

GAHC010004882023



2024:GAU-AS:11467

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

Case No. : WP(C)/132/2023

SIPL INFRACON

A PARTNERSHIP FIRM HAVING ITS OFFICE AT SRI KRISHNA NAGAR, BELA
ROAD, P.O. RAMNA, DIST.- MUZAFFARPUR, BIHAR- 842002 REP. BY ITS
PARTNER AND AUTHORIZED REPRESENTATIVE SRI PRASHANT SAURABH

VERSUS

THE UNION OF INDIA AND 6 ORS.

REP. BY THE SECY. TO THE UNION OF INDIA, MINISTRY OF POWER, NEW
DELHI-6

2:NATIONAL HYDROELECTRIC POWER CORPORATION

REP. BY ITS CHAIRMAN CUM MANAGING DIRECTOR

FARIDABAD

HARIYANA

PIN- 121001

3:THE EXECUTIVE DIRECTOR

LOWER SUBANSIRI H.E. PROJECT

GERUAMUKH

DIST.- DHEMAJI

ASSAM

PIN- 787035

4:THE GROUP SR. MANAGER (P AND C)

LOWER SUBANSIRI H.E. PROJECT

GERUAMUKH

DIST.- DHEMAJI

ASSAM

PIN- 787035

5:THE GENERAL MANAGER (CONTRACT)

LOWER SUBANSIRI H.E. PROJECT
GERUAMUKH
DIST.- DHEMAJI
ASSAM
PIN- 787035

6:THE TENDER EVALUATION COMMITTEE
REP. BY THE SENIOR MANAGER
LOWER SUBANSIRI H.E. PROJECT
GERUAMUKH
DIST.- DHEMAJI
ASSAM
PIN- 787035

7:BRAHMAPUTRA INFRASTRUCTURE LTD.
BRAHMAPUTRA HOUSE
A-7
MAHIPALPUR (NH-8)
MAHIPALPUR CROSSING
NEW DELHI- 110037 (

For the Petitioner(s) : Mr. S. K. Ghosh, Advocate

For the Respondent(s) : Mr. P. K. Tiwari, Senior Counsel
: Mr. A. K. Dutta, Advocate
: Mr. B. D. Deka, Advocate
: Mr. U. Pathak, Advocate

Date of Hearing : **21.11.2024**

Date of Judgment : **21.11.2024**

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Heard Mr. S. K. Ghosh, the learned counsel appearing on behalf of the
Petitioner and Mr. P. K. Tiwari, the learned Senior counsel appearing on

behalf of the Respondent Nos. 2, 3, 4, 5, and 6. I have also heard Mr. B. D. Dekka, the learned counsel appearing on behalf of the Respondent No.7.

2. The instant writ petition has been filed challenging the rejection of the technical bid of the Petitioner on the basis of the Tender Evaluation Committee report dated 10.12.2022 and for directing the Respondent Authorities to accept the technical bid of the Petitioner and for other consequential reliefs.

3. The brief facts leading to the filing of the instant writ petition are that a Notice Inviting e-Tender was issued by the NHPC Ltd. i.e. the Respondent No.2 for the work of "River Bank protection/erosion control measures on the Left Bank of River Subansiri Downstream of village Gerki 1 (RD 28 KM - 29 KM)." As per the said Notice Inviting e-Tender, the bid security amount was Rs.13,31,000/- which was to be paid in the manner stipulated therein. The said notice Inviting e-Tender contains various clauses. Clause 3.2A, 3.2B and 3.2E being relevant are reproduced herein under:

"3.2.A To qualify for award of the Contract, each bidder should have:

a) Achieved in any one year in last three year a minimum financial turnover of at least two and half times the amount equal to the annualized estimated cost of works for which bid has been invited. (Annualized estimated cost of work = Estimated cost of work ÷ construction period in years).

(Estimated cost of work = Rs.6,65,26,134/-)

b) Satisfactorily completed, in last five year ending with last day of month previous to the one in which tenders are invited, at least one similar work equal in value to 80% of the estimated cost of work or two similar works each

equal in value to 50% of estimated cost of work or three similar works each equal in value to 40% of the estimated cost of works.

*Similar works means "**River Bank Protection works, erosion control measures, River Training works, any other civil works along or across the rivers**"*

c) The bidder must be a registered Contractor with any Government/Semi Government Departments/ NHPC Registration certificate allowing for undertaking works equivalent to estimated value (Class 1 or Class A or as the case may be) shall be submitted along with the bid.

3.2.B Each bidder must also produce with their Bid:

- i) PAN No., GST Registration No. and EPF Registration No.*
- ii) A declaration that the information furnished with the bid documents is correct in all respects in form-5 form of declaration, Section-III.*
- iii) Such other certificates if any as defined in the ITB.*
- iv) The 'Class-I local supplier'/'Class-II local supplier' at the time of tender, bidding or solicitation shall be required to indicate percentage of local content and provide self-certification that the item offered meets the local content requirement for 'Class-I local supplier'/'Class-II local supplier', as the case may be. They shall also give details of the location(s) at which the local value addition is made.*

3.2.E *All Startups (whether MSEs or otherwise), falling within the definition as per Gazette notification G.S.R.501(E) dt.23.05.2017 or as amended from time to time are exempted from meeting the qualification criteria in respect of Prior Experience-Prior Turnover as per para 3.2A subject to their meeting the quality and technical specification. However, the Employer reserves the right to deny such exemptions to Startups (whether MSEs or*

otherwise) in case of circumstances like procurement of items related to public safety, health, critical security operations and equipment, etc.”

4. From a perusal of the above quoted Clauses, it would be seen that in terms with Sub-Clause (a) Clause 3.2A, the bidder is required to have achieved in any one year in the last three years a minimum financial turnover of at least two and a half times the amount equal to the annualized estimated cost of the works for which the bid have been invited. It was also mentioned that the estimated cost of the work to be Rs.6,65,26,134/-. The said Sub-Clause (a) therefore related to the financial turnover of the bidder.

5. Sub-Clause (b) of Clause 3.2A relates to experience inasmuch as the bidder is required to have satisfactorily completed in the last five years ending with the last day of the month previous to the one in which the tender was invited, at least one similar work equal in value to 80% of the estimated cost of the work or two similar works each equal in value to 50% of the estimated cost of the work or three similar works each equal in value to 40% of the estimated cost of the works. The term “similar work” as appearing in Sub-Clause (b) have been further defined to mean “River Bank Protection works, erosion control measures, River Training works, any other civil works along or across the rivers”. Sub-Clause (c) of Clause 3.2.A mentions that the bidder must be a registered contractor with any Government/Semi Government Department/NHPC Registration Certificate allowing for undertaking works equivalent to estimated value (Class 1 or Class A or as the case may be). Such certificate is required to be submitted along with the bid.

6. Clause 3.2B relates to certain documents which the bidder is required

to submit along with the bid. Amongst the various documents, Sub-Clause (i) of Clause 3.2B stipulates that the bidder has to produce the PAN Number, GST Registration Number and the EPF Registration Number.

7. Clause 3.2E as quoted above relates to startups whereby all startups (whether MSEs or otherwise) falling within the definition as per the Gazette Notification No. G.S.R.501(E) dated 23.05.2017 were granted exemption from meeting the qualification criteria in respect of Prior Experience-Prior Turnover as per para 3.2A subject to their meeting the quality and technical specification. Be that as it may, in terms with the said Clause i.e. Clause 3.2E, NHPC reserved the right to deny such exemptions to startups in case of circumstances like procurement of items related to public safety, health, critical security operations, equipments etc. Therefore, it could be seen from Clause 3.2E that the requirement as stipulated in Sub-Clause (a) and (b) of Clause 3.2A were exempted insofar as all startups (whether MSEs or otherwise). The said Clause being Clause 3.2E did not stipulate in respect to the exemption from submission of certificate of registered contractors with any Government/Semi Government Departments/NHPC which was the mandate in terms of Clause 3.2A(c).

8. Be that as it may, from the materials on record, it transpires that pursuant to the said Notice Inviting Tender, seven bidders including the Petitioner and the Respondent No.7 participated in the said bid process. The materials on record more particularly Annexure R3 and R4 to the affidavit-in-opposition shows clarifications/additional information were sought by NHPC in terms with Clause 16.4 and Clause 21.4 of the instructions to bidders from the Petitioner as well as the Respondent No.7. The clarification which was

sought for insofar as the Respondent No.7 was concerned was that the Respondent No.7 was asked to submit the EPF Registration Certificate in the name of Brahmaputra Infrastructure Limited as per the requirement of Clause 3.2B(i) and the Petitioner was asked to Submit Class 1 or Class A contract registration issued by the Government or Semi Government Department as per Clause 3.2A(c).

9. The Respondent No.7 submitted an EPF Challan in the name of Brahmaputra Infrastructure Limited pursuant to the email. The Petitioner also submitted a Class 1 contractor Registration Certificate in the name and style of M/s SIPL INFRACON proprietor Prashant Saurabh. However, the Petitioner did not submit the Class 1 Registration Certificate in the name of M/s SIPL INFRACON (startup partnership firm). The record further reveals that a technical evaluation was made on 29.11.2022 wherein the Petitioner was held to be techno commercially responsive bidder whereas the other six bidders were held to be techno commercially non-responsive bidder. A further perusal of the technical evaluation reveals that insofar as the Respondent No.7 was concerned, it was observed that as the EPF certificate was submitted in the name of M/s Brahmaputra Consortium Limited which was not as per the NIT, the Respondent No.7 was Techno-commercially non-responsive bidder. In respect to the Petitioner, however the certificate submitted as regards the proprietorship firm was accepted in terms with Clause 3.2A(c).

10. The record further reveals that upon such technical evaluation being carried out, the same was forwarded for financial concurrence and approval of the Executive Director. During the process of financial concurrence, it was

noticed that the Class 1 contractor Registration Certificate submitted by the Petitioner was not in the name of the startup partnership firm rather in the name of M/s SIPL INFRACON proprietor Prashanth Saurabh. It was also noticed that the EPF Challan submitted by the Respondent No.7 through the email dated 14.10.2022 was not taken into consideration by the Technical Evaluation Committee in its evaluation made on 29.11.2022. Under such circumstances, a review of the Technical Evaluation Committee was held. On the basis of the said review, a further Technical Evaluation Committee report was made on 10.12.2022 whereby the Petitioner's bid was held to be Techno-commercially non-responsive whereas the bid of the Respondent No.7 was held to be Techno-commercially responsive.

11. The record further reveals that pursuant to the report dated 10.12.2022, the price bid of the Respondent No.7 was opened and the contract was recommended to be awarded to the Respondent No.7 at a quoted price of Rs. 5,05,59,861/- on 05.01.2023 and such recommendation was sent to the Executive Director for approval and financial concurrence. At that relevant stage, the instant writ petition was filed and vide an order dated 09.01.2023, this Court stayed the operation of the report of the Technical Evaluation Committee dated 10.12.2022 which still continues.

12. It is further relevant to take note of that the pursuant to the filing of the writ petition, pleadings have been exchanged whereby the Respondent NHPC have justified its stand for rejecting the technical bid of the Petitioner and also the Technical Evaluation Committee report dated 10.12.2022. The record further reveals that reply to such affidavit-in-opposition have also been filed by the Petitioner.

13. In the backdrop of the above, let this Court now take note of the respective submissions made by the learned counsels for the parties.

14. Mr. S. K. Ghosh, the learned counsel appearing on behalf of the Petitioner submitted that the Petitioner firm which is now a startup partnership firm was earlier a proprietorship firm belonging to one Shri Prashanth Saurabh. The said proprietorship firm belonging to Shri Prashanth Saurabh had the requisite experience and the financial turnover as well as the certification as a Class 1 contractor. The learned counsel further submitted that in terms with Clause 3.2.E, the requirement as necessary under Clause 3.2A were exempted and as such the Respondent Authorities could not have rejected the bid of the Petitioner. Even otherwise also, the learned counsel for the Petitioner submitted that Shri Prashanth Saurabh proprietorship firm i.e. M/s SIPL INFRACON was a registered Class 1 contractor and the said certification ought to have been taken into consideration. In that regard, the learned counsel submitted that the doctrine of lifting of the corporate veil ought to have been taken into account by the Respondent Authorities which is the mandate of law in terms of the judgments of the Supreme Court in the case of ***New Horizons Limited and Another Vs. Union of India and Others*** reported in (1995) 1 SCC 478 as well as in the case of ***M/S MAA Nabadurga Construction Vs. Saroj Kumar Jena and Others*** dated 04.08.2015 which is also in the similar lines.

15. Per contra, Mr. P. K. Tiwari, the learned Senior counsel appearing on behalf of the Respondent Nos. 2 to 6 submitted that a conjoint reading of Clause 3.2A along with Clause 3.2E would show that as regards all startups (MSEs or otherwise) exemptions were granted in respect to the prior

turnover as well as the prior experience. Clause 3.2E however, did not grant any exemption insofar as the requirement in terms with Sub-Clause (c) of Clause 3.2A. Under such circumstances, the certification of Class 1 of Class-A contractor under the Government or Semi Government institutions was the requirement as per the Notice Inviting Tender. The Petitioner was duly granted an opportunity to produce the same. However, the Petitioner only provided the Class 1 Registration Certificate of M/S SIPL INFRACON Proprietorship firm Shri Prashanth Saurabh and not the certification in respect to the petitioner which is a startup partnership firm. Under such circumstances, as the said Clause was a requirement of the tender conditions, the Respondent Authorities more particularly, the Technical Committee in its meeting dated 10.12.2022 had rightfully held that the petitioner's bid was Techno-commercially non-responsive. He submitted that the judgments which have been placed by Mr. S. K. Ghosh, the learned counsel appearing on behalf of the Petitioner are in respect to importing the turnover as well as the experience of the constituents of a partnership firm and this aspect of the matter have been duly provided in the tender document itself i.e. in Clause 3.2E and as such, the said judgments would have no relevance to the facts of the instant case.

16. He further submitted that it is a trite principle of law as has been held by the Supreme Court in the case of ***Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited and Another*** reported in (2016) 16 SCC 818 wherein the Supreme Court categorically observed that the requirements as per the tender should be best left to the authors of the tender documents and the Constitutional Court should not second guess on such requirements unless such an interpretation made by the authorities concerned are mala

fide or suffers from perversity. The learned Senior Counsel further submitted that if M/s SIPL INFRACON which is a proprietorship firm wanted to participate, they could have very well participated but in order to take the benefit of Clause 3.2A as well as the exemption from payment of the EMD, the Petitioner herein has applied on the basis of as a startup partnership firm and as such now having taken that benefit cannot raise the issue that M/s SIPL INFRACON which is a proprietorship firm had the due qualifications.

17. Mr. B. D. Deka, the learned counsel appearing on behalf of the Respondent No.7 submitted that pursuant to the email issued on 13.10.2022 by the NHPC Authorities to the both the Petitioner as well as the Respondent No. 7, the Respondent No.7 on 14.10.2022 submitted an EPF challan in the name of the Respondent No.7. However the said aspect of the matter was not taken into consideration in the technical evaluation carried out on 29.11.2022. He further submitted that the name of the company M/s Brahmaputra Consortium Ltd. was changed to M/s Brahmaputra Infrastructure Ltd. and that too by following the due process and as such the credentials of M/s Brahmaputra Consortium Ltd. by operation of law became the credentials of M/s Brahmaputra Infrastructure Ltd.

18. I have heard the learned counsels appearing on behalf of the parties and given my anxious consideration to the respective submissions.

19. As noted in the previous segments of the instant judgment, Clause 3.2E had provided certain exemptions to all startups (whether MSEs or otherwise) falling within the definition as per Gazette notification dated 23.05.2017 from meeting the qualification criteria in respect of Prior Experience-Prior Turnover as per Clause 3.2A however subject to meeting

their quality and technical specifications. In that view of the matter, Sub-Clause (a) and Sub-Clause (b) of Clause 3.2A which pertain to the prior financial turnover as well as the prior experience were to be exempted.

20. It is also relevant to take note of that this exemption was not absolute inasmuch as the employer reserves the right to deny such exemptions to startups (whether MSEs or otherwise) in case of circumstances like procurement of items relating to public safety, health, critical security, operations and equipments, etc. However, Sub-Clause (c) of Clause 3.2A were not in relation to prior experience or prior turnover but was specifically as regards registration with any Government/Semi Government Department/NHPC as a Class 1 or Class A contractor or as the case may be, thereby allowing such contractors for undertaking works equivalent to estimated value. The submission of the certificates as required under Sub-Clause (c) of Clause 3.2A was not exempted in terms with Clause 3.2E inasmuch as the Clause 3.2E only related to prior experience and prior turnover.

21. In the instant case, it would be seen that the Petitioner was issued an email on 13.10.2022 asking the petitioner to provide the certificate required under Clause 3.2A(c) of the Notice Inviting Tender. The Petitioner knew the requirement but submitted the certification as a Class 1 contractor of the proprietorship firm namely M/s SIPL INFRACON, proprietor Prashanth Saurabh and not M/s SIPL INFRACON (startup partnership firm). Under such circumstances, the technical evaluation which was carried out on 29.11.2022 whereby the Petitioner was held to be responsive, taking the said certificate so submitted by the Petitioner to satisfy the requirement of Clause 3.2A(c) was not as per the requirement of the Notice Inviting Tender. The said error

which occurred in the technical evaluation carried out on 29.11.2022 was however rectified on 10.12.2022 that too after giving a further opportunity to the Petitioner to produce such certification. Under such circumstances, this Court is of the opinion that the exercise of the power so carried out by the Respondent Authorities in rejecting the technical bid of the Petitioner cannot said to be arbitrary, unreasonable or even contrary to the notice inviting tender.

22. It is a well settled principle of law that the jurisdiction to exercise the power of judicial review is only limited when such actions on the part of the Respondent Authorities is illegal, unreasonable, arbitrary and does not satisfy the principles of Wednesbury. However, there being no case made out insofar as the rejection of the Petitioner's technical bid by the Petitioner in the facts of the instant case, this Court is of the opinion that no interference is required.

23. Be that as it may, a further question though arises in the instant case as to whether the decision of the Technical Committee in its meeting dated 10.12.2022, insofar as the Respondent No.7 is required to be interfered with. It is seen that like the petitioner, the Respondent No.7 was also issued an email on 13.10.2022 asking the Respondent No.7 to submit a valid Registration Certificate. The Respondent No.7 thereupon submitted an EPF Challan on 14.10.2022 wherein the EPF Challan contained the Registration Number in the name of M/s Brahmaputra Infrastructure Ltd. It is further seen that this aspect was not taken into consideration during the technical committee meeting held on 29.11.2022 which was subsequently rectified in the technical committee meeting held on 10.12.2022 and accordingly, the

technical bid of the Respondent No.7 was held to be Techno-commercially responsive. Under such circumstances, the question of interference with the decision of the technical committee held on 10.12.2022 does not arise.

24. In that view of the matter, the instant writ petition stands dismissed.

25. Interim order passed earlier stands vacated.

JUDGE

Comparing Assistant