

GAHC010061362025



2025:GAU-AS:5890

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

Case No. : WP(C)/1615/2025

SUDHANG KUMAR BRAHMA
S/O- LATE RATIRAM BRAHMA, R/O- MIJING NWGWR, WARD NO.5, PO
KOKRAJHAR, PIN- 783370, DIST- KOKRAJHAR, BTC, ASSAM AND
PROPRIETOR OF M/S J.T. ENTERPRISE

VERSUS

THE BODOLAND TERRITORIAL COUNCIL AND ANR
REPRESENTED BY ITS PRINCIPAL SECRETARY, KOKRAJHAR, PIN- 783370,
ASSAM

2:THE DIRECTOR
PANCHAYAT AND RURAL DEVELOPMENT
BODOLAND TERRITORIAL COUNCIL
KOKRAJHAR
PIN-783370
ASSA

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioner : Mr. K.P. Pathak,
Mr. B. Das,
Mr. C. Paul Advocates.

For the respondents : Mr. S. Bora, SC, BTC.

Date of hearing : 01.05.2025.

Date of judgment : 14.05.2025.

JUDGMENT AND ORDER (CAV)

- 1.** Heard Mr. K.P. Pathak, learned counsel for the petitioner as well as Mr. S. Bora, learned Standing Counsel, Bodoland Territorial Council (BTC).

- 2.** The petitioner is challenging Clause-5 of the Corrigendum dated 14.03.2025, by which a change has been made to Clause-5 of the NIT dated 13.02.2025.

- 3.** The petitioner's case is that the respondents had issued NIT dated 13.02.2025, for procurement of Desks and Benches for distribution to various schools under the Bodoland Territorial Council (BTC) for an amount not exceeding Rs.6.00 crores. The last date of submission of bids in terms of the NIT dated 13.02.2025 was 10.03.2025.

- 4.** Clause-5 of the Eligibility Criteria of the NIT required the bidder to have an experience of executing at least one single work order of similar nature/Government supply order of 34% of the tender value and the Annual Financial Turnover minimum 67% of the tender value (in all cases of Civil Engineering Norm/Government supply) in one year during the last five year, updated to present price level, which meant that the bidder was to have had the past experience of supplying similar articles/materials worth Rs.2,03,99,660/-, i.e. approximately Rs.2.04 crores.

5. The respondents thereafter issued a Corrigendum dated 10.03.2025, i.e. on the last date of submission of bids/tenders in terms of the NIT dated 13.02.2025, wherein the last date of submission of bids was extended upto 20.03.2025. Thereafter the respondents issued another Corrigendum dated 14.03.2025, wherein Clause-5 of the Eligibility Criteria of the NIT was altered. As per the Clause-5 of the Corrigendum dated 14.03.2025, which replaced Clause 5 of the NIT, the bidder must have the experience of executing and completing at least one supply order of Wooden Desks and Benches with Iron and Steel frame to the Government of BTC in the Education Department, for an amount of not less than Rs.2.40 crores.

6. The petitioner's counsel submits that the change in the past experience/financial capacity required of a bidder, in terms of Clause-5 of the Corrigendum, restricting the experience of supply only to the Government of the BTC is arbitrary and liable to be set aside. He submits that the rules of the game cannot be changed after the game has been played, inasmuch as, the petitioner had the past financial experience of supply of similar materials in terms of Clause-5 of the NIT, wherein a tenderer had to have the experience of supplying 34% of Rs.6.00 crores, i.e. Rs.2,03,99,660/- of similar items, to the Government . The raising of the past minimum supply order required of a bidder, to qualify/participate in terms of the Corrigendum to Rs.2.40 crores, is without any objective criteria. No reasons have been given by the State respondents as to why the past Experience Criteria of having supplied similar materials of Rs.2,03,99,660/- has been raised to Rs.2.40 crores. He submits that the raising of the past experience of having supplied similar materials to the Government amounting to Rs.2.40 crores, being without there being any nexus to the object,

has been made only to favour their blue eyed boys. As such, the same should be set aside as it was arbitrary. He also submits that as per the NIT dated 13.02.2025, a bidder had to have the past experience of supplying similar materials to the Government. However vide the Corrigendum, the supply of similar materials to the State/Central Government is no longer a eligible criteria and a bidder is required to have the experience of supplying similar materials only to the Bodoland Territorial Council (BTC) Government. The said condition is as such, also arbitrary and unreasonable. The requirement of a supplier not being eligible to supply the materials, if not having supplied similar materials to the BTC Government earlier, even though he may have made past supplies to the State/Central Government, is based only to favour a particular person. In support of his submission that Clause-5 of the Corrigendum dated 14.03.2025 should be set aside, he has relied upon the judgments of the Supreme Court in the case of ***Ramana Dayaram Shetty vs. International Airport Authority of India & Others***, reported in ***(1979) 3 SCC 489***, , ***Tej Prakash Pathak & Others vs. Rajasthan High Court & Others***, reported in ***(2025) 2 SCC 1***, ***Meerut Development Authority vs. Association of Management Studies & Another***, reported in ***(2009) 6 SCC 171*** and ***Dutta Associates Pvt. Ltd. vs. Indo Merchantiles Pvt. Ltd. & Others***, reported in ***(1997) 1 SCC 53***.

7. Mr. S. Bora, learned Standing Counsel, BTC, on the other hand submits that there is no arbitrariness in the change of Clause-5 of the NIT by Clause-5 of the Corrigendum. He also submits that the change in the past experience of a bidder had been made, after the last date for submission of bids had been extended and as such, the petitioner had the opportunity to submit his bids in terms of Clause-5 of the Corrigendum. He also submits that the change in the

past experience of the bidders has been made to ensure that the best person supplying the items has the required financial capacity. He submits that in terms of the judgment of the Supreme Court in the case of ***Michigan Rubber (India) Limited vs. State of Karnataka & Others***, reported in ***(2012) 8 SCC 216*** and ***Directorate of Education & Others vs. Educomp Datamatics Ltd. and Others***, reported in ***(2004) 4 SCC 19***, the Government and their undertakings must be given a free hand for setting the terms and condition of a tender and the Court should not interfere with the same, because it feels that some other terms would have been better or wiser. Further, the Court should not interfere with the administrative policy decisions and should not strike down terms of a tender unless it is arbitrary, discriminatory or mala fide. He accordingly submits that the writ petition should be dismissed.

8. I have heard the learned counsels for the parties.

9. To decide the issues raised by the petitioner, it would be best if Clause-5 of the Eligibility Criteria in NIT dated 13.02.2025 and Clause 5 of the Corrigendum dated 14.03.2025 are reproduced hereinbelow, which are as follows :

“Clause-5 of the NIT dated 13.02.2025

The bidder should have experience of executing at least 1 (one) single work order of similar nature/Government supply order of minimum 34% of tender value and the Annual Financial Turnover minimum 67% of the tender value (in all cases of Civil Engineering Norm/Government supply) in one year during the last five year, updated to present price level.”

“Clause-5 of the Corrigendum dated 14.03.2025

The bidder must have experience of executing and completed at least one supply order of Wooden Desks and Benches with iron and steel frame of Government of BTC in Education Department, BTC during the financial year 2022-23, 23-24 & 2024-25 for an amount not less than Rs.2,40,00,000.00 (Rupees Two crore, forty lakh) only.

Joint venture with any firm/enterprise shall not be accepted for execution/completion of such work. "

10. In terms of Clause-5 of the NIT dated 13.02.2025, a bidder is to have supplied similar materials amounting to a minimum 34% of the tender value and the Annual Turnover minimum 67% of the tender value. 34% of the tender value amounts to Rs.2,03,99,660/-, i.e., approximately Rs.2.04 crores. Secondly, the bidder was to have supplied similar nature of materials to the Government.

11. Clause-5 of the Corrigendum dated 14.03.2025 now requires a bidder to have supplied similar materials amounting to Rs.2.40 crores. Secondly, the past supply should have been made only to the Government of the BTC.

12. Thus, there are two issues to be decided in this writ petition. Firstly, whether the raising of a requirement of a bidder to have supplied similar materials earlier, from Rs.2.04 crores approximately to Rs.2.40 crores, was arbitrary and unreasonable. Secondly, whether the requirement of a bidder to have made past supplies only to the Government of the BTC, without accepting past supplies made to the State/Central Government as an eligibility criteria, could also be said to be arbitrary and unreasonable.

13. In the case of ***Ramana Dayaram Shetty (supra)***, the Supreme Court

has held that it was a settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.

14. In the case of *Tej Prakash Pathak (supra)* which pertained to recruitment to Government posts, the Supreme Court has held that an eligibility criteria for being placed in the select list, notified at the commencement of the requirement process, cannot be changed midway through the recruitment process, unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit. Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness.

15. In the case of *Meerut Development Authority (supra)*, the Supreme Court has held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person, with a view to eliminate all others from participating in the bidding process. It further held that the bidders participating in the tender process have no other right except the right to equality and fair treatment, free from hidden agenda, in the matter of evaluation of competitive bids offered by interested persons in response to NIT.

16. In the case of *Dutta Associates Pvt. Ltd. (supra)*, the Supreme Court

has held that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bonafide error of error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned.

17. In the case of *Michigan Rubber (India) Limited (supra)*, and in the case of *Educomp Datamatics Ltd. (supra)*, the Supreme Court held that the Government and their undertakings must have a free hand in settling the terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

18. In the present case, the eligibility criteria of the tenderers in terms of the NIT had clearly stated that tenderers should have had the experience of past supply of similar materials worth approximately Rs.2.04 crores and that it should have supplied the same to the Government. The change of the quantity of the supplied materials from approximately Rs.2.04 crores to Rs.2.40 crores is no doubt within the powers of the author of the tender. However, the reasons for the change have to be provided. The petitioner herein was an eligible bidder, in terms of Clause-5 of the NIT. However, the eligibility criteria for past supply of similar materials has been raised by approximately Rs.36,00,000/- (Rupees Thirty Six Lakhs), for reasons not provided by the authority. The affidavit of the respondent no.2 does not give any reason why it has raised the requirement

having a past supply of similar materials from Rs.2.04 crores approximately to Rs.2.40 crores. The only reason provided in the affidavit of the respondent no.2 for change of the eligibility criteria is that the respondents wanted to get the best product from the most capable and eligible bidder, having prior experience in executing similar works, in the interest of the students and the public while spending public money.

19. It is not the case of the respondents that a bidder who had the past experience of supplying approximately Rs.2.04 crores worth of similar materials to the Government, does not have the capacity or the capability to supply materials worth Rs.6 crores, as required in the NIT. As such, the change of Clause-5 of the NIT by the impugned Clause-5 of the Corrigendum does not have any nexus to the object sought to be achieved by the respondents. There cannot be an arbitrary exercise of power by the State respondents only because it has the power to make the terms and conditions of a tender, as per its requirement. In the present case, the petitioner having the eligibility criteria to submit his bid in terms of Clause-5 of the NIT, it was necessary for the State respondents to justify the reason, for the change made to the past experience required of a bidder. Despite this Court having given opportunity to the respondents, to give reasons as to why they have changed the requirement of a bidder to have Rs.2.40 crores of past experience of supply of similar materials, as against the earlier requirement of approximately Rs.2.04 crores, no attempt has been made to justify the said change, except by giving a very generalised explanation in paragraph-8 of the affidavit-in-opposition of the respondent no.2, which is, as follows :

“8. That the modified eligibility criteria were made to ensure the interest

of the students, the end users and the interest of the public in general in spending public money to get the best product to be supplied by the most capable and eligible bidder having prior experience in executing similar works.”

20. The experience of a bidder for having made past supplies for approximately Rs.2.04 crores and Rs.2.40 crores, having been made for the same objective, the change made to the eligibility criteria does not appear to be fair and transparent. The object sought to be achieved by way of Clause 5 of the NIT is the same as the object sought to be achieved by Clause 5 of the Corrigendum. There should not be a hidden agenda in making such a change to the NIT, without there being any reasons being given for the change provided in the corrigendum. This Court is well aware of the various decisions of the Supreme Court, where it has been held that the Government must be given a free hand in the making of the terms and conditions of a tender. Further, this Court is also well aware that the Courts cannot substitute it's views/terms in the tender, only on the ground that the same may be fairer, wiser or more logical. It can only interfere if the decision is arbitrary, unreasonable, discriminatory or mala fide. This Court is accordingly not examining the terms and conditions of the tender. However, when there is a change made to Clause V of the NIT by Clause-5 of the Corrigendum, justifications/reasons have to be provided by the State Government. The same is sadly lacking. Though the corrigendum had been made known to the tenderers, prior to the last date of submissions of bids and though the State Government has the power to make corrigendum, the reason/justification for the same has to be provided, when it is not the case of the author of the tender that the object sought to be achieved, would not have been achieved by Clause-5 of the NIT.

21. The next issue to be decided is as to whether the action of the State respondents was arbitrary, by restricting the eligibility criteria of a bidder to have the experience of past supply of similar materials only to the Government of the BTC, though Clause-5 of the NIT had held that bidders who had made past supplies of similar materials to the Government were also eligible bidders. The petitioner's case is that he had made past supplies to the Government of Assam and as such, the eligibility criteria of bidders could not have been restricted to bidders who had been made past supplies only to the Government of BTC and not the Government of Assam.

22. The Bodoland Territorial Council is an Autonomous Administrative Unit constituted under the 6th Schedule of the Constitution of India, within the State of Assam. Many subjects are being handled by the Government of the BTC, and the State Government within the BTC area. When Clause-5 of the NIT allowed bidders, who had made past supplies of similar materials to the Government, to also be eligible bidders in respect of the supplies to be made in pursuant to the present NIT, there can be no justifiable reason for restricting bidders to participate in the NIT, to only those who have made past supplies of similar materials only to the Government of BTC, pursuant to Clause-5 of the Corrigendum. No reason has been provided by the BTC for the said restriction and the only reason given is the one that has been reproduced in the foregoing paragraphs. This restriction made on the eligibility criteria of bidders by way of Clause-5 of the Corrigendum, in the view of this Court is also patently unreasonable and arbitrary and the same has to be interfered with.

23. As stated in the foregoing paragraphs, the Supreme Court has held that the Court should not interfere in the making of the terms and conditions of the tender by the State unless it is arbitrary, malafide or discriminatory. However in

the present case, the eligibility criteria of the petitioner has been taken away by a subsequent Corrigendum, without any reasons given, for the change in the eligibility criteria. It is the common object of all tenders that the best bid is selected and to ensure that a capable bidder is selected. In the present case, the object sought to be achieved by Clause-5 of the NIT and Clause-5 of the Corrigendum is the same and as such, the change in the eligibility criteria would have to be justified.

24. On considering the fact that the changes made to Clause-5 of the NIT by Clause-5 of the Corrigendum, has been made without any justification or proper reason, this Court is of the view that the terms of Clause-5 of the Corrigendum is arbitrary. Accordingly Clause-5 of the Corrigendum dated 14.03.2025 is set aside. The State respondents would have to consider the bids of the tenderers in terms of Clause-5 of the NIT.

25. The writ petition is accordingly allowed.

JUDGE

Comparing Assistant