



GAHC010228822023

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

Case No. : WP(C)/5944/2023

ALL ASSAM POLICE HOUSING CORPORATION CONTRACTORS
ASSOCIATION AND ANR
HAVING ITS REGISTERED ADDRESS AT ASSAM POLICE HOUSING
CORPORATION LIMITED HEAD QUARTER, MADHABDEBPUR, P.O.
REHABARI, P.S. PALTAN BAZAR, GUWAHATI, KAMRUP (METRO), ASSAM,
PIN- 781008, REPRESENTED BY ITS SECRETARY, SRI SIMANTA JYOTI
BORUAH

2: SRI SIMANTA JYOTI BORUAH
SECRETARY OF ALL ASSAM POLICE HOUSING CORPORATION
CONTRACTORS ASSOCIATION
SON OF SRI TOSHEN BORUAH
RESIDENT OF A-201
SUBHAM ENCLAVE
LAKHIMINAGAR
HATIGAON ROAD
GUWAHATI
KAMRUP (M)
ASSAM
PIN- 78103

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM, HOME AND POLITICAL DEPARTMENT, DISPUR,
GUWAHATI- 781006, ASSAM

2: THE PRINCIPAL SECRETARY
GOVERNMENT OF ASSAM
HOME AND POLITICAL DEPARTMENT
ASSAM SACHIVALAYA
DISPUR
GUWAHATI- 781006
ASSAM



3:THE ASSAM POLICE HOUSING CORPORATION LIMITED
MADHABDEBPUR
P.O. REHABARI
P.S. PALTAN BAZAR
GUWAHATI- 781008
ASSAM
REPRESENTED BY ITS CHAIRMAN

4:THE MANAGING DIRECTOR
ASSAM POLICE HOUSING CORPORATION LIMITED
MADHABDEBPUR
P.O. REHABARI
P.S. PALTAN BAZAR
GUWAHATI- 781008
ASSAM

5:THE CHIEF ENGINEER
ASSAM POLICE HOUSING CORPORATION LIMITED
MADHABDEBPUR
P.O. REHABARI
P.S. PALTAN BAZAR
GUWAHATI- 781008
ASSA

Advocate for the Petitioner : MR. M K CHOUDHURY

Advocate for the Respondent : GA, ASSAM

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioner : Shri MK Choudhury, Sr. Advocate.
Shri P. Bhardwaj

Advocates for the respondents : Shri D. Saikia, AG, Assam
Shri S. Bora

Dates of hearing : **05.01.2024 & 12.01.2024**

Date of Judgment : **19.01.2024**

JUDGMENT & ORDER

The extraordinary jurisdiction of this Court has been sought to be invoked by means of this petition filed under Article 226 of the Constitution of India challenging, *inter alia*, a clause in a tender process which, according to the petitioners, is arbitrary, unreasonable and intends to exclude the petitioners from the purview of participation in the said process. While the petitioner no. 1 is an association of the contractors of the Assam Police Housing Corporation, the petitioner no. 2 is the Secretary of the petitioner no. 1 - Association.

2. Before going to the issue which has arisen for determination, it would be convenient if the facts of the case are narrated briefly.

3. A Notice Inviting Tender (e-tender) was floated by the Chief Engineer, Assam Police Housing Corporation (hereinafter called the Corporation) for works of Construction of RCC (S+4), Lower Subordinate (L/S) Quarter (16 unit/building) – Civil Works, Sanitary and water supply works, site development, deep tube well, Internal and External Electrification, Transformer, Diesel Generator, Street Light etc. in the Police Reserves across 16 numbers of districts of the State. The said construction work is under the scheme for special assistance to the States for capital investment for the year 2023–2024 on certain modes with an estimated bid value of Rs.7,02,02,550/- for each district. A pre-bid meeting was scheduled on 08.09.2023 and the last date of submission of bids was extended to 09.10.2023. It has been projected on behalf of the petitioners that they have been doing contractual works with the Corporation for a long period of time and have sufficient experience. The grievance raised in this petition is with regard to a particular clause in the contract namely, clause 2.2.2.4, which pertains to additional qualification. As the validity of the aforesaid

clause is the subject matter of dispute in this writ petition, it would be convenient to quote the relevant part of the aforesaid clause which reads as follows:

“Clause 2.2.2.4 – Additional Qualification-

- *The Contractor / Bidder should have experience of executing at least one building project of value not less than 50% of Estimated Cost during last 7 (seven) years ending last date of the month previous to the one in which tenders are invited. These works should have been executed either on EPC mode or Design and Build (D&B) mode or the work was executed with in house architectural firm of the contractor/ bidder having structural engineer and architect or the work was executed by the bidder / contractor by tie-up with an architectural firm having structural engineer and architect.*

4. It is the case projected by the petitioners that the EPC mode has been introduced for the first time and by such introduction, the members of the petitioner no. 1 association, in spite of having immense experience in executing similar types of constructions would be ousted as they do not possess the additional qualification. It has also been projected that the same clause has been introduced only to facilitate big players and certain blue eyed contractors whereby a fair competition would be adversely affected.

5. On the other hand, the version of the respondent is that introduction of the said clause is only in the interest of public so as to maintain a high standard of the construction work more so, when the said work is under a scheme of the Central Government. It is also contended that it is the discretion of the owner to include certain clauses in the tender document in the interest of public and unless it can be demonstrated that such clause is grossly irrational or arbitrary

or has been introduced with a *mala fide* intention or to suit any particular party, such clauses cannot be the subject matter of interference.

6. I have heard Sri MK Choudhury, learned Senior Counsel assisted by Shri P. Bharadwaj, learned counsel for the petitioners. The respondents are represented by Shri D. Saikia, the learned Advocate General of the State assisted by Shri S. Bora. The relevant documents and materials pertaining to this case have also been placed on record. The respondent no. 4, apart from filing an affidavit-in-opposition on 15.11.2023 has also filed an application for vacating the interim order, which has been registered as IA(C)/3724/2023.

7. Shri Choudhury, the learned Senior Counsel for the petitioners has submitted that for the first time, a new mode has been introduced as additional qualification in the form of the impugned clause. As per the said clause, it is contended that the bidder, to be eligible is required to have at least 50% experience during the last seven years in works done on EPC mode. It is submitted that the members of the petitioner association do not have such experience and further no time has been granted to the petitioners to enable to meet up with such requirement. It is further submitted that the scheme under which the work has been initiated does not require such incorporation. It is submitted that the issue was raised in the pre-bid meeting

8. With regard to the urgency expressed in this matter, the Senior Counsel for the petitioners submits that the scheme is dated 03.02.2023 and the NIT itself was issued after seven months wherein the last date was admittedly extended. On the issue that the work in question was a high-value work, it is submitted that as per stipulation of the NIT, one contractor can be granted a maximum of four works each of Rs.7,00,00,000/- approximately and therefore it cannot be said that it is one single work of very high-value. It is further submitted that

none of the members of the petitioner no. 1 association has been blacklisted and therefore ousting the petitioners from participation would amount to gross illegality and arbitrariness and would also amount to indirectly blacklisting them. It is also submitted that except the impugned clause, all other clauses including clause 2.2.2.2 regarding work experience are fulfilled by the petitioners.

9. By referring to the tender document, more particularly clause 2.2.1.1, it is submitted on behalf of the petitioners that a bidder was entitled to engage an architect. It is accordingly submitted that such clause would be itself contradictory to the impugned clause as experience in that field is a pre-requirement.

10. *Per contra*, Shri D. Saikia, learned Advocate General of the State has raised a preliminary issue, questioning the maintainability of the writ petition itself. He submits that a Writ Court is not an appellate forum for examining the validity of a clause in tender process and unless it can be demonstrated that such clause is grossly arbitrary or is in conflict with public interest, a Writ Court would not embark upon such contentious issues.

11. Coming to the facts of the case, the learned Advocate General, at the outset, submits that the work in question is under a central scheme and the completion time is 18 months. By referring to the relevant documents, it is submitted that the funds which have been made available by the Central Government is valid up to 31.03.2024 and therefore, there is extreme urgency in this matter.

12. It is categorically submitted by the learned Advocate General that the issue was raised in a pre-bid meeting and the same was rejected vide order dated 08.09.2023 and this action is not the subject matter of challenge. It is

submitted that the said meeting was headed by experts who had expressed their views that the challenge has been made without any basis. It is submitted that 16 numbers of bidders have participated in the tender in question out of which 3(three) are members of the petitioner no. 1 association and therefore the instant writ petition may not even be maintainable.

13. By referring to the clause which is the subject matter of challenge, the learned Advocate General has submitted that though the projection made on behalf of the petitioners is that experience of having executed at least one building project of value not less than 50% of the estimated cost during the last seven years is prescribed, the experience required is not limited only to EPC mode. He clarifies that there are four modes prescribed in the aforesaid clause 2.2.2.4, which are as follows:

- i. EPC Mode
- ii. Design and Build (D&B) Mode
- iii. Execution with in-house architectural firm of the contractor having Structural Engineer and Architect.
- iv. Work executed by the bidder by tie-up with an architectural firm having Structural Engineer and Architect.

14. He submits that a bidder is required to have the additional qualification in any of the above four modes and therefore the projection made by the petitioners that it is only the EPC mode available is factually incorrect.

15. By referring to the affidavit-in-opposition of the respondent no. 4 filed on 15.11.2023, the learned Advocate General has submitted that in paragraph 6 thereof, it has been specifically averred that it is not for the first occasion that a bidding process on EPC mode was initiated. It has further been submitted that

as per the condition of the scheme of the Central Government, the first installment of 50% of the approved amount would be released to the State for transfer on approval of the project to the Bank and the second installment of the remaining 50% would be released on or before 31.03.2024. He further submits that since the scheme is a time bound project, the nodal agency which in this case is the Corporation is to ensure completion of the project within the stipulated time frame and therefore, there is a requirement that the bidders are having the adequate financial capacity and sufficient experience of the design and construction.

16. With regard to the projection made on behalf of the petitioners that a subsequent NIT dated 15.09.2023 does not contain such requirement of additional qualification, the learned Advocate General submits that there is a vast difference in the nature of the works as the total value of the work connected with the NIT dated 15.09.2023 is about Rs.45.82 lacs whereas the contract value of the present contract would be more than Rs.100 crores. Shri Saikia also refers to Section 19(6) of the Assam Public Procurement Act, 2017 which lays down the procedure for registration and the requirement is that the unit has to be registered with the State. It is submitted that the objective is to ensure that the work is of the best quality.

17. In support of his submissions, the learned Advocate General relies upon the following case laws-

***i. Raunaq International Ltd. v. I.V.R. Construction Ltd.,
[(1999) 1 SCC 492]***

***ii. Michigan Rubber (India) Ltd. v. State of Karnataka,
[(2012) 8 SCC 216]***

- iii. **Montecarlo Ltd. v. NTPC Ltd., [(2016) 15 SCC 272]**
- iv. **Silppi Constructions Contractors v. Union of India, [(2020) 16 SCC 489]**
- v. **Uflex Ltd. v. State of T.N., [(2022) 1 SCC 165]**
- vi. **Balaji Ventures Pvt. Ltd. Vs. Maharashtra State Power Generation Company Ltd. and Anr. [2022 Online SC 1967]**

18. In the case of **Raunaq International** (supra), the Hon'ble Supreme Court has laid down a caveat that while examining a challenge in contractual matters, the Court has to be keep in mind the overwhelming public attached to the project and as to whether there are any allegation whatsoever of any *mala fides* or collateral reasons.

19. In the case of **Michigan Rubber** (supra), it has been laid down that the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities unless the same suffers from gross arbitrariness or the decision is vitiated by *mala fide*.

20. In the case of **Montecarlo Ltd.** (supra), the Hon'ble Supreme Court, after discussing the relevant case laws in the field had held that before a Court interferes in tender or contractual matters in exercise of power of judicial review, it should pose to itself the question whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the judicial conscience cannot countenance. The emphasis was laid on the test, that is, whether award of contract is against public interest.

21. In the case of **Silppi Constructions Contractors** (supra), the following has been laid down in the context of the role of a Court while examining

contractual matters.

“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 like 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.”

22. In the case of **Uflex Limited** (supra), it has been laid down that while element of transparency is always required in a tender process as the same concerns public money, but the contours under which they are to be examined are restricted. It has further been held that the objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded.

23. In the case of **Balaji Ventures Pvt. Ltd.** (supra), it has been laid down that the owner should have the freedom to provide for eligibility criteria and the terms and conditions unless it is found to be arbitrary, *mala fide* and tailor

made, a bidder cannot be permitted to challenge any bid condition which might not suit him or be inconvenient to him.

24. Rejoining his submissions, Shri Choudhury, learned Senior Counsel for the petitioners has however submitted that the distinction sought to be carved out from the NIT dated 15.09.2023 is incorrect. He submits that though the total value of the work in question would be more than Rs.100 crores, it consist of different works in different districts and the value of each work is about Rs.7 crores with the additional stipulation that one contractor can be offered a maximum of four numbers of works.

25. The rival submissions have been duly considered and the materials placed before this Court have been examined.

26. It appears that the work in question is under a centrally sponsored scheme with the Corporation as the nodal agency. The value of the work is more than Rs. 100 cores spread over 16(sixteen) districts of Assam and is in connection with construction of RCC quarters and all other ancillary works, including sanitation, water supply, electrification, street light etc. in the Police Reserves and there is no manner of doubt regarding the aspect of paramount public interest involved and also the requirement of the works to be of high standard and quality. The impugned Clause 2.2.2.4 of the NIT dated 24.08.2023 is with regard to requirement of additional qualification in the form of experience. An examination of the said clause would reveal that the experience of having executed at least one building project of value not less than 50% of the estimated cost during the last 7 years by any of the four modes, namely, (i) EPC, (ii) Design and Build (D&B), (iii) Execution with in-house architectural firm of the contractor having Structural Engineer and Architect and (iv) Work

executed by the bidder by tie-up with an architectural firm having Structural Engineer and Architect.

27. It is seen that the aforesaid requirement is not one which can be termed as unreasonable or irrational. On the other hand, this Court is of the view that a great deal of latitude has been afforded to an interested bidder inasmuch as, the experience can be of executing even one building project during the last 7 years in any one of the four modes. Apart from the aspect that the projection made on behalf of the petitioners that it is only the EPC mode which is prescribed is incorrect, this Court is of the opinion that adherence to the experience clause with any of the four modes is only to ensure a high standard/better quality in the work in question. The requirement of having experience in any of the modes is directly connected with the quality of the construction. The objective of introducing such additional clause with regard to experience would only be to ensure that the work executed would be of the best quality.

28. This Court is also of the opinion that though the petitioner no. 1 is an association of contractors who are registered with the Corporation, the present work under the NIT dated 24.08.2023 is not the only work of the Corporation and in fact, the petitioners have themselves brought on record another NIT dated 15.09.2023 which does not contain such a clause and therefore, the submission made on behalf of the petitioners that their means of livelihood would be adversely affected cannot be countenanced.

29. This Court has also been informed that in the present tender process, 16 nos. of bidders have participated, amongst whom, there are 3 nos. of members of the petitioner no. 1 association.

30. An argument was sought to be made by the petitioners that the work in question though appears to be of a total value of more than Rs. 100 crores, the same is spread out through sixteen districts of the State and therefore, the individual works would be of lesser value. Adherence to the additional qualification with regard to the experience cannot strictly be restricted to the value of the work as each of the construction is expected to be of high standard and quality and the experience clause is only inserted as a means to achieve the said objective. That apart, though the work would be concerning sixteen districts, the same is under one scheme of the Central Government and the entire expenses would be borne by the Centre.

31. As regards the argument that the scheme does not contemplate the mode of construction, this Court is of the view that though the aforesaid argument appears to be correct, the scheme is being implemented by the nodal agency which is the Corporation and to ensure better quality of the construction, the Corporation is required to be given a leeway in prescribing the mode of construction, including adhering to the requirement of having a particular experience. This Court has already held that the experience clause does not appear to be unreasonable at all and by no stretch of imagination, it can be held to be tailor made to suit any particular bidder. As already observed, sixteen numbers of bidders have already participated in the bidding process.

32. With regard to the submission that the impugned clause 2.2.2.4 is inconsistent with clause 2.2.1.1, this Court is unable to accept the said submission. While the clause 2.2.2.4 is with regard to additional qualification in terms of experience, clause 2.2.1.1 is with regard to engaging an architect for execution of the work in question.

33. This Court is of the view that in matters of incorporation of tender

conditions, discretion should be vested with the owner and unless such conditions appear to be grossly unreasonable or arbitrary or against the interest of public, a writ court would be loath in interfering with such conditions. The case law cited in this regard by the respondents fortifies the aforesaid view of this Court wherein, it has been clearly laid down that apart from the fact that the employer would be the best person to interpret any clause of the contract, a leeway should be granted to the employer in incorporating clause so as to ensure the best outcome. It is a settled law that in matters of distribution of State largesse, there not only has to be fairness and transparency, the Court is also required to see that employer is given a "fair-play in the joints". The Hon'ble Supreme Court in a catena of decisions has held that judicial review can be made only on the decision making process and not on the decision. In other words, it is lawfulness and not the soundness of the decision which can be matters of judicial review.

34. This Court has noticed that when this writ petition was moved on 09.10.2023, while issuing notice, no interim order was passed. However, WA/408/2023 was preferred against the aforesaid order with the primary contention that all the documents could not be annexed as the writ petition was filed hurriedly. Accordingly, the Hon'ble Division Bench vide order dated 19.10.2023 had given liberty to the petitioners to file additional documents and pray for interim relief. On such remand, the learned Single Judge vide order dated 06.11.2023 had passed an interim direction to the effect that no final order be issued to the successful bidder.

35. In view of the aforesaid discussion, this Court is of the view that no case for interference is made out and accordingly, the writ petition is dismissed. The interim order operating is accordingly vacated.



36. No order as to costs.

JUDGE

Comparing Assistant