

(2010) 04 GAU CK 0061

In the Gauhati High Court

Case No : Writ Petition (C) No. 486 (AP) of 2009

Microcosm Builders

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2010) 4 GLR 713

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : D. Majumdar, B. Habung and T. Tamang, for the Appellant; R.H. Nabam and I. Riram, for the Respondent

Judgement

P.K. Musahary, J.—The challenge in this writ petition is to an order accepting the tender of a bidder whose tender was not recommended by the Tender Evaluation Committee disregarding, the recommendation made in favour of the petitioner.

2. Briefly stated, the Executive Engineer, RWD. Hawai Anjaw District (respondent No. 3) floated NIT dated 30.6.2009 for encouraging the eligible contractors for carrying out the job of construction of road from Hayuliang Kibithu BRO Road to Barfu (Stage-I) package No. AR/05/02/007. Pursuant to the said NIT, the petitioner, a registered Class-1 contractor under RWD, Arunachal Pradesh submitted tender enclosing all the necessary documents as asked for in the tender notice. As many as 7(seven) interested parties including the respondent No. 6. M/s. Nabam Tadap Agency, Naharlagun, submitted tender. The tenders so received were placed before a standing 4-Member Tender Evaluation Committee headed by Superintending Engineer as its Chairman, which was constituted earlier by the Member Secretary vide an order dated 22.10.2005. After scrutiny, the Tender Evaluation Committee ("Committee") found the technical bids of four firms including the petitioner and the private respondent No. 6, responsive and recommended to open their financial bids.

3. The Committee held its meeting on 27th July, 2009. After opening the financial

bids it found that the petitioner and private respondent No. 6 quoted the same lowest bid value at Rs. 12, 55, 31, 100 which is exactly 5.00% below over the estimated project cost of Rs. 13,21,38,000. The Committee, therefore, decided to find out the successful bidder between the two lowest quoted bidders on the basis of item-wise variation of the quoted rate over the estimated item-wise rates. In the result, the Committee found the petitioner firm substantially more responsive and recommended for awarding the construction work in favour of the petitioner firm M/s. Microcosm Builders, Barpeta, Assam. Accordingly the respondent-Superintending Engineer vide his letter dated 28.7.2009 submitted the evaluation report to the respondent-Chief Engineer for final approval but the respondent-Chief Engineer refused to accept the recommendation of the Committee, rather, he accepted the bid/tender of respondent No. 6 and communicated the same vide impugned letter/order No. RWD/PMGSY-TAP-VIII/2009-10 dated 23.10.2009 addressed to the respondent-Executive Engineer with a direction to issue formal letter/order of acceptance to respondent No. 6 firm. In compliance to the respondent-Chief Engineer's order aforesaid, the respondent-Executive Engineer vide his letter dated 2.11.2009 (Annexure-VII series to the writ petition) requested the respondent No. 6 firm to furnish performance security in the form of bank guarantee for an amount of Rs. 31,39,000 only within 10 days of the receipt of his letter.

4. Mr. Majumdar, learned Counsel for the petitioner submits that the respondent-Chief Engineer has no power under the general conditions of the contract to grant approval and issue work order in favour of the respondent No. 6 inasmuch as the Committee did not recommend its case for awarding the contract and as such the impugned order awarding the contract in favour of respondent No. 6 is bad in law and liable to be set aside and quashed. Further, he submits that the respondent-Chief Engineer took the decision to award the contract with respondent No. 6 on extraneous consideration and collateral purpose inasmuch as he has given undue value to the respondent No. 6 being a local firm and the lower rates quoted by it on some star items. This fact, according to Mr. Majumdar, has been revealed from the endorsement of the Chief Engineer on the body of the letter of recommendation dated 28.7.2009 issued by the respondent-Superintending Engineer in favour of the petitioner, which the petitioner received through RTI and annexed as annexure XV to the rejoinder filed by the petitioner on 26th March, 2010. In support of his submissions, he cites the following cases:

- (1) Jagdish Mandal v. State of Orissa and Ors. (2007) 14 SCC 517.
- (2) Karnataka State Forest Industries Corporation Vs. Indian Rocks,
- (3) ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others,
- (4) Tata Cellular v. Union of India (1994) 6 SCC 651.
- (5) Kading Panio Multipurpose Co-operative Society Ltd. and Anr. v. State of Arunachal Pradesh and Ors. (2009) 4 GLT 90.

5. Mr. Nabam, learned senior Government Advocate mainly submits that the Committee though recommended the petitioner's case, failed to consider the reasonability of rates of star items of works, i.e., the items requiring high quality materials and high skilled labour towards construction works substantiated by technical justification and factors like work experience in similar weather and terrain condition as required in the case in hand, which are likely to affect the work during execution. The recommendation of the Committee is not final and binding. The employer/accepting authority, i.e., the Chief Engineer has to satisfy himself with the bids recommended by the Committee and he has the right to accept or reject any bid as per Clause 30(1) of Standard Bidding Document (SBD) without assigning any reasons thereof. The accepting authority (Chief Engineer) acted legally in awarding the contract work with respondent No. 6 after considering the aforesaid factors without any element of arbitrariness, biasness, favouritism and free from collateral purpose. The main contentions/submissions of the respondent authorities have been enumerated in paragraph 8 of the counter affidavit filed on behalf of respondent Nos. 1 to 4, which is quoted below:

8. That with regard to the statement made in paragraph 10 of the writ petition, your humble deponent begs to state that as per Clause 16.6 of Standard Bidding Documents (SBD). No bidders can withdraw their bid after technical Bid opening, within bid validity period and award letter is issue only to the firm approved by the accepting authority, it is not mandatory to inform other bidders. Obviously, validity of bid in respect of petitioner is never denied. The bid of respondent No. 6 has been considered on the basis of facts stated in paras 5 and 6.

As stated in para 7 accepting authority has reserved the right to reject or accept any bids as per Clause 30(1) of SBD. Thus, the petitioner is misleading honourable court by furnishing false information.

Duty of accepting authority is not limited to accord approval of bid recommended by the Committee but also to examine entire documents which include comparative statement, checklist, etc., submitted by the committee in support of bids. Accordingly, the documents in respect of 3 firms were examined. It has been observed that the system adopted by Tender Evaluation Committee to determine the most responsive bidders amongst the 2 firms who has quoted equal tender value has no justified basis as stated in para 5.

Items wise variation in rate quoted by the bidders for entire works items has been considered by the committee and variation within any above 25% has been rated normal and abnormal respectively which has no technical justification. So having unsatisfied over the recommendation of Tender Evaluation Committee, the bids have been re-examined and reconsidered taking into account, rate variations in star item of work where high quality materials and high skill mason is required. Further, work experience in similar nature of work in similar weather and terrain condition and cash in hand, etc., has also be considered while determining the responsiveness of bids. It is found that the percentage variation in rate in respect of M/s. Nabam Tadap and M/s. Macrocosm are (-) 6.8 and (-)

2.6 respectively (Comparative Statement showing difference in star item. Apparently the percentage variation of (-6.8 of M/s. Nabam Tadap) is nearing to overall percentage variation, i.e., (-) 5% of tendered value) and, hence, more reasonable. It is also found that the M/s. Nabam Tadap has work experience of executing 29 numbers of road works (similar nature of work) in localities of Arunachal Pradesh. Whereas the petitioner has work experience of 4 numbers of roads works in State of Assam where weather and terrain condition is completely different.

Hence, order passed by the respondent No. 2 (Chief Engineer, RWD) in favour of respondent No. 6 is justified and also in accordance to Standard Bidding Document (SBD), rules and within the jurisdiction of Power conferred.

6. In support of his submissions, Mr. Nabam relies on the following cases.

- (1) Tata Cellular v. Union of India (1994) 6 SCC 651.
- (2) R.M. Narayana Chettiar and Anr. v. N.L. Chettiar and Ors. (1991) 1 SCC 49.
- (3) Bijita Saha and Ors. v. State of Tripura and Ors. 2006 (2) GLT 26.
- (4) Uncle's Shop and Ors. v. Biva Hazarika 2002 (1) GLT 109.
- (5) G.R. Engineering Works Ltd. v. Oil India Ltd. and Ors. 2009 (2) GLT 968 (DB).

7. Mr. I. Riram, learned Counsel for the private respondent No. 6, completely endorsing the submissions" made by Mr. Nabam, learned senior Government Advocate, submits that the Chief Engineer has taken his conscious decision to award construction work with respondent No. 6 after carefully examining the bids of both the petitioner and respondent No. 6 and taking into account the materials on record. There is nothing wrong in rejecting the recommendation of the tender Committee inasmuch as it failed to take into consideration the various relevant factors including the lower rates quoted by the respondent No. 6 in respect of star items. Placing reliance on the averments made in paragraph 10 of the affidavit, the respondents. 6 has asserted that the tender in question has already been accepted by depositing necessary performance security and signing agreement on 4.12.2009 and accordingly started construction work up to 4 kms. by procuring necessary equipments worth cores of rupees for execution of the works. According to him, stalling of work at this stage would cause great financial loss to the funding agent, contractor and public at large. It is also asserted by the respondent No. 6 in the said counter affidavit that the husband of the power of attorney holder of the petitioner's firm is an Assistant Engineer working under Water Resource Department, which is a clear violation of the terms under the SBD for rejection of the petitioner's bid.

8. Mr. Majumdar, learned Counsel for the petitioner in reply to the submissions of respondent No. 6, asserted that the agreement was signed on 4.12.2009 and the court issued notice of motion with interim order on 21.12.2009 to the effect that until further orders, the contract work, which forms the subject-matter of this

writ petition, shall remain suspended and shall not be acted upon without obtaining leave of this Court. Although, liberty was given to the respondents to move for modification and alteration and/or vacation of the interim direction, if so advised, no such petition was moved by the respondents and the said interim order is still in force till this date. Between the date of signing of agreement on 4.12.2009 and interim direction passed on 21.12.2009, the respondent No. 6 got hardly about 17 days and as such, it is not at all believable or acceptable that the respondent No. 6 could complete 4 kms. of road construction within such short period of time.

9. From the pleadings of the parties, it is found that there is no dispute as regard the recommendation of the Committee in favour of the petitioner and forwarding the same by the respondent-Superintending Engineer for approval of the respondent-Chief Engineer. There is no dispute as regard the power of the employer/Chief Engineer to accept or reject the recommendation of the Committee under Clause 30.1 of the SBD. What is disputed by the petitioner is the manner in which the employer/Chief Engineer has rejected the recommendation of the Committee and awarded the works with the respondent No. 6 inasmuch as it has been done in violation of the principle of natural justice and Article 14 of the Constitution of India with sole purpose to favour the respondent No. 6 on extraneous consideration and by importing hidden criterion like policy of the State Government to encourage the local firms and lower rates in star items. Going through the press notice, i.e., NIT (Annexure 1 to the writ petition), no indication has been given therein that the local firms or contractors would be given preference in the matter of settlement of the construction work. The respondent authorities in their counter affidavit have not also mentioned that such preference would be given to the local firms/contractors. Nor have they furnished any government circular reflecting the policy decision of the Government in that respect. In the SBD also, there is no mention about such preference for the local firms/contractors.

10. I have gone through the records produced by the State respondents through the learned senior Government Advocate, Mr. Nabam. From the records also, I could not find out any material in support of the preferential treatment for the local firms/contractors in the matter of awarding the contract based on public policy. From the records produced before this Court by the learned senior Government Advocate, I could not find any material to the effect that the respondent-Chief Engineer while rejecting the Committee's recommendation, any reason has been assigned or recorded for accepting the tender offered by the respondent No. 6 justifying such decision either. Moreover, it is to be noted here that the reasoning recorded by the Chief Engineer in his own hand regarding lower rates for star items to encourage the local firms and accepting the rates quoted by the respondent No. 6, as found on the body of the recommendation letter of the respondent-Superintending Engineer vide annexure XV to the rejoinder filed by the petitioner, is not found in the record produced by the State respondents. The reasoning/order allegedly written on the aforesaid

annexure by the respondent-Chief Engineer in his own hand reads as follows:

The amount quoted by M/s. Nabam Tadap Agency, Nig on some of the star items reveals/show lower in all the items. Moreover the firm is a local firm, therefore, as per the Government of Arunachal Pradesh policy we should encourage the local firms as such the rate quoted by M/s. Nabam Tadap Agency, Nig for Rs. 12,55,31,100 (Rupees twelve cores fifty-five lakhs thirty-one thousand and one hundred) only for the C/O Rd. from Hayuliang-Kibithu road to Barfu is hereby approved and accepted.

11. No additional affidavit has been filed by the State respondents particularly the respondent-Chief Engineer confirming or denying as to whether such reasoning order was at all recorded or passed by the Chief Engineer although, specific averments and allegations have been made in this regard by the petitioner in its rejoinder. In absence of such denial, the court has no other option but to presume that the averments/allegations made by the petitioner are correct and acceptable.

12. Relying on Tata Cellular (supra), particularly, in the light of observations made in paragraph 70, it has been argued by Mr. Nabam, learned senior Government Advocate that Government is the guardian of the finances of the State and it is expected to protect the financial interest of the State by accepting lowest rate offered by the respondent No. 6 on star items. Moreover, according to him, the right to refuse the higher/highest rate of any tenderer is always available to the Government. There is no dispute on the aforesaid settled position of law but he failed to appreciate that in the same paragraph of the aforesaid judgment, it is held that the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing the tender. Further it is held therein that there can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation and such right to choose cannot be considered to be arbitrary power and such power cannot be exercised for any collateral purpose. The settled law is that if the, discretionary power is exercised for any collateral purpose, it would offend the equality provision under Article 14 and it would be liable to be struck down.

13. In the present case, it is found that the respondent-Chief Engineer exercised his discretionary power on consideration of certain criterion which not provided in the NIT, like preference to the local firms/contractors and preference to lower rates on star items. This consideration of preference, in my considered view, is nothing but extraneous consideration and the respondent-Chief Engineer has given undue emphasis on the same for collateral purpose only to render undue favour to respondent No. 6.

14. The rates quoted by the petitioner except in some so called star items are same with the rates quoted by the respondent No. 6. It was incumbent upon the respondent-Chief Engineer, as Accepting authority, to know from the petitioner if it was ready to offer lower rates on the star items, as such exercise is normally

done in the financial interest of the Government in awarding the government contract. Such procedure was not adopted by the respondent authorities and the endorsement was made behind the back of the petitioner. It was not even intimated after his tender was rejected by the accepting authority. In my considered view, the petitioner, being recommended by the Committee for settlement of work, has acquired the right to know why his tender was rejected by the respondent-Chief Engineer and as to why the respondent No. 6 has been awarded with the contract work although the Committee did not recommend its case.

15. In *Jadish Mandal* (supra), it is held that the very purpose of constituting a Committee for scrutinizing the tender is to find out whether any freak low rate will affect the work if the contract is awarded to the tenderer. While awarding the contract, it is the duty of the tender Committee whether the contractor would be able to execute the work at the lowest rates offered by him. Because it is not unusual in certain cases that the contractor some times offers very low rate just to get the work order but it becomes impossible on his part to execute the work and has to leave midway as the rate quoted in some items are found to be unworkable and thereby putting the work in jeopardy. This aspect was not examined by the respondent-Chief Engineer while accepting the tender of the private respondent No. 6. He should be satisfied with sufficient reasoning that respondent No. 6 would be able to complete the work at the lowest rate offered by him and it would not leave the work midway. It appears that the respondent-Chief Engineer has mechanically and blindly accepted the rates offered by the private respondent No. 6 and it amounts to arbitrariness, irrationality, unreasonableness, biasness and smacks mala fide intention with collateral purpose and such decision must be declared unlawful and unsustainable.

16. I do not feel it necessary to discuss all the case laws as cited by the learned Counsel for the parties. In view of the clear factual position that the respondent-Chief Engineer rejected the petitioner's tender recommended by the Committee and settled the work with private respondent No. 6 arbitrarily in exercise of his discretionary power for collateral purpose, namely favouring the private respondent No. 6 on extraneous consideration not contemplated in the NIT as well as the SBD.

17. For what has been discussed above and reasons recorded, the impugned order dated 23.10.2009 (Annexure VII to the writ petition) is liable to be quashed and set aside, which I do hereby accordingly. The respondent authorities are directed to place the tenders of the petitioner and private respondent No. 6 before the Tender Evaluation Committee for reconsideration on the rates of star items quoted by the petitioner and the private respondent No. 6 and also possibility and feasibility of executing the work at such lower/lowest rates quoted by them without causing any financial loss to the Government. After such reconsideration and recommendation made by the Committee, the respondent-Superintending Engineer shall place the same before the respondent-

Chief Engineer, who shall take final decision and record reasons for such decision and also communicate the same to the parties concerned.

18. With the above observations and directions, this writ petition stands disposed of. There shall be no order as to cost.