

THE HIGH COURT OF MEGHALAYA

W.P. (C) No.36/2015

Shri. Baiengskhem S. Lyngdoh,
S/o (L) T.G. Syiemiong,
R/o Mawlai Mawroh,
Shillong, East Khasi Hills District,
Meghalaya.

::: Petitioner

-Vs-

1. The State of Meghalaya represented by the
Secretary to the Govt. of Meghalaya,
Public Works Department, Shillong.

2. The Chief Engineer,
Public Works Department (Building),
Govt. of Meghalaya, Shillong.

3. The Executive Engineer,
Health Engineering Wing,
Directorate of Health Services,
Govt. of Meghalaya, Shillong.

4. Smti. Banalari Khongwar,
R/o Mawlai Nongkwar, Shillong,
East Khasi Hills District, Meghalaya.

::: Respondents

BEFORE THE HON'BLE MR. JUSTICE T NANDAKUMAR SINGH

For the petitioner : Mr. N Mozika,
Mr. P Nongbri, Advs,

For the respondents : Mr. ND Chullai, Sr.GA,
Mr. B Khyriem, GA,
Mr. B Bhattacharjee, Adv for respt.No.4

Date of hearing : **28.10.2015**

Date of Judgment : **28.10.2015**

JUDGMENT AND ORDER (ORAL)

Heard Mr. N Mozika, learned counsel for the petitioner, Mr. ND Chullai, learned Sr.GA assisted by Mr. B Khyriem, learned GA appearing for the respondents No.1-3 and Mr. B Bhattacharjee, learned counsel for the respondent No.4.

2. By this writ petition, the petitioner is assailing the final work order No.PW/CE/BD/TR/129/2014/48 dated 8th December, 2014 for construction of residential school at Shnongkalong village, Ranikor, West Khasi Hills to the respondent No.4 (*Annexure-11 to the writ petition*) and also for a direction to the respondents No.1-3 to award the said contract work in favour of the petitioner.

3. The fact of the case leading to the filing of the present writ petition is briefly noted. The respondent No.2-Chief Engineer, PWD (B), Govt. of Meghalaya Shillong issued Notice Inviting Tender (for short 'NIT') No.PW/CE/BD/TR/129/2014/6 dated 04.08.2014 for construction of Residential Schools in 20 Blocks in the State of Meghalaya (9 Nos. of Schools in Khasi and Ri Bhoi Districts). The tenders were invited two bids system i.e. technical bid and price bid. The eligibility criteria for the said contract work are clearly mentioned in the said NIT dated 04.08.2014. For convenience the eligibility criteria for the work mentioned in the said NIT dated 04.08.2014 is reproduced hereunder:-

“Eligibility criteria for the work:-

The tenderer(s) should have satisfactorily completed during the last 5 (Five) years of at least:-

*(i) 1 (one) work of similar nature and having a magnitude of **50% (Fifty percent-price updated @ 10% per annum compoundable)** of the value for which pre-qualification is sought **OR***

*(ii) 2 (two) works of similar nature and having a magnitude of **30% (Thirty percent each-price updated @ 10% per annum compoundable)** of the value for which pre-qualification is sought **OR***

*(iii) The Bidder should be satisfactorily executing currently at least 1 (one) work** of similar nature and having completed **billing not less than 50%** of the current value of work in any Government organization for which pre-qualification is sought.*

*The work of construction of RCC Building at least G+1/RCC framed building with CGI sheet with composite works of Civil work, Electrical work, Sanitary and water supply etc. shall be considered as similar work. **OR** Construction of RCC Bridge and peripherals shall be considered as work of similar nature."*

4. The petitioner also constituted a joint venture with one Shri.D.C.Khongsit, who is a Registered Class-I Contractor. The joint venture of the petitioner and Shri.D.C.Khongsit being eligible in all respects had submitted their bids under the two bids system (i.e. technical bid and financial bid) for the work "Construction of Residential School at Shnongkalong village, Ranikor, West Khasi Hills District". Four other bidders namely, Smti.Banalari Khongwar (respondent No.4), Shri.R.Kenneth Hashah, Shri.Hapbok Lyngkhai and Shri.R.S. Gallong also submitted their bids for the said contract work. As per the said NIT, the approximately tender value for the work ("construction of residential school at Shnongkalong village, Ranikor, West Khasi Hills District") was Rs.2,44,91,000/- (Rupees two cores forty four lakhs ninety one thousand) only. The eligibility criteria laid down in the said NIT was that the tenderer should have satisfactorily completed during the last 5 (five) years at least:

(i) 1 (one) work of similar nature and having a magnitude of 50% of the value for which pre-qualification is sought, OR

(ii) 2 (two) works of similar nature and having a magnitude of 30% of the value for which pre-qualification is sought, OR

(iii) Should be successfully executing currently at least 1 (one) work of similar nature and having completed billing not less than 50% of the current value of work.

5. As per the information received by the petitioner under the Right to Information Act, 2005 from the office of the respondent No.2, the respondent No.4 in support of her work experience had submitted the

Completion Certificate dated 28.10.2010 issued by the Executive Engineer (HEW), Directorate of Health Services, Meghalaya-respondent No.3 that the respondent No.4 had executed and satisfactorily completed the following works:

(1) Name of Work	Construction of Trauma Centre including site preparation at Nongpoh, CHC Complex and Upgradation of Blood Bank at Civil Hospital, Nongpoh in Ri Bhoi District.
(2) Name of Contractor	Smti.Banalari Khongwar
(3) Work Order No.	HEW/TB-CS/2008/96.9166 dated Shillong the 13/08/2008.
(4) Stipulated date of completion	13/06/2010
(5) Date of completion	08/07/2010
(6) Tender value	1,69,09,440/-
(7) Actual value	1,69,09,440/-

6. It is alleged in the writ petition that the respondent No.4 with an ulterior motive did not annex a copy of the said purported work order No.HEW/TB-CS/2008/96.9166 dated Shillong the 13.08.2008 along with her bid. The said completion certificate dated 28.10.2010 was taken into consideration by the State respondents in deciding the purported claim of the respondent No.4 that the contract work of Rs.1,69,09,440/- was completed in the year 2010, and also that the respondent No.4 work experience was for Rs.2,47,57,000/- and qualified for the said contract work. The petitioner also obtained copies of the said work orders issued by the respondent No.3 in favour of the respondent No.4 including the said work order No.HEW/TB-CS/2008/96.9166 dated Shillong, the 13.08.2008. Surprisingly, the copy of the work order No.HEW/TB-CS/2008/96.9166 dated 13.08.2008 issued by the respondent No.3 in favour of the respondent No.4 stated that the said work order was for Rs.81,000/- (Rupees eighty one thousand only) and the work awarded was for "Providing Shelves and Platform Table to Blood Bank". From the information received by the petitioner, it was further transpired that though the respondent No.3 had awarded some additional works to the

respondent No.4 during the year 2008, all those works were under separate work orders. It is further stated that the total work orders in favour of the respondent No.4 were also well below the eligibility criteria.

7. The technical bids of all the five tenderers were opened and a summary of particulars for pre-qualification of the bidders was prepared. The said summary was placed before the 9th Departmental Tender Committee on 19.09.2014 and as per the decision of the Departmental Tender Committee, out of the five tenderers, one tenderer namely, R.S. Gallong was declared to be not qualified. The decision of the Departmental Tender Committee as to the eligibility of the respondent No.4 based on the said Completion Certificate dated 28.10.2010 was arbitrarily and illegally. It is also the case of the petitioner that the three tenderers as per the Departmental Tender Committee were qualified and the three qualified tenderes were Smti.Banalari Khongwar (respondent No.4), joint venture of the petitioner and Shri.D.C. Khongsit and Shri.R. Kennedy Hahshah. As per the proceedings of the Departmental Tender Committee, the said three tenderers i.e. the joint venture of the petitioner, the respondent No.4 and Shri.R.Kennedy Hahshah had quoted the same rate in their bids. But without giving any reason, the respondent No.4 had been picked up and awarded the said contract work to her vide the impugned final work order dated 08.12.2014.

8. The respondents No.1-3 had filed joint affidavit-in-opposition dated 26.06.2015. In paras 8 & 9 of the writ petition, the petitioner had categorically stated that the respondent No.4 had been picked up without giving any reason for awarding the said contract work to her vide the impugned final work order dated 08.12.2014 and also that the respondent No.4 was not the eligible bidder. In other words, the case of the petitioner in the present writ petition is that no reason had been given for picking up the

respondent No.4 amongst the three bidders including the petitioner, who had submitted the same rate in their bids. The State respondents in their joint affidavit-in-opposition vide paras 13 & 17 stated that the three qualified bidders quoted the same rate. However, the work was awarded to the respondent No.4 as per the decision of the 10th Departmental Tender Committee meeting held on 10.10.2014 and as per the approval of the Govt. Para 13 of the joint affidavit-in-opposition filed by the respondents No.1-3 reads as follows:-

“13. That with regard to the statements made in paragraph 9 of the writ petition the answering deponent as stated by the petitioner, the 3 (three) qualified bidders quoted the same rate. However, the work was awarded to the respondent No.4 as per the decision of the 10th Departmental Tender Committee meeting held on 10th October 2014 and as per Government approval for the same (copy of the Tender Documents and Letter No.PW/ADT/69/2014/8 dated 13th November, 2014 are marked as Annexure-I)”

9. On bare perusal of para 13 of the joint affidavit-in-opposition filed by the respondents No.1-3, it is clear that the respondents No.1-3 in their joint affidavit-in-opposition did not mention the reason for picking up the respondent No.4 amongst the three qualified bidders who quoted the same rate in their bids for awarding the said contract work vide the impugned work order dated 08.12.2014. The respondents No.1-3 in their joint affidavit-in-opposition also annexed the copy of the minutes of the 10th Departmental Tender Committee meeting held on 10.10.2014 as Annexure to the joint affidavit-in-opposition. For easy reference, the relevant portion of the minutes of the 10th Departmental Tender Committee held on 10.10.2014 is quoted hereunder:-

“Minutes of the 10th (Tenth) Departmental Tender Committee Meeting held on the 10th October 2014 in the Conference Room of P.W.D. (R&B) Secretariat, Lower Lachiumere, Shillong.

Members Present:-

1. Shri.M.M. Sun, : Chairman
Secretary to the Govt. of Meghalaya,
P.W.D. (R&B), Shillong.

2. Shri.M. Phanbuh, : Convenor
Chief Engineer P.W.D. (B), Meghalaya,
Shillong.

3. Shri. P.A. Sawian, : Member
Officer on Special Duty
Finance (E) Department, Shillong.

4. Shri. L.M. Sangma, : Member
Secretary, Law Department,
Meghalaya, Shillong.

The Chairman welcomed all the Members present in the meeting and requested the Chief Engineer P.W.D. (Bldg) to initiate the discussion as per the Agenda stated here under:

Agenda-1: Residential Schools in 20 Blocks in the State of Meghalaya (9 Nos. of Schools in Khasi and Ri-Bhoi District) – IN GROUPS.

GROUP-1: Construction of Residential School at Mawsmat Nongthymmai Elaka, Shella Bholaganj, East Khasi Hills (Financial Bids there-of)

Approximate Tender Value: Rs.2,44,91,000.00

As per decision of the 9th Tender Committee Meeting held on 19th September, 2014 vide Agenda 5, Technical bids were pre-qualified for Opening of the Financial Bid of the following bidders namely:

1. Smti.Banalari Khongwar 2. Shri.Hapbok Lyngkhai 3. Dorjen Khongsni.

Subsequently, Financial Bid of the bidders were opened on the 1st October 2014 in presence of the bidders.

The Committee observed that all 3 (Three) Bidders quoted the same rate which is AT PAR the S.O.R. (Bldg) of 2013-2014 as applicable in Khasi Hills and AT PAR the S.O.R. (Electrical) of 2013-2014 as applicable in the State of Meghalaya.

After a threadbare discussion, the Committee recommended for allotment of work to the Bidder Smti. Banalari Khongwar at her own quoted rate of AT PAR S.O.R. (Buildings) of 2013-2014 amounting to Rs.2,26,07,000.00 and AT PAR the S.O.R. (Electrical) of 2013-2014 amounting to Rs.18,84,000.00.

.....”

10. On bare perusal of the minutes of the 10th Departmental Tender Committee, it is clear that no reason had been given for giving preference to the respondent No.4 where there were three qualified bidders including the petitioner who quoted the same rate in their bids for awarding the said contract work vide the impugned work order dated 08.12.2014.

11. The respondent No.4 also filed affidavit-in-opposition. Para 10 of the affidavit-in-opposition filed by the respondent No.4, the respondent No.4 stated that she has possessed all the eligibility criteria to take part in the tender process for the said contract work. For easy reference, para 10 of the affidavit-in-opposition filed by the respondent No.4 is quoted hereunder:-

“10. That the averments made in paragraph No.5, 6, 7, 8 and 9 of the writ petition are not correct and hereby denied. In reply thereto, it is respectfully stated that the answering deponent had all the eligibility criteria to take part in the tender process and bid furnished by her was a valid bid in the matter and the same was settled rightfully with her. It may be stated here that the list of works orders annexed by the writ petitioner in his writ petition as Annexure-6 make it amply clear that all those work orders were issued, undertaken and completed by the answering deponent in pursuance of one work resulting out of one scheme relating to the construction of Trauma centre including site preparation at Nongpoh, CHC Complex and upgradation of Blood Bank at Civil Hospital, Nongpoh Ri Bhoi District. It is further stated that an arithmetical calculation of all the amounts shown against the various work orders make a total of Rs.12,512,840 which made the answering deponent an eligible bidder in the tender process on the basis of the calculation provided in the eligibility criteria in the Notice Inviting Tender. It may be stated here that in the list of works annexed by the petitioner in his writ petition, the amount of Rs.1,41,500 reflected against work order at serial No.5 is not correct. The correct amount is Rs.1,45,000 and the same is projected in the related work order No.HEW/TB-CS/2006/265/2144 dated 15.03.2007. It is further stated that the imputation of allegation ulterior motive on the answering deponent by the petitioner on the basis of the certificate dated 28.10.2010 is totally unwarranted and uncalled for as the same was an outcome of clerical error and omission resulting out of no fault of answering deponent. The previous works undertaken by the answering deponent forming the basis of fulfillment of her eligibility criteria are all parts of records and there is no question of any foul play in the matter. The entire settlement in favour of the answering deponent, as such, is totally justified and valid and there is no

question of extension of any undue favour to the answering deponent by the authorities concerned.”

12. Mr. N Mozika, learned counsel for the petitioner by relying on the decision of the Apex Court in ***Natural Resources Allocation in Re. Special Reference No.1 of 2012 reported in (2012) 10 SCC 1*** contended that pick and choose method shall not be adopted out of the several persons falling in the same category for the purpose of issuing contract work. Para 183 of the SCC in ***Natural Resources Allocation in Re. Special Reference No.1 of 2012*** case (*Supra*) reads as follows:-

“183.The parameters laid down by this Court on the scope of applicability of Article 14 of the Constitution of India, in matters where the State, its instrumentalities, and their functionaries, are engaged in contractual obligations (as they emerge from the judgments extracted in paras 159 to 182 above) are being briefly paraphrased. For an action to be able to withstand the test of Article 14 of the Constitution of India, it has already been expressed in the main opinion that it has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. The judgments referred to, endorse all those requirements where the State, is instrumentalities, and their functionaries, are engaged in contractual transactions. Therefore, all “governmental policy” drawn with reference to contractual matters, it has been held, must conform to the aforesaid parameters. While Article 14 of the Constitution of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it does not permit the power of pick and choose arbitrarily out of several persons falling in the same category. Therefore, criteria or procedure have to be adopted so that the choice among those falling in the same category is based on reason, fair play and non-arbitrariness. Even if there are only two contenders falling in the zone of consideration, there should be a clear, transparent and objective criteria or procedure to indicate which out of the two is to be preferred. It is this, which would ensure transparency.”

13. The Apex Court in ***Association of Registration Plates v. Union of India & Ors: (2005) 1 SCC 679*** held that Article 14 of the Constitution of India prohibits the Govt. from arbitrarily choosing a contractor

at its will and pleasure and has to act reasonably, fairly and in public interest in awarding contract. Para 43 of the **Association of Registration Plates** case (*Supra*) reads as follows:-

*“43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (*supra*) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.”*

14. The Apex Court in **B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd & Anr: (2006) 11 SCC 548** held that the requirements in a tender notice can be classified into two categories: those which laid down the essential conditions of the eligibility and the other which are merely ancillary or subsidiary with the main object to be achieved. In the first case, the authority issuing the tender may be required to enforce them rigidly. Therefore, the ratio decidendi in **B.S.N. Joshi & Sons Ltd** case (*Supra*) is that the essential eligibility criteria as mentioned in the NIT should be strictly followed. Para 61 of the SCC in **B.S.N. Joshi & Sons Ltd** case (*Supra*) reads as follows:-

*“61. Law on the similar term has been laid down in **Poddar Steel Corpn. v. Ganesh Engg. Works: (1991) 3 SCC 273** in the following terms: (SCC p.276, para 6)*

“6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank Clause 6 of the tender notice was not obeyed

literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. 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. The requirements in a tender notice can be classified into two categories – those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance with the condition in appropriate cases.”

15. It is now well settled law that the validity or otherwise of the order is to be determined on the reason mentioned therein; reason for passing the order cannot be supplemented by way of an affidavit or otherwise. In the instant case, this Court has given anxious consideration to the minutes of the 10th Departmental Tender Committee held on 10.10.2014 and is of the considered view that no reason had been given for picking up the respondent No.4 amongst the tenderers who submitted the same rate in their bids for awarding the said contract work vide the impugned work order dated 08.12.2014. Mr. B Bhattacharjee, learned counsel for the respondent No.4 by referring to the affidavit-in-opposition filed by the respondent No.4 strenuously contended that the respondent No.4 had possessed all the eligibility criteria for submitting the bid for the said contract work for which the said NIT had been issued. He also further contended that the 10th Departmental Tender Committee had rightly come to the finding that the respondent No.4 possessed all the eligibility criteria for submitting the tender. This disputed point is not deciding in the present writ petition. This Court is of the considered view that this point is to be decided by the Departmental Tender Committee by looking into the documents submitted by the petitioner and the respondent No.4 on or before the last date of submitting the tender.

But it is very clear from the record that no special reason had been given by the State respondents for awarding the said contract work by issuing the impugned work order dated 08.12.2014 to the respondent No.4.

16. For the reasons discussed above, this Court is of the considered view that sufficient materials had been made out for interfering with the impugned work order dated 08.12.2014. Accordingly, the impugned work order dated 08.12.2014 is hereby set aside and quashed. However, the State respondents is directed to hold the Departmental Tender Committee afresh for consideration as to whether the respondent No.4 had possessed the eligibility criteria or not on the basis of the documents submitted by the respondent No.4 on or before the last date of submitting her (respondent No.4) bids as mentioned in the said NIT and as to whom amongst the qualified bidders including the petitioner and the respondent No.4 the contract work is to be awarded? As the contract work is for construction of a residential school, in the interest of public, and also for the interest of the students, it is required to be completed as expeditiously as possible. As such, the Departmental Tender Committee is directed to complete the whole exercise within a period of 45 days from the date of receipt of a certified copy of this judgment and order.

17. Interim order dated 12.03.2015 also stands vacated.

18. Writ petition is disposed of with the above observations and directions.

JUDGE

LAM