



GAHC010222842022

Page No.# 1/6



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

Case No. : WP(C)/7008/2022

ASSAM FORT
A PROPRIETORSHIP FIRM, HAVING ITS REGISTERED OFFICE AT 202,
BLOCK-C HINDUSTAN TOWER,
JAWAHAR NAGAR, BELTOLA,
GUWAHATI- 781022,
DISTRICT- KAMRUP(METRO), ASSAM,
DULY REPRESENTED BY ITS PROPRIETOR SHRI BIKAS JYOTI GOGOI,
SON OF NABA KUMAR GOGOI,
AGED ABOUT 45 YEARS,
RESIDENT OF RAJABHETTA DIGHOLA GAON,
BORPATHAR, RAJABHETTA 135 F.S.,
MOHANAGHAT, DIBRUGARH,
ASSAM, PIN- 786008.

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM,
AGRICULTURE DEPARTMENT,
DISPUR, GUWAHATI- 781006,
DISTRICT- KAMRUP(M), ASSAM.

2:THE DIRECTOR
DIRECTORATE OF AGRICULTURE
ASSAM
KHANAPARA
GUWAHATI- 781022

ASSAM

Advocate for the Petitioner : MR. A SARMA



Advocate for the Respondent : SC, AGRI. DEPARTMENT

**BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**

JUDGMENT & ORDER (ORAL)

Date : 21-11-2022

Heard Mr. B Kaushik, learned counsel for the petitioner. Also heard Mr. B Choudhury, learned counsel for the respondents in the Agriculture Department of the Government of Assam.

2. The respondent no. 2 Director of Agriculture, Assam had issued an e-procurement notice dated 19.09.2022 for supply of micronutrient fertilizer for the year 2022-23 under various schemes. The Instructions to Bidders at Clause v. provides that the average annual turnover of the bidder for the last 3 (three) financial years i.e. 2019-20, 2020-21 and 2021-22 should not be less than 20% of the total quoted value in the tender. Clause vii. provides that the bidder should have the experience in supplying the concerned items to the Government Departments/ Government undertakings for at least 20% of the required quantity of items for the years 2019-20, 2020-21 and 2021-22.

3. A reading of the aforesaid two conditions in the Instructions to Bidders makes it discernable that the bidders should have the experience of supplying the required items in the required quantity for at least three preceding years prior to the tender notice. A subsequent corrigendum dated 10.10.2022 had been issued by the Director of Agriculture, Assam which provides that the experience of supplying 20% of the required items for three years had been reduced to 15%. However, a further provision had been added that if a manufacturer participates in the bid process, in that case, the manufacturer should have three times the production capacity of the required quantity of items for the last three financial years i.e. 2019-20, 2020-21 and 2021-22 in lieu of the experience of supplying the 15% of the required items to a Government Department/Government undertaking for the last three years.



4. The petitioner is an intending bidder who is also an existing supplier having the experience of supplying the item concerned for the last three financial years i.e. 2019-20, 2020-21 and 2021-22. The petitioner is aggrieved by the corrigendum that if the bid eligibility is opened to a manufacturer, firstly there is an arbitrary requirement of the manufacturer to have the capability to produce three times of the required quantity in the tender and secondly, the earlier eligibility requirement of having experience of three years in respect of a supplier is absent for a manufacturer.

5. Considering that this is a writ petition assailing a tender process, we deemed it appropriate that instead of going for issuing notice and passing interim orders, we required the respondents in the Agriculture Department to provide the information as to in what manner the provisions of the corrigendum dated 10.10.2022, which is assailed in this writ petition are sought to be justified.

6. As regards the first contention of the petitioner that the requirement of a manufacturer to have a production capacity of three times the required quantity, Mr. B Choudhury, learned counsel for the respondents in the Agriculture Department has produced a communication dated 04.11.2022 from the Joint Director of the Agriculture Department in the Directorate of Agriculture, Assam which provides that the relevance of requiring the manufacturer to have three times the production capacity is that it would firstly indicate that the manufacturer has the appropriate marketing network etc. to sell three times the required product in the tender notice which will give an indication of his capability. Secondly, a stand is taken that if the manufacturer has a capability of producing three times the required quantity in the tender, it would have a cost effective effect in the supply to be made inasmuch as a manufacturer in bulk always have a cost effective advantage over a manufacturer of a lower quantity.

7. Prima facie, the reasoning given by the respondent authorities do not appear to be arbitrary or unreasonable in any manner and it is an economic analysis of the Department which the Court should not ordinarily interfere unless it is found to be grossly arbitrary or unacceptable in law.

8. Mr. B Kaushik, learned counsel for the petitioner urges upon that by the offending provision in the corrigendum dated 10.10.2022, the bidders of the category of manufacturers



are precluded from the requirement of having three years of experience of supply. Accordingly, it is the submission that there is discrimination in favour of the manufacturers by requiring them not to have any past supply experience and therefore, it violates Article 14 of the Constitution of India.

9. We examined the contention of Mr. B Kaushik, learned counsel for the petitioner from the point of view as to whether by bringing in a provision of there being no requirement to have past supply experience, it would violate Article 14 of the Constitution of India. The basic facet of Article 14 is that in the absence of any reasonable classification there ought to be equal treatment.

10. Accordingly, we examined as to whether there is a reasonable classification between the supplier simplicitor and the manufacturer who also would be a prospective bidder. A supplier in its ordinary concept would be an entity who would procure the required items in the tender process from some other source inasmuch as they do not have their own source of manufacturing the items and thereafter provide it to the requiring authorities. But on the other hand, a manufacturer of the items is in a different footing that they manufacture the items themselves and are not required to procure it from any other source. The said differentiation can also be accepted to be a reasonable differentiation having a nexus with the object at hand to justify a classification.

11. At least from the aspect of having the required materials available with them for making the supply, a manufacturer does not have the requirement of any past experience to procure the items whereas a supplier simplicitor would be required to have such experience, also of procuring the items.

12. Mr. B Kaushik, learned counsel for the petitioner makes a further submission that the experience would also be required for making the actual delivery of the items to the intending purchaser and therefore, there would also be a requirement of past experience. A supplier simplicitor by virtue of his past experience would also have the experience of causing the delivery of items but a manufacturer who had earlier not supplied the same items, may or may not have the necessary mechanism to cause the delivery.

13. The said contention raised by Mr. B Kaushik, learned counsel for the petitioner is



examined from the point of view that in the corrigendum dated 10.10.2022 there are two further requirements that the intending tenderer who is a manufacturer would have to satisfy, i.e. to have a production capacity of three times the required quantity in the tender for the last three financial years prior to the tender i.e. 2019-20, 2020-21 and 2021-22.

14. By having the requirement to have a manufacturing capacity of three times of the required quantity in the tender for the last three financial years is itself an indication that unless it is a specific case of someone that the said manufacturer never delivered any of the items for the last three financial years i.e. 2019-20, 2020-21 and 2021-22 to anyone and only went on manufacturing it, it cannot be construed that they don't have the experience of causing delivery of the items at a designated place.

15. From such point of view the second submission of Mr. B Kaushik that without having the past experience of supply, the manufacturer may not have the experience of making delivery of the items also cannot be accepted.

16. The other contention raised by Mr. B Kaushik is by referring to Section 6 (1) of the Assam Public Procurement Act, 2017 (in short, the Act of 2017). Section 6(1) of the Act of 2017 which is relied upon provides that the procuring entity shall not establish any requirement aimed in limiting the participation of bidders in a procurement process that discriminates against or among the bidders against any category thereof.

17. Accordingly, a contention is raised that there should not be any differentiation in the terms and conditions of the tender in respect of a supplier simplicitor and that of a manufacturer bidder.

18. A reading of Section 6(1) shows that the provision is to avoid limiting the participation of the bidders but whereas in the instant case by including the manufacturer bidders, it is a case of not limiting but expanding the participation of bidders. From such point of view, the provision of Section 6(1) would be inapplicable.

19. In view of the above, we do not find any merit in this writ petition.

Writ petition stands disposed of in the above terms.

JUDGE



Comparing Assistant