

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

**WP (C) 372 (AP) 2015**

**M/s T. L. Construction,**  
Head Office at T.L. Complex,  
Picnic Road, Tippi,  
P/O & P.S. Bhalukpong,  
Dist. West Kameng, represented by  
Its proprietor, Mr. Tage Lapung,  
Aged about 47 years,  
S/o Charu Lapung.

.....Petitioner

Advocates for the Petitioner:

Mr. D. Mazumdar, Id. Sr. Counsel,  
Assisted by Mr. A. K. Singh.

**-Versus-**

1. The State of Arunachal Pradesh represented by the Secretary, PWD, Itanagar, Government of Arunachal Pradesh.
2. The Chief Engineer, (Western Zone), Department of Public Works, Govt. of Arunachal Pradesh, Itanagar.
3. The Superintending Engineer, PWD, Rupa circle, Govt. of Arunachal Pradesh, P.O/P.S. Rupa,
4. The Executive Engineer,  
Bomdila Divison, PWD Department,  
Govt. of Arunachal Pradesh,  
P.O/P.S. Rupa, West Kameng Dist.,  
Arunachal Pradesh.
5. The Secretary, Law, Legislative and Justice Department, Arunachal Pradesh,  
Civil Secretariat, Itanagar.  
Govt. of Arunachal Pradesh.

6. M/s R.D. Enterprises,  
Head Office at Bomdila Town,  
West Kameng District, Arunachal Pradesh,  
Represented by its proprietor,  
R/o Bomdila Town, P.O/P.S. Bomdila,  
District-Bomdila, Arunachal Pradesh.

.....Respondents

Advocates for the Respondents:

Mr. K. Ete, learned AAG  
Assisted by Ms. L. Hage, Govt. Adv.  
Mr. T. Tagum, for respondent No. 6.

**WP (C) 345 (AP) 2015**

**M/s Dongru Siongju,**  
Head Office at Nafra,  
P.S. Bomdila, Dist-West Kameng,  
Represented by its proprietor,  
Mr. Dongru Siongju,  
S/o Kyang Siongju, aged about 45 years,  
R/o Dibin Village,  
P.O./P.S. Nafra, Arunachal Pradesh.

.....Petitioner

Advocates for the Petitioner:

K. Jini, Adv.

**-Versus-**

1. The State of Arunachal Pradesh represented by the Secretary, PWD, Itanagar, Government of Arunachal Pradesh.
2. The Chief Engineer, (Western Zone), Department of Public Works, Govt. of Arunachal Pradesh, Itanagar.
3. The Superintending Engineer, PWD, Rupa circle, Govt. of Arunachal Pradesh, P.O/P.S. Rupa,
4. The Executive Engineer,

Bomdila Divison, PWD Department,  
Govt. of Arunachal Pradesh,  
P.O/P.S. Rupa, West Kameng Dist.,  
Arunachal Pradesh.

5. M/s R.D. Enterprises,  
Head Office at Bomdila Town,  
West Kameng District, Arunachal Pradesh,  
Represented by its proprietor,  
R/o Bomdila Town, P.O/P.S. Bomdila,  
District-Bomdila, Arunachal Pradesh.

.....*Respondents*

Advocates for the Respondents:

Mr. K. Ete, learned AAG  
Assisted by Ms. L. Hage, Govt. Adv.  
Mr. T. Tagum, for respondent No. 5.

**:::BEFORE:::**  
**HON'BLE JUSTICE (MRS.) Dr. INDIRA SHAH**

Date of hearing : 04-03-2016.

Date of Judgment & Order : 10-03-2016.

**JUDGMENT & ORDER (CAV)**

The Writ petitioner in WP(C)345 (AP)2015 have prayed for setting aside and quashing of the recommendation letter dated 06.08.2015 and approval order dated 12.08.2015 issued by the Chief Engineer (W2), PWD, Itanagar, whereby name of private respondent firm has been forwarded for construction of CC roads at Bomdila, West Kameng District, Arunachal Pradesh.

**2].** The petitioners in both the writ petitions are Class-I(A) registered firm registered under Public Works Department. In pursuance to Notice Inviting Tender (NIT) dated 07.07.2015, published in local dailies, they

along with private respondent and others participated in the tender process. The respondent authorities constituted a Board and the Board initiated scrutiny proceeding. One of the firm namely M/S Tenzin Enterprises was declared non responsive due to non submission of required numbers of documents. It is alleged that the private respondent No. 6 M/S R.D. Enterprises had also not submitted the VAT Registration Certificate, PAN Card, Bank Solvency Certificate etc. Board declared that the case of M/S R.D. Enterprise would be also rejected and rest of the bids will be recommended for financial bids. However, the Superintending Engineer, Rupa Circle after accepting all the tender papers communicated to the Chief Engineer, vide letter dated 06.08.2015 stating that the comparative statement along with justification of rates have been prepared by the Bomdila Division as well as Circle Office. The respondent authorities declared the rate quoted by the private respondent reasonable. In the comparative statement the justification rate is Rs 9,14,33,212/-, whereas, as per estimated cost put to tender is Rs. 9,45,66,000/-. It is alleged that the Superintending Engineer, Rupa Circle in most arbitrary manner unilaterally lowered the estimated cost just to accommodate the respondent No. 6. The State respondents vide order dated 12.08.2012 approved the bid documents of respondent No. 6 which is contrary to established norms. The rate quoted by the private respondent was below 10 % from the rate of the tender amount. That apart the private respondent did not submit the VAT Registration Certificate, PAN card, Bank Solvency certificate, address communication and proof of mobile number and Employees Provident fund Registration certificate and it even failed to submit work done certificate, details of key personnel, details of tools and plants, annual turnover etc of the firm.

**3].** It is further alleged that the government of Arunachal Pradesh in a high level committee minute dated 02.09.2014 had discussed on the proper

implementation of projects and special plan Assistance. Under clause 5 of the said minutes it was decided that "No Tender having 10 % amount should be accepted by the department in order to ensure quality and safety of the projects. The copy of the minutes was widely circulated to all departments for strict compliance of the minute of the meeting. But inspite of the fact that private respondent quoted the rate below 10 % i.e. 10.97 %, the respondent authorities deliberately approved respondent No. 6 as contractor for execution of the said works in violation of minutes dated 02.09.2015.

**4].** The respondent No. 4 in his affidavit-in-opposition has stated that tenders were invited from only Class-I registered contractors domiciled in the District of West Kameng which is a mandatory condition under" The Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentives Development and Promotional) Act, 2015.

**5].** According to the respondent the Board made no formal recommendation of the cases of two bidders. It is further contended that bid document specifically mentions that bidders with Class-I registration were not required to submit the details of VAT registration certificate, PAN card, Solvency certificate, address proof etc. except the earnest money deposits. The Class-I registered contractors were required to submit their bid along with their valid registration certificates and requisite Earnest Money Deposits.

**6].** It is further contended that the rate quoted by M/S R.D. Enterprises (respondent No. 6) was 10.97 % below the amount put to retender of Rs 9,75,66,000/- but the bids are accepted on the basis of variation over justified amount worked out at the time of acceptance based on current price level as laid down in the CPWD manual 2014 at 20.4.3.2. The bid of M/S R. S. Enterprises of Rs 8, 68,67,564 was within a variation of 4.99 % over the justified amount and was within acceptable limit of 5 %. In the instant case, as per the respondent, the justified rate was fixed at Rs 9,14,33,212.00.

**7].** It is further averred that though a decision was taken in a high level committee meeting on the minutes of its meeting held on 02.09.2014 for review

of SPA projects, till date no government approval has been accorded for implementation. The department therefore, cannot implement this in absence of government approval.

**8].** It is further contended that M/S Dangru Siongju (writ petitioner in WP(C)345(AP)2015) by virtue of being a Class-IA registered contractor was not eligible to take part in the bid as per the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentive, Development and Promotional) Act, 2015. Therefore, the petitioner in writ petition No.WP(C)345(AP)2015 has no *locus standi* to prefer writ petition.

**9].** The main grievance of the petitioners in both the writ petitions are as follows:- (i) the private respondents failed to produce the necessary documents at the time of submitting the tender. As per Clause 35 Sub-Clause I of the special terms and conditions of the tender Class-I Contractor registered under Arunachal Pradesh Enlistment of Contractors (APEC, in short) in works Department Rule 2008 shall submit a copy of valid registration certificate in lieu of all technical qualification criteria viz (1) work Done (2) Key Personal (3) Tools & Plants (4) Annual Turn Over etc., except the earnest money deposit, therefore, the allegations of the petitioner that the private failed to submit necessary bid documents is devoid of merit.

**10].** The next allegation of the petitioner is that the respondent authorities failed to follow the minutes dated 25.09.2014 whereby it was decided that no tender having 10% below the tender amount should be accepted by the Department in order to ensure quality and safety of the project and there is nothing on record to show that bid more than 10% amount put to tender cannot be accepted. Even, there is no such executive order to make it enforceable.

**11].** As per CPWD Manual, bids are to be accepted on the basis of variation over justified amount worked out at the time of acceptance based on current price level as laid down in CPWD Manual, 2014. Section 20.4.3.1 & 20.4.3.2 are quoted below:-

### **20.4.3.1 Justification of tenders**

**Justification statement shall be prepared for checking the reasonability of rates. (Modified vide DG/MAN/254 dt. 07.12.2012).**

*The method consists of preparing detailed analysis of rates by taking market rates of labour, materials, cartage etc. The method of analyzing item is the same as given in the standard CPWD Analysis of Rates. The major items on the whole costing at least 90% of the estimated cost put to tender are analyzed, to work out the justified percentage on this basis. The items to be considered should be so selected that have higher estimated cost and amount. One should start with the items having the highest estimated amount, and then the next lower amount in the descending order and so on, till at least 90% of the estimated amount is reached. Stipulation of material for the works falling in North Eastern States have been allowed and for other areas of the Country ADG of the concerned region is empowered to take a decision on case to case basis based on merits. (Modified as per OM/MAN/152). While preparing the justification for tender in these areas handling charges @ 2.5% are to be allowed on the cost of stipulated materials. (Added as per OM/ MAN/195).*

*Any other suitable method may also be adopted, depending upon the kind and complexity of work. The adoption of a particular method should be decided judiciously by the authority competent to accept the tenders. The justification of tenders should be prepared based on prevailing marked rates only and the items used are of specified quantity and conform to standards/ specification laid down in the Tender document. (Added as per OM/MAN/159) In case of tenders to be accepted by the Central Works Board, the adoption of a particular method should be decided by the concerned Chief Engineer. For the justification of tenders, the issue rate (and not the market rate) of stipulated materials shall be considered for items stipulated for issue, irrespective of the quantity of stipulated materials stated in the draft NIT/tender documents. For justification of tenders for the materials for which the base rates have been specified under clause 10 CA, the base rates of the material stipulated under clause 10 CA shall be considered for justification statement. (Added as per OM/MAN/187).*

**Wherever the work of Flyovers, Bridges, Grade Separators and Highways/Hill Roads/Major Roads are involved, the justification shall be prepared on the basis of analysis of rates adopted in MORTH standard data book. (Added vide OM DG/MAN/311 dt. 02.07.2014).**

Effect of following taxes is to be added:-

- (i) Building and other construction workers cess as applicable in the state / union territory.**
- (ii) VAT @ 2% applicable on works contract drawn under the jurisdiction of Govt. of Delhi.**

**The effect of these two taxes shall be added as under on :-**

***(a) Justification of tenders: To be added at the end of justified cost worked out on the basis of net prevailing market rates inclusive of all taxes i/c VAT on each material considered in justification.***

***(b) Sanction of extra item, substituted item and rate for the quantity deviated beyond deviation limit specified under clause 12 of the contract:***

***To be added at the end of analysis of rate after adding contractors profit & over heads. But nothing shall be added in analysis of rates for service Tax since being reimbursed to the contractor separately.***

***The rate of VAT is different in different states / Union territories. Therefore, for other states / union territories, the ADG of the region shall notify the rate of VAT to be considered.***

***The element of VAT will not be applicable in following cases:***

***(1) Purchase of materials through supply orders or tenders or through DGS&D rate contracts.***

***(2) Contracts / Work orders for Hiring of vehicles.***

***(3) Contracts / Work orders for Watch and ward.***

***(4) Contract/work orders for all kind of Horticulture works.***

***(5) Contracts / Work orders for miscellaneous services such as running / maintenance of computer services, running of vehicles etc.***

***(6) And other similar contracts / Work orders having no involvement of materials. The element of building and other construction workers cess as applicable in the state / union territory will not be applicable for purchase of materials.***

**EPF & ESI contribution paid to the contract workers shall not be added in the analysis of rates while preparing market rate justification. It shall be reimbursed on actual basis for all contracts. (Modified vide OM DG/MAN/252 dt. 08.11.2013).**

***At the time of increasing contractor's profit and overheads from 10 to 15% no change has been made in the contractor's profit @ 7.5 % as applicable earlier whereas the contractor's overhead has been increased from 2.5 to 7.5 % on account of following factors :-***

**(1) Cost of Engineering establishment deployed by the contractor.**

**(2) Cost of effort in arranging T&P and heavy machinery which have not been considered in the analysis of rates for the items included in the BOQ of the work. (Modified vide OM DG/MAN/ 254 and 270 dt. 01.05.2013).**



- (3) Cost of cleaner environment at site & labour welfare facilities.
- (4) Cost of Quality Assurance set up enhancing testing lab.
- (5) Cost of office set up including engagement of necessary staff for computerized billing etc.
- (6) Cost of Earnest Money/Performance Guarantee/ Security Deposits.

**Therefore no extra cost is to be added in justification on account of various factors mentioned SECTION 20 CPWD WORKS MANUAL 2014 140 160 Years of Engineering Excellence above. However, special conditions having financial bearing incorporated in NIT, or any other factor having financial bearing, which are not covered or considered above and in the analysis of the rate of the items included in the BOQ of the work, are to be added on actual basis or by a rough approximation although not with so much exactitude if actual analysis is not possible.** (Added vide OM DG/MAN/270, 297 and 311 dt. 02.07.2014)

No extra cost for T&P @2% is to be added in Standard Analysis of Rates prepared either to work out estimated cost of item or market rate justification of the item for E&M works. (Added as per OM/MAN/184).

CP & OH @ 15% shall be followed for analysis of all items of work both Schedule & Non Schedule pertaining to Civil, Electrical and Horticulture works etc. for the purpose of estimation, justification and to the additional/substituted items/deviated quantities of items to the sanctioned on market rates beyond deviation limit etc. carried out under the contract wherever applicable.

#### **20.4.3.2 Acceptance of tenders at justified rates with allowable variations**

Apropos provisions under para 20.4.3 variation up to 5% over the justified rates may be ignored. Variation up to 10% may be allowed for peculiar situations and in special circumstances. Reasons for doing so shall be placed on record. Tenders above this limit should not be accepted.

**12].** It is submitted by the learned counsel for the petitioners that the respondent authorities cannot change the estimated cost invoking the justified rate. Moreover, the NIT does not speak about contractor from outside the, therefore, the contention of the respondent authorities that the petitioner in WP (C) 345 (AP) 2015 being a registered contractor from outside the state, has no locus-standi to file writ petition and cannot be accepted. On perusal of the NIT, it

appears that sealed tenders in form PWD-8 on behalf Governor of Arunachal Pradesh was invited from all registered contractors, in clause-I categories, domicile within the territorial jurisdiction of West Kameng District of Arunachal Pradesh. Thus, there was no such condition that the contractors in Class-I categories must be registered contractors within the state. The only condition was that such contractor must be domicile of Arunachal Pradesh

**13].** The Arunachal Pradesh Based Entrepreneurs and Professionals (Incentives, Professionals) Act, 2015 also speaks about the contractors domicile within the territorial jurisdiction of the District Assembly Constituency or its community Block.

**14].** In the case of G. J. Fernandez-vs-State of Mysore and Others reported in AIR 1967 SC 1753, it was held that the code, Rules if not framed under any Statutory enactment or under any provision of constitution they are merely in the nature of administrative instruction for the guidance of the Department and have been issued under the Executive Power of the State, if they have no Statutory force, they confer no rights to anybody and a tenderer cannot claim any right on the basis of this administrative instruction. If this are mere administrative instruction it may be upon for the Government to take disciplinary action against its servant who do not follow this instructions but non observation of such administrative instruction does not confer any right to any member of the public like a tenderer to ask for a writ against the Govt. by a petition under Article 226.

**15].** Here, in this case, the minutes of the meeting also do not have any statutory force. In the case of AIR India Ltd.-vs- Cochin International Airport Ltd and Others reported in (2000) 2 SCC 617, it was held as under.

***"7 The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty-vs International Airport Authority of Inida, Fertilizer Corpn. Kamgar Union (Regd.) –vs-***

*Union of India, CCE-vs- Dunlop India Ltd, Tata Cellular-vs- Union of India, Ramniklal N. Bhutta-vs-State of Maharashtra and Raunaq International Ltd.-vs- I.V.R. Construction Ltd. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.”*

**16].** Similarly, in the case of Jagdish Mandal-vs- State of Orissa and Others reported in (2007) 14 SCC 517, it was held as under:-

***"22 Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interference even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of mole hills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions.***

- (i) Whether the process adopted or decisions 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 court can say "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached".***

**(ii) *Whether public interest is affected.***

***If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sights/shops, grant of licenses, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.***

**17].** As per the clause 20.4.3.1 & 20.4.3.2, a comparative statement along with the justification of rates was prepared by the division as well as Circle Office i.e. Assistant Engineer (P) and Executive Engineer (P) and it was observed that some calculation mistake was made by the division and latest rates were not adopted for justification. The justified rates and amount at Circle level was worked out and it was forwarded to the Chief Engineer by the Superintending Engineer. The comparative statement is quoted as under:-

Sl. NO	Name of Firm/Contractor	Variation Over	
		Cost put to tender	Justification amount
1.	M/s Tenzin Enterprises, Tenga	17.97%	12.46%
2.	M/s R. D. Enterprises, Bomdila	10.97%	4.99%
3.	M/s T.L. Construction, Tippi	10.00%	3.96%
4.	M/s L. R. Construction, Nafra	10.00%	3.96%
5.	M/s Dongru Siongju, Dibbin	10.00%	3.96%

**18].** Clause 20.4.3.1 & 20.4.3.2 prescribes the procedure of the process by which the justified rates may be concluded. There is difference between the

estimated cost published in the NIT and the justified amount. Justified amount has to be calculated as per CPWD Manual, 2014 of Section 20.4.3.2.

**19].** In view of the above, this Court having no expertise over the matter cannot interfere with the decisions taken by the respondent authorities. It is settled law that the Court can exercise jurisdiction in the matter of contract/tender only for furtherance of the public interest. There is no such public interest involved in these writ petitions, therefore, these writ petitions stand dismissed and disposed of.

*talom*

**JUDGE**