



GAHC010015062023

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

Case No. : WP(C)/358/2023

PREMIER CRYOGENICS LTD. AND ANR.
A COMPANY REGISTERED UNDER THE COMPANIES ACT, 1956 AND
HAVING ITS REGISTERED OFFICE AT MANIRAM DEWAN ROAD
CHANDMARI GUWAHATI PIN-781003 ASSAM AND REP. BY ITS MANAGING
DIRECTOR SRI ABHIJIT BAROOAH

2: ABHIJIT BAROOAH
S/O LT. BIPUL CHANDRA BAROOAH R/O HOUSE NO. 4 KUSHAL KONWAR
ROAD P.O. LATASIL PIN 781004 DIST. KAMRUP (M) ASSA

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REP .BY THE PRINCIPAL SECRETARY ANIMAL HUSBANDRY AND
VETERINARY DEPTT. DISPUR GUWAHATI-781006 ASSAM

2:ASSAM LIVESTOCK DEVELOPMENT AGENCY
REP BY THE CHIEF EXECUTIVE OFFICER AND HAVING ITS OFFICE AT G.S.
ROAD KHANAPAR GUWAHATI-781022 ASSAM

3:THE CHIEF EXECUTIVE OFFICER ASSAM LIVESTOCK DEVELOPMENT
AGENCY
HAVING ITS OFFICE AT G.S. ROAD KHANAPAR GUWAHATI-781022 ASSAM

4:THE TECHNICAL BID ECALUATION COMMITTEE
REP. BY ITS CHAIRMAN AND HAVING ITS OFFICE AT ASSAM LIVESTOCK
DEVELOPMENT AGENCY G.S. ROAD KHANAPAR GUWAHATI-781022
ASSAM

5:APPELLATE AUTHORITY
UNDER THE ASSAM PUBLIC PROCUREMENT ACT
2017 ANIMAL HUSBANDRY AND VETERINARY DEPTT. DISPUR
GUWAHATI-781006 ASSAM



6:M/S MEGHALAYA OXYGEN PRIVATE LTD.
ATHGAON GUWAHATI-781001 KAMRUP (M) ASSA

For the Petitioners : **Mr. I. Choudhury, Sr. Adv.**

Mr. K. P. Pathak, Adv.

For the Respondents: Mr. Sisir Dutta, Sr. Advocate (R/6)

Mr. S. Dutta, Advocate.

Mr. D. Nath, Sr. GA, Assam (R-2, 3 & 4).

Ms. M. M. Katakya, SC, AH & Vety. Deptt. (R-1 & 5).

**BEFORE
THE HON'BLE MR. JUSTICE SUMAN SHYAM**

Date of hearing : 30/11/2023.

Date of judgement : 06/12/2023

JUDGEMENT AND ORDER (CAV)

1. Heard Mr. I. Choudhury, learned senior counsel assisted by Mr. K.P. Pathak, learned counsel appearing for the writ petitioner. Also heard Mr. Sisir Dutta, learned senior counsel assisted by Mr. S. Dutta, learned counsel for the respondent no. 6. Mr. D. Nath, learned Senior Government Advocate, Assam, has appeared for the respondent nos. 2, 3 & 4 whereas Ms. M.M. Katakya, learned Standing Counsel, Animal Husbandry and Veterinary Department, Assam, has appeared for the respondent nos. 1 & 5.

2. The writ petitioner herein is a company registered under the Companies Act, 1956, having its registered office at Maniram Dewan Road, Chandmari, Guwahati. Assailing *inter alia* the order dated 13/01/2023 issued by the Chief Executive Officer, Assam Live Stock Development Agency (ALDA) i.e. the respondent no. 3 herein cancelling the tender dated 26/05/2022, the instant writ petition has been filed.

3. The facts and circumstances of the case, leading to the filing of this writ petition, briefly stated, are as follows :-

(i) On 26/05/2022, the respondent no. 3 had issued Notice Inviting Bids (NIB), for open competitive bidding, for the purpose of awarding the work of supply of Pure Liquid Nitrogen (LN) for approximately 12 lakh litres. As per the NIB, it was a single stage two bid system. The tender value was Rs. 150 lakh and the bid security was Rs. 1 lakh. NIB dated 26/05/2022 had notified that the procedure to be followed for the



tender would be as prescribed by "The Assam Public Procurement Act, 2017" and "The Assam Public Procurement Rules, 2020", as amended from time to time. The last date of submission of bid was upto 03.00 p.m. of 17/06/2022. The bidders were required to submit hard copy of the technical bid on or before 18/06/2022, 02.00 p.m. The time for opening the technical bids was fixed on 20/06/2022 at 03.00 p.m. The price bid was to be opened online only in respect of the technically qualified bidders.

(ii) It appears that in response to the NIB, only one tender i.e. the bid of the writ petitioner was received. As such, by issuing a corrigendum dated 18/06/2022, the respondent no. 3 had modified the eligibility condition, as a result of which, the respondent no.6 also became eligible to participate in the tender process and was accordingly, permitted to submit its bid.

(iii) On opening the technical bids, it was found that the writ petitioner herein fulfills all the eligibility criteria. However, the respondent no. 6 did not fulfill the eligibility condition. As such, it was alleged by the petitioner that the bid submitted by the respondent no. 6 was technically non-responsive. Notwithstanding the aforesaid objection raised by the petitioner, the authorities had accepted the technical bid submitted by the respondent no. 6. On opening the price bids, the respondent no. 6 emerged as the lowest (L-1) bidder. However, supply orders were issued to both the bidders by bifurcating the total quantity of 12 lakh litres. The writ petitioner was awarded 4 lakh litres at the rate quoted by the L-1 bidder i.e. the respondent no. 6 whereas the balance quantity of 8 lakh litres was awarded to the respondent no. 6 as per the rate quoted by it.

(iv) Being aggrieved by the acceptance of the bid submitted by the respondent no. 6, the petitioner had preferred a statutory appeal under sections 38 (1) & (4) of the Assam Public Procurement Act, 2017 read with Rule 26 of the Assam Public Procurement Rules, 2020 before the appellate authority i.e. the Secretary of the Department, *inter alia*, contending that the respondent no. 6 did not fulfill the eligibility conditions and hence, its bid was technically non-responsive. Under the circumstances, no supply order could have been issued in favour of the respondent no. 6.

(v) Taking note of the grounds of appeal and after going through the record, the appellate authority had found that the bid submitted by the respondent no. 6 was technically non-responsive. As such, the appellate authority had recommended cancellation of the bid of the respondent no. 6. Consequently, the impugned order

dated 13/01/2023 has been issued by the respondent no. 3 cancelling the entire bid process including that submitted by the writ petitioner.

(vi) On the same day i.e. on 13/01/2023 itself, a fresh tender was floated in the GeM Portal (E-market place) of the Government inviting bids for supply of the entire quantity of 12 lakh litres of liquid Nitrogen. However, the aforesaid tender does not contain any of the previous eligibility conditions appearing in the earlier tender, as a result of which, the respondent no. 6 would be eligible to participate in the new tender process. Aggrieved thereby, the writ petitioner has approached this Court by filing this writ petition *inter alia* contending that the cancellation of the entire tender was not only arbitrary and illegal but the new tender floated by the respondents on 13/01/2023 was also illegal as the same had been tailor made only to extend undue favour to the respondent no. 6, which did not meet the eligibility norms to participate in the earlier tender process. According to the writ petitioner, after cancellation of the bid submitted by the respondent no. 6, the balance quantity of 8 lakh litres of LN ought to have been awarded to the petitioner company.

4. The respondent nos.2, 3 & 4 have filed their joint counter affidavit. In paragraphs 8 of the counter affidavit, the justification for cancellation of the tender has been furnished, which is reproduced herein below for ready reference :-

'8. That with regard to the statements made in paragraph 12 of the writ petition the deponent denies that upon cancellation of the supply order issued to the respondent no. 6, the same ought to have awarded to the petitioner Company. It is also denied that the Authorities of ALDA has issued the order dated 13.1.2023 cancelling the NIT dated 26.5.2022 in deviation of the order dated 4.1.2023 issued by the Appellate Authority. In this regard, the deponent respectfully states that after receipt of the Order dated 4.1.2023 passed by the Appellate Authority, the ALDA has found that the L1 bidder pursuant to the NIT dated 26.5.2022 has been found to be invalid and in the tender process only one valid bidder (i.e. the petitioner) remained. The Authorities considered that in the interest of uninterrupted supply, L1 bidder was placed order for supply of 8 lakh litres at the lowest rate and L2 bidder was also placed order for 4 lakh litres at the L1 rate. The total order placed was for 12 lakh litres valued at Rs. 105.48 lakh as per L1 rate. If the order is placed at L2 rate to the petitioner/PCL, the order value will be Rs. 159.36 lakh and ALDA have to incur excess expenditure of Rs. 53.88 lakh if the PCL is allowed to supply the entire 12 lakh litres of LN at their

quoted rate. Further, the tender process has become a single bid process without any competitive rate, which is not in tune of the CVC guidelines. Therefore, in such a situation the authorities has decided to cancel the entire process and invite re-tender by reconsidering the condition that more interested parties can participate and the ALDA may get more competitive rates of LN. The decision for retender was taken to save money and reduce operational costs of ALDA in the greater public interest. Accordingly, the order dated 13.1.2023 was issued cancelling entire tender process and retender has been issued in GeM”.

5. The records produced by Mr. D. Nath, learned Senior Government Advocate, Assam, supports the contention of the departmental authorities that the impugned order of cancellation of tender dated 13/01/2023 had been issued in the wake of the order dated 04/01/2023 passed by the appellate authority.

6. By referring to the materials available on record, Mr. I. Choudhury, learned senior counsel for the writ petitioner has argued that the respondents could not have issued the corrigendum notice dated 18/06/2022 altering the eligibility conditions of the tender, after the time for submission of bids had expired and therefore, the aforesaid exercise was completely arbitrary and illegal. Mr. Choudhury has also argued that the respondent no. 6 did not fulfill the eligibility criteria and therefore, supply order of 8 lakh litres LN could not have been issued to it. Contending that the order dated 04/1/2023 passed by the appellate authority holding the bid of the private respondent as non-responsive, having attained finality, the respondent no. 3 was duty bound to award the entire quantity of 12 lakh litres of Liquid Nitrogen (LN) to the petitioner instead of cancelling the tender or floating the fresh NIT. Mr. Choudhury has also prayed for a Writ of Mandamus to that effect.

7. By referring to a decision of the Hon’ble Supreme Court rendered in the case of ***Meerut Development Authority Vs. Association of Management Studies and another*** reported in ***(2009) 6 SCC 171***, Mr. Choudhury has argued that it is impermissible in the eyes of law to tinker with the eligibility conditions of the tender and to change it only to extend undue favour to a party to the bidding process, which was otherwise ineligible to participate in the tender process.

8. By referring to the statements made in the counter affidavit filed by the department, Mr. D. Nath, learned Senior Government Advocate, Assam, on the other hand, submits that considering the higher price quoted by the writ petitioner in view of the findings recorded by the appellate authority, the Tender Committee has taken a conscious decision to retender the entire work by floating a fresh tender. Contending that the procedure followed in this case is wholly transparent and as per the

Government norms, Mr. Nath submits that there is no scope for interference in the matter by this Court. As such, a prayer has been made to dismiss the writ petition.

9. Mr. Sisir Dutta, learned senior counsel appearing for the respondent no. 6 has fairly submitted that since the respondent no. 6 has not challenged the order dated 04/01/2023 passed by the appellate authority holding that the bid submitted by his client was non-responsive and considering the fact that the order of the appellate authority has attained finality, he cannot advance any argument on the above count. However, contending that his client is entitled to participate in the fresh tender process, Mr. Dutta submits that the petitioner cannot assail the tender on the grounds stated in the writ petition on account of the fact that law is well settled that terms and conditions of tenders falls in the realm of contract and therefore, the same cannot be subjected to judicial review.

10. I have considered the submissions made at the Bar and have also gone through the materials available on record.

11. The basic facts, involved in this case, are not in dispute. It is the admitted position of fact that as per the NIB dated 26/05/2022, the quantity of procurement was approximately 1 lakh litres of LN per month for a period of one year or more from the date of signing of the agreement which is about 12 lakh litres per annum. As per Clause 4.2.1 of the qualification criteria laid down in the tender document, a bidder, not being the manufacturer, should have the installed capacity to supply goods of similar nature to different Government departments/Undertakings/Entities of one lakh litres per month during the last 3 (three) financial years i.e. 2019-2020, 2020-2021 and 2021-2022. Clause 4.2.3(a) provides that the bidder must have their own production plant or bulk storage facility, minimum capacity of 1 lakh litres per month, in Assam. Details of self owned infrastructure should be furnished. As per clause 4.2.3(c), location of plant/storage facility should not be more than 150 KMs from the operational headquarters of ALDA at Khanapara, Guwahati.

12. From the comparative statement prepared by the authorities after opening the technical bids, it appears that the respondent no. 6 did not meet any of the above noted eligibility criteria as prescribed by the NIB. Not only that, the respondent no. 6 also did not have the requisite experience of making supply to a Government undertaking and/ or entity as per the eligibility criteria set out in the tender document.

13. It further appears that the respondent no. 6 was not the manufacturer but it had merely relied on the authorization letter issued by one M/s. S.D. Cryogenic Gases Private Limited, having its base at Bhutan. Moreover, as per the documents submitted by the respondent no. 6, the storage capacity under its control at Guwahati was of only 40,000 litres and the remaining 70,000 litres storage capacity was at Sandrup Jongkhar, Bhutan. There was also shortfall of document on the part

of the respondent no. 6, which was permitted to be produced within 21/07/2022. After such 'shortfall' document was produced by the respondent no. 6, the Technical Bid Evaluation Committee, constituted by 3 members, out of which, one member i.e. Shri Basanta Kakati had retired on 31/07/2022, it was held that the document submitted by the respondent no. 6 was sufficient as the same was based on an understanding between the producer and the stockiest. On the basis of such document, the technical bid of the respondent no. 6 was cleared by the Tender Committee.

14. As noted above, aggrieved by such erroneous assessment of the technical bid submitted by the respondent no. 6, the writ petitioner had preferred a statutory appeal, which was allowed by the order dated 04/01/2023. The findings and conclusions of a appellate authority with regard to the grounds of the appeal vis-à-vis the deficiencies in the bid submitted by the respondent no. 6, are reproduced herein below for ready reference :-

“Grounds of Appeal

Sl. No.	Qualification Criteria	Compliance by MOPL
4.2.1	The Bidder (if not the manufacturer) should have installed capacity of supplying goods of similar nature to different government departments / undertakings/entities of 1,00,000 litres quantity per month during last three financial years i.e. 2019-20, 2020-21 and 2021-22	No document has been uploaded by the Bidder that either the bidder or the manufacturer has made any Liquid Nitrogen supply to any Government entity. The manufacturer has started operations in November 2021 . It clearly does not have experience of 1,00,000 litre per month during last 3 financial years. (Refer to document uploaded by MOPL, title "Years of Experience in similar line of activity") (Enclosure C). The qualification criterion is not deliberated in the Comparative Statement of Technical Committee (Enclosure E & F)
4.2.2	The Bidder (if not the manufacturer) should have installed capacity of supplying goods of similar in nature up to	On perusal of the papers as well as the bid documents of the bidder, it has been found that the bidder is not responsive to the qualification criteria as the bidder

	<p>1,00,000 Litres quantity per month (in multiple consignments) during Current FY-2022-23.</p>	<p>itself has stated in the bid document that it has the experience of producing industrial gas only. They have set up 40 TPD ASU plant at Bhutan 100 Kms from Guwahati in Nov 2021 hence there is no evidence to the fact that the bidder has installed capacity of supplying Liquid Nitrogen Gas and they did not have either the installed capacity or the experience to supply Liquid Nitrogen Gas during 2019-20, 2020-21. Bidder has not claimed in the bid that they fulfill this qualification criteria.</p>
<p>4.2.3 a)</p>	<p>Experience and Technical Capacity : Bidder must have own production plant OR bulk storage facility minimum capacity of 1 Lakh litre per month in Assam. Details of self owned infrastructures should be furnished.</p>	<p>They have installed capacity of 40,000 litres Liquid Nitrogen Gas storage tank in Amingaon, Assam which falls short of 1 lakh litre. The bidder did not have license or Liquid Nitrogen Gas tank at the time of bidding and the committee has not gone in to the details of the claim of the bidder that they have 40000 litres Liquid Nitrogen installed capacity.</p>

In consideration to the aforementioned and infirmities, it appears that the bid submitted by Meghalaya Oxygen Private Limited is a non-responsive bid as per section 11(d) of the Assam Public Procurement Rules 2020 wherein it is stated that the bidder must fulfill the eligibility criteria given in the bidding document. (Copy of Assam Public Procurement Rules 2020 enclosed).

CONCLUSION

The undersigned is of the opinion that the NIT evaluated by Assam Livestock Development Agency in contrary to the provisions as laid down in Section 10(d) of Assam Public Procurement Rules 2020, bid of Meghalaya Oxygen Private Limited being a non responsive bidder was accepted by the Technical Committee in violation of



section 10(d) of Assam Public Procurement Rules 2020.

Hence the bid is recommended to be cancelled.”

15. From a bare reading of the order dated 04/01/2023, there can be no doubt or dispute about the fact that the appellate authority had recommended cancellation of only the bid of the respondent no. 6. Notwithstanding the same and despite the award letter dated 04/11/2022 issuing supply order for 4 lakh litres to the writ petitioner, acting on the basis of the order of the appellate authority dated 04/01/2023, the respondents have cancelled even the bid of the petitioner and that too, without serving any prior notice or giving any opportunity of being heard to the writ petitioner.

16. It is to be noted herein that once the technical as well as the price bid was opened and the L-2 bidder i.e. the writ petitioner was awarded a part of the work at the price of the L-1 bidder, the same had created a valuable right in favour of the writ petitioner. Therefore, the respondents could not have cancelled the supply order dated 04/11/2022 on the basis of the order of the appellate authority dated 04/01/2023, that too, without serving any prior notice upon the petitioner, more so, since the appellate authority had passed the order dated 04/01/2023 in an appeal filed by the writ petitioner calling into question, the validity of the technical bid submitted by the respondent no. 6. As such, the cancellation of the entire tender including the quantity of 4 lakh litres awarded to the writ petitioner, is found to be wholly arbitrary, illegal and hence, liable to be interfered with by this Court. The writ petitioner, having bagged the supply order for delivering a part of the quantity of LN, was clearly entitled to execute the order for supply of 4 lakh litres of LN, subject to fulfillment of the terms and conditions of the tender and such right of the writ petitioner could not have been taken away by the authorities merely because the technical bid of the respondent no. 6 was held to be non-responsive.

17. It may be pertinent to note herein that the ground for cancelling the bid of the writ petitioner, as stated in paragraph 8 of the counter affidavit filed by the respondent nos. 2, 3 & 4 also appears to be wholly irrational inasmuch as, the writ petitioner, having agreed to execute the supply order at the rate quoted by the L-1, there was no legal justification to cancel its bid merely because the bid of the L-1 bidder was found to be non-responsive.

18. Coming to the next issue raised by the petitioner pertaining to the prayer for issuance of a direction from this Court to award of supply order for the balance quantity (8 lakh litres LN) to the petitioner, it is to be noted herein that by the award letter / supply order dated 04/11/2022, the writ petitioner was allowed to supply only 4 lakh litres of LN, which was much below the total quantity projected in the NIB. There is no clause in the NIB to split the supply order in between two tenderers.



Notwithstanding the same the writ petitioner had not only accepted the order dated 04/11/2022 without any protest but had also agreed to supply 4 lakh litres of LN at the rate quoted by the L-1 bidder i.e. the respondent no. 6. Not only that, the supply order dated 04/11/2022 is not under challenge even in the present proceeding although the technical bid of the respondent no. 6 had been found to be non-responsive. If that be so, this Court is of the considered opinion that a Writ of Mandamus, directing the respondents to allow the petitioner to supply the balance quantity of 8 lakh litres of LN, would not lie in the facts and circumstances of the case as long as the supply order dated 04/11/2022 remains undisturbed. For the reasons mentioned above, the aforesaid prayer made by the petitioners' counsel does not commend for acceptance by this Court and the said relief is accordingly declined.

19. In so far as the challenge made to the new NIB, issued on 13/01/2023 through the GeM portal, is concerned, it is to be noted herein that the eligibility conditions pertaining to the storage facility etc. appearing in the previous tender issued on 26/05/2022, appears to have been completely done away with in the fresh tender. The learned departmental counsel has also not disputed the above position. It is also submitted at the Bar that save and except the writ petitioner and the respondent no. 6, there is no other bidder which had submitted bid in response to the new tender. Therefore, the contention of Mr. Choudhury, learned senior counsel for the writ petitioner, that the eligibility criteria in the fresh NIB has been diluted only to accommodate the respondent no. 6, *prima facie*, appears to be correct. However, even if that be so, that by itself cannot be a ground for this Court to interfere with the terms and conditions of tender, unless it is established from the record that the decision making process itself was flawed and the same stood vitiated by arbitrariness and *mala fide* exercise of administrative power. In order to succeed on the above count, the petitioner must also show that the decision to dilute the eligibility criteria is opposed to public interest.

20. At the present stage, although fresh bids have been received in terms of the new tender floated on 13/01/2023, in view of the interim order dated 25/01/2023 passed in this proceeding, the bids have not been processed by the authorities. Therefore, it is not known as to what would be the outcome of the tender process once the technical and financial bids are evaluated. Under the circumstances, this Court is not inclined to express any opinion on the plea raised by the petitioners' counsel that the terms and conditions of the new tender have been tailor made only to favour the respondent no. 6.

21. In the case of ***Meerut Development Authority (Supra)***, the Apex Court has observed that limited judicial review may be available in cases where it is established that terms of the Invitation to Tender were so tailor made to suit the convenience of any particular person with a view



to eliminate all others from participating in the bidding process. In the present case, if the arguments of Mr. Choudhury, learned senior counsel for the writ petitioners is accepted, even then, the conditions of the tender cannot be said to have been tailor made so as to eliminate all other bidder but the same would be for the sake for permitting wider participation in the tender process. In view of the above, this Court is of the opinion that the ratio laid down in the case of **Meerut Development Authority (Supra)**, would not have any application in the facts and circumstances of the present case.

22. Since the new tender is yet to be finalized and in view of the observations made herein above, this Court refrains from expressing any opinion on the question of legality and validity of the terms and conditions of the NIB dated 13/01/2023 on the grounds urged in the writ petition and leaves the matter open to be agitated by either parties to the proceeding, as and when a final decision is taken in the matter by the Tender Evaluation Committee. As such, by granting liberty to the contesting parties to agitate their grievance in the matter at an appropriate stage, by taking all such pleas, as may be permissible under the law, the aforesaid aspect of the matter is kept open.

23. In view of the discussions made herein above, this writ petition succeeds in part. The cancellation of the tender, to the extent the same seeks to interfere with the supply order dated 04/11/2022 issued in favour of the writ petitioner, is hereby set aside. The respondents are, however, granted liberty to proceed with the NIB dated 13/01/2023, in accordance with law and finalise the same for the balance quantity of 8 lakh litres of LN, if so advised.

The writ petition stands partly allowed.

Records be returned back.

There would be no order as to costs.

JUDGE

Sukhamay

Comparing Assistant