IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5029 of 2015

==

Ranjeet Kumar, Son of Sri Ram Singhasan Singh, resident of Mohalla-Chandmari Road, Lane no.2, Police Station- Kankarbagh, District-Patna

.... Petitioner

Versus

1. The Airport Authority of India through the Chairman, Rajiv Gandhi Bhawan, Safadarjang Airport New Delhi.
2. The Chairman, the Airport Authority of India through the Chairman, Rajiv Gandhi Bhawan, Safadarjang Airport New Delhi.
3. The Executive Director, the Airport Authority of India through the Chairman, Rajiv Gandhi Bhawan, Safadarjang Airport New Delhi.
4. The Regional Director, Eastern Region, Airport Authority of India, Kolkata.
5. Jai Prakash Narayan International Airport, Patna through the Airport Director, Airport Authority of India, Patna.
6. The Airport Director, Jai Prakash Narayan International Airport Authority of India, Patna.
7. The Tender Committee through its Member, Jai Prakash Narayan International Airport Authority of India, Patna.
8. The Members, the Tender Committee, Jai Prakash Narayan International Airport Authority of India, Patna.
9. The Manager Commercial, Jai Prakash Narayan International Airport, Patna.
10. Amazing India Contractors Private through its Director/ Partner /Proprietor, Chamelichak, Bhagalpur-813113.

.... Respondents

==

Appearance :

For the Petitioner : M/s Y.V.Giri, Sr. Advocate
Sanjeev Kumar and
Birendra Kumar Singh, Advocate
For the Respondent 1 to 9 : Dr. Pankaj, Advocate
For the Respondent No. 10: M/s R.S.Pradhan, Sr. Advocate
Ranjeet Choubey and
Jainandara Kumar, Advocate

==

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN
ORAL JUDGMENT
Date: 09-09-2015

I have heard the parties and have perused the records of the case.

This writ application has been filed *inter alia* for grant of following reliefs.

> "1(i) To issue a direction to the authorities to call for entire records related to e-Tender for award of license for car park contract at Jai Prakash Narayan International Airport, Patna and after production of the same, issuance of writ in the nature of Certiorari for quashing the entire tender process exercised by the authorities on the ground that the same has been taken in the hottest haste, in most unfair and non transparent manner thereby rendering the entire action against public policy and public faith.
>
> (ii) To issue a writ in the nature of Mandamus commanding the authorities to go for fresh tender for the Car parking area to be strictly done in adherence to transparency and fairness.
>
> (iii) To any other relief or reliefs to which the petitioner is entitled in the facts and circumstances of the case.

The petitioner has also filed I.A. No. 2683/2015 by which he has been directed to handover the vacant possession of car park area and space occupied by him to the new party selected for award of contract and by which his licence extended from 15.1.2015 to 14.04.2015 was also terminated with immediate effect, i.e. from midnight of 30.3.2015. The petitioner claims that he had been granted licence for car parking area in Jai Prakash Narayan International Airport, Patna from 15.10.2014 which was admittedly extended till 14.4.2015. The extension was granted to the petitioner from 15.1.2015 till 15.4.2015 or till award of a fresh contract, whichever would be earlier. In the meantime e-notice inviting tender was issued on 13.2.2015 for award of contract for car parking area (Annexure 1) which shows that opening of technical bid would be held on 27.2.2015 at about 3.30 P.M. whereas the date of opening of financial bid was to be intimated separately later on.

Petitioner claims to have duly participated by submitting his tender documents. The date of opening of technical bid was extended and ultimately the technical bid was opened on 16th of March, 2015 at 4.21 P.M. The petitioner received message through e-mail (Annexure 3) that his technical bid response has been accepted and, at the same time, he also received e-mail (Annexure 2) informing him that financial bid would be opened on 26.3.2015 at 16.30 hrs. However, to the utter surprise of the petitioner, the financial bid was opened on the same date, i.e., the date on which the said e-mail was sent to the petitioner and the technical bid was opened, i.e., on 16th of March 2015 in place on 26.3.2015 behind the back of the petitioner as would be apparent from Annexure 4 and the contract was awarded to the respondent no. 10.

Mr. Y.V. Giri, learned Sr. Counsel appearing for the petitioner submitted that in above view of the matter, the procedure followed by the respondent apparently lacks transparency as the financial bid was opened behind the back of the petitioner and even the date of opening of financial bid has illegally been preponed due to which the petitioner could not remain present on the date of financial bid either physically or even on the concerned computerized system. It is contended that the action of the authority is in the teeth law laid down by the Apex Court in several cases as the tenderers have a right to be treated with equality and fair treatment. The process of evaluation of tender must be transparent and in accordance with the agenda. It is contended that the petitioner was already working as a licensee and the licence admittedly was extended also, as has been mentioned above, however, it is apparently clear that aforesaid procedure has been adopted by the Air Port Authority with a purpose to get his claim defeated behind his back.

In support of his contention, learned counsel has placed reliance upon the decisions of the Apex Court rendered in **B.S.N. Joshi & Sons Ltd. vrs. Nair Coal Services Ltd. and others [2006(11) SCC 548]**, **Siemens Public Communication Networks Private Limited and another vrs. Union of India and others**

[2008(16) SCC 215] and **Natural Resources Allocation, In Re, Special Reference No.1 of 2012 [2012(10) SCC 1].**

Per contra, learned counsel appearing for the Airport Authority of India as well as respondent no. 10 have submitted that there is no question of lack of transparency in the matter and the petitioner cannot raise such issue by filing a writ application as admittedly in the financial bid he has been at third position having quoted Rs. 6,61,500/- only, whereas, the respondent no. 10 is at number one position quoting Rs. 8,11,211/- and one Kumar Gaurav Shankar was at second position quoting Rs. 6,75,001/- .

Counter affidavit and supplementary counter affidavit have been filed on behalf of respondent nos. 1 to 9. A stand has been taken that award of contract was to be carried out on-line and, as such, there was no requirement of personal presence of the tenderers. It is submitted that since Annexure 4 has been electrically generated, no prejudice has been caused to the petitioner even though he could not remain present at the time of opening of financial bid. It has further been stated that though the aforesaid e-mail was generated and sent to all the bidders on 16.3.2015 stating that financial bid for subject mentioned contract will be opened on 26.3.2015 at 16.30 hrs. through the e-mail I.D. of Manager Commercial but it was a human error or typing mistake and, as such, all the bidders were immediately informed on their respective telephone numbers including the petitioner regarding the aforesaid mistake. However, the petitioner, by filing supplementary affidavit, has denied to have received such information on phone. That apart, it has also been stated by the petitioner that the e-NIT or other documents do not show that the communication by telephone , cell phone or mobile phone are also one of the accepted modes of communication prescribed in the tender process. The respondent nos. 1 to 9 in support of their aforesaid submissions have appended Annexure A which is extract from guidelines for compliance of quality requirements in e-procurement system. This document has been relied by the aforesaid respondents to show that the facility for authorized personnel to conduct public online tender opening event with bidders attending from remote locations electronically with full security procedures has been provided and it ensures that the tender opening is simultaneously viewable by all the attendees from their respective locations. It has further been submitted that guidelines are clear that while bidders would be welcome to be present physically during the tender opening event, however, it would not be mandatory for them to do so. All the above should be achieved online in a user-friendly manner. The respondents have also relied upon Annexure B which is a document dated 14.2.2015 electronically generated at 2 P.M. which has been captioned as Display Bid Invitation. It is stated that the aforesaid document clearly shows that date of opening of financial bid was fixed on 16.3.2015 at 16.30 hrs much earlier, therefore, there was no confusion regarding that and, thus, the writ petitioner's allegation is misconceived.

Respondent no. 10 has also filed a counter affidavit almost adopting the same line which has been taken by the respondent nos. 1 to 9. He has also appended Display Bid Invitation dated 14.2.2015 as annexure A and has stated that since it was the highest bidder in the financial bid, the contract has been awarded accordingly.

On consideration of rival contention, in my considered view, the following issue fall for determination by this Court:

Whether the tender process passes the well accepted test of fairness, reasonableness, non-discriminatory, unbiased and transparency in view of the e-mail generated on 16.3.2015 (Annexure 2) from the side of the Manager Commercial of the Air Port Authority and having sent to the petitioner and other participants disclosing the date of opening of financial bid to be 26.3.2015 at 16.30 hrs. but, at the same time, the bid having admittedly been opened on the same day, i.e., on 16.3.2015?

The e-NIT has been appended as Annexure 1, which indicates in clear terms the date of opening of technical bids to be 27.2.2015 at 15.30 hrs., whereas, the date of opening of financial bid was to be intimated separately. The petitioner claims that this notice e-NIT was floated on 13.2.2015, whereas, the respondents have also appended the Display Bid Invitation which is dated 14.2.2015 which discloses date of submission of bid as 27.2.2015, date of opening technical bids as 27.2.2015 as well as the date of opening of financial bid to be 16.3.15 at about 16.30 hrs. However, admittedly the technical bid could not be opened on 27.2.2015 and actually it was opened on 16.3.2015 which is apparent from Annexure 3, i.e., e-mail in this regard sent to the petitioner. However, on the same day another e-mail was sent to the petitioner vide Annexure 2 at about 3.15 P.M. that financial bid would be opened on 16.3.2015 at 16.30 hrs. This is also admitted fact that actually the financial bid was opened on that very date itself, i.e., on 16.3.2015. The Airport authority's stand is that it was a human error and the petitioner was subsequently informed about this on telephone.

However, a question would crop up as to whether the aforesaid submission can be accepted that it was a human error as the specific date and time was given in the admitted e-mail generated from the end of the Manager, Commercial concerned vide Annexure

2 ? Secondly, if information regarding human error was given to the petitioner on telephone then the date and time of passing such information to the bidders would be relevant because the financial bid was opened on that very date itself. The respondent nos. 1 to 9 in their supplementary counter affidavit have made statement that as soon as the same mistake was located it was thought proper to inform all the bidders to avoid any delay and the same was communicated from the official phone number of the respondents to the respective cell phone of the bidders including the petitioner's mobile numbers. However, it has not been stated as to on which date and time such information was given. It is also not stated that the aforesaid information was communicated vide SMS or by making call upon the mobile number. If a call was made then whether the representative of the respondents had a talk with the petitioner himself or one of his representatives? These questions do not stand answered and the petitioner has denied any thing having been informed on the phone by filing an affidavit. In the aforesaid background of matter, the authorities were directed to produce the original records also, however, they miserably failed to produce any record to demonstrate that such decision was taken by a competent authority to inform the bidders regarding the aforesaid human error having been committed on their respective cell phones and that was

eventually done. In fact learned counsel for the respondent nos. 1 to 9 has informed this Court that a disciplinary proceeding has been initiated against the person who was found responsible for generating the e-mail concerned. This itself goes to show that there was some mischief on the part of some body. It could also not been demonstrated by the respondents that communication by cell phone was also an accepted mode of communication during tender in process and above all, if an erroneous e-mail was generated by mistake, it is also not understandable as to why not it was followed by another e-mail informing all the concerned regarding the error which had occurred?

It has also been stated on behalf of the respondents that there was no requirement for presence of the bidders at the time of e-tender opening event and as every thing was electronically generated and further, since ample care has been taken that at the time of development of concerned software, no tempering could be done with tender documents. The petitioner had admittedly quoted the rate which is the lowest amongst the three bidders whose financial bids were opened. In support of his statement learned counsel for the respondents have placed reliance upon Annexure A which, according to them, is extract from guidelines for compliance to quality requirements in e-procurement system. Learned counsel has made an endeavor to demonstrate that the presence of the bidders was not mandatory as the goal is to be achieved in the manner prescribed in the guidelines and there was no possibility at all of any tampering of tender papers. However, the Annexure A is merely guideline for compliance of quality requirements of e-procurement system. The same document also discloses that the recommended practices for conducting public online opening event includes that opening of the bids should be mandatorily in the online presence of bidders or their authorized representatives with proper attendance records. It has been written specifically that merely opening bids online and then subsequently displaying some results to the bidders does not fulfill the requirement of transparency of online public opening events. The necessary guidelines upon which the respondents have also relied are being extracted and quoted as under:

> **Guidance and recommended practices**
>
> The GFR requires that tenders be opened in public in the presence of the authorized representatives of the bidders. The Finance Ministry Manual on procurement procedures outlines in details the requirements of a transparently conducted Public Tender Opening Event. CVC Guidelines on security aspects of e-procurement also stae the requirement of 'Online Public Tender Opening Event'. Merely opening bids 'online', and then separately making them available for display to the bidders subsequently, and/or from a different location/screen (ie user interface) without the simultaneous online presence of bidders, does not fulfill the requirements of a proper and transparent online Public TOE. A comprehensive and transparent Public Tender Opening Event is the

'backbone' of transparency and fairness' of the Public Procurement process, manual or electronic. This has an impact on technical as well as procedural aspects.

It must be ensured that e-tendering/e-procurement has comprehensive functionality for a transparent Public Online Tender Opening Event (Public OTOE). Well established practices of manual tender opening (with legal and transparency related significance) should have corresponding electronic equivalents for transparent e-tendering/e-procurement. Some relevant processes of a fair and transparent online public TOE should include:

i. <u>Opening of the bids in the simultaneous online presence of the bidders with proper online attendance record of the authorized representatives of the bidders. Merely opening bids online, and then subsequently displaying some results to the bidders does not fulfill requirements of a transparent Online Public Tender Opening Event</u>.

ii. Security Checks to assure bidders of non-tampering of their bids, et al during the online TOE itself.

iii. <u>One-by-one opening of the sealed bids in the simultaneous online presence of the bidders</u>

iv. Online verification of the digital signatures of bidders affixed to their respective bids

v. Reading out, ie allowing bidders to download the electronic version of the salient points of each opened bid (opened in the simultaneous online presence of the bidders)

vi. There should be a procedure for seeking clarifications by the TOE officers during online Public TOE from a bidder in the online presence of other bidders, and recording such clarifications

vii. Digital counter-signing (by all the tender opening officers) of each opened bid, in the simultaneous online presence of all participating bidders

viii. Preparation of the 'Minutes of the Tender Opening Event' and its signing by the concerned officers in the simultaneous online

> presence of the bidders
>
> While bidders should be welcome to be present physically during the TOE, it should not be mandatory for them to do so. All the above should be achieved online a user-friendly manner.
>
> The e-procurement system has to satisfactorily address the above requirements through suitable functionality built into the e-procurement application. Where, in addition, some issues are being further addressed through organizational procedures under ISO 27001, these should be explicitly defined with satisfactory explanations."
>
> (emphasis is mine)

From bare perusal of the aforesaid guidelines it would be clear that, to maintain a transparency, the opening should be in online presence of bidders with proper online required authorized representatives. It is stated in clear terms that GFR requires tenders to be opened in public in the presence of the authorized representative of the bidders and records of such presence should be maintained. Of course it is also stated that while the bidders should be welcome to remain physically present during the tender opening event but that should not be mandatory to done but that has been stated only for the reason that the goal could be achieved by their online presence itself, as indicated above, with proper online attendance record.

Thus, in my considered view the moment there was lack of communication of the actual date on which the financial bid was to be opened, there was no question of proper online attendance of the petitioner or his authorized representative and the stand of the respondent authority that the correction was made by informing the petitioner on telephone cannot be accepted as there is no record available regarding such step having been taken and admittedly no corrective e-mail was sent to him. At the same time, the petitioner has denied having received any call or SMS. The respondents have not able to show from original records regarding such decision having been taken by competent authority with respect to corrective measure to be taken. The stand of the respondents that the presence of petitioner was not mandatory is also noted to be rejected on the ground that if that was so then there was no occasion for intimating them the dates of opening of technical bid or the financial bid at all as the same could have been done by the authorities themselves without any presence and communication to the bidders. In my view, even in e-finalization of tenders, communication of date of tender opening event was required and online presence of the bidders or their representatives was mandatory as per the guidelines produced by respondents themselves. The stand of the respondent no. 10 that the petitioner, being at the third position in the financial bid, has not been prejudiced by opening of financial tender in his absence, is also to be rejected as it is well settled that if there are essential conditions then the same must be followed by the authorities. Reference in this regard is made to the decision rendered by the Apex Court in **B.S.N. Joshi & Sons Ltd. (supra).** It is apparent from Annexure 1, which is e-notice inviting tender, that though right to postpone the dates of opening of the bids has been reserved but that does not empower the authorities to prepone the event in the aforesaid manner.

The Apex Court, while answering the Presidential Reference No. 1 in the aforesaid case, has observed that for an action to be able to withstand the test of Article 14 of the Constitution of India, it has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favourtism or nepotisms and in pursuit of promotion of healthy competition and equitable treatment.

In my considered view the aforesaid action of the authorities fails in several of the aforesaid tests. The respondents' stand is completely misconceived that, since physical presence of the bidders was not required, the action above cannot be faulted with as it is clear from their document itself that it was left to open to the bidders whether they would like to remain physically present or not by not making the same mandatory, however, their own or their representatives' online presence was a condition precedent for tender opening event. If that has not achieved, the process cannot be held to be a transparent, non-discriminatory and in pursuit of promotion of healthy competition and equitable treatment.

As a result the question involved is answered in negative and against the respondents. It is held that the tender process in the manner aforesaid cannot be held to be transparent and non-discriminatory and as such the entire process has to be declared erroneous and liable to be quashed.

Ordered accordingly.

The entire procedure along with consequential award of contract as the respondent no.10 is quashed and set aside.

However, the respondent nos. 1 to 9 would be at liberty to come up with a fresh notice inviting tender for grant of the said contract but at the same time that would not mean that the licence of the petitioner which was valid either till finalization of new tender or April 2015 would continue. The Air Port Authority would be at liberty to make temporary arrangements in accordance with law till the finalization of fresh contract.

(Dr. Ravi Ranjan, J)

Spd/- AFR

U			