

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED: 3rd April, 2017

S.B. : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

W.P.(C) NO. 68 OF 2016

Petitioner : M/s Nektor Engineers & Project Consultants,
A registered Partnership firm
Having its office at B 104 Silicon Valley,
Shivranjani Cross Roads, Satellite,
Ahmedabad, Gujarat -380 015,
Represented by its duly authorized
power of attorney holder
Shri Krishn Rameshbhai Pethani,
S/o Rameshbhai Pethani,
Resident of A 704 Silicon Valley,
Shivranjani Cross Roads, Satellite,
Ahmedabad, Gujarat -380 015,

Versus

Respondents :

1. Union of India,
Represented by the Secretary,
Ministry of Urban Development,
Maulana Azad Road,
Nirman Bhawan,
New Delhi- 110 011.
2. Central Public Works Department,
Maulana Azad Road,
Nirman Bhawan,
New Delhi- 110 011.
Represented by the Director General
Central Public Works Department,
Maulana Azad Road,
Nirman Bhawan,
New Delhi- 110 011.
3. The Chief Engineer,
IBBZ-II,
Central Public Works Department,
Nirman Bhawan,
Paribahan Nagar,
Matigara,
Siliguri- 734 010.
4. The Executive Engineer,
Border Road Project Division – II,
Central Public Works Department,
1st floor, Post Office Building,
Chungthang, North Sikkim.

Petition under Articles 226 and 227 of the Constitution of India.

Appearance

Mr. A.K Upadhyaya, Sr. Advocate with Mr. Debojit Senapati, Ms. Aruna Chhetri and Ms. Hemlata Sharma, Advocates for the Petitioner.

Mr. Karma Thinlay, Central Government Counsel for the Respondents No. 1, 2, 3 and 4.

J U D G M E N T

Meenakshi Madan Rai, J.

(1) By filing the instant Writ Petition, the Petitioner prays for issuance of a Writ in the nature of *mandamus* directing the Respondents to cancel, recall or otherwise forbear from giving effect to the impugned NIT No.04/CE/IBBZ-II/SLG/2016-17 (2nd Call), issued by the Respondent No.4 and to finalize the tender process in which the Petitioner had participated being NIT No: 04/CE/IBBZ-II/SLG/2016-17 (hereinafter 'NIT No.04') for consultancy services, for preparation of Detailed Project Report (hereinafter 'DPR') for additional high altitude road from Dembuen-Bruni (40 kilometers), under Phase-II, in the state of Arunachal Pradesh, using satellite imagery with the last time and submission of bid as 3 p.m. on 26.08.2016.

(2) The Petitioner is a registered partnership firm with its office at Ahmedabad, Gujarat, and is engaged in providing consultancy services in the field of Civil and Structural Engineering

including Architectural design and specialty engineering services. The Petitioner has over the years provided consultancy services to various clients including the Central Public Works Department (hereinafter 'CPWD') and other governmental organizations.

(3) The Respondent No.4 issued a Notice inviting e-Tender for the above stated NIT No.04 in which the Petitioner being eligible submitted its valid bid enclosing all the requisite documents and Demand Draft towards Earnest Money Deposit (hereinafter 'EMD') and thereafter, awaited news from the Respondent as to the date for opening of financial bid.

(4) Prior in time, in fact, the Petitioner had participated in another notice inviting tender being NIT No. 01/CE/IBBZ-II/SLG/2016-17 (hereinafter 'NIT No.01'), for consultancy services for preparation of DPR for additional high altitude roads under Phase-II, in the state of Sikkim using satellite imagery and his bid was accepted by the Respondent No.4. Both NIT No. 01 and NIT No.04 were works of identical nature. While the Petitioner was taking steps for the works in NIT No.01, the Respondent No.4 issued a letter dated 01.08.2016, informing him that he had learnt that the Tax Deducted at Source (hereinafter 'TDS') Certificate issued by M/s Vraj & Vaj Constructions in favour of the Petitioner, for the year 2009-2010, indicated that payment had been made towards construction activity @ of 1% only, while the tax deducted at source towards consultancy services ought to be 10%. It was further informed that the nature of payment shown in the TDS

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Certificate is under Section 194C of the Income Tax Act, 1961, which relates to Contractors. That, as the Petitioner's bid had been approved on the basis of Consultancy work with M/s Vraj & Vaj Constructions, he was requested to submit proof of balance tax deposited to the Income Tax Department during the final settlement of the tax liabilities, along with the Performance Guarantee (PG) within the time limit as prescribed in the letter dated 27.07.2016 (Annexure P-7).

(5) It was asserted by the Petitioner that the works executed by him for M/s Vraj & Vaj Constructions was consultancy services and mere tax deductions under Section 194C of the Income Tax Act, 1961, would not alter the nature of the work from consultancy to that of a contractor, hence the interpretation by the Respondent No.4 was wholly erroneous. That, the TDS is deducted and deposited with the government by the payer of the income i.e. M/s Vraj & Vaj Constructions, with the Petitioner having no control over it. However, at the end of every financial year, the actual tax payable by the Petitioner on the income of the entire year is deposited. Therefore, although the TDS was deducted by the payer, M/s Vraj & Vaj Construction, the full tax liability for the year has been paid by the Petitioner.

(6) In the interim, on 12.08.2016, despite the above query, as the works were time bound the Respondent No.4 directed the Petitioner to commence execution of the works pertaining to NIT No.01, however, due to want of approval for

certain matters from the Respondent authorities, the progress of the work came to a halt. While awaiting such approval, the Petitioner was served with a Show Cause notice by the Respondent No.4 dated 06.10.2016 [impugned in W.P.(C) No.1 of 2017] directing the Petitioner to show cause within ten days as to how shortfall of tax over and above TDS was to be paid by the Petitioner's firm if the nature of his business was that of a Contractor, in view of the information received from the Income Tax Officer that the Petitioner had deducted tax under Section 194C of the Income Tax Act, 1961, and shown the nature of business code as 0505 which pertains to Contractors and not Consultants. As per the Petitioner, the said Report of the Income Tax Officer, however, was allegedly deliberately withheld from him thereby preventing him from replying effectively. In the meanwhile, fearing adverse action by the Respondent No.4 for non filing of reply to the Show Cause, the Petitioner without the Income Tax Officer's letter submitted his response on 15.10.2016.

(7) As the Respondent No.4 failed to make over the Report of the Income Tax Officer despite several requests, thus, the Petitioner approached this Court by filing W.P.(C) No.51 of 2016, wherein on 09.11.2016, the Petition was disposed of on the undertaking of the Respondent No. 4 that the concerned letter would be furnished to the Petitioner, which was accordingly made over on the same date. The Respondent No.4 was also directed to grant the Petitioner three weeks' time to file response. Following this, however, on 19.11.2016, the Respondent No.4 issued a letter

alleging commission of breach by the Petitioner in the execution of the work in NIT No.01 of 2016. The Petitioner submitted a reply on 28.11.2016, in addition to the reply dated 15.10.2016, to the Show Cause dated 06.10.2016.

(8) Meanwhile, as there was no communication from the Respondent No.4 with regard to the status of NIT No.04, the Petitioner vide letter dated 30.11.2016 and e-mail of the same date enquired of it from the Respondent No.4 requesting him to expedite the process of eligibility evaluation and to open the bid at an early date. In response, vide his email dated 1.12.2016, the Respondent No.4 informed him for the first time that the NIT No.04 had already been recalled and NIT No.04/CE/IBBZ-11/SLG/2016-17 (2nd Call) was uploaded in the CPWD Website. On receipt of such information, the Petitioner visited the concerned portal on 01.12.2016 at 3:49 p.m., where it was clearly shown that NIT No.04 (1st Call) was still "*in race*", of which he obtained a screen shot on the same date. Admittedly on the same date, he also saw the impugned NIT No.04 (2nd Call), hosted on 18.11.2016, with the last date for submission of bid being 28.11.2016. That, the impugned recalled NIT No.04/CE/IBBZ-II/SLG/2016-17 (2nd Call) for the same work has been illegally and arbitrarily floated for extraneous considerations without assigning any reason for cancellation of the previous work and the Petitioner was unable to participate in it. The earnest money deposit has not been refunded, hence the prayers in the Petition.

(9) While no counter affidavit was filed by the Respondents but a joint response to the Application for stay of the operation of the impugned recalled NIT No.04 (2nd Call), being I.A. No. 01 of 2016, was filed. The stand taken by the Respondents therein was that the Petitioner along with one M/s L.N. Malviya Infra Projects Pvt. Ltd. had participated in the impugned NIT No.04 dated 14.08.2016 (1st Call). In the said NIT, the Petitioner had enclosed an Experience Certificate issued by M/s Vraj & Vaj Constructions, reflecting therein that the Petitioner had provided and satisfactorily completed consultancy services for preparation of Capital Township of project road network DPR at Ahmedabad. That, the Petitioner had previously participated in NIT No.1 floated by the Respondent No.4, and had been awarded the work vide letter dated 27.07.2016, however, on 30.07.2016, the Respondents received a complaint from one Ramesh Pandey, an RTI activist from Jaipur, alleging that the documents submitted during the technical and financial bid in NIT No.1, by the Petitioner was fake and forged. Evidently, in a bid to verify whether the allegations were genuine or otherwise, the Respondent No.4 wrote three letters on 05.08.2016, 20.08.2016 and 02.09.2016 respectively to various Income Tax Authorities at Ahmedabad. A response was received from the concerned authority on 29.09.2016, informing therein that the Petitioner while submitting his Income Tax Return for the financial year 2009-10, relevant to Assessment Year 2010-11 for the work executed by the Petitioner for M/s Vraj & Vaj Constructions had shown the nature of business code as 0505, which relates to Contractors and not Consultancy

services. According to Respondent No.4, the Petitioner thereby misled and misrepresented facts to the concerned authorities while submitting the bid under NIT No.01. Thereafter, the Show Cause notice dated 06.10.2016, was issued to the Petitioner requiring him to explain as to why action should not be taken as per the terms and conditions of the agreement and for misrepresentation, as the Petitioner was a contractor and not extending consultancy services. That, in NIT No.04, the bidder was to certify that all the information given pursuant to the eligibility criteria are correct and would be liable to be debarred, disqualified or even cancellation of enlistment in case of furnishing of incorrect information. On considering the replies to the Show Cause submitted by the Petitioner, the Respondent No.4 cancelled the work NIT No.01, in terms of the letter of transmittal on grounds of misrepresentation. Subsequently, the Petitioner participated in NIT No.04, wherein it was found that the document earlier submitted in NIT No. 01 was again enclosed. Hence, considering the action on the part of the Petitioner, who had misrepresented/misled the authorities in the earlier bid being NIT No. 01, the Respondent No.4 did not recommend his name in NIT No.04, which was recalled on 18.11.2016, for administrative reasons by the competent authority, duly invoking Clause 13 of NIT(CPWD-6).

(10) That, the 2nd Call for NIT No.04 was republished on 19.11.2016, after recall of the 1st NIT No.04, was made on 18.11.2016 and the last date of submission and opening of eligible bid was fixed on 28.11.2016, which was widely published in the

national newspapers and uploaded in the Website of CPWD. Pursuant to the 2nd Call of the NIT No.04, only M/s Highway Engineers Consultants participated and was found technically qualified. The financial bid for 2nd Call NIT No.04 was opened on 05.12.2016 and accepted on 26.12.2016. The Petitioner failed to participate in the second recall despite wide advertisement but even otherwise failed to fulfil the criteria set out in NIT No.04, in view of the aforesaid reasons. Hence, the Petitioner is now estopped from questioning the re-tendering of the NIT No.04 and the Stay Petition is liable to be rejected on grounds of delay and laches.

(11) Learned Counsel for the parties was heard at length. I have also perused the pleadings and examined the documents meticulously.

(12) Having heard the rival contentions of the learned Counsel, what requires consideration is whether there was any arbitrary or illegal action on the part of the Respondent authorities in issuing NIT No. 04 (2nd call) for the consultancy services for preparation of DPR for additional high altitude road from Dembuen-Bruni (40 Kilometers), under Phase-II in Arunachal Pradesh, by recalling NIT No.04 (1st Call).

(13) In this regard, it would be pertinent to refer to W.P.(C) No. 1 of 2017, wherein the Petitioner had participated in the NIT floated by the Respondent No.4 being NIT

No.01/CE/IBBZ-II/SLG/2016-17. On pain of repetition, it may be stated here that it was found by the Respondent No.4 on enquiry from the Income Tax Authorities at Ahmedabad, that the tax deducted by the Petitioner for work done by it for M/s Vraj & Vaj Constructions was under Section 194C of the Income Tax Act, 1961, hence, nature of business code used was 0505, which pertained to Contractors and not Consultants. The Respondent No.4 having granted the work NIT No.01, to the Petitioner for consultancy works cancelled the said works, in view of the fact that the Petitioner as per the information received by the Respondent No.4 had carried out contract works and not consultancy works. It is also relevant to point out that the last date and time for submission of bid for NIT No.01 was 3 p.m. on 21.06.2016 and after issuing Show Cause on 06.10.2016, to which response was received on 15.10.2016 and 28.11.2016 and being dissatisfied with the grounds put forth, the work so awarded was cancelled on 08.12.2016. On the other hand, in NIT No.04, the last date and time for submission of bid was on 26.08.2016, obviously subsequent in time and date to NIT No.01. It is the case of the Respondent No. 4 that while bidding for NIT No.04 (1st Call), the Petitioner had relied on documents that he had filed in NIT No.01. In this context, we may advert to the decision of this Court in W.P.(C) No.1 of 2017, wherein while discussing the issue of tax deduction, it was held as follows;

".....

20. *Thus, what transpires from the above is that the consultancy works were awarded to the Petitioner by the Respondents on the basis of the Certificate of M/s Vraj & Vaj Constructions. To gauge whether the Petitioner had indeed*

provided consultancy works in view of the letter of the ITO informing to the contrary, as no other documents were forthcoming from the Petitioner, the Respondent No.4 had to fall back on the income tax deducted at source. The correspondence discussed hereinabove clarifies that the TDS was for contract works and not for consultancy services.

(14) Suffice it to say that as the Respondent No.4 found that the tax deducted by the Petitioner was for works extended as a Contractor and not Consultants. As work in NIT No.01 was cancelled, it is obvious that the Respondent No.4, had deemed it prudent not to consider Petitioner for NIT No.04, on consideration of the same documents, apart from which it was also canvassed that the NIT No.04 (1st Call) was recalled due to administrative reasons and the 2nd Call for NIT No.04 was issued on 19.11.2016 with last date for submission of tender on 28.11.2016. There appears to be no arbitrariness in the decision of the Respondents.

(15) Now what remains to be seen is whether the Respondents have been able to establish that the 2nd call was widely advertised in national newspapers and that it was uploaded in their website accordingly.

(16) The Respondents have taken this Court through several documents being Annexure R1 to R17, of which Annexure R-11 indicates a notice inviting e-tender by the CPWD being NIT No.04/CE/IBBZ-11/SLG/2016-17 (2nd Call). Annexure R-11 is dated 19.11.2016. The said NIT has been published in the Telegraph dated 19.11.2016. It is also published in the Sikkim

Express, Times of India, Mumbai Edition and Times of India, Kolkata edition of the same date. Admittedly, on 01.12.2016, the Petitioner saw on the Website of the CPWD that the NIT No.04 (1st Call) was still "*in race*". But at the same time, it is an admitted position that the Petitioner saw the NIT No.04 (2nd call) also on the same Website of the CPWD on the same date. It is obvious that two calls for the same work cannot co-exist for obvious reasons. Therefore, considering that the NIT No.04 (2nd Call) was widely advertised, it is obviously a human error that the 1st Call was not removed from the Website. This does not, however, mean that the 2nd Call is not valid, considering the wide publicity given and if the Petitioner chose to put blinkers on and was heedless and unmindful, he cannot fault the Respondents for it.

(17) That, having been said, learned Senior Counsel for the Petitioner argued that in terms of the CPWD Work Manual, 2014 it is specified in 20.4.9(6) that the tenderers whose tenders are rejected should be informed in writing, intimating them of the rejection, it was countered by learned Counsel for the Respondents that in the first instance the tender of the Petitioner was not rejected but in fact, the entire NIT No.04, was recalled due to administrative reasons, following which it was retendered by advertisements as already stated and therefore, the Petitioner has no case.

(18) Having considered the said submissions, we may refer to the CPWD Works Manual 2014, where at 20.4.9 at (1) reads as follows;

"20.4.9 Communication of acceptance/rejection of tenders

(1) After the tender for the work has been accepted, the same shall be communicated to the contractor in a sample form shown in Annexure-I. Para 21.1 may be seen for submission of the performance security/guarantee by the contractor.

.....

(19) 20.4.9(6) is the provision that the petitioner relies on and reads as

"20.4.9 Communication of acceptance/rejection of tenders

(6) The tenderers whose tenders are rejected should be sent written intimation about the rejection."

(20) A perusal of the entire provision of 20.4.9, would indicate that each Section cannot be read and interpreted in isolation. The above extracted provisions go to show that when there is acceptance of a tender, the concerned contractor shall be communicated of such acceptance. Similarly, when the tender is rejected then this is to be intimated to the concerned person. Admittedly, the bid was not opened, as evident from the submission of the Petitioner stating that vide communication dated 30.11.2016, he requested Respondent No.4 for expediting the process of eligibility evaluation and opening of the bid whereupon he was informed that the 1st bid had been recalled. When there is neither "acceptance" nor "rejection" but a "recalling" of the bid on administrative grounds, I would opine that the question of informing the party of rejection is redundant. Added to that as

earlier pointed out, it is clear that the recall and issuance of 2nd bid has been advertised widely, thus, the question of crying foul does not arise.

(21) Hence, in view of all of the foregoing discussions, I find no merit in the Writ Petition, which deserves to be and is accordingly dismissed.

(22) No order as to costs.

Sd/-
(Meenakshi Madan Rai)
Judge
03.04.2017

Approved for reporting : Yes

Internet : Yes

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