

BEFORE

HON'BLE MR. JUSTICE HRISHIKESH ROY

1. Heard Mr. S Katakki learned counsel appearing for the petitioner. Also heard Mr. D P Chaliha learned senior counsel representing respondent No. 1. Mr. H Rahman learned Government Advocate makes submission on behalf of the State respondents.

2. This matter pertains to the selection of the respondent No. 4 for execution of the contract on the basis of the tender notice dated 30/09/09 issued by the Inspector General of Prisons, Assam. The contract pertains to supply of 11,000 numbers of woollen blankets for consumption in the jails in the State.

3. Amongst the 6 tenders the petitioner's offer at Rs. 234/- was found to be the second lowest and the offer of respondent No. 4 at Rs. 235/- was found to be the 3rd lowest. The tender of party which made the lowest offer was rejected as non responsive.

4. The petitioner challenged the Purchase Committee's decision taken on 17/11/09, whereby the Committee declined to consider the petitioner's offer purportedly due to i) non submission of the Sales Tax Clearance Certificate and ii) the petitioner had pledged the earnest money in favour of the IGP instead of Inspector General of Prisons.

5. Before proceeding further it may now be appropriate to extract Clause 6 and 7(a) of the tender notice, on the basis of which the petitioner's tender was found to be unacceptable by the Purchase Committee:-

Clause 6- The intending tenderers must deposit an earnest money calculated @ 2.5% of the estimated value of the articles tendered for in the form of National Savings Certificates (NSC)/Kisan Vikash Patra (KVP) to be pledged in favour of the Inspector General of Prisons Assam, provided that in case of Schedule Casts/Tribes and Other Backward Classes the earnest money may be reduced to 1%. In no circumstances Government Promissory notes, Savings Bank Passbook, Demand Drafts, cheque or any other mode of payment except as above, shall be considered unless accompanied by earnest money. No tender shall be considered unless accompanied by earnest money in the form of NSC/KVP duly pledged as aforesaid.

Clause-7-

(a) All tender must be accompanied by up to date Income Tax/Vat Registration Certificate/sales tax clearance certificate including PAN card.

6. Mr. S Katakki, learned counsel appearing for the petitioner submits that in so far as the Clause-6 which requires deposit of earnest money in the form of NSC/KVP to be pledged in favour of the Inspector General of Prisons, Assam, the petitioner in his application (dated 15/10/09) made to the postal authorities had applied for pledgement in favour of I.G. Prisons, Assam, Guwahati-22 and the said application of the petitioner as is required, was endorsed by the Superintendent in the Office of the Inspector general of Prisons, Assam, Guwahati and therefore the description of the pledged authority in the shorter version as IGP in the NSC/KVPs should not result in disqualification of the petitioner.

7. The learned counsel by reference to the letter dated 22/12/09 of the Assistant Post Master, NSC/KVP, Guwahati, submits that the pledged documents have been endorsed in favour of the Inspector General of Prisons, Assam and not to IGP and therefore the petitioner cannot be said to have breached the Clause 6 requirement.

8. The learned counsel also submits that the object of furnishing the earnest money is to show financial soundness and that the party is serious in getting the contract and it is submitted by Mr. Katakki that irrespective of whether NSC

/KVPs have been pledged in the name of the IGP , the same should be considered as sufficient compliance with Clause 6 of the contract conditions.

9. It is further submitted that the objection raised by the Purchase Committee with regard to pledging of earnest money has nothing to do with the substance of the pledged document but only with its form and since the postal authority had specifically clarified that the KVPs/NSCs have been pledged in favour of the Inspector general of Prisons , there is no justification to consider the petitioner's tender to be an invalid one.

10. Attacking the next ground of rejection of his tender, Mr. Kataki contends that the Assam General Sales Tax Act (hereinafter referred to as the AGST Act ) stood repealed and replaced by the Assam Value Added tax Act 2003 (hereinafter referred to as the VAT Act ), w.e.f 15/03/05 and under such circumstances, the requirement of furnishing a Sales Tax Clearance Certificate under Clause 7(a) is an impossibility and it is further submitted that none of the tenderers had submitted any Sales Tax Clearance Certificate and therefore, rejection of the petitioners on this ground was not at all justified.

11. Mr. Kataki refers to the VAT registration Certificate dated 21/10/2008 furnished by the petitioner and the Composition Permission to pay composition amount of tax granted to the petitioner by the Superintendent of Tax and submits that at the tender of the petitioner ought to be considered valid and cannot be rejected for non-furnishing the Sales Tax Clearance Certificate which could not be furnished by anyone.

12. Mr. DP Chaliha learned senior counsel for the respondent No. 4 submits that in pursuant to his selection by the Purchase Committee, the authority has already directed the respondent No. 4 to commence supply and on the basis of order dated 08/12/09, the respondent had placed orders for delivery of the goods and only because of the subsequent letter dated 24/12/09 of the deputy I.G. of Prisons, the supply order could not be executed by him.

13. Mr. Chaliha further submits that the petitioner should have submitted VAT Clearance Certificate instead of Sales Tax Clearance Certificate as required by Clause 7(a) of the NIT and for his failure to supply the VAT Clearance Certificate which has been supplied by the respondent No. 4, the petitioner's tender has rightly been not considered as responsive by the Purchase Committee.

14. Mr. Chaliha refers to the provisions of Section 8 of the General Clauses Act, 1897 to contend that when the AGST Act is repealed and replaced by the VAT Act, the requirement of furnishing a Sales Tax Clearance Certificate must be understood to mean a Vat Tax Clearance Certificate.

15. Mr. H Rahman the learned Government Advocate has produced the concerned records for perusal of the court. He fairly submits that none of the tenderers including the respondent No. 4 had submitted a Sales Tax Clearance Certificate but it is further submitted that validity of the other tenderers have been considered on the basis of the Vat Tax Clearance certificate enclosed by them.

16. The arguments advanced by the rival counsels indicate that the dispute in the present case can be resolved by answering as to whether the tender of the petitioner could be considered invalid because of his failure to supply a Sales Tax Clearance Certificate and whether under Clause 7(a), a tenderer is required to furnish a of Vat clearance certificate. Of course, the respondent No. 4 and other tenders have furnished a Vat Tax clearance certificate instead of a Sales tax clearance certificate and on that basis their tenders are accepted for consideration, whereas the petitioner's tender has not been considered, due to non submission of the Sales Tax Clearance certificate which according to the Purchase Committee is required to be submitted as per Clause 7(a) of the tender notice.

17. Even on a prima facie reading of Clause 7(a) it can be gathered that there is no requirement of furnishing a VAT tax clearance certificate and under such circumstance in my view, the petitioner could not have been considered to be an invalid tenderer under Clause 7(a), for non furnishing of a Vat clearance certificate as that was not stipulated in any of the clauses of the tender notice. In any case from the proceeding of the departmental Purchase Committee held on 17/11/09 (Annexure-G), the petitioner's tender was rejected for not furnishing a Sales Tax Clearance Certificate.

As his tender was considered invalid for non submission of the Sales tax clearance certificate and since none of the tenderers have produced Sales Tax clearance certificate, their rejection only of the petitioner's tender on this ground has to be declared as unjustified.

In this context the reference to Section 8 of the General Clauses Act by Mr. Chaliha in my considered view has no application in as much as in the case in hand, the Court is not scrutinising a provision of any enactment but is examining the purport of a tender clause only.

18. In so far as the other ground i.e. non description of the pledged authority in full in the pledged documents, I find that the description in short version has been made by the postal authorities who have later clarified that the documents have been pledged in favour of the Inspector General of Prisons, Assam.

In this context we may usefully refer to the decision of the Apex Court in Global Energy Ltd. Vs. M/s. Adani Exports Ltd. reported in AIR 2005 SCC 2653, where the Apex Court held that the object of deposit of earnest money is to indicate that the party is financially sound and is serious about getting the work in question.

This Court in the case of Bidhu Bhusan Chowdhury & Anr Vs. Union Of India reported in 2000 (1) GLT 342 has held that when earnest money is deposited in wrong name and the same has been clarified subsequently by the bank, the rejection of a tenderer on such ground is not tenable as the same would amount to rejection on the basis form and not on substances.

Having regard to the above decisions, I am of the opinion that non consideration of the petitioner's tender on the ground that the earnest money has not been pledged appropriately is not justified and accordingly I find every reason to declare that non consideration of the petitioner's tender by the Purchase Board on 17/11/09 was illegal and can not be sustained in law.

19. Selection of a party to execute a supply work through tender process would normally require selection of the party who has quoted the lowest price and in this case the petitioner's quotation was lower than the respondent No. 4 to whom the work order was issued. Considering the lower quotation of the petitioner, he has a better right in my view to secure the contract in question and under such circumstances the work order granted in favour of the respondent No. 4 is declared to be illegal.

20. In view of the above, the respondent authorities are directed to take necessary steps to consider the offer of the petitioner and pass consequential necessary orders.

21. This writ petition stands allowed accordingly.