Equipment Ltd. has accepted the decision of the Bid Evaluation Committee to reject its technical bid. There is also no controversy about the technical validity of the bid submitted by the respondent No. 4. As such, the respondent Nos. 1 and 2 are directed to consider the price bid submitted by the writ petitioner and the respondent No. 4 (petitioner in W.P.(C) No. 5067/2020) and thereafter, proceed with the tender in accordance with law.

Parties to bear their own cost.

**JUDGE**

GS

**Comparing Assistant**