



GAHC010209222021

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

Case No. : WRIT PETITION (C) No. 6700/2021

Sri Robi Boruah, Son of Late Bijay Boruah, Resident of
Mohanbari, P.O. & P.S. Mohanbari, District – Dibrugarh,
Assam.

.....Petitioner

-Versus-

1. Northeast Frontier Railway, Maligaon, Guwahati, Represented by its General Manager, North-East Frontier Railway, Maligaon, Guwahati, Assam.
2. The Chief Workshop Manager, North East Frontier Railway Mechanical Workshop, Dibrugarh, Assam.
3. Sri Biswajit Bora, Boiragimath, P.O., P.S. & District – Dibrugarh, Assam, PIN – 786001.

.....Respondents

Advocates :

Petitioner : Mr. P.J. Saikia, Senior Advocate.
Mr. R.S. Mishra, Advocate.

Respondent nos. 1 & 2 : Ms. U. Chakraborty,
Special Senior Railway Counsel.

Date of Hearing, Judgment & Order : 25.08.2023



BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER [ORAL]

The writ petition under Article 226 of the Constitution of India has been instituted by the petitioner to challenge the award of a contract work, "Comprehensive Garbage Disposal from DBWS for 3 [three] years [2021 – 2024]" ['the Contract-Work', for short] made in favour of the respondent no. 3, by the respondent North East Frontier Railway.

2. The factual matrix of the case lies in a narrow compass. The necessary facts can be expounded, in brief, as follows : the respondent North East Frontier Railway ['the N.F. Railway', for short] through its Chief Workshop Manager [CWM], Mechanical Workshop, N.F. Railway, Dibrugarh [the respondent no. 2] published a Notice Inviting Tender [NIT] on 07.10.2021 for the Contract-Work vide e-Tender Notice no. DBWS-NIET-06-2021-22 dated 07.10.2021 inviting open tenders through E-Tendering System from competent firms/contractors. As per the NIT, the approximate cost of the Contract-Work was Rs. 56,07,360/- inclusive of GST @ 18%. The NIT notified that the tenders in response to the NIT, would be accepted up-to 15-00 hours, 29.10.2021 and the tenders would be opened at 15-30 hours, 29.10.2021. The NIT and the Tender Document containing the Instructions to Tenderers and Conditions of Tenders, set forth the Minimum Eligibility Criteria. As per the NIT, the Tenderers were required to fulfill the Technical Eligibility Criteria, Financial Eligibility Criteria and Special Criteria contained therein in Clause 1.1, Clause 1.2 and Clause 1.3 respectively. As per Clause 1.4 of the NIT, non-compliance of any of the conditions set forth

thereinabove would result in the tender being rejected. Similar Technical Eligibility Criteria, Financial Eligibility Criteria and Special Criteria were also prescribed in Clause 10.1, Clause 10.3 and Clause 10.4 of the Tender Document containing the Instructions to Tenderers and Conditions of Tenders. Clause 10.5 therein had made it clear that non-compliance of any of the conditions set forth thereinabove would result in the tender being rejected.

2.1.In response to the NIT, 5 [five] nos. of tenders were received by the respondent N.F. Railway authorities. Apart from the petitioner, the other 4 [four] tenderers were :- [i] M/s Aardi Commercial, [ii] Biswajyoti Bora [the respondent no. 3], [iii] M/s Dynamic Enterprise, and [iv] M/s Maa Virasini Construction and Material Supplier. After receipt of the tenders through the e-Procurement Portal, the Techno-Commercial Bids and the Financial Bids were uploaded in the e-Procurement Portal of the N.F. Railway. On opening of the bids, the respondent no. 3 was declared as the lowest tenderer [L-1] and the petitioner herein was declared as the 5th lowest tenderer [L-5].

3. In the Techno-Commercial Bid tabulation, uploaded in the e-Procurement Portal by the respondent N.F. Railway authorities, the documents attached by the participant tenderers in respect of the Special Criteria were mentioned and they were :- [i] MSME Certificate by M/s Aardi Commercial, [ii] Pollution Certificate by Biswajyoti Bora [the respondent no. 3], [iii] Undertaking letter by M/s Dynamic Enterprise, [iv] ISO Certificate and letter pad 1 by M/s Maa Virasini Construction and Material Supplier, and [v] Pollution Authorisation by the petitioner. The present writ petition has been preferred questioning the fulfillment or non-fulfilment of the Special Criteria by the other participant



tenderers including the respondent no. 3.

4. It is noticed that though notice was served upon the respondent no. 3 by way of dasti, as reflected from the affidavit submitted by the petitioner, none has appeared for the respondent no. 3 and the Court, by Order dated 13.09.2022, had observed that the service of notice upon the respondent no. 3 was duly affected.

5. I have heard Mr. P.J. Saikia, learned Senior Counsel assisted by Mr. R.S. Mishra, learned counsel for the petitioner and Ms. U. Chakraborty, learned Special Senior Railway Counsel for the respondent nos. 1 & 2.

6. Mr. Saikia, learned Senior Counsel for the petitioner has contended that though the Techno-Commercial Bid tabulation showed that tenders of all the tenderers were found responsive to all the mandatory requirements as per Clause 1.3 [Special Criteria] of the NIT and Clause 10.4 of the Tender Document containing Instructions to Tenderers and Conditions of Tender, the petitioner upon making an inquiry came to know that none of the other 4 [four] tenderers, except the petitioner, submitted documents in fulfillment of the Special Criteria contained in Clause 1.3 of the NIT and Clause 10.4 of the Tender Document. Having noticed such deficiencies on the part of the other 4 [four] participant tenderers, the petitioner submitted a Representation dated 15.11.2021 before the respondent no. 2 not to accept the tenders of the other 4 [four] participant tenderers including that of the respondent no. 3. The petitioner had come to know later that despite the Representation dated 15.11.2021, the respondent N.F. Railway authorities had already issued a Work Order in favour of the



respondent no. 3. The petitioner had thereafter, submitted applications before the appropriate authorities in the N.F. Railway under the Right to Information Act, 2005 [‘the RTI Act’, for short] to obtain the copies of the documents submitted by the other tenderers for the Contract-Work in response to the NIT dated 07.10.2021. From the documents obtained through the applications submitted under the RTI Act, the petitioner came to know that the respondent no. 3 had applied for the Authorisation Certificate required to fulfill the Special Criteria before the Pollution Control Board, Assam only on 25.10.2021 and the Authorisation Certificate purportedly fulfilling the Special Criteria was issued to the respondent no. 3 by the Pollution Control Board, Assam only on 09.11.2021, which was after expiry of the last date of submission of tenders, that is, 29.10.2021 fixed by the NIT dated 07.10.2021. It was on 13.11.2021, the respondent authorities had issued the Letter of Acceptance [LoA] in favour of the respondent no. 3. Mr. Saikia has contended that by issuing such LoA on 13.11.2021, the respondent N.F. Railway authorities had violated its own terms and conditions set forth in the NIT dated 07.10.2021 and the Tender Document containing the Instructions to Tenderers and Conditions of Tender. It is submitted that admittedly, the tender of the petitioner was a responsive one and the tenders of the other 4 [four] participant tenderers including that of the respondent no. 3, were non-responsive ones.

7. Ms. Chakraborty, learned Special Senior Railway Counsel countering the submissions of Mr. Saikia, learned Senior Counsel for the petitioner, has strenuously urged that in the tender process initiated by the NIT dated 07.10.2021, the respondent no. 3 emerged as the lowest [L-1] tenderer. The difference between the tender values offered by the petitioner as L-5 tenderer



and the respondent no. 3 as the L-1 tenderer was substantial in that the petitioner had quoted a tender amount which was higher by Rs. 22,12,804.44/- than the tender amount offered by the respondent no. 3. It is contended that from the date of opening of the tenders, the respondent Railway authorities had 45 [forty five] days' time to finalise the tender and accordingly, 7 [seven] days' time was granted to the L-1 tenderer by issuing a letter to the respondent no. 3 on 03.11.2021 whereby the respondent no. 3 was requested to submit the Authorisation Certificate on or before 11.11.2021. In response, the respondent no. 3 had submitted the requisite Authorisation Certificate on 11.11.2021. Contending that the reason behind the decision to award the Contract-Work to the respondent no. 3 was none other than to safeguard the financial interests of the N.F. Railway, Ms. Chakraborty has contended that no interference is called for as the tendered amount of the petitioner was quite higher and an unreasonable one. Ms. Chakraborty has referred to Clause 6[b] of the Indian Railway Standard General Conditions of Contract, 2020 to submit that by exercise of powers conferred by the said clause, the tender of the respondent no. 3 was accepted on 13.11.2021.

8. I have given due consideration to the submissions of the learned counsel for the parties and have gone through the materials brought on record by the parties through their pleadings.

9. From the rival submissions of the parties, it has emerged that the contestation is confined to the Special Criteria contained in Clause 1.3 of the NIT as well as in Clause 10.4 of the Tender Document containing the Instructions to Tenderers and Conditions of Tenders. Both Clause 1.3 in the NIT



and Clause 10.4 in the Tender Document are similarly worded. As per the said clauses, all tenderers must have Authorization Certificate issued from the Pollution Control Board [Department of Environment & Forest, Government of Assam], Assam regarding collection, handling and transportation of the hazardous and other wastes under the provision of the Hazardous and other wastes [Management & Transboundary Movement] Rules, 2016. It had been specifically set forth in both the clauses that a tenderer must have to submit such Authorization Certificate along with the tender, failing which the tender shall be rejected.

10. The petitioner was earlier awarded a contract work of 'Comprehensive garbage disposal from DBWS' vide a Work Order dated 18.07.2019 for a period of 2 years pursuant to a tender process and the period of said contract work was extended by the N.F. Railway authorities up-to 28.12.2021. The contract work the petitioner was earlier awarded with, was similar to the one for which tenderers were invited by the NIT dated 07.10.2021. It is not in dispute that the petitioner had submitted an Authorization Certificate dated 27.07.2021, with validity period of 3 [three] years, issued under the provisions of the Hazardous and other wastes [Management & Transboundary Movement] Rules, 2016 from the Pollution Control Board, Assam along with his tender, submitted in response to the NIT dated 07.10.2021.

11. From the affidavit-in-opposition filed by the respondent nos. 1 & 2 on 21.12.2022, it is revealed that the respondent no. 3 who was issued the LoA on 13.11.2021, did not have the Authorization Certificate under Hazardous and other wastes [Management & Transboundary Movement] Rules, 2016 from the

Pollution Control Board, Assam on the last date of submission of tenders fixed by the NIT dated 07.10.2021, that is, on 29.10.2021. A look at the Authorization Certificate issued in favour of the respondent no. 3 on the basis of which the respondent N.F. Railway authorities has issued the LoA on 13.11.2021, goes to show that the said Authorization Certificate under the provisions of Hazardous and other wastes [Management & Transboundary Movement] Rules, 2016 was issued in favour of the respondent no. 3 by the Pollution Control Board, Assam only on 09.11.2021, meaning thereby, on the last date of submission of bids, that is, on 29.10.2021, the respondent no. 3 did not have such Authorisation Certificate from the Pollution Control Board, Assam.

12. It is well settled that an administrative authority is equally bound by the norms, standards and procedure laid down by it for others. It must be held to be judged to the norms, standards and procedure by which it professes its actions to be judged and it must also observe those norms, standards and procedure on the pain of invalidation of an act in violation of them. The said principle of law has been evolved as a check against exercise of arbitrary power by the executive authority, as has been held by the Hon'ble Supreme Court of India in *Ramana Dayaram Shetty vs. International Airport Authority of India and others*, reported in [1979] 3 SCC 489. Every action of the executive authority must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. A tenderer whose tender has been rejected has the locus to challenge the award of contract if the tendering authority has accepted the tender of a non-responsive tenderer. There is another aspect which is also involved in acceptance of a tender of a non-responsive tenderer. A responsive tenderer is

well within his right to contend that he has been differentially treated and denied equality of opportunity with the non-responsive tenderer who has ultimately been awarded the tender. It is also open for a person who did not participate in the tender process where such a condition of eligibility like 'the Special Criteria' involved herein is involved, to contend that had it been known to him that non-fulfilment of such condition of eligibility would not have been a bar for consideration of his tender, he also would have submitted a tender and competed for obtaining the contract, but he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, whereas in respect of another non-responsive tenderer like him in whose favour the contract ultimately was awarded, the tender was entertained and accepted even though he did not satisfy the condition of eligibility resulting in inequality of treatment which is constitutionally impermissible. It has been held in *Central Coalfields Limited & Another vs. SLL – SML [Joint Venture Consortium] & others*, reported in [2016] 8 SCC 622, to the effect that goalposts cannot be re-arranged or asked to be re-arranged during the tender process to affect the right of some or deny a privilege to some.

13. In the case in hand, by relaxing the requirement of submission of Authorization Certificate contained in Clause 1.3 of the NIT and Clause 10.4 of the Tender Document, the respondent N.F. Railway authorities had clearly re-arranged the goalpost thereby denying the level playing field to the petitioner herein who was otherwise the sole responsive tenderer in the tender process and also by denying the benefit of privilege of participation to those persons who due to incorporation of 'Special Clause' in Clause 1.3 of the NIT and Clause 10.4 of the Tender Document with the condition that non-submission of an



Authorisation Certificate under the provisions of the Hazardous and other wastes [Management & Transboundary Movement] Rules, 2016 from the Pollution Control Board, Assam would entail rejection of the tender, did not participate in the tender process. The respondent N.F. Railway authorities have themselves while setting forth the Special Criteria in Clause 1.3 of the NIT and Clause 10.4 of the Tender Document, had professed that if a tenderer did not submit the Authorization Certificate from the Pollution Control Board, Assam under the provisions of the Hazardous and other wastes [Management & Transboundary Movement] Rules, 2016 with his tender, then his tender would be rejected. This condition goes to show that the same was an essential condition of eligibility to participate in the tender process initiated by the NIT dated 07.10.2021 and a tenderer was required to fulfill the same on the last date fixed for submission of tenders. The relaxation made in the case in hand by the respondent N.F. Railway authorities are clearly not in conformity with the terms and conditions set forth in the NIT and such deviation shown in favour of the respondent no. 3 is found to be arbitrary and unjust, resulting in denial of level playing field and discriminatory treatment to others. As has been already mentioned that the respondent N.F. Railway, as the tendering authority, must be rigorously held to the norms, standards and procedure by which they profess its action to be judged.

14. Though it is contended at the time of hearing that Clauses of the General Conditions of Contract, 2020, more particularly, Clause 6[b] thereof had been resorted to to award the Contract-Work to the respondent no. 3, the same is found to be not a pleaded case of the respondent N.F. Railway authorities in their affidavit-in-opposition. As per Clause 6[b] of the Indian Railways General



Conditions of Contract, 2020, to which Ms. Chakraborty has placed reliance, a tenderer is required to keep the offer open for a minimum period of 45 days from the date of opening of the tender. The submission advanced by Ms. Chakraborty on the basis of Clause 6[b] of the Indian Railway Standard General Conditions of Contract, 2020 does not deserve acceptance as the said clause is in respect of bid validity and does not pertain to an invalid tenderer like the respondent no. 3, to meet the deficiencies.

15. The contention advanced on behalf of the respondent N.F. Railway authorities that the responsive tender of the petitioner was not accepted because of the higher tendered amount quoted by the petitioner and the bid of the L-1 tenderer i.e. the respondent no. 3, though a non-responsive one at the time of submission of tenders, was accepted as it quoted a reasonable tender amount and to safeguard the financial interests of the N.F. Railway as the tendering authority, seems attractive at first blush, but the same is not acceptable. If the bid value offered by the only responsive was found to be an unreasonable and/or exorbitant one, the same could have been a reason for the tendering authority to give a consideration as to whether to continue the tender process or to cancel the same, but that could not be a valid pretext for the tendering authority to relax an essential condition of eligibility in order to admit the tender of one particular non-responsive tenderer as the same has amounted to re-arrangement of the goalpost after the tender process is underway, which is not permissible as it violates the principles enshrined in Article 14 of the Constitution of India. It is too well settled that award of a contract is essentially a commercial transaction which must be determined by taking all the relevant factors into consideration.



16. In view of the discussion made above and for the reasons assigned, the award of the Contract-Work made in favour of the respondent no. 3 by Letter of Acceptance dated 13.11.2021 is set aside and quashed. The writ petition is allowed to the extent indicated above. With the setting aside of the award of contract made in favour of the respondent no. 3, the respondent N.F. Railway authorities are required to re-visit the tender process initiated by the NIT dated 07.10.2021 so as to bring it to its logical conclusion in terms of the observations made within a period of 1 [one] month from today.

17. At this stage, Ms. Chakraborty, learned Special Senior Railway Counsel has submitted that the Contract-Work involved herein is in respect of garbage disposal from the Dibrugarh Railway station. As the work order made in favour of the existing contractor has been interfered with, there would be difficulty in garbage disposal Dibrugarh Railway Station. Ms. Chakraborty has, thus, prayed that the existing arrangement may be allowed to continue till a period of 1 [one] month from today. Accepting the nature of difficulties likely to be faced by the respondent N.F. authorities with the setting aside of the Contract-Work made in favour of the respondent no. 3, the respondent N.F. Railway authorities are allowed to continue with the existing arrangement only for a period of one month from today.

JUDGE

Comparing Assistant