

(2013) 08 GAU CK 0039

Gauhati High Court

Case No: Writ Petition (C) No. 1225 of 2013

M/s. Brahmaputra Automobiles
Pvt. Ltd.

APPELLANT

Vs

The State of Assam, The Director
and M/s. R. Champaklal (Assam)
and Co.

RESPONDENT

Date of Decision: Aug. 2, 2013

Citation: (2014) 1 GLD 191 : (2013) 4 GLT 841

Hon'ble Judges: B.K. Sharma, J

Bench: Single Bench

Advocate: I. Choudhury and Mr. G. Choudhury, for the Appellant; D. Saikia, AAG, Assam
and Mr. K.R. Surana, Adv for R/3, for the Respondent

Final Decision: Dismissed

Judgement

B.K. Sharma, J.

Both the writ petitions challenging the action of the respondents in rejecting the tender submitted by the petitioner in respect of the particular NIT have been heard together and are being disposed of by this common judgment and order.

WP (C) No. 1520/2013

1. The petitioner M/s. D.B. Enterprise, represented by its proprietor, as claimed in the writ petition, is engaged in various kinds of supply works including supply of goods to various department of Govt. of Assam. Responding to the NIT dated 07/02/2013 inviting offers for supply of kitchen devices, more particularly, Stainless Steel plate and glass for Lower Primary and Upper Primary Schools under Midday meal scheme, the petitioner offered its bid. The process of tender was a 2 (two) bid system, technical bid followed by commercial bid. The bidders were required to supply the samples of the items mentioned in the NIT. The last date of submission of bid documents was 18/02/2013. The bids were to be opened on the same day and

the date of opening of the commercial bid was to be intimated to the qualified bidders on the date of opening of technical bids. According to the petitioner, it came to know about the decision of the tender committee to award the contract to the respondent no. 3 whose offered rate was Rs. 122/- per set of one plate and one glass as against the petitioner's offered rate of Rs. 111.15. It is the case of the petitioner that there being no valid ground to reject its technical bid, its commercial bid should have been considered and awarded with the contract, more particularly, when its bid value was lower than that of the respondent No. 3.

2. In the counter affidavit filed by the respondents, it has been stated that while selecting the respondent No. 3 for the contract, the commercial bids were opened in respect of those tenderers whose samples were found satisfactory and technical bids were also found valid. As regards the petitioner's bid it has been stated that its tender was rejected because of non-fulfillment of one of the criteria i.e. annual sales turnover of Rs. 2 crores in any single year during the past 3 (three) years.

3. In response to the said plea of the respondents in their counter affidavit, the petitioner has contended in its affidavit-in-reply that it is wholly incorrect to say that the petitioner did not submit any evidence of having received a minimum sale turnover of Rs. 2 crores in any single year during the last three years. It has been stated that the petitioner is the sole proprietor of 3 (three) firms, namely, M/s. D.B. Enterprise, M/s. Smooth Wine and M/s. Tanvi Enterprise. Taking together all the 3 units, their annual turnover is more than Rs. 2 crores in the year 2011-12 and thus its technical bid could not have been rejected. As shown in the affidavit-in-reply, the annual turnover of the 3 units are as follows:-

M/s. D.B. Enterprise (petitioner) Rs. 56,10,000/-

M/s. Smooth Wine Rs. 1,58,78,169/-

M/s. Tanvi Enterprise Rs. 9,90,000/-.

WP (C) No. 1225/2013

4. The petitioner is a company duly incorporated under the Companies Act, 1956 having its registered office at Guwahati. According to the petitioner, it is engaged in manufacturing as well as resale of various commodities like motor parts, cars, vehicles, trucks, accessories, iron and steel furniture, etc. It is also engaged in supply of goods to various departments of Govt. of Assam. Referring to the aforesaid NIT, the petitioner has stated in the writ petition that in response to the said NIT it submitted its tender putting the rate of Rs. 108/- which is much lower than the rate offered by the Respondent no. 3 (Rs. 122/-). Thus according to the petitioner, the respondents ought to have accepted its tender and awarded the contract instead of awarding the same to the respondent No. 3.

5. In the counter affidavit filed by the respondents it has been stated that upon technical evaluation of the bids, it was found that its technical bid was not

technically acceptable as per terms and conditions of the NIT. As stated in the affidavit, 11 tenderers participated in the tender process and after technical evaluation, 3 tenderers were rejected including that of the petitioner. Referring to the purchase committee meeting held on 26.2.2013 under the Chairmanship of the Commissioner and Secretary, Education (Ele) Department, it has been stated that the said committee unanimously decided not to approve the samples furnished by the petitioner as the same was found un-finished and un-safe for students and not up to the mark for use of the students.

6. In the affidavit-in-opposition filed by the respondent No. 3 it has been stated that the sample furnished by the respondent No. 3 having demonstrated superior quality to the samples furnished by the petitioner, the tender committee rightly selected it for awarding of the contract. Referring to the certificate of registration annexed to the writ petition, it is stated that it does not disclose that the petitioner is authorized to sale kitchen equipments, devices and utensils.

7. I have heard Mr. I. Choudhury, learned counsel appearing for the petitioner in WP (C) No. 1520/2013. I have also heard Mr. G. Choudhury, learned counsel appearing for the petitioner in WP (C) No. 1225/2013. Mr. D. Saikia, learned AAG, Assam, appearing for the official respondents made his submission in reference to the stand of the respondents in their counter affidavit and also records produced by him. Mr. K.R. Surana, learned counsel appearing for the successful bidder i.e. the respondent No. 3, while adopting the arguments advanced by the learned AAG, Assam also submitted that the case of the petitioners being devoid of merit, both the writ petitions are liable to be dismissed.

8. Mr. I. Choudhury, learned counsel for the petitioner in WP (C) No. 1520/2013 in his persuasive pursuits attributing fault on the part of the respondents in rejecting the technical bid of the petitioner submitted that the annual turnover of the petitioner being more than Rs. 2 crores, its bid would not have been rejected on the ground of non-conforming to the requirement of annual turnover. Referring to the turnover of the 3 (three) units/firms of the petitioner's proprietor, he submitted that it being not the requirement of the turnover annually in respect of the tenderer, the tender committee ought to have considered the annual turnover of all the 3 firms of the proprietor of the petitioner form. In this connection, he placed reliance on two decisions, which are reported in New Horizons Limited and Another Vs. Union of India (UOI) and Others, and G.R. Engineering Works Ltd. Vs. Oil India Ltd. and Others.

9. Countering the above argument, both Mr. D. Saikia, learned AAG, Assam and Mr. K.R. Surana, learned counsel for respondent No. 3 referring to the various clauses of the NIT submitted that the petitioner cannot claim the benefit of annual turn over of some other firms, proprietor of which might be the petitioner's proprietor. Emphasising the need for reading the tender conditions compositely, it was also submitted that on a total reading of the said conditions, there is absolutely no

manner of doubt that the petitioner lacked in the requisite criterion of annual turn over and accordingly the tender committee rightly rejected its technical bid.

10. As regards the second writ petition, Mr. G. Choudhury, learned counsel appearing for the petitioner submitted that its bid value being much lower than that of the respondent No. 3, the authority could not have rejected its bid at the very threshold i.e. at the stage of technical evaluation. According to him, the committee ought to have considered is commercial bid upon acceptance of the technical bid. Countering the said argument, both Mr. Saikia, learned AAG, Assam and Mr. K.R. Surana, learned counsel for official respondents and private respondent No. 3 submitted that it is for the technical committee to consider the technical bids in reference to the various parameters laid down in the NIT and the petitioner cannot dictate its terms. They submitted that merely because the bid amount of the petitioner was lower than that of the respondent no. 3, the same cannot be the whole criterion for acceptance of tender.

11. I have given my anxious consideration to the submissions made by the learned counsel for the parties and have also perused the entire materials on records including the file in which the impugned decision has been taken. My findings and conclusions are as follows.

WP (C) No. 1520/2013

12. By the NIT in question it was provided that a composite set of bid documents can be purchased by "interested eligible bidder". The invitation of bids was open only for "reputed authorized dealers of Steel Utensils having minimum annual turnover of Rs. 2 crores in any single year during last 3 years". This means that the tenderer/dealer not only will have to be a reputed authorized dealer of steel utensils but also will have to have a minimum annual turn over of Rs. 2 crores in any single year during the last 3 years. The question is whether this qualification can be shown to have had by referring to annual turn over of other firms not dealing with the steel utensils, although the proprietor of the said firm/firms is the one representing the petitioner said to have dealings with steel utensils.

13. Apart from the fact that the NIT is concerned with reputed authorized dealers of steel utensils having minimum annual turn over of Rs. 2 crores, the bidder must also fulfill other conditions stipulated in the tender documents. The term bidder will have to be understood in the context of the particular firm offering the bid. If we refer to the eligibility of the bidder as reflected in the tender documents, the bidder must have registration under VAT, manufacturers authorization certificates, copy of PAN card from Income Tax Authority in the name of the firm/dealer, VAT registration certificate etc. It is the bidder who must have minimum sales turnover of Rs. 2 crores in a year during last 3 years.

14. In the instant case, admittedly, the bidder M/s. D.B. Enterprise (petitioner) does not have the annual turnover of Rs. 2 crores. As shown by the petitioner itself it has

annual turnover of Rs. 56,10,000/- . It is only by taking into account the other two firms of the petitioner's proprietor, it is sought to be shown that the petitioner has a turnover of more than Rs. 2 crores.

15. Clause-3(x) and Clause 22.2 of the NIT read as follows:-

3(x) A certificate from the bidder's banker or registered Chartered Accountant (CA), stating therein that the bidder has achieved a minimum sales turnover of Rs. 2.00 crores in any single year during the past three years.

22.2 The Bidder must furnish evidence of having achieved a minimum sales turnover of Rs. 2.00 crores in any single year during the last 3 Years supported by audit reports, loss and profit statement, Balance Sheet and Banker's Certificate, etc.

16. The aforesaid two clauses with the specified eligibility of bidder which is the requirement of being a reputed authorized dealer of steel utensils having minimum annual turnover of Rs. 2 crores is relatable only to the dealer participating in the bid process. In the instant case, it is M/s. D.B. Enterprise which participated in the tender process whose turnover is only Rs. 56,10,000/- and thus having not conformed to the requirement of the annual turnover of Rs. 2 crores, if the tender committee decided to reject its technical bid, no fault can be attributed to it. Clause-4 of the tender documents laying down the procedure of consideration of the tenders reads as follows:-

4. Procedure of consideration on the tenders-The envelope marked as "Technical bid" will be opened and the contents will be evaluated at the first stage. Then the samples submitted by the bidders will be inspected. The commercial bid of those bidders will only be opened whose samples are found satisfactory and Technical bid are found valid in accordance with the instructions and specifications.

17. In New Horizon Ltd. (Supra), the Apex Court was concerned with a joint venture corporation. In the said case, an advertisement was published inviting sealed tenders from competent agencies for printing, binding and supply of specified number of telephone directories for 3 annual issues commencing from 1993. Dealing with the particular experience required for the tenderer, it was held that the said experience may not be construed to mean that it should be of the tenderer in his name only. The particular joint venture company was a tenderer and in the said circumstances it was held that experience of constituents of the joint venture company should be treated as the own experience of the tenderer. Same is not the case in hand. The petitioner is not a joint venture company so as to take into account its experience of financial conditions of its constituents as its own experience. As noted above, the petitioner is an independent firm having no nexus with other two firms, namely, M/s. Smooth Wine and M/s. Tanvi Enterprise. The said two other firms also do not deal with steel utensils and not the authorized dealers of

steel utensils.

18. In G.R. Engineering Works Ltd. (Supra), this Court was concerned with the assessment of eligibility conditions, it was observed that the satisfaction of the authority that really matters in awarding of a contract to a prospective bidder. Such satisfaction is from the commercial and not the legalistic point of view. In the said case, the scope of the work was residual design, detailed engineering procurement of materials and bought out components, fabrication etc. It was stipulated in the NIT that the tender must be an established fabricator of mounded storage vessels/vessels of carbon steel etc. and should have fabricated at-least two such items in the past 7 (seven) years. It was also provided that the minimum annual turnover of the bidder should be equal to or more than INR 2325 lakhs during any one of the last 3 (three) financial years. In that case, the 3rd respondent company came to be incorporated on 11.6.2002. It was a partnership firm carrying on business from 1994 with two partners for the purpose of fabricated, welding etc. The said partnership firm came to be reconstituted in the year 1999 by taking a 3rd partner and continued the business. The said three partners floated the 3rd respondent, a private limited company in the year 2002. The main object of the 3rd respondent to take over the existing business of the partnership firm with all its assets and liabilities and to continue with the business. It was in the said circumstances, it was held that there was no impediment in law in taking into account the experience and financial soundness of the 3rd respondent when the persons were partners not only became the share holders but directors of the respondent no. 3.

19. The said position in G.R. Engineering Works Ltd. (Supra) is not the position here. As discussed above, the tender was submitted by M/s. D.B. Enterprise as dealer in steel utensils. Its proprietor may be the proprietor of two other firms unconnected with the dealings of steel utensils. The annual turnover of the petitioner firm inter alia is shown independently. When the NIT has specified that bid will be accepted only from the reputed dealers of steel utensils having minimum annual turnover of Rs. 2 crores, the petitioner firm cannot fall back on the annual turnover of the other two firms unconnected with the tender process.

20. Above being the position, none of the aforesaid decision is applicable to the facts situation of the present case and accordingly the writ petition is liable to be dismissed, which I accordingly do.

WP (C) No. 1225/2013

21. As noted above as per the tender clause, the commercial bid of those bidders will only be opened whose samples are found satisfactory and technical bid are found valid in accordance with the instructions and specifications. On perusal of the records produced by the learned AAG, Assam, it is found that the purchase committee in its meeting held on 07/03/2013 duly considered the bid of the

petitioner and noticing the diameters and weight of the utensils offered by it as samples, found the same unfinished, unsafe and not up to the mark of the students. Accordingly, its bid was rejected.

22. During the course of hearing of the writ petition also as per the earlier direction of this Court issued on 05/04/2013, the officials of the respondents along with record also produced the samples furnished by the petitioner as well as the respondent No. 3. For a *prima-facie* satisfaction of the said utensils, the same was verified in presence of the learned counsel for the parties and *prima-facie* it was found that the utensils offered by the respondent No. 3 are of better in quality than that of the petitioner. However, this aspect of the matter need not detain us as the samples were verified by an expert body and this Court exercising writ jurisdiction cannot sit on appeal over the findings recorded by the said expert body so as to return a finding that the utensils offered by the petitioner are of inferior quality than the one offered by the respondent No. 3. In absence of any *mala fide* and/or colourable exercise of power and nothing to show that the decision making process of the tender committee is vitiated by any procedural irregularity, it is not for the Writ Court to issue any direction to the respondents to act in a particular manner as has been desired by the petitioner.

23. For all the aforesaid reasons, this writ petition also merits dismissal, which I accordingly do. Both the writ petitions are dismissed. Interim orders stand vacated and the parties are left to bear their own costs.