IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2662 of 2016

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Ramesh Kumar Pandey, son of Late Shivakumar Pandey, resident of Premchand Path, Gaurakshani, Sasaram, P.S. Sasaram, District- Rohtas (Bihar).

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Health Department Government of Bihar, Patna.
2. The Principal Secretary, Health Department Government of Bihar, Patna.
3. The Managing Director, Bihar Medical Services & Infrastructure Corporation Limited, 5th Floor, Biscomaun Bhawan, Gandhi Maidan, Patna.
4. The Chief General Manager (Project), Bihar Medical Services & Infrastructure Corporation Limited, 5th Floor, Biscomaun Bhawan, Gandhi Maidan, Patna.
5. The General Manager (Project), Bihar Medical Services & Infrastructure Corporation Limited, 5th Floor, Biscomaun Bhawan, Gandhi Maidan, Patna.
6. The Deputy General Manager (Project), Bihar Medical Services & Infrastructure Corporation Limited, 5th Floor, Biscomaun Bhawan, Gandhi Maidan, Patna.
7. The Manager (Project), Bihar Medical Services & Infrastructure Corporation Limited, 5th Floor, Biscomaun Bhawan, Gandhi Maidan, Patna.

.... Respondent/s

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Appearance:

For the Petitioner/s	:	Mr. Chitranjan Sinha, Sr. Advocate Mr. Raj Kishore Prasad, Advocate
For the Respondent/s	:	Mr. Lalit Kishore, Sr. Advocate; & Mr. Prabhat Kumar Singh, Advocate
For the State	:	Mr. Ashok Priyadarshi, G.A.-4

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 28-09-2016

The petitioner has filed this writ petition praying for issuance of a writ in the nature of mandamus commanding the respondent authorities of the State Government to issue a letter of acceptance as well as to enter into an agreement with the petitioner for execution of work of Group No. 2 in terms of the notice inviting tender bearing No. BMSILCL/Infra/23/2015 dated 29.7.2015 issued under the signature of the Chief General Manager.

Facts of the case briefly stated is that a notice inviting tender was issued under the signature of the General Manager, Bihar Medical Services and Infrastructure Corporation Limited (hereinafter referred to as the 'Corporation') on 29.7.2015, a copy of which is placed at Annexure-1. The tender is for construction of 30 bed hospital at Primary Health Centres at Kochas and Kargahar in the District of Rohtas, at Ali Nagar in the District of Darbhanga and at Mohra in the District of Gaya. The last date for submission of tender was 11.8.2015. The technical bid was to be opened on 13.8.2015 and the date of the financial bid was to be informed through website. The validity of the tender period was 120 days in terms of the Standard Bid Document (hereinafter referred as 'SBD' for the sake of brevity).

The present dispute relates to the construction of a 30 bed hospital at the Primary Health Centre at Kargahar in the District of Rohtas at an estimated cost of Rs. 2,90,000/- to be completed in 12 months. The earnest money deposit for the work in question listed at Item No. 2 of the tender was Rs. 9,80,000/-. The petitioner along with some others participated in the tender after completing the formalities. The technical bid of the tenderers was opened by the Tender Bid Committee and the papers of the petitioner along with one other contractor, namely, Rajesh Kumar was found to be in order. After the technical bid and scrutiny of the documents, the petitioner was asked to clarify in respect of work experience vide letter dated 26.8.2015 of the Chief General Manager present at Annexure-5 and which was duly responded to by the petitioner vide his letter dated 27.8.2015. According to the petitioner due to the assembly election, the finalization of the tender got delayed and the prescribed period of 120 days lapsed. Since the validity period of the tender could only be extended by mutual consent, that the Chief General Manager vide letter dated 11.12.2015 asked for consent of the petitioner for extension of the validity period for further 120 days vide Annexure-7. The petitioner expressed his consent on the request so made and communicated the same vide his letter dated 14.12.2015 present at Annexure-8. The financial bid was opened on 13.1.2016 and the rate quoted by the petitioner was found 1.11% above the estimated cost in terms of the notice inviting tender. The copy of the financial bid sheet is placed at Annexure-9. The petitioner vide his letter dated 19.1.2016 requested the Managing Director of the Corporation for issuance of the letter of acceptance and for executing the agreement as according to the guidelines after the finalization of the financial bid, a letter of acceptance has to be issued within two working days and an agreement has to be issued within 10 days of deposit of performance security. A copy of the guideline of the Corporation has been enclosed at Annexure-11 which is dated 27.9.2013 and clause-7, 8 and 9 would be relevant for the issue. No steps were taken by the respondents to complete the process and which left no option for the petitioner but to move through the present writ petition. It is after the filing of the writ petition that the tender itself has been cancelled vide notice dated 11.2.2016 and which has been questioned by the petitioner by filing an interlocutory application bearing I.A. No. 1510 of 2016 impugned at Annexure-12. The ground assigned is a single financial bid. The respondents thereafter have proceeded to issue a fresh tender on 09.5.2016 which again has been brought on record vide Annexure-14 to I.A. No. 4227 of 2016 with a prayer to quash the same. The decision of the Financial Bid Committee to cancel the tender due to first time single financial bid dated 23.10.2016 is impugned vide Annexure-17 to I.A. No. 5321 of 2016. The petitioner feeling aggrieved is before this Court.

Mr. Chitranjan Sinha, learned senior counsel has appeared for the petitioner along with Mr. Raj Kishore Prasad while the Corporation is represented by Mr. Lalit Kishore, Sr. Advocate who appears along with Mr. Prabhat Kumar Singh. The State is represented by learned Government Advocate No. 4.

Before adverting to the arguments advanced by the parties on the merit of the case, I would consider the prayer made by the petitioner through the three interlocutory applications filed bearing I.A. No. 1510 of 2016, I.A. No. 4227 of 2016 and I.A. No. 5321 of 2016 and considering that the relief prayed in these interlocutory applications are merely consequential, I would permit the petitioner to question the developments placed on record through the interlocutory applications in question, in the present proceedings. The interlocutory applications are accordingly allowed. The parties have argued at length and have also filed written arguments.

Mr. Sinha, learned senior counsel appearing for the petitioner has with reference to the sequence of events submitted that once the respondent Corporation has proceeded for opening the financial bid of the petitioner then there is no turning around for the Tender Committee to cancel the tender process which stands completed by the opening of the financial bid. It is the submission of Mr. Sinha that though the reason assigned for cancellation of the tender process is that there is a single financial bid but then this information was always available with the respondents and thus there was no occasion for opening the financial bid of the petitioner. According to Mr. Sinha unless the offer made by the petitioner is not to the satisfaction of the Tender Committee and a rejection is based on sound reasons, a single financial bid cannot be a ground for cancellation of the tender process. It is the argument of Mr. Sinha that the stand taken by the respondent Corporation in the counter affidavit as well as in the decision to cancel the selection process on grounds of single financial bid is resting upon past practice but the position is otherwise and there has been instances where the Corporation has proceeded on single financial bid itself. Mr. Sinha in reference to the statement made in paragraph-14 of the writ petition has submitted that the petitioner himself was allotted the construction of office cum residence of District Programme Manager at Sadar Hospital, Sasaram being a single tenderer and thus the stand of the committee is not sustainable. It is the argument of Mr. Sinha that the statement made in paragraph-19 of the writ petition and similar instances given at paragraph-9 to I.A. No. 1510 of 2016 has not been responded to by the Corporation. Learned counsel has referred to a decision of this Court rendered in a case arising from CWJC No. 10319 of 2015 (M/s Deo Construction & ors vs. the State of Bihar & ors) to submit that the tender process could not have been cancelled after reaching the final stage.

The argument of Mr. Sinha, learned senior counsel appearing for the petitioner has been contested by Mr. Lalit Kishore, learned senior counsel representing the Corporation. While arguing on the limited scope of interference in exercise of judicial review by a High Court under Article 226 of the Constitution of India in contractual matters, it is submitted that the choice entirely rests with the employer and if the employer decides to go in for a wider competition and a better response, there can be no impediment to such exercise. According to Mr. Kishore the six member tender committee under the chairmanship of the Managing Director taking into consideration the past precedent, was of the view to go for re-tender in view of the single financial bid available and which decision of the Tender Committee cannot be faulted. Learned counsel has referred to clause-29 of the Stand Bid Document to submit that the employer reserves the right to accept or reject any bid as well as to cancel the bid process and thus the decision suffers no infirmity. Responding to the reliance of the petitioner to the judgment passed in the case of M/s Dev Construction (supra), he submits that the facts are different and the judgment passed in the said case was considered by a Bench of this Court in a similar matter arising from **CWJC No. 8328 of 2015 (M/s NCC Limited vs. the Bihar Medical Services and Infrastructure Corporation**) and the decision of the Tender Committee to cancel the bid process even after reaching the financial bid stage has not been interfered with. Learned counsel has also referred to a judgment of the Supreme Court reported in **(2016)4 SCC 716 (State of Uttar Pradesh vs. Al Faheem Meetex Private Ltd.)** to submit that the Supreme Court has upheld the discretionary power of the committee whether or not to accept any bid and to go for fresh tender. Learned counsel with reference to the conclusion present at paragraph-14 and 15 of the judgment has submitted that until a tender is translated into an agreement, it has not reached finality and thus no enforceable right accrues to a tenderer. Mr. Kishore has also referred to a Bench decision of this Court in the case of **M/s Hari Om Construction vs. State of Bihar** reported in **2016(2) PLJR 56** to submit that the Court has recognized the right of the government to protect its financial interest by going for fresh tender. He submits that the fresh tender having been floated the tenders have been received for the work advertised which calls for no interference.

I have heard learned counsel for the parties and I have perused the records. In my opinion, the only issue which arises for consideration in the present contest is, whether there is any infirmity in the decision of the Tender Committee to go for fresh tender, when undisputedly there was only one financial bid available on record.

While it is the argument of learned counsel for the petitioner in reference to the judgment of **M/s Deo Construction (supra)** that having reached the financial bid stage and finding no other reason for disqualification of a tenderer, an eventuality of a single financial bid, cannot be a reason for cancellation of a tender process, on the other hand, the argument is contested by learned counsel for the respondents on the plea that mere opening of the financial bid is not a completion of tender process and no enforceable right as such accrues to a tenderer merely on account of opening of his financial bid. It is also argument of the counsel for the respondents that even if the financial bid of a tenderer is opened and a decision is taken by the Tender Committee to go for fresh tender in absence of any competition to the single financial bid, the discretion was always present under Clause-29 of the Standard Bid Document and the right of employer as such also stands confirmed in the judgments relied upon by learned counsel appearing for the respondents. In between a plea is taken that the decision to go for re-tender is resting on past practice, is not a correct factual position.

As I have observed at the outset the only issue that requires a consideration is whether the decision by the respondents to go for fresh tender would suffer any infirmity in the background of the facts on record and the judicial pronouncement on the issue.

There is absolutely no contest on the proposition advanced by Mr. Kishore learned Senior Counsel representing the Corporation as regarding the limited scope of intervention by the Courts in exercise of jurisdiction under Article 226 of the Constitution of India in the commercial sphere and contractual disputes. Law as to intervention in contractual matters is well settled and unless a decision smacks of abject arbitrariness or is clothed with malafides, nepotism, procedural impropriety, abuse of powers or the likes, it is not to be interfered with lightly, considering the commercial nature of the dispute. There is no gainsaying that clause-29 of the Standard Bid Document, the relevant extract of which has been placed at Annexure-B to the counter affidavit of the respondent no. 3 to 7 *inter alia* vests jurisdiction in the employer to cancel the bid process at any time prior to the award of contract. It is an admitted position that the contract was yet to be finalised and the opening of the financial bid was only a step towards that. The issue is whether the power and jurisdiction so vested in the employer under Clause-29 has been correctly exercised. According to Mr. Sinha the respondents, after having obtained consent from the petitioner for validation of the offer and having proceeded with opening of financial bid, could not turn back. Reliance in this context has been placed by learned counsel for the petitioner to the judgment rendered in the case of M/s Deo. Construction (supra) but in my opinion the facts present in the case of M/s Deo Construction (supra) are different to the issue in hand. In the said case the decision to cancel the tender process was not by reason of a single tender rather the reason spelt out in the counter affidavit filed in the said writ proceedings, was a doubt on the experience certificate thus questioning the eligibility to participate. Since the eligibility of the said petitioner already stood tested at the technical bid stage and the petitioner of the said case was found fit for participation in the financial bid, that this Court did not approve of the action and the decision to disqualify him, was quashed.

The issue involved in the present case is entirely different and the reason assigned is a single financial bid received. The decision of the Tender Committee is placed on record vide Annexure-17 to I.A. No. 1510 of 2016 and discusses the reasons for resorting to fresh tender and considering the right vested in the employer under clause-29 of the Standard Bid Document, in my opinion, a mere opening of the financial bid did not vest any enforceable right in the petitioner. It is undisputed that a letter of acceptance was yet to be issued formalizing the contract, leave alone the execution of agreement. The opinion of the Supreme Court in the case of **Al Faheem Meetex** (supra) at paragraph-15 would be relevant for the contest at hand and which runs as follows:

> "15. The High Court has also gone wrong in finding fault with the decision of BEC by holding that such a subsequent decision could not have been taken by BEC without notice to or in the absence of the appellant. When the decision-making process had not reached any finality and was still in embryo and there was no acceptance of the bid of Respondent 1 by the competent authority, no

> right (much less enforceable right) accrued to Respondent 1. In such a situation, there was no question of giving any notice or hearing to Respondent 1."

In view of the position settled by the Supreme Court in the judgment above, no infirmity can be attributed to the decision taken by the Tender Committee to go for fresh tender, since the tender process in the case in hand had not reached a finality. Neither any enforceable right accrued to the petitioner nor the decision to cancel is backed by any disqualification to invite interference.

One of the issue which has been raised by learned counsel for the petitioner is that though the decision of cancellation of the tender process on account of single financial bid is attributed to past practice but which is not the correct position and there are instances referred to in the writ petition where the Corporation has proceeded to also accept a single financial bid. In my opinion, even this issue stands answered by clause-29 of the Standard Bid Document where the employer is conferred with the right to accept or reject the bids. As I have said, the dispute in question arises from a commercial venture and thus a play in the joints is admissible to the employer for securing his financial interest. There is no straightjacket formula which can be universally applied in all cases rather each case has to be tested on the decision making process and if the same is backed by sound reasons, then merely a second opinion on the issue, would not render the decision illegal.

For the reasons aforementioned, I am not persuaded to interfere with the decision of cancellation of tender impugned at Annexure-1 as well as the decision taken for re-tender together with tender vide Annexure-17 and 12 as well as the issuance of fresh tender vide Annexure-14.

The writ petition is dismissed accordingly.

(Jyoti Saran, J)

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Uploading Date	
Transmission Date	