
(2017) 04 GAU CK 0009
In the Gauhati High Court
Case No : 28 (K) of 2016

East West Construction(M/s)

APPELLANT

Vs

State of Nagaland & Ors.

RESPONDENT

Date of Decision : 10-04-2017

Acts Referred:

[Constitution of India](#), [Article 226](#) -
Power of High Courts to Issue certain writs

Citation : (2017) 04 GAU CK 0009

Hon'ble Judges : S. Serto

Bench : SINGLE BENCH

Advocate : Z. Zhimomi, Z. Swu, V. Suokhrie, Imti Longjem, Joshua, Esther, Vinitoli

Judgement

1. Heard Ms. Z. Zhimomi, learned counsel who appeared on behalf of the petitioner and also heard Ms. V. Suokhrie, learned Addl. Senior Government Advocate who appeared on behalf of the State respondents and Mr. Imti Longjem, learned counsel who appeared on behalf of the respondent No. 7. 2. This is an application under Article 226 of the Constitution of India, praying for quashing and setting aside the impugned letter bearing No. CE (H) TB/CAWD/DC (ZBTO) 2013, dated 11th May. 2015, of the Chief Engineer, PWD (Housing), Nagaland (Respondent No. 5), directing the respondent No.6, to issue Work Order for construction of D.C's Office Complex at Zunheboto to M/S Naga Construction. Reg. No. NPWD/ Class-I /462, Dimapur and, praying for appropriate order or direction directing the respondents to issue the Work Order for the same work mentioned above to the petitioner. 3. The brief facts of the case are as follows: The Office of the Commissioner, Government of Nagaland, issued the notice bearing No. CAWD/DC/ZBTO/2014, dated 13.3.15, inviting tender in two standard bidding system i.e. technical bid and financial bid for construction of D.C's Office Complex at Zunheboto District. Following the issuance of the notice, the petitioner and 4(four) other firms/ contractors submitted their respective tenders. Thereafter, the Government constituted

5(five) members committee for evaluation of the tenders submitted by the 5(five) firms. The NIT in its full form as notified is given here below:-
 "Government of Nagaland Office of the Commissioner: Nagaland : Kohima No. CAWD/DC/ZBTO/2014 Dated, Kohima, the 13h March, 2015. Notice Inviting Tender The Executive Engineer CAWD, Commissioner's Office, Nagaland, Kohima on behalf of the Governor of Nagaland invites tender notice for the under mentioned work from Registered Contractors of Nagaland PWD Class-I/CPWD/MES on percentage basis as per Schedule of Rate 2013,NPWD.

Sl.	Name of Work	Estimate cost (Rupees in Lakhs)	Earnest Money (Rupees)	Time of completion
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1.	Construction of D.C's Office Complex, Zunheboto	Rs. 10,25,42,000		
	Local 1%	10,25,420	Non local 2%	20.50,840 36 (Thirty six months)

Terms and Conditions: 1. Sealed Tenders in 2(two) separate envelopes consisting each of pre-qualification Techno-Commercial bid (1st Envelope) and Financial bid (2nd Envelopes) will be received upto 1:00 P.M. on 2nd April 2015 along with the latest Money affixing Court Fees Stamp of Rs. 7.50 (Rupees seven and paisa fifty) only. The Bid will be opened on the same date at 2:00 P.M. in the Office of the Executive Engineer CAWD. Commissioner's Office, Nagaland, Kohima. 2.The sealed envelope should clearly specify the name of work. 3. Contractors are advised to purchase the bidding Tender documents from the Office of the Executive Engineer CAWD, Commissioner's Office, Nagaland, Kohima from 17th March, 2015 upto 30th March, 2015. The tender documents shall be issued on payment of Rs. 10000.00/-(Rupees ten thousand) only (non-refundable) in cash for the above mentioned work during office working hour. 4. The Earnest Money shall be in the form of DAC/Fixed deposit receipt from any Scheduled Bank of India in favour of Executive Engineer, CAWD, Commissioner's Office, Nagaland, Kohima. Earnest Money and Court Fees Stamp has to be enclosed in the first envelope. 5. Contractor should have over draft/credit facility certificate equivalent to 15% (Fifteen) of the tendered amount certified by Chief Manager/Branch Manager whose name, designation, code number and contact number for necessary clarification. 6. The first envelope Technical Bid will be opened and evaluated by the Department and on qualifying, the 2nd envelope Financial bid shall be opened in presence of the Bidders or their authorised representatives. Financial offer of those bidders who could not qualify in Technical Bid shall be returned without opening. 7. The criteria for issue of tender documents in respect of eligible registered contractors will be given provided they have completed one similar nature of work individually during the last 5(five) years costing not less than 50% (fifty) of the tender value of the above mentioned work. 8. Intending Contractors are advised to acquaint themselves with the local conditions by inspecting the site before tendering such that the work put to tender is workable and agreeable. 9. The Department shall physically verify the purchase of machinery documents of the contractor and other requirement against the job. Hiring or leasing of machineries among the intending tenders

shall not be allowed during any period when other works are in progress and shall not be considered in the assessment of bid evaluation. 10. The tenderer should not have abandoned any Housing construction under CAWD. 11. The undersigned reserves the right to accept or reject any or all tenders without assigning any reason thereof. 12. The acceptance of the lowest tender is not obligatory. 13. Works Tax will be deducted out of the Contract amount and forest tax etc will be deducted as per the prevailing rate of the State Govt. 14. Other details can be seen in the Bidding document (F-2 Form) 15. The Instructions in the Bidding Document should be studied carefully before submission of the Bids. In complete tender documents submitted by the Contractor(s) shall be out rightly rejected. 16. For any dispute arising in between the Employer and the Bidder, the matter will be settled strictly as per the NPWD/CPWD Code. 17. Mobilization Advance Payment will not be considered. 18. Tender Documents sold to one should not be transferred to other. 19. Ali works shall have to be carried out as per instruction contained in the project specifications unless otherwise specified by the Engineer in Charge, as covered by the detailed specification. 20. Payment will be subject to availability of fund by the State Govt, of Nagaland. (Er. Sungtiba Amer) Executive Engineer, (CAWD) Office of the Commissioner Nagaland: Kohima." 4. On 02.04.2015, the techno-commercial bid was opened by the 5(five) members committee constituted for evaluation of the tenders. The Minutes of the committee recorded on that day is given here below:- "Minutes on Technical Bid held on 2nd April, 2015 in the Conference Hall of the Executive Engineer (CAWD), Commissioner's Office Nagaland for the Construction of D C. Office Complex Zunheboto thereof On behalf of the Chief Engineer, PWD (Housing), Nagaland, the Executive Engineer (CAWD) convened the Technical Bid for the Construction of DC office Complex Zunheboto at 1400 hr on 2nd April 2015 following the procurement notice & invitation for Bids published on all the prominent local paper on 13th March, 2015. At the preface, he thanked and welcomed Er. Cheniram Borauh, SDO (1C), representative officer for Chief Engineer PWD (Housing), Nagaland, CAWD staffs, bidders and the NCSU, representatives personnel who were also present to authenticate the bidders on NCSU registration. He briefly highlighted the members the significant of the Project for the State, Department and in particularly the communities of Zunheboto District and further reassures the requisite mandatory responsibility from the CAWD Office and Bidders regard to execution of the project in accountability & transparency. Hence, open bidding established. Order of the Technical Bid. A. The sealed envelopes No. 1 (one) for Technical Bid were opened sequentially as listed below, under the administrative control of the Executive Engineer (CAWD). i. SL No. 1/5. M/S East West, Dimapur ii. SL No. 2/5. Naga Construction, Dimapur iii. SL No. 3/5. Chabou & Co., Kohima iv. SL No. 4/5 M/S Multi Builders, Dimapur v. SL No. 5/5. Jordan Construction, Dimapur B. During the Evaluation on the Check-list of "Technical Qualification. In formation", (enclosed for reference) and the Executive Engineer (CAWD) correspondingly pre-evaluate and conference from the bidders on the tendered technical information. Observation and Deliberanon: a. Electrical Technical Personnel: i. "Technical

Personnel Capacity", the Executive Engineer (CAWD) observed and stated, the necessity of Electrician personnel within the Technical Establishment of any corporate/firm is not mandatory but may avoid dissemination among the Civil and legitimate electrical contractors while allocating electrical works for the same construction project. ii. Some bidder lamented that the current ongoing bidding was on the matter related to the Civil Works only. However, if required for the above said bidding in future, there is no quandary as they would be able to provide services and execute electrical work by collaborating/facilitating with other electrical agencies. iii. However, after thorough deliberation and views shared on the objection finished by the Nagaland Electrical Contractor Union. It was amicably agreed in principle on the need of Electrical personnel. b. Bank Balance Sheet: i. The key issue and deliberation following the non-submission of Bank Balance Sheet, a reference enclosure document on Bank Certificate by the Chabou & Co bidder's. The Executive Engineer (CAWD) established and clearly authenticates the inevitable mandatory on Bank Balance Sheet in bidder's Profile to evaluate Availability of Credit Facility as certified by the Bank. In response to the E.E (CAWD) observation and comment, all the other 4(four) bidders, accordingly, agreed and further established the mandatory submission of Bank Balance Sheet as a reference enclosure on Bank Certificate. Recommendation by Executive Engineer (CAWD): 1. Any negotiations by the bidders at any stage/course of Technical bidding shall stand invalid, as per the provision under SBD or PWD code i.e "Negotiation with the bidders at any stage of bidding are not permitted." However, the Department welcomes comments, suggestions and deliberation by the bidder. 2. With Check list completed and counter signed by the respective bidders, he noticed that the Technical bid Evaluation shall general commence immediately after the receiving necessary confirmation and authentication letters from the departmental authorities, on the tendered credentials. 3. The result of the Technical evaluation shall be appropriately communicated to the bidders. 4. Fixation of date for opening of Second Envelope (Financial Bid) shall be fixed by the Chief Engineer PWD (Housing), Nagaland and accordingly, the Executive Engineer (CAWD) will invite qualified bidders for Financial Bid. Members, present during Technical Bid hold on 2nd April 2015 in the Conference Hall of the Executive Engineer (CAWD), Commissioner's Office, Nagaland for the construction of D.C Office Complex, Zunheboto. (Enclosed for reference). (Er. Sungtiba Amer) Executive Engineer, (CAWD) Office of the Commissioner Nagaland: Kohima."

Er. Cheniram Boraiah

SDO(TC), Office of the Chief Engineer PWD (H) Er. Odinokdnag Jamir
Assistant Engineer (CAWD) Kohima, Nagaland Commissioner's Office

Kohima, Nagaland Shri. Varghese Junior Engineer (CAWD) Shri. Martin,
Junior Engineer (CAWD) Commissioner's Office Commissioner's Office

Kohima, Nagaland Kohima, Nagaland."

5. Based on their assessment/evaluation of the technical bids submitted by the firms/ contractors, the committee recorded the marks scored by each of them. The marks as given and recorded by the committee are given here below:-
"Technical Bid Capacity Evaluation

Ref: No. : CE(H)/TB/CAWD/DC(ZBTO) 2013 Dated 29th April 2015

Name of the Work : Construction of D.C's Office Complex at Zunheboto

Date of issue of Notice Inviting Bids : No. CAWD/DC/ZBTO/2014
dt.Kohimathe 13th March 2015.

Time and Date for opening Technical Bids : 1400 hour, 2nd April 2015"

Place of Opening Bid : Conference Hall of the Executive Engineer
(CAWD) Commissioner's Office, Nagaland

Sl.	Bidder	Tender Amount (Rs. In Lakhs)	Mark/Score on the Evaluation on Technical Bid	Enclosed	Remarks
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1.	M/s East West Construction, Dimapur				
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87.50	In Annexure 'X'	Regular			
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2.	Naga Construction, Dimapur				
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55.00					
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Regular					
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3.	Chabou & Co Kohima	1025.42	Disqualified due to the following reason: (i) Photo copy of 1st Work order not enclosed (ii) No page numbers were marked to any of the submitted documents therefore Transparency of the documentation was doubted. (iii) Bank Balance Sheet not enclosed. Accordingly, on further scrutiny of the Tender Papers minutely as directed by CEs Office more deficiencies in the documents were clearly identified as mentioned above. Hence. Disqualified.	Irregular	
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4.	M/S Multi Builders Dimapur				
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Bidder No. 4/5	has "Withdrawn" for the Tender on 08.04.2015	Irregular			
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5.	Jordan Construction Dimapur				
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49.00	Irregular				
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Certified that on the regular qualified contractors, financial bid shall be opened. As per the Bid evaluation, total 5(five) Nos. of bidders received for this work of which 3(three) are found Regular Sl. No. 1/5 of M/S East west Construction Dimapur. Second highest with 50 marks. SL No. 2/5 Naga Construction, Dimapur scored second highest with 55. Mark and SL No. 5/5 Jordan Construction Dimapur scored third highest 49.00 marks....." 6. After the technical bid, the financial bids were opened on 08.05.2015. and the comparative statement

prepared by the committee is given here below:- "Comparative Statement (Financial Bid)

Ref.No. : CE(H)/TB/CAWD/DC (ZBTO) 2013, Dated 05.05.2015.

Name of the Work : Construction of D.C's Office Complex at Zunheboto

Tender Amt. : Rs. 1025.42 lacs

Date & Time of opening financial Bids : 08.05.2015.10:00 A.M.

Sl.	Name of the Contractors	Earnest Money	DAC No.	& Date	CFS	Rate quoted above/ below/as per SoR 2013	Remarks
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1/5	Jordan Construction	Reg.No.NWD	/Class-1/284,	Dimapur	Rs. 10,26,000/-	502337 Dt. 25.03.15	Rs. 7.50 5% below NPWD SoR 2013
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2/5	Naga Construction, Dimapur	Reg. No. NPWD/	Class-1/462,	Dimapur	Rs. 10,25,420/-	057866 Dt. 26.03.2015	Rs. 8.00 As per NPWD SoR 2013 .
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3/5	M/s East West Construction, Dimapur	Reg. No.NPWD	/Class-I/305,	Dimapur	Rs. 10,25,450/-	105437 Dt. 27.03.2015	Rs. 8.00 As per NPWD SoR 2013
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4/5	Chabou & Co	Reg.No. NPW D/Class-I/165	Kohima				
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Disqualified in Technical Bid. Hence, Financial Bid not opened

5/5	Multi Construction	No. NP WD/Class-I/	495,	Dimapur			
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Tender Bid Withdrawn

Observation 1. Out of the three qualified bids, SL. No. 3/3 scored the highest marks-87.50 in Technical Bid Evaluation. 2. As required in the NIT, the firm SL. No. 1/3, Jordan Construction, did not submit Working capital, Financial Information & Solvency Certificate in their Financial bid. Instead, the above documents were submitted in the 1st envelope. 3. The works are estimated at NPWD SoR 2013 rates. Taking into account the inflation and escalation of cost, whether works as per specification can be carried out at 5% below NPWD SoR 2013." 7. After all that was done, the Committee gave their observation/ evaluation on the technical bid as well as the financial bid as follows:- "Name of Work : Construction of DC's Office Complex at Zunheboto. Observation on the Technical and Financial Bids SL. No. 1/5, M/s Jordan Construction, Regd. No. NPWD/Class-1/284, Dimapur. 1.Technical score- 49 marks out of 100 Though qualified, the technical score is less\$ and reflects poorly on the technical ability of the firm. A score of at least 80 marks would objectively reflect ability of the firm to take up such major works. 2.Quoted 5% below NPWD SoR 2013 The work is estimated at NPWD SoR 2013 rates. If we consider the time gap of 4 years (2 years from 2013 to 2015 and 2 years for completion of the project), the present

material and labour cost, inflation etc. it may not be possible for the firm to do the works according to the specification required. Submitted working capital, financial information (balance sheet) and solvency certificate in the technical bid envelope and not in the financial bid envelope. The approved NIT specified that the above documents are to be submitted in the 2nd envelope (Financial Bid). However, the firm submitted the same in the Technical Bid. SL. No. 2/5, M/s Naga Construction, Regd. No. NPWD/Class-1/462, Dimapur 1. Technical score-55 marks out of 100 Though qualified, the technical score is less and reflects poorly on the technical ability of the firm. A score of at least 80 marks would objectively reflect ability of the firm to take up such major works. 2. Quoted as per NPWD SoR 2013 The work is estimated at NPWD SoR 2013 rates. The firm has also quoted the same rates. SL. No. 3/5, M/s East West Construction, Regd. No. NPWD/Class-1/305, Dimapur 1. Technical Score- 87.5 marks out of 100 Highest score among the qualified tenderers. 2. Quoted as per NPWD SoR 2013 The work is estimated at NPWD SoR 2013. The firm has also quoted the same rates. SL. No. 4/5, M/s CH ABOU & CO. Regd. No. NPWD/Class-1/165, Kohima During technical bid evaluation, it was found hat the Work Order submitted by the firm was not in order-the original work order was not submitted and the document submitted as revised work order was found to be a letter informing of Govt."s approval of revised estimate only without mentioning any details such as work completion period. The firm"s technical bid was therefore disqualified. The Financial Bid of the firm was not opened because the firm"s technical bid was disqualified. SL. No. 5/5, M/s Multi Construction, Regd. No. NPWD/Class-1/495, Dimapur The firm voluntarily withdraw its tender bid for the work." 8. The case of the petitioner is that since he was awarded the highest mark in the technical bid i.e. 87.50 marks out of 100, whereas, his nearest rival i.e the respondent No. 7 was awarded only 55 marks out of 100 and, since both of them quoted NPWD SoR 2013, he should have been given the Work Order for the construction of D.C"s Office Complex at Zunheboto but for extraneous reasons and in most arbitrary manner, the respondent No. 5. approved the tender submitted by the respondent No. 7, and directed the respondent No. 6, to issue Work Order in favour of the M/s Naga Construction i.e. respondent No.7, vide his letter No. CE(H)/TB/CAWD/DC"s (ZBTO)/2013, dated, Kohima, the 11th May, 2015. Therefore, the same is illegal, unconstitutional, unreasonable and also not in conformity with the NIT issued, as such, the same deserves to be quashed and set aside. The impugned approval letter is given here below:- "Government of Nagaland Office of the Chief Engineer PWD (Housing) Nagaland: Kohima No. CE(H)/TB/CAWD/DC"s (ZBTO)/2013 Dated, Kohima, the 11th May, 2015. To, The Executive Engineer (CAWD), Office of the Commissioner, Nagaland: Kohima Sub:- Approval of Comparative Statement for the Work "Construction of D.C"s Office Complex at Zunheboto." Please find herewith the "Comparative Statement (Financial Bid)" pertaining to the above stated work. The rate quoted by M/s Naga Construction, Regd No.NPWD/Class-I/462, Dimapur @ As per Nagaland PWD Building Schedule of Rate 2013 is approved. The Work Order may be issued in favour of the approved firm from your end. Encl:-As above. (Er. O.N. Ngully)

Chief Engineer, PWD (Housing) Nagaland: Kohima" 9. The respondent No.5, who is the Chief Engineer, PWD, (Housing) filed an affidavit-in-opposition on behalf of himself and all the State respondents. The main ground of defense or response of the respondents is given in Para-5 and 6 of the affidavit-in-opposition and they are reproduced here below:- "5. That with regard to the statements made in paragraphs 11,12,13, 14 and 15 of the writ petition the deponent respectfully beg to state that as per the terms and conditions of NIT dated 13.03.2015 at SI. No. 17 "Mobilization advance payment will not be considered" and also SI. No. 20 "Payment will be subject to availability of fund by the State Government of Nagaland". Although it is clearly mentioned in the terms and conditions of the NIT for not considering the advance payment some contractors have suspending/ceasing their works in half done until advance payment is made. At present the State Government financial position is very" tight and if the contractors are not financially sound position he/she cannot complete the project in specified time. And considering the repeated escalation of prices if the project is not completed in time by the amount allotted for the project the Government will unnecessarily spend extra fund. This period is a time bound and inordinate delay will hamper the developmental works of general public interest. It is also stated in NIT terms and conditions at SI. No. 12" The acceptance of the lowest tender is not obligatory"". It means that lowest tender as well as the highest bidder has no right to be awarded the work order. While awarding the work order the department has consider some criteria according to the nature of works and Government financial position. 1 hence considering all this factors the deponent had approved M/S Naga Construction for construction of D.C Office Complex at Zunheboto. Since the firm is financially sound than the petitioner i.e M/S East West Construction as per the records available in the Technical Bid SI. 2 Financial strength. 6. That the averment made in paragraphs 16 and 17 of the writ petition are denied. As stated in the preceding paragraphs that after considering the financial position among the tenders the deponent had approved the firms of the private respondent No.7 for construction of Deputy Commissioner's Office Complex, Zunheboto. There is no favouritism, nepotism, discrimination and biasness. If the Hon"ble Court intervene this matter the Government developmental works will be hampered." 10. The private respondent No. 7 also filed an affidavit-in-opposition and the main contentions raised in the affidavit are as follows; i) That the petition was filed after 10(ten) months from the date of the impugned letter was written, therefore, on that ground alone it may be dismissed. ii) That the respondent has also been a very experienced contractor having successfully completed so many works allotted to him earlier, therefore, there is no criteria given in the NIT which he did not meet. iii) That technical bid is only a pre-qualification bid to enter into financial bid, therefore, once a person is qualified from it the same loses its relevance and thereafter, the fate of the competitors will have to be decided based only on their financial bids. Therefore, the evaluation committee erred in adding the marks secured in the technical bid in the final score of the competitors. And, as such, even though the petitioner secured higher marks in the technical bid that would not entitle him to get the

work order for the contract work. iv) That it is not obligatory for the respondents to accept the lowest tender as it is made clear in Clause-12 of the NIT, therefore, the petitioner cannot claim issuance of Work Order as a matter of right. 11. Learned counsel for the petitioner submitted that amongst the 5(five) bidders, the petitioner and the private respondent No.7, got the highest marks in the technical bidding as per the assessment of the duly constituted committee as given above i.e. the petitioner got 87.50 marks and the private respondent No. 7, got 55 marks. And in their financial biddings, it was found that they have both bided as per SoR 2013. Therefore, there is no justifiable reason or reasons why the petitioner should have been ignored and instead the respondent No.7, should have been recommended for issuance of Work Order for construction of the D.C's Office Complex, Zunheboto. The learned counsel further submitted that the tender evaluation committee is consisted of members who are most qualified because of their high qualifications, experience and knowledge earned through training and actual field experiences and it is also the highest and final authority for evaluation of the credentials of all the bidders. Therefore, their evaluation is final and must be accepted in the interest of the work to be executed. As such, to just brush aside their evaluation would amount to nothing but arbitrariness, show of favouritism, discrimination and ignoring of all the terms and conditions set out in the NIT. The Learned Counsel also submitted that the petitioner, after having read and understood all the terms and conditions of the NIT had submitted his tender, therefore, the state respondents have no reason to presume that he will be asking for mobilization fund for starting the work or will be asking for running bill to complete the work. In fact, he has shown his overdraft/credit facility of Rs. 6 crores, whereas, as per the terms of the NIT, a contending contractor is required to show an overdraft/credit facility certificate equivalent to only 15% of the tender amount, which works out to be approximately Rs. 1.54 crores only. Therefore, the reason given by the state respondents for not giving the work order to the present petitioner and recommending respondent No. 7, instead, is most unreasonable and manifests biasness, arbitrariness and discriminatoriness on their part. 12. Learned Senior Additional Government Advocate submitted on behalf of the state respondents that since the state government is not in sound financial condition, it was well thought over before the NIT was issued to give the contract work to a contractor who would be able to mobilize resources and execute the work till its completion and, who can also be paid his due bill as and when the state's financial condition improves. Therefore, when the NIT was issued conditions such as (i) overdraft/credit facility certificate equivalent to 15% of the tender amount, (ii) mobilization advance payment will not be considered and, (iii) payment will be subject to availability of funds by the state government of Nagaland, were specifically mentioned amongst the terms and conditions. Keeping that in view the respondents considered the financial strength of the contractors shown through overdraft/credit facility certificates issued by the banks as paramount importance in deciding as to who should be awarded the contract work. And as such, and, since the respondent No. 7, had overdraft/ credit facility of Rs. 10 crores which is more than what the petitioner had i.e. Rs.

6 crores only, the authorities considered that it would be in the interest of the work, which is urgently needed for public purpose, to issue him the work order. The Learned Counsel also submitted that in the two tier bidding system of tender, technical bidding is only a qualification for participating in the financial bidding. And, it is the financial bidding which is the final determinant for selection of a contractor. Further, the Ld. Counsel submitted that tender is only an offer for acceptance, therefore, the authority who issued the tender may either choose to accept or not to accept the same and the contractor has no vested right to be selected for the work order even if he is evaluated as the best amongst the competing tenderers or the lowest bidder. Lastly, the Learned Counsel submitted that the petitioner did not challenged the decision making process, therefore, it cannot be argued at this stage that the decision making process was unfair, unreasonable, arbitrary and discriminatory. 13. The learned counsel for respondent No.7, submitted that the petitioner was given 10 marks for quality of work done in completed work as per performance certificate, whereas, he was not given any mark because he did not submit such certificate as it was not mentioned in the NIT. He also submitted further that the petitioner was also given 10 marks for his experience in having taken up under the heading "any major project under G.A.", whereas, he was not given any mark for the same, though he is an experienced contractor and had undertaken many major projects. Therefore, the final result of the evaluation was not based on the terms and conditions of the NIT. Further, the learned counsel also submitted that technical bidding is only qualifying criteria for entering into financial bidding, which is the determining factor in awarding contract to the competing firms/contractors. Therefore, the respondent No.7, having been declared qualified to enter into the financial bid and also having been found on a much better and sound financial condition, was rightly recommended by the respondent No.6, for issuance of work order. The learned counsel also submitted that allotment of contract work is essentially a commercial transaction, therefore, the paramount consideration of the Government has to be that of commercial consideration. In this case the Government after considering its own financial status and the necessity of constructing the D.C. office complex at Zunheboto, in public interest, had chosen the respondent No.7, in view of his past experience and sound financial status. Therefore, there is nothing wrong in the decision of the Government, lastly, the Ld. Counsel submitted that in contract matters, courts have been slow and cautious in interfering, except when they find that such decisions in awarding contract works were vitiated by malafide, unreasonableness, arbitrariness and overwhelming public interest, requires interference. In support of his submission, the learned counsel cited paragraph 7 of the *Air India v. Cochin International Airport Ltd*, reported in (2002) 2 SCC 617. The same is reproduced here below; "7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *R. D. Shetty v. International Airport Authority*" 1979 (3)SCC 489), *Fertilizer Corporation Kamgar Union v. Union of India* 1981 (1) SCC 568), *Assistant Collector, Central*

Excise v. Dunlop India Ltd. 1985 (1) SCC 260 = 1984 (2) SCALE 819), Tata Cellular v. Union of India 1994 (6) SCC 651 = 1995 (1) Arb. LR 193), Ramniklal N. Bhutta v. State of Maharashtra 1997(1) SCC 134= 1996 (8) SCALE 417). and Raunaq International Ltd. v. I.V.R. Construction Ltd. 1999 (1) SCC 492 = 1999 (1) Arb. LR 431 (SC). The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene." 14. From the pleadings of the parties and the submissions of the learned counsel, I find that there is no dispute on the fact that the petitioner and the respondent No.7, got the highest marks in the technical bidding; the petitioner scored 87.5 marks and the respondent No.7, scored 55 marks. There is also no dispute with the fact that both of them quoted the same rate as per SoR-2013, which was stated to be the prevalent rate at that time. There is also no contention between the parties on the overdraft/credit facility status of the petitioner and the respondent No.7, which is stated to be Rs. 6 crores for the petitioner and Rs. 10 crores for respondent No. 7. The only contentious issues which are relevant and necessary for deciding this case are being taken up and discussed as follows:- (i) The first issue raised by both the State respondents and the respondent No.7, is that the technical bidding is only qualifying criteria for entering into the financial bidding, which is the determining factor, therefore, the mark scored therein, should not be taken into consideration along with the mark scored in the financial bid, while determining as to who among the competing contractors should be selected. Nowhere in the NIT, it is mentioned that technical bid is only a qualifying criteria for entry into financial bid. Conjoint reading of the terms and conditions No. 1, 6 and 9 of the NIT would make this crystal clear. Though, the full NIT is given above, the above stated terms and

conditions are reproduced here for better appreciation: 1. Sealed Tenders in 2(two) separate envelopes consisting each of pre-qualification Techno-Commercial bid (1st Envelope) and Financial bid (2nd Envelopes) will be received upto 1:00 P.M. on 2nd April 2015 along with the Earnest Money affixing Court Fees Stamp of Rs. 7.50 (Rupees seven and paise fifty) only. The Bid will be opened on the same date at 2:00 R.M. in the Office of the Executive Engineer CAWD, Commissioner's Office, Nagaland, Kohima. 6. The first envelope Technical Bid will be opened and evaluated by the Department and on qualifying, the 2nd envelope Financial bid shall be opened in presence of the Bidders or their authorised representatives. Financial offer of those bidders who could not qualify in Technical Bid shall be returned without opening. 9. The Department shall physically verify the purchase of machinery documents of the contractor and other requirement against the job. Hiring or leasing of machineries among the intending tenders shall not be allowed during any period when other works are in progress and shall not be considered in the assessment of bid evaluation. In the term & condition No. 1. the language used therein i.e. "Sealed Tenders in 2(two) separate envelopes consisting each of pre-qualification Techno-Commercial bid (1st Envelope) and Financial bid (2nd Envelopes) will be received", leaves no room for any other interpretation then this that the tender consists of two tiers i.e. technical commercial bid and financial bid. Secondly, the construction of the sentence, the words used therein only conveys that the tender consists of the two tiers and the consideration would be based on the marks scored in both the biddings. Further, by reading of the term & condition No.6. especially the ones underlined, it is sufficiently clear that one can only enter into financial bid. If, he is qualified in the technical bid, but, it does not convey in any manner that the marks obtained in the technical bid would cease to be relevant thereafter. It is just that technical bid comes first and financial bid comes later. They are intrinsic and integral part of each other and as such, a decision to award contract based on the result of only one of them would not lead to achieving the objective and purpose intended to be achieved through the NIT. This is because in executing such kind of works one has to have all the required machineries, technical support, manpower, experience etc., besides having sufficient financial capacity and, should have quoted the right or desired rate, which is workable, for executing the work in time and with the desired quality. Therefore, to say that the marks scored in the technical bid loses its relevance once a competitor is qualified to enter into the next stage i.e. financial bidding would amount to missing the purpose and object of floating the tender as stated above. Further, it would be seen that the contents of the said term & condition No. 9, gives so much emphasis on the contractor's ownership and possession of machineries to be used in the execution of the work. This also shows that technical bid is not intended to be only a qualifying criteria to enter into the financial bid but it is also an integral, intrinsic and indispensable part and parcel of the other criteria of consideration for allotment of the contract work. In fact the Evaluation Committee in their observation and evaluation given at Para-7, of this judgment had mentioned as follows; "SI. No. 2/5, M/s Naga Construction, Regd. No. NPWD/

Class-1/462, Dimapur 1. Technical score-55 marks out of 100 Though qualified, the technical score is less and reflects poorly on the technical ability of the firm. A score of at least 80 marks would objectively reflect ability of the firm to take up such major works. 2. Quoted as per NPWD SoR 2013 The work is estimated at NPWD SoR 2013 rates. The firm has also quoted the same rates." (ii) The second issue that emerges is whether the respondent No.5, was justified in issuing the impugned letter directing the respondent No.6, to issue the work order to the respondent No.7 based on the amount of over draft/credit facility the contractors have as per bank certificates? It has been submitted both by the learned counsel for the State respondents and the learned counsel for respondent No.7 that the Government considering its financial condition have chosen the respondent No.7 who has highest overdraft/ credit facility over the petitioner to execute the work in the public interest. It would be seen at term and condition No.5 of the NIT issued by the respondents that the contractor is required to have overdraft/credit facility equivalent to 15% of the tender amount only. As stated above the respondent No.7, is shown to have 10 crores overdraft/credit facility whereas, the petitioner is shown to have 6 crores only. However, the fact that the respondent No.7, was recommended for the contract work based on that alone amounts to fallacy, arbitrariness, discrimination, unreasonableness and nepotism. A tender is a public notice, in this case it is issued by the State Government after having considered all its pros & cons. Therefore, the terms & conditions mentioned therein cannot be and should not be changed/altered according to the whims and fancies of the people in charge. It must have certain sanctity and certainty since it is issued for public information, especially for those who are interested in it and for public work to be executed with public fund. One cannot even think or imagine of a Government, especially in a democratic setup, to issue such a notice on which it has no intention to, act upon or act according to the terms and conditions given therein. Because, a government in a democratic set up is expected to act in the interest of the people with manifest fairness wherein discrimination, arbitrariness and nepotism finds no place. The estimated tender amount as given in the NIT is Rs. 10,25,42,000/-, therefore, 15% of the same would amount to be approximately Rs. 1.54 crores only. As such, the petitioner whose draft/credit facility has been shown as Rs. 6 crores is well qualified for consideration since he has scored the highest mark as per the evaluation of the expert and competent committee. Besides, for a work with estimated cost of only a little above Rs.10 crores, it would be unreasonable to presume that a person having Rs.6 crores overdraft/credit facility, that too with good standing in technical support i.e. of machineries, manpower and other requirements, will not be able to carry it out or execute it properly. Moreover, rule of the game cannot be changed when the game is over. In this case the game was over when the technical bid and financial bid were submitted as per the terms and conditions given in the NIT. That is to say, when the contractors as per the term & condition No.5, were required to show that they have overdraft/ credit facility of 15% of the estimated cost of the work only and when they have done it, the respondents cannot now turn around and say that the one who has

shown more amount of overdraft/credit facility is selected. Perhaps, given the chance who knows the petitioner might have also shown more overdraft/credit facility based on his accounts and assets kept in other banks. Therefore, it would be most unreasonable besides being unfair, arbitrary and discriminatory, if contract works are allotted in such manner. This principle of law is a well known, one and often quoted and applied in many cases by the courts in the country. One of such cases in which the same principle was applied by the Hon''ble Supreme Court is in the case of K. Manjusree v. State of Andhra Pradesh & Anr., reported in AIR 2008 SC 1470. In that case the Hon''ble Supreme Court held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process. The rules of the game cannot be eh aimed after the game is over. The competent authority, if the statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process. Change of criteria of selection in the midst of selection process is not permissible. (iii) The last issue that emerges from both the petition as well as from the affidavits filed by the parties and submissions of the parties is, whether, as per the terms & condition of the NIT the authorities have the right to accept or reject any or all tenders without assigning any reason thereof? This term and condition has to be read in the context of the objective and purpose intended to be achieved in issuing the tender. Further, a tender notice is not issued just to be withdrawn or to reject or select in the whims and fancies of the authority who issued the same, especially when it is issued by Government machineries or agencies. Much has been stated already in the above paragraphs, therefore, the same need not be repeated here. The right to accept or reject would occur when none of the tenders submitted by the competitors meet the requirements or terms and conditions given in the tender notice or when lowest tender submitted is not practicable/workable for execution of the work effectively with the desired quality. It does not mean that the authorities have unfettered or unbridled discretion to reject even the best tender/bid who meets all the requirement given in the NIT. Besides, government machineries or agencies cannot be allowed to breach or violate the terms and conditions framed and notified by themselves. To allow such exercise of unbridled or unfettered discretion would be against public policy, basic principles of law, natural justice and may also amount to violation of Article 14 of the Constitution of India. In this regard, what the Hon''ble Supreme Court stated in the case cited by the learned counsel for the respondent No. 7, is relevant and instructive, therefore, the relevant portion of the same is reproduce as follows: " But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. Though that decision is not amendable to judicial reviews but the Court can examine the decision making process and can interfere if it is found vitiated by malafide, unreasonable and

arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerns. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point." On careful perusal of the above what one can understand and conclude is that government machineries and its agencies or instrumentalities have a duty to be fair to all concerns while acting through their offices for public purposes and if in the process of doing so if they make some mistakes courts should be slow and cautious in interfering under Article 226 but, if such decision making process or acts of theirs" are vitiated by mala-fides, unreasonableness and arbitrariness, courts can interfere in public interest. It may also not be out of place to mention here what Hon"ble Justice Matthew observed in the case of V. Punnath Thomas v. State of Kerala, which was also referred to by the Hon"ble Supreme Court in Ramana Dayaram Shetty v. The International Airport, reported in (1979) 3 SCC 489: "The Government is not and should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal". In this present case, it is about allotment of contract work to a deserving person as per the terms and conditions laid down in the NIT itself and not just regarding selection of an individual for doling out a largess by the respondents as is in the case given above. Therefore, the rules of the game as laid down by the respondents themselves must be followed scrupulously and the discretion given to them should be exercised even more strictly and within the bounds of the same rules so as not to vitiate the decision/the process of decision making by mala-fides, unreasonableness and arbitrariness. 15. The reason or reasons given for denying the petitioner the contract work in spite of having met all the requirements and scored the highest marks, and instead, giving the same to respondent No.7 is not only unreasonable rather on the face of it arbitrariness, malafide, favouritism, nepotism are all writ large. There is no unfettered discretion in public law. A public authority possesses power only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is "fair play in action". As such it would be against public interest and basic principles of law to allow the decision based on such ground, which has been already stated as unreasonable, malafide, arbitrary and discriminatory, to stand. Therefore, the decision of the concerned authority approving the tender submitted by respondent No.7 and recommending issuance of work order to him as conveyed in the impugned letter No. CE(H)/ TB/CAWD/DC(ZBTO)/2013, dated 11.5.15, of the respondent No.5, has to be quashed and set aside in public interest. Accordingly, the same is quashed and set-aside. Further, the respondents are directed to issue work order to the deserving firm/contractor i.e. the petitioner within one month from today so that execution of the work may start at the earliest, in public interest. Let a copy of this order be issued to the

learned counsel representing the parties for information of the parties and prompt compliance.