



GAHC010127322021

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4044/2021

B K CONSTRUCTION

**N.S AVENUE, VIDYASAGAR SARANI. SILCHAR, 788005, CACHAR, ASSAM,
REPRESENTED BY SHRI KUMARJIT DEB SON OF LATE KALIRANJAN DEB,
RESIDENT OF N.S AVENUE, VIDYASAGAR, SARANI, SILCHAR, 788005, DIST
CACHAR, ASSAM**

VERSUS

**MANAGING DIRECTOR, NHM AND 2 ORS
ASSAM, SAIKIA COMMERCIAL COMPLEX, CHRISTIAN BASTI, GUWAHATI
05**

2:TECHNICAL EVALUATION COMMITTEE

**O/O THE MISSION DIRECTOR
SAIKIA COMMERCIAL COMPLEX
CHRISTIAN BASTI
GUWAHATI 05**

**3:M/S K.K ENTERPRISE
UZAN BAZAR
DIST KAMRUP M ASSAM GUWAHATI 78100**

Advocate for the Petitioner : MR A K SHARMA

Advocate for the Respondent : MR P NAYAK (r-3)

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner :Mr. U K Nair, Senior Advocate
Mr. A K Sarma, Advocate

For the Respondents : Mr. B Gogoi, SC, NHM
Mr. P Nayak, Advocate

Date of Hearing : 12.05.2022

Date of Judgment & Order :06.06.2022

JUDGMENT & ORDER(CAY)

Heard Mr. UK Nair, learned Senior counsel assisted by Mr. A. K. Sarma, learned counsel for the petitioner. Also heard Mr. B Gogoi, learned standing counsel for the NHM and Mr. P Nayak, learned counsel representing respondent No. 3.

2. This writ petition is preferred challenging the decision of the Technical Bid Evaluation Committee (in short Technical Committee) in declaring the bid of respondent No. 3 to be technically responsive in the Tender Process relating to work of up-gradation of existing Tangla CHC to SDCH in Udalguri district. It is the case of the petitioner that respondent No. 3 did not furnish the details of the subcontracting firm while making proposal for sub contract and the Technical Committee though rejected such proposal but declared it to be a technically responsive bidder allowing the respondent No.3 to have tie up with the same entity for using Electrical license.

3. Initially interim order prayed for by the petitioner was not granted by this court and being aggrieved, the petitioner approached the Hon'ble Division

Bench. The Hon'ble Division Bench by order dated 10.09.2021 passed in WA 194/2021 was pleased to remand the matter to this court to reconsider the issue whether, despite being nonresponsive on the ground as alleged by the writ appellant, the work can still be awarded to the respondent No. 3. While remanding back the matter and till such a decision by the court, it was directed to the authorities not to issue any work order.

4. Background facts:

(I) The petitioner, BK Construction, a partnership firm participated in the tender process floated by the respondent NHM by its Notice Inviting Tender dated 24.05.2021 for "up-gradation of existing Tangla CHC to SDCH in Udalguri district" under National Health Mission Assam on turnkey basis.

(II) The petitioner along with 7 others including respondent No. 3 participated in the tender process.

(III) The respondent authorities more particularly the Technical Committee, declared respondent No. 3 as the responsive bidder along with the petitioner and three others.

(IV) Such decision is under challenge in the present writ proceeding.

5. Submission of Mr. UK Nair, learned Senior counsel for the petitioner:

(I) The provision of clause 4.3 (xi) permits submission of proposal for subcontracting some component of the work and such proposal is required to be made by the bidder declaring the qualifications and experience of

the identified subcontractor in the relevant field along with the bid.

(II) Taking to clause 4.5 (a), Mr. Nair submits that the said clause mandates that the contractor must possess valid electrical license, anti-termite license etc. and clause 4.6 of the bid documents further mandates that except to the extent stated in clause 4.5(i) of the tender document, the subcontractor's other experience and resources shall not be taken into account towards determining the bidder compliance.

(III) Mr Nair further submits that respondent No. 3 declared one M/s Solitaire Enterprise to be its subcontractor for electrical works and submitted a notarized affidavit in proof of it. Thus, respondent No. 3 proposed M/s. Solitaire to be its sub contractor as per clause 4.3(xi), its subcontractor for the execution of electric work, submits Mr Nayar, learned Senior Counsel.

(IV) A bare perusal of the decision of the Technical Committee reflects that respondent No. 3 had failed to furnish details of the Subcontractor in the table, which is a mandatory requirement as per clause 7 of part 3 of the GCC, though the proposal of subcontracting was made. Despite such findings, respondent No.3 was declared to be a responsive bidder, submits the Learned Senior Counsel.

(V) It was further finding by the Technical Committee that the undertaking given by respondent No. 3 relating to subcontract and the information given as per clause 7 are mismatched and sufficient data was not available for evaluating the subcontracting value. Despite such defect and failure on the part of respondent No. 3, the Committee has declared respondent No. 3 to be responsive, which is nothing but an absolute illegality, submits Mr

Nair.

(VI) Mr Nair also submits that the Technical Committee cannot be allowed to approbate and reprobate at the same time. The learned Senior counsel contends that treating the undertaking between respondent No. 3 and M/s Solitaire to be a tie-up despite the satisfaction that required documents for subcontract for electrical work was not available, is an act beyond the jurisdiction of the committee and the same has been done only to favour the respondent No. 3.

(VIII) Mr Nair relying on clause 4.3 submits that respondent No. 3 was suppose to furnish the document as mandated in clause 4.3. (xi) including table 10 declaring the sanction of the work, the value of the subcontract, subcontractor's name and address and experience in similar works. However, respondent No. 3 admittedly had uploaded the said form along with its bid document declaring it to be "Nil". In view of such declaration of the petitioner and clear finding by the Technical Committee, the committee could not have declared respondent No. 3 as a responsive bidder.

(IX) Mr Nair further submits that though Technical Committee has rightly rejected the proposal for M/s. Solitaire as their subcontractor, but Technical Committee allowed the respondent No.3 to use the electrical license of M/S. Solitaire as tie-up based on the document of Respondent No.3, by which it proposed M/S. Solitaire to be its subcontractor. Once such document is rejected by the Committee, the same cannot be allowed to be used as the tie-up and the document belonging to M/S. Solitaire including the electric license cannot be relied upon by the Technical Committee to make respondent No. 3 a responsive bidder.

(X) Mr Nair further submits that the clause 4.3(xi) read with table 10 are essential conditions and the same must be adhered to, which is even discernable from the committee report on compliance of clause 9 which declares that the verification and qualification were measured based on clause 4.3 of ITB.

6. Submission of Mr. B Gogoi, learned standing counsel for the NHM:

(I) It is clear and discernable from the report of the Technical Evaluation Committee that in the bid of the respondent No. 3, it was found that the respondent No. 3 had submitted a declaration/undertaking that M/s Solitaire Enterprise would be engaged as subcontractor as per GCC clause 7 as well as 7.1 of the contract data. However, it was found that the said respondent No. 3 submitted unfilled table 10 where the details of proposed subcontract was required to be submitted. Accordingly, both the undertaking as well as table 10 mismatched and as sufficient data as required were not available, the Technical Committee decided to reject the proposal of subcontracting made by respondent No. 3. However, the electric license of M/s Solitaire was allowed to be used for the work in question treating that to be tie-up.

(II) Mr. Gogoi further submits that such tie-up is allowed in respect of all the bidders including the petitioner.

(III) He further submits that the petitioner is not having any anti-termite license and he made a proposal to use the license of one M/s Sunrise Enterprise. Similar was the situation concerning other bidders namely NA Enterprise, who was allowed tie-up relating to the electric license. The

respondent No. 3, and one Manaranjan Brahma was also allowed to have tie-up.

(IV) Therefore, Mr. Gogoi submits that though there was no provision of tie-up in the contract document, however this is the practice exercised in the organization while allowing the bidder and no different stand is taken in respect of any of the bidders.

(V) He further submits that the Technical Committee after due consideration of the tender documents submitted by all the tenderers allowed to have tie up without any discrimination, same may not be interfered with in exercise of power of judicial review in as much as the petitioner is also a beneficiary of such relaxation.

(VI) Mr Gogoi further submits that the undertaking relied on by the respondent No. 3 is not a document prescribed under the tender clauses and table 10 is the only format for submission of proposal of a subcontract. Therefore, the respondent authority was within its competence to ignore such document while rejecting the proposal for subcontract made by the respondent No. 3 and by relying on table 10, which was marked as "Nil".

(VII) In that view of the matter, the technical evaluation committee has rightly rejected the proposal of subcontract being not a proposal as per table 10 and decided not to allow respondent No. 3 to have a subcontractor. However, the respondent authorities were within its jurisdiction and competence to accept the tie-up between respondent No. 3 and the M/s Solitaire Enterprise so far relating to the use of the electrical license, Submits Mr. Gogoi, Learned Standing Counsel.

(VIII) In support of his Contention, he relies on the judgments passed in the case of (1) ***Caretel Infotech Limited –Vs- Hindustan Petroleum Corporation Limited and Ors*** reported in ***2019 14 SCC 81***, (2) in the case of ***Jagdish Mandal –Vs- State of Orissa & Ors*** reported in ***2007 14 SCC 517*** and (3) in the case of ***Deepak Bajaj –Vs- State of Maharashtra & Anr*** reported in ***2008 16 SCC 14***.

7. Adopting the argument of Mr D Gogoi, learned standing counsel for NHM, Mr. P Nayak, learned counsel representing respondent No. 3 further submits in the following manner:

(I) While relying upon clause 26 of the GCC, Mr Nayak submits that responsiveness is to be determined by taking note of eligibility criteria as defined in clauses 3 and 4 i.e. the proper signature of the bidder, accompaniment of required security. Responsiveness is to be decided not on an absolute basis but it should be responsive substantially. Therefore, responsiveness of bid of the respondent No. 3 cannot be determined on the basis of the undertaking, which is not even a required document under any of the clauses of the tender.

(II) Mr Nayak further submits that a document which is not necessary as per the guideline and term of the bid document and GCC, incorporation of the same with the bid document by a bidder, cannot make the bidder nonresponsive until and unless the said document is essential as defined in clause 26 of the GCC. He further submits that the Document in question was uploaded along with the Bid document for the purpose of tie up with M/s. Solitaire and not for purpose of subcontracting. As there was no

intention to propose subcontract, therefore, Table was Marked as "Nil". Submits Mr. Nayak, Learned Counsel.

(III) Mr Nayak further submits that in this writ petition it is pleaded that as respondent No. 3 has given undertaking and not submitted any document as per table 10, the tender is liable to be rejected as per clause 4.8. However, after remand of this matter by the Hon'ble Division, without there being any amendment of pleadings whatsoever or additional affidavit, arguments are being advanced on the merit of the undertaking as well as on the issue of subcontracting which is not permitted under law.

(IV) In his support his Contentions, Mr. Nayak relies on the judgments in the case of ***BSN Joshi and Sons Limited –Vs- Nair Coal Services Limited*** reported in ***2006 11 SCC 548*** and in the case of ***Afcons Infrastructure Ltd –Vs- Nagpur Metro Rail Corporation & Anr*** reported in ***2016 16 SCC 818***.

8. I have given anxious consideration to the submissions made by the learned counsel for the parties and perused the records.

9. The Hon'ble Apex Court in ***BSN Joshi and Sons Limited vs. Nair Coal Services Limited*** reported in ***(2006) 11 SCC 548*** while laying down certain cheques and balances relating to the public tender opined that the public authorities have the autonomy to fix their term and condition and even they are entitled to enter into negotiation before finally deciding to accept one of the offers amongst many offers made to it. They are having lee way to grant relaxation, of course, for a bonafide reason, if the tender condition permits the same.

10. In view of different pronouncement of Hon'ble Apex Court, this court can take judicial notice that there has been a rise in scrutiny of tender in writ proceedings under Article 226 of the Constitution of India and almost all tenders are sought to be challenged by way of the writ petition in a matter of routine. In the aforesaid backdrop, Hon'ble Apex court has repeatedly held that in certain aspects relating to tender judicial review is equivalent to judicial restraint. The Hon'ble Apex court has viewed that such review should relate not to the decision itself but to the decision making process. It is well settled that the writ court does not have the expertise to correct such a decision by substituting its own decision for the decision of the authority. This court can gainfully rely on the decision of **Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651**, which is quoted as under:

“94. The principles deducible from the above are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews how the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by the process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

- (5) The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of the Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness and not affected by bias or actuated by mala fides.

- (6) Quashing decisions may impose a heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

11. **Afcons Infrastructure Ltd. Vs Nagpur Metro Rail Corpn. Ltd. reported in (2016) 16 SCC 818** that it was held that a mere disagreement with the decision

making process or with the decision of the administrative authority is no reason for the Constitutional court to interfere. The threshold of malafide, intention to favour someone, arbitrariness, irrationality, and perversity must be satisfied before the Constitutional Court to interfere with the decision-making process or the decision.

12. It is also well settled that the owner or employer of a project having authored the tender document is the best person to understand and appreciate its requirement and interpret its document. It is possible that the owner or employer of a project may give an interpretation to the tender document which is not acceptable to the Constitutional Court but that by itself is not a reason for interfering with the interpretation given.

13. In **Silppi Constructions Contractors vs. Union of India and Another reported in (2020) 16 SCC 489**, the Hon'ble Apex Court held as follows

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit as a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind, we shall deal with the present case.”

14. From the aforesaid pronouncement of the Hon'ble Apex court, it can safely be concluded that the Apex Court has consistently viewed that judicial

review of a decision of public authorities, so far it relates to the award of the contract, should be limited. It is equally well settled that as the process of tender involves public authorities, the court does have the authority to intervene in terms of how a decision, action or process was arrived at. Therefore, to intervene in such a situation, while making a judicial review of the action, the court must satisfy that the action of the authority is arbitrary, irrational, malifide, whimsical or contrary to law, done to favour someone, done with an ulterior motive, misuses its power or such action has adversely affected public interest. The court can also intervene, if it is shown that a condition which is essential is not complied with or which is not essential is being insisted upon and applying such method contract work is allotted to some favoured party.

15. In the aforesaid backdrop now let this court examine the present case.

16. Clause 4.3 of the condition of tender prescribes the necessary information and document with their bids in section 2.

The relevant is sub-clause (XI) of clause 4.3. The said clause prescribes that proposal for subcontracting components of the works amounting to more than 10 % of the bid price, the qualification and experience of such sub-contractor in the relevant field need to be annexed. The said clause further provides that subcontracting agencies once identified will not be allowed to be changed or dropped without the approval of the Mission Director, National Health Mission.

17. Table 10, which is part of the bidding document at page 31 is formulated under ITB clause 4.3 (XI). Table 10 consists of four columns for disclosure of

detail particular to the subcontracting firm such as sanction of work, the value of subcontract, subcontractor's name and address and subcontractor's experience in similar work. Thus the requirement under ITB clause 4.3 (XI) is to be assessed based on particulars declared in table 10.

In the case in hand, the private respondent while submitting his bid document did not fill up table 10 and it was written in the said table as 'Nill'.

Clause 4.3.(XI) is in the form of a proposal only and such proposal for subcontracting is to be accepted by the employer when such proposal for subcontract is more than 10% of the bid price and the bidder fulfills the requirement as mandated in table 10 along with such proposal.

18. In the case in hand the Report on Deliberation of Technical Evaluation reflects that the private respondent has declared by way of a notarized document that M/s Solitaire Enterprise will be engaged as a subcontractor as per GCC clause 7 as well as clause 7.1. However, the said bidder has declared in table 10 as 'Nill' and because of the aforesaid facts, the technical evaluation committee rejected the proposal for subcontracting on the ground that the bidder has failed to submit the required information.

19. A reading clause 4.3.(XI) shows that the subcontracting is a proposal and said proposal can only be accepted if the condition is laid in 4.3.(XI) read with table 10 are fulfilled. In the case in hand, as the proposal of the private respondent was not as per the said clauses and table, same has rightly been rejected by the Technical Evaluation Committee. The clause 4.3 is at the stage of the proposal, if such proposal is rejected by the employer for non-fulfilment

of the criteria, in the considered opinion of this court, the entire bid of the bidder cannot be treated as technically nonresponsive inasmuch as it is a proposal and it is up to the employer to accept or reject such proposal as per fulfilment or non-fulfilment of the requirement as detailed in Table 10.

20. The sub-clause (f) of clause 4.5 of ITB prescribes that the contractor should possess the required valid electrical license and anti-termite license for executing the electrical works and should have executed similar electrical works for a minimum amount as indicated in appendix-I in any one year.

While dealing with such clause, the Technical Evaluation Committee had allowed all the bidder's to have tie-up with third party having such a license.

It is admitted position that in the ITB no provision for any tie-up for use of license of any third party to satisfy the condition of ITB 4.5 is made. A perusal of the Technical Evaluation report reflects that the bidder namely M/s N A Enterprise, K K Enterprise (private respondent), one Manoranjan Brahma, one Ganesh Tamuli Engineering Pvt. Ltd and the writ petitioner, BK Construction were not having a valid anti-termite licenses. However, they have submitted documents showing a tie-up with a third-party organization who was having valid anti-termite license and those were held to be satisfactory as per ITB.

21. So far relating to electric license under ITB 4.5.(f), respondent No. 5 was not having an electrical license but had tie-up with one M/s Solitaire Enterprise and similarly, such tie-up was accepted by the tender evaluation committee as satisfactory as per ITB. Thus, the employer has accepted tie-up with third parties when the bidders are not having valid anti-termite licenses and electrical

licenses and such relaxation has been granted uniformly and to all the bidders.

The petitioner B. K. Construction is also a beneficiary of such relaxation. Though the petitioner was not having any anti-termite license, tie-up with one Sri Abbas Shubhan was accepted by the Technical Evaluation committee. Therefore, in the considered opinion of this court, the acceptance of the tie-up with M/s Sunrise Enterprise for electrical license by the writ petitioner cannot be faulted.

22. The argument of Mr Nair, learned Senior counsel that moment the proposal of subcontracting with M/S Solitaire Enterprise for subcontracting electrical component is not accepted, no document relating to said M/s Solitaire can be accepted and therefore accepting the tie-up for an electrical license with M/s Solitaire had made the respondent No. 3 non responsive, do not find favour of this court for the reason that the two components and requirements under clause 4.5 and 4.5.(f) and under clause 4.3.(XI) are separate and distinct. The employer is having the autonomy to fix their terms and conditions and the power to grant relaxation to tender conditions without any discrimination which has been done in the present case allowing tie-up for purpose of fulfilment of conditions under clause 4.5.7.(a). The writ petitioner is also a beneficiary of such relaxation. Such relaxation has been granted to all the tenderers and therefore this court is not inclined to interfere with the decision of the expert Technical Committee inasmuch as judicial review should not relate to the decision but the decision-making process.

This court do not have the expertise to correct such a decision by substituting its own decision for the decision of the authority more particularly in absence of any pleading and proof of mala-fide intention to favour the private respondent.



23. This court also cannot term the aforesaid decision to allow tie-up, as arbitrary and irrational, the similar relaxation being allowed to all the tenderers. The employer is the best person to understand and appreciate its requirement and interpret its documents. Even if such interpretation given or acceptance of tie-up is not acceptable to this court, the same cannot be a ground for interfering with the interpretation given.

24. For the aforesaid reasons, this court do not find any illegality in the decision-making process nor does it can accept the argument of the learned Senior Counsel for the petitioner that the private respondent having projected M/s Solitaire Enterprise as its subcontractor for executing the electrical component of the work same being rejected, tie-up with M/s Solitaire for use of electrical license cannot be allowed, for the reason that the two components are different and the condition under clause 4.3.(XI) is in the shape of proposal and non acceptance of such proposal on the ground of non-furnishing of documents as per table 10 shall not invalidate the tie-up under clause 4.5.(a).(f).

25. For the forgoing discussions and reasons, this writ petition is dismissed. However, no order as to cost.

JUDGE

Comparing Assistant