

**IN THE GAUHATI HIGH COURT  
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

**ITANAGAR PERMANENT BENCH**

**1. WP(C)309(AP)2016**

**M/s Mega Electricals**

A partnership firm having its registered office at  
Ground Floor, Raj Apartment 3, J. B. Road, Silpukhuri,  
Guwahati-3 represented by its partner Sri Umesh Chandra Boro  
S/o Late Dharmeswar Boro, R/o H/No. 3, 3<sup>rd</sup> Bye Lane, Nabagraha Road  
Silpukhuri, P.S. - Chandmari, District - Kamrup(M), Assam.

**.....Petitioner**

**By Advocates:**

S. Borthakur  
A. Chandran

**-Versus-**

1. The State of Arunachal Pradesh represented by the Commissioner to the Government of Arunachal Pradesh, Power Department, Itanagar, Arunachal Pradesh.
2. The Chief Engineer(Power), CEZ, Department of Power, Vidyut Bhawan, Itanagar, Arunachal Pradesh.
3. The Superintending Engineer, A.P. Electrical Circle No. -II, Department of Power, Pasighat, Arunachal Pradesh.
4. The Executive Engineer, A.P. Electrical Circle No. -II, Department of Power, Aalo, Arunachal Pradesh.
5. The Bid Opening Board represented by its Chairman, A.P. Electrical Circle No. -II, Department of Power, Pasighat, Arunachal Pradesh.

**.....Respondents**

**By Advocates:**

Mr. Kardak Ete, Senior Additional Advocate General, Arunachal Pradesh

**2. WP(C)311(AP)2016**

**M/s Mega Electricals**

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2. The Chief Engineer(Power), CEZ, Department of Power, Vidyut Bhawan, Itanagar, Arunachal Pradesh.
3. The Superintending Engineer, A.P. Electrical Circle No. VI, Department of Power, Aalo, Arunachal Pradesh.
4. The Executive Engineer, A.P. Electrical Circle No. VI, Department of Power, Aalo, Arunachal Pradesh.
5. The Bid Opening Board represented by its Chairman, A.P. Electrical Circle No. VI, Department of Power, Aalo, Arunachal Pradesh.

**.....Respondents**

**By Advocates:**

Mr. Kardak Ete, Senior Additional Advocate General, Arunachal Pradesh

**:::BEFORE:::**

**THE HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN**

**Date of hearing : 24-10-2016**  
**Date of Judgment & Order: 27-10-2016**

**JUDGMENT & ORDER(CAV)**

Heard Mr. S. Borthakur, learned counsel for the petitioner. Also heard Mr. Kardak Ete, learned Senior Additional Advocate General, Arunachal Pradesh, assisted by Mr. Subu Tapin, learned Senior Government Advocate, for all the respondents.

2. Both these writ petitions are being taken-up today for disposal since both are preferred by the same petitioner against identical issues.

3. The gist of the case, in WP(c)309(AP)2016, in brief, is that, the petitioner Firm is a partnership Firm of Kamrup District in the State of Assam and an Invitation for Bids(IFB) was published by the respondent authority for

package DDUGJY/PEC/EAST SIANG/01 for execution of electrical works of East Siang District under the centrally sponsored scheme called Deen Dayal Upadhyaya Gram Jyoti Yojana ('DDUGJY', for short) and the last date for submission was fixed on 30.05.2016 and as such, the petitioner submitted his e-tender for the said tender process. There were altogether 4(four) different packages including East Siang District, and the petitioner after preparing all documents relating to the tender, drew a demand draft of Rs. 25,000/- in favour of Superintending Engineer(E), Pasighat Electrical Circle, payable at Pasighat. Thereafter, the petitioner uploaded the details of the Demand Draft in the web documents of the respondent authority and the petitioner could access and download the bid documents as well as the related correspondence issued by the respondent authority. After opening the tender documents, the Tender Opening Board found integrity pack of the petitioner and the demand draft drawn against cost of documents submitted by the petitioner, as valid. Surprisingly, the said Board found the Bank Guarantee submitted by the petitioner as Bid Security/EMD, as invalid. Upon enquiry, the petitioner came to know that the Bid Security/EMD ought to have been made in the form of Fixed Deposit/Demand Draft and hence, the authority concerned considered it to be invalid. Against rejection of his tender, the petitioner submitted an appeal before the competent authority but the same is still pending consideration. Hence, the writ petition, above-mentioned, has been preferred by the petitioner.

The gist of the case, in WP(c)311(AP)2016, in brief, is that, the petitioner Firm is a partnership Firm of Kamrup District in the State of Assam and an Invitation for Bids(IFB) was published by the respondent authority for package DDUGJY/PEC/WS/01 for execution of electrical works of West Siang District under the centrally sponsored scheme called Deen Dayal Upadhyaya Gram Jyoti Yojana ('DDUGJY', for short) and the last date for submission was fixed on 02.06.2016 and as such, the petitioner submitted his e-tender for the said tender process. There were altogether 4(four) different packages including West Siang District, and the petitioner after preparing all documents relating to the tender, drew a demand draft of Rs. 25,000/- in favour of Superintending

Engineer(E), A.P. Electrical Circle-VI, Aalo, payable at Aalo. Thereafter, the petitioner uploaded the details of the Demand Draft in the web documents of the respondent authority and the petitioner could access and download the bid documents as well as the related correspondence issued by the respondent authority. After receipt of letter dated 23.05.2016 from the office of the Superintending Engineer(E), A.P. Electrical Circle-VI, West Siang District; the petitioner immediately drew a fixed deposit in favour of Executive Engineer(E), Aalo Electrical Division and submitted the same as Bid Security alongwith the tender before 02.06.2016. After opening the tender documents, the Tender Opening Board found integrity pack of the petitioner and EMD submitted by the petitioner, as valid. Surprisingly, the said Board found the Demand Draft submitted by the petitioner against the cost of tender documents as invalid since it was drawn in favour of Superintending Engineer. Against rejection of his tender, the petitioner submitted an appeal before the competent authority but the same is still pending consideration. Hence, this writ petition has been preferred by the petitioner.

4. In WP(c)309 (AP)2016, State Respondents by filing the counter affidavit, have contended that the statement of the petitioner to the effect that "payable at Pasighat on all working days upto 02/06/2016 between 10.30 to 3PM" is totally false as the e-tender was published on 15.04.2016 at 6PM and opening of the Bids was scheduled for 30.05.2016 at 3PM. Furthermore, there was nothing like 4(four) packages in the tender, in question, as the said tender has no package wise division. According to the respondents, the petitioner did not bother to check the Corrigendum dated 16.05.2016 which was uploaded on the e-tendering portal itself. As against the contention of 11 tenderers, there were only 7 tenderers including the petitioner.

5. The further contention of State Respondents was that the Tender Opening Board constituted for the purpose, had firstly rejected the tender of M/s Prag Electricals, Guwahati, because of conflicting statement as regards actual submission and statement displayed in respect of instrument of EMD payment. Proceeding further, the Tender Opening Board also rejected the tender of the petitioner namely M/s Mega Electricals on the ground that the

statement made on the e-portal regarding instrument of EMD payment was to be made by Demand Draft whereas the actual submission made by the petitioner was that of Bank Guarantee.

**6.** The further stand of the State Respondents was that no appeal as has been purportedly reported to have been preferred by the petitioner against rejection of his tender, has been received by any of the Officers i.e. Commissioner(Power), Chief Engineer(Power), Superintending Engineer(E), Pasighat; or Executive Engineer(E), Pasighat.

**7.** It has been reiterated by the State Respondents that the tender bid of the petitioner was rejected by the Tender Opening Board because the Bid Security was to be made by Demand Draft and not by Bank Guarantee as has been done by the present petitioner. Situated thus, there is no extraneous consideration or mala fide intention on the part of the respondent authority in rejecting the tender of the petitioner. It has been vehemently argued by the State Counsel that since the DDUGJY is a time-bound project and it should be completed within 31.12.2016 and the present petition being a frivolous petition, the same should be dismissed summarily.

**8.** In WP(c)311(AP)2016, State Respondents by filing the counter affidavit, have contended that in the concerned web portal, the petitioner did not bother to check the Corrigendum dated 06.05.2016 which was uploaded on the e-tendering portal itself, and published on 10.05.2016, clearly instructing that Demand Draft for cost of Tender Documents & Fixed Deposit for EMD/Bid Security shall be drawn in favour of Executive Engineer(Elec.), Aalo, Electrical Division Aalo, instead of Superintending Engineer(E), Aalo Electrical Circle.

**9.** Further contention of State Respondents was that the Demand Draft of the petitioner was issued by the State Bank of India, Silpukhuri Branch, Guwahati, on 31.05.2016, in favour of Superintending Engineer(E), Aalo Elec. Circle, which is clear violation of the Corrigendum and the EMD/Bid Security

was drawn in favour of Executive Engineer(E), Aalo Electrical Division, on 31.05.2016 itself.

**10.** It is the categorical stand of the State Respondents that all the prospective bidders were directed to deposit the tender cost and estimated cost in favour of the Executive Engineer and the said amendment/corrigendum was brought to the notice of all concerned through Website as well as in Newspaper. The petitioner being a Class-A contractor ought to have been absolutely vigilant about such amendments in the Clauses of the Bid and because of utter negligence of the petitioner, he failed to deposit the cost of tender documents as Demand Draft in favour of Executive Engineer(E), Aalo, and the same was the ground for rejection of his tender, not for any mala fide intention or any extraneous consideration.

**11.** In this writ petition i.e. WP(c)311(AP)2016, it has also been vehemently argued by the State Counsel that since the DDUGJY is a time-bound project and it should be completed within 31.12.2016 and the present petition being a frivolous petition, the same should be dismissed summarily.

**12.** It is to be noted that in both these cases, there is an interim stay.

**13.** Initiating the argument, the learned counsel for the petitioner has vehemently contended that technical bid of the petitioner has been rejected in a very mechanical manner there being no any substantial deviation of the bid conditions. Referring to the condition of rejection, it has been urged that in one case[WP© 309(AP)2016], the technical bid of the petitioner has been rejected on the ground that the bid security was submitted in the form of Bank Guarantee but it should be in the form of Fixed Deposit and as such, violative of bid conditions. In this context, it has been submitted that the petitioner was not communicated about the change of bidding conditions by subsequent corrigendum so the bid amount was deposited in the form of Bank Guarantee. Such a rejection on the part of the respondent showing it to be a conflict with

the web portal and actual submission is nothing but to reject the bid documents on such frivolous pretext. In other way, all the bid documents of the petitioner was very much responsive and is capable of performing the contract, in question.

**14.** In another case[WP(c)311(AP)2016], the technical bid of the petitioner has been rejected on the ground that the bid security was deposited in favour of Superintending Engineer but it should have been addressed to the Executive Engineer as per the corrigendum issued by the respondents. According to the petitioner, such rejection on the part of the respondents is not legally tenable as the petitioner's bid was otherwise was substantially found to be responsive and such minor deviation can be waived by the respondents by giving a chance to the petitioner to rectify the same. The appeal so preferred by the petitioner against both the cases have not been decided by the respondents. In support of his contention, learned counsel for the petitioner has referred the decisions reported in **2011 (5) GLT 746 [Makrub Khan v. Manoj Kr. Sarma & ors]**, wherein the Division Bench of this Court, held that procedure for acceptance/rejection of tender must be disclosed in the NIT to ensure transparency/openness and fairness. Omission to mention is fatal. Accordingly, it has been submitted that there is no disclosure in the tender documents that failure of filing such bid security may result for rejection of tender.

**15.** Petitioner has further relied on the observation of the Apex Court in **(2008) 5 SCC 772 [S.S. N. Co. V. Orissa Mining Corporation]**, wherein it has been held that the NIT should not be viewed in the highly pedantic and legalistic manner but it should be viewed and understood for what it is. Accordingly, it has been submitted that though there may be some deviation in depositing the amount but the fact remains that the said amount was made for a tender and the exact amount has been deposited as directed by the tender documents ~~but~~ in the form of Bank Guarantee but not in the form of Fixed Deposit.

16. By referring to another decision reported in *2012 (4) GLT 723, M/s Mega Electricals Dihang Edutech Infrastructure Pvt. Ltd. & ors. V. State of Assam*, it has been contended by the petitioner that such a deposit though not in the form as offered by the tender have no fatal consequences and it can be held as substantive compliance of the bidding documents.

17. Further, learned counsel for the petitioner has referred to the decision of the Hon'ble Apex Court reported in *(1991) 3 SCC 273 [Poddar Steel Corpn. V. Ganesh Engineering Works & ors.]* and *(2013) 10 SCC 95 [Rashmi Metallics Ltd. & anr. V. Kolkata Metropolitan Development Authority & ors.]* wherein it has been held that minor technical irregularity in a government contract can be waived off when there is deviation of non-essential or ancillary/subsidiary requirement.

In para.6 of the case of *Poddar Steel*(supra), it has been held as below:

***"As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the Notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or of no significance. The requirement of a tender notice can be classified into two categories - those who can lay down the essential condition of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In other cases, it must be open to the authorities to deviate from and not to insist upon the strict lateral compliance of the condition in an appropriate case."***

In *Rashmi Metallics*(supra), the Hon'ble Apex Court has dealt with similar matter and has held that disqualification of the appellant company on the ground of its failure to submit its latest income tax return along with its bid/offer is not sufficient reason for disregarding of its bids. In such case, instead of disqualifying the bid for non-compliance of the term in question, the tendering authority ought to have brought this discrepancy to the notice of the tenderer and if even thereafter, no rectification was carried out, position would be different.



**18.** Per contra, the learned counsel for the respondents, Mr. Ete, has submitted that the respondents have duly notified the change of bid documents by issuing necessary corrigendum regarding submission of bid by way of FD which is to be deposited in the name of EE not in the name of SE and the petitioner being should be vigilant for such bidding condition as the tender process was initiated was through e-tendering and all the bid documents were uploaded in the web portal in the concerned website. Such a failure on the part of the petitioner to deposit the documents in terms of the bid documents issued by the respondents by way of corrigendum can be said as a substantial deviation from the bidding condition and as such, the bid is liable to be rejected for non-compliance. It has also been stated that the respondents are empowered by virtue of Clause 7 of IFB to amend the bidding documents and such amendments are binding on the bidders. It has also been contended that the petitioner did not take part in the pre-bid meeting so held by the respondents to get any clarification but has deposited the said documents without going through the relevant documents uploaded in the web-portal. The learned counsel Mr. Ete has tried to impress upon the Court that the said documents were rejected due to conflict in the web portal in the actual furnishing of documents and accordingly, there bid has been rightly rejected by the respondent authorities.

**19.** Considered the above rival submissions and has gone through the relevant documents like Instruments to Bidders(ITB) and bidding documents (IFB). after going through all the documents and the matter, in dispute, it is to be noted that the petitioner has deposited the prescribed bid amount in the form of Bank Guarantee in the name of SE(though even the issuance of the Corrigendum) but the fact remains that the petitioner has deposited the exact amount to be deposited and has deposited in the name of respondent Department only. The Department is in a position to realize this amount suitably. Only because the petitioner was not aware of such corrigendum his case should not be outrightly rejected by the respondents and the petitioner could have been given an opportunity to make his submission as has been mandated by the Apex Court in the cited case of *Rashmi Metallica*(supra).

**20.** In view of the matters on record, the case of the petitioner is not found to be substantial deviation. It is to be noted that as per Clause 22.2, the employer may waive any minor informality, non-conformity or irregularity in a bid that does not constitute a material deviation, whether or not identified by the bidder in attachment and that does not prejudice or effect, the relative ranking of any bidder as a result of technical and commercial evaluation.

**21.** Clause 22.3 of IFB provides that prior to detail evaluation, the employer will determine whether each bid is of acceptable quality, is complete and is substantially responsive to the bidding documents. For the purpose of this determination, a substantially responsive bid is one that conforms to all the terms, conditions and specifications of bidding documents without material deviations/objections/conditionalities or reservations. A material deviation, objection, conditionality or reservation is one. (i) that affects any substantial way the scope, quality or performance of the contract (ii) that limits in any substantial way inconsistent with the bidding documents, the employer's right or the successful bidder's obligation under the contract or (iii) whose rectification would unfairly affect the competitive position of other bidders who are presenting substantially responsive bids.

**22.** In view of the above proposition, the respondent authorities is in a position to waive the non-conformity or irregularity of the bid furnished by the petitioner which does not constitute a material deviation as indicated above. It is also not essentially a breach of contract.

**23.** Learned counsel for the respondents has submitted that the scope of judicial review under writ jurisdiction in the matter of contract, is very limited and the Courts would be slow while interfering in such matters by involving Article 226 of the Constitution. In this context, learned counsel has referred the following case laws:

- i. (2014) 3 SCC 493 [Sanjay Kr. Sukla v. Bharat Petroleum Corpn. Ltd.]*

- ii. (2000) 2 SCC 617 [AIR india ltd. V. Cochin International Airport ltd.]
- iii. (2014) 3 SCC 760 [Maa Brinda Carrier Express v. North East Frontier Railway]
- iv. (2012) 8 SCC 216 [ Michigan Rubber(India) v. State of KJar.]
- v. (1999) 1 SCC 492[Raunaq International Ltd. v. IVR Construction Ltd.]

In all the above referred cases, it has been laid down that jurisdiction under Article 226 of the Constitution is to be exercised cautiously and the Court can examine the decision making process and interfered with if it is found that it suffers from *mala fide*, unreasonableness and arbitrariness. The State, its corporations and instrumentalities have the public duty to be fair to all concerned.

**24.** In the instant case, as has been discussed above, the decision making process at the time of technical evaluation is not fair and reasonable as they could have avoided the technicalities that have been crept into without there being substantial deviation from the bidding conditions. It is also reflected from the bid opening summary, that while rejecting the case of the petitioner, the respondents have accepted the bid documents of some other persons with an opinion "admitted for further scrutiny and for evaluation of techno-commercial bid, consideration of EMD, etc., etc.". However, such a clause is hyper-technical in the sense that how can such bid documents can be admitted if still further scrutiny is required, in respect of those other bidders.

**25.** Considering all above, it is found that the petitioner should be permitted to take part in the financial bid and it will in no way cause prejudice to other side.

**26.** In view of all above, the impugned technical bid rejection Communication No. SE(E)II/WS-31/2016-17/283-96 dated 31.05.2016 as well as Communication No. SE/APEC-VI/WO/17/2016-17/292-97 dated 02.06.2016 and all other consequential actions are hereby set aside as regards the present

petitioner in the bidder column. Further, it is hereby directed that respondent authorities will provide the opportunity to the petitioner to take part in the said tender process by opening its financial bid along with other eligible firms.

27. With the above observations, both these writ petitions stand allowed and accordingly stand disposed of.

**JUDGE**

*Bikash*