

(2004) 02 GAU CK 0013

Gauhati High Court

Case No: WP (C) No. 642 of 2004

Abul Kalam Azad

APPELLANT

Vs

B.S.N.L. and Others

RESPONDENT

Date of Decision: Feb. 27, 2004**Acts Referred:**

- Constitution of India, 1950 - Article 14

Citation: (2005) 1 GLR 252**Hon'ble Judges:** Ranjan Gogoi, J**Bench:** Single Bench**Advocate:** S. Kalita, A. Ganguly, Th Borbora and A. Bora, for the Appellant; S.N. Sarma, B.M. Choudhury and Y. Doloi, for the Respondent**Final Decision:** Dismissed

Judgement

Ranjan Gogoi, J.

Tenders for the work of carriage of tower materials (40 meters x 60 meters) by mechanical transport from Jabalpur to different places in Assam were invited from eligible contractors by the Executive Engineer (C), BSNL, Civil Division, Guwahati. The estimated cost of the work was mentioned in the NIT to be Rs. 25,64,929.00. The time limit for completion was stipulated as one month. Under the NIT, a tenderer, to be eligible for consideration, was required to have satisfactorily and successfully completed at least three similar works each not less than Rs. 8.50 lakh under the Central Government/State Government or Public Sector Undertakings during the last one year. In the NIT, it was further stipulated that a tenderer would be required to deposit Rs. 5 lakhs as guarantee money apart from earnest money.

2. The writ petitioner being aggrieved by the incorporation of the above noted two conditions in the NIT, has instituted the present writ petition contending that the said two requirements apart from being arbitrary and unreasonable have been imposed by the respondent authority only with a view to favouring the respondent

No. 5 for the grant of the contract. This Court acting on the basis of the statements made in the writ petition to the effect that pursuant to the NIT issued only one tender was received and the further statement that the contract had not yet been awarded, by an interim order dated 6.2.2004, had directed that the award of the contract in favour of the respondent No. 5 shall remain suspended. The respondent No. 5 thereafter had approached this Court for vacation of the interim order dated 6.2.2004 contending, inter alia, that the contract had already been granted to the said respondent No. 5 on 23.1.2004 and the same was in the process of execution when on account of the interim order dated 6.2.2004 the same had to be stopped. As the execution of the contract had come to a stand still and having regard to the public interest involved in the matter, this Court with the consent of the learned counsel for the parties, had taken up the writ petition itself for hearing; the hearing having concluded today, orders are being pronounced in open Court.

3. The primary thrust of the challenge made in the writ petition appears to be in respect of the two Clauses of the NIT (Notice Inviting Tender), i.e., the stipulation with regard to successful execution of three similar works of the value of Rs. 8.50 lakh in the preceding one year and secondly the condition imposing the requirement, in all tenderers, to furnish guarantee money to the extent of Rs. 5,00,000/-. Counsel for the petitioner has argued that the aforesaid two clauses of the NIT impose wholly unreasonable requirements besides being arbitrary and unjust. The BSNL follows the CPWD Code and under the relevant Clause of the said Code what a tenderer is required to execute is three works of similar nature of the value of at least 30% of the estimated costs of the works for which the tenders were invited. According to the learned counsel, under the CPWD Manual, satisfactory completion of 3 such works are required to be made in the preceding 5 years whereas in the NIT such a requirement has been imposed in so far as the preceding year alone is concerned. Learned counsel for the petitioner has further contended that furnishing of guarantee money to the extent of Rs. 5 lakh along with the tender documents is not contemplated anywhere in the CPWD Code. According to the writ petitioner, the respondent authority, who had issued the NIT was not competent to incorporate any such condition in the NIT; yet the same has been so incorporated with an evil design to ensure that the contract goes in favour of a particular chosen person. On the aforesaid broad basis, it has been contended that the terms of the NIT and the grant of the contract in favour of the respondent No. 5 must be declared to be bad in law. The arguments advanced on behalf of the petitioner have been further sought to be fortified by reference to the pleadings made to the effect that in response to the NIT issued only one tenderer had submitted his tender, which figure subsequently stood corrected to two.

4. The arguments advanced on behalf of the writ petitioner have met with stiff resistance from Mr. BN Chaudhury, learned Addl. CGSC appearing on behalf of the official respondents as well as Mr. S.N Sharma, learned counsel appearing on behalf of the respondent No. 5. Reliance on the affidavit filed on behalf of the official

respondents has been made by the learned Addl. CGSC to contend that the incorporation of the two conditions under challenge has been done purely in the interest of the works. According to the learned counsel for the respondents, the works involved carriage of Lower materials of unusual dimensions by road transport from distant Jabalpur to the different places in the North East. The BSNL was committed to providing a mobile service network to the customers in the N.E. Region by the end of March 2004 and the materials sought to be transported through the contract works in question were for the said purpose. There was no room for any error or slip in the course of execution as everything was time-bound. In view of the commitment of the BSNL to provide mobile service to the customers within a time-bound framework, the BSNL had to take into account that any delay in the execution of the works may have a detrimental effect in providing mobile service to the customers in the N.E. Region. That is why it was essential on the part of the respondent authority to take extra care and caution in choosing the best person to ensure that the person to whom the work is awarded must be a wholly competent and able person to successfully execute the works. Learned counsel for the respondents by placing reliance on the provisions of Clause 19.14 of the CPWD Manual, has submitted that the requirement of execution of three similar works in the preceding

5. years as spelt out vide Clause 19.14(c)(i) has been amended and the stipulation with regard to time, i.e., 5 years has been taken away by the modified clause incorporated. Referring to Clause 19.3 of the Manual, learned counsel for the respondents has argued that carriage of materials is a specialised contract and in respect of such contracts under Clause 19.3(a)(i) prescription of pre-qualification criteria in the NIT was within the domain of the respondent authority. It is in exercise of the aforesaid power under the CPWD Manual that the impugned conditions in the NIT have been incorporated. Reliance in this regard has been placed on the averments made in the affidavit filed to contend that it is the work and the interest of the work alone that was considered while imposing the said two requirements. There is a subsidiary argument advanced on behalf of the respondents to the effect that, even otherwise, if completion of three similar works each of the value of at least 30% of the estimated cost of the contracted works is taken into account during the preceding 5 years, the petitioner, by his own showing, would not be eligible for grant of the contract works.

6. The submissions advanced on behalf of the rival parties have received due consideration of this Court. What particular clauses and conditions should be incorporated in a NIT is primarily for the authority issuing the NIT to decide. The authority, which required a particular work to be executed within a particular time-span must be understood to be the best judge of the situation. The power to impose conditions in a notice inviting tenders is within the realm of freedom to contract which freedom must be allowed to have a free play. The role of the Courts would come only if the clauses or the conditions incorporated in a NIT are ex facie

not relatable to the interest of the work or on the very face of it are arbitrary, permitting an inference that such clauses or conditions have been promoted by reasons extraneous and collateral. Every clause or condition incorporated in a NIT may have the effect of making a certain category of intending tenderers ineligible. It is for this reason that the approach of the Court in such matters must be slow and cautious. In the present case, what this Court has noticed is that the contract is required to be performed within a very short time, i.e., one month and a huge quantity of materials was required to be transported by road transport covering a huge distance of several thousand ms. It must be noticed that a policy to have a mobile network throughout the North East from a particular date had already been announced. It was, therefore, necessary to ensure that the necessary construction materials arrive at the sites well in time so that the contract work is executed without any impediment. In such a situation, there will be nothing unusual in the authority in prescribing certain conditions in the NIT which may at first blush appear to be out of the ordinary. Naturally, if the works which are of a specialised nature and had to be executed within a particular time and that too without any margin of error or accident, the authorities cannot be blamed for incorporation of the two conditions in the NIT which has come to be challenged in the present proceeding. The power to lay down such conditions is also traceable to the provisions of the CPWD Manual. That the petitioner became ineligible because of the incorporation of the aforesaid two conditions would hardly invite the applicability of Article 14 of the Constitution as it has been held that every condition incorporated in a contract may have the effect of depriving one person or the other. If such a deprivation is inevitable in the larger interest of the project, for public good and in the public interest, a conclusion which this Court is inclined to reach on the facts stated above. Certainly this Court will not stand in the way.

7. For all the aforesaid reasons, I am unable to hold that the petitioner would be entitled to any relief. The writ petition is, therefore, found to be without any merit and the same shall stand dismissed. Interim order dated 6.2.2004 shall stand vacated. However, having regard to the totality and facts and circumstances of the case, there shall be no order as to costs.