

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 8328 of 2015

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M/s NCC Ltd (formerly known as Nagarjuna Construction Company Limited),
having regional office at Flat No. 504, Sri Ram Kunj Apartment , IAS Colony,
Bailey Road, Patna, through its Chief General Manager (Tech) Sri G. Ramakrishna
Reddy son of G. Ramalinga Reddy, residing at Flat No. 403, Legend K.N. Raju
Residency, Street No. 2, Ashok Nagar, Hyderabad-20.

.... Petitioner/s

Versus

1. The Bihar Medical Services & Infrastructure Corporation Ltd. through its
Managing Director, Biscomaun Bhawan , 5th Floor, Gandhi Maidan, Patna-
800001.
2. Managing Director, Bihar Medical Services & Infrastructure Corporation Ltd.,
Biscomaun Bhawan, 5th Floor, Gandhi Maidan, Patna- 800001.
3. The Chief General Manager, Bihar Medical Services & Infrastructure
Corporation Ltd., Patna.
4. The Tendering Committee, Bihar Medical Services & Infrastructure
Corporation Ltd., Biscomaun Bhawan, 5th Floor , Gandhi Maidan, Patna-
800001.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Y. V. Giri, Sr. Advocate.
Mr. Ashish Giri, Advocate.

For the Respondent/s : Mr. Lalit Kishore, P.A.A.G.
Mr. Tuhin Shankar, Advocate.
Mr. Siddharth Shankar Pandey, Advocate.

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH
ORAL JUDGMENT

Date: 12-02-2016

Heard learned counsel for the parties.

The petitioner has moved the Court for quashing
of the re-tender notice bearing NIT No. BMSICL/Infra/14/2015
dated 30.05.2015 issued by respondent no. 3 for construction of
Government Dental College and Hospital, Paithna, Rahui in the
District of Nalanda and further to allot the contract to him having
been the lowest bidder.

Learned counsel for the petitioner submits that
initially, pursuant to the tender being issued, the petitioner having



been found eligible in the initial scrutiny after acceptance of his technical bid, the financial bid was also opened and the petitioner being the lowest tenderer, the authorities approved award of work to him. However, in view of there being controversy relating to the experience certificate submitted by the petitioner which was brought to the notice of the authorities by a compliant of a citizen forwarded through an Hon'ble Member of Parliament, the authorities got the matter verified from the person who had issued the completion certificate relating to experience and the matter having been clarified was considered once again by the technical committee and the decision to award contract to him was reiterated. Thereafter, before finally issuing the letter of acceptance, as the complaint was forwarded through the Health Department, the Bihar Medical Services and Infrastructure Corporation (hereinafter referred to as the 'Corporation') thought it prudent to get the opinion of the Department but before that there was a rethinking by the respondent no. 2 and pursuant to opinion being sought from the other Works Departments, the authorities made a U-turn and have unsuited the petitioner on the ground that the experience certificate furnished by him was not worth accepting in terms of the N.I.T. Learned counsel submits that the certificate in issue clearly mentioned that the petitioner had '*virtually completed*' the project on 31st January, 2014 which was the cut off date and when the same was clarified from the authority issuing the said certificate, it was replied that the petitioner had '*actually completed the work*' and the concerned



medical college was functioning, having been inaugurated in February, 2014. Learned counsel submits that there is no controversy with regard to the nature and quantum of work required to be completed. Learned counsel draws the attention of the Court to Clause 7(i) of the Pre-qualification bid document which stipulates that the tenderer should have '*satisfactorily completed*' in India as a Prime contractor during the last five years ending January, 2014 construction of at least one hospital project (including residential component) on composite basis (civil works along with services like plumbing, electrical, HVAC etc.) having total cost not less than 40% of the estimated value of this project put to tender. Learned counsel submits that the present tender was for an estimated cost of Rs. 324.70 crores and as per the experience certificate/completion certificate submitted by the petitioner, he had completed work of Rs. 792 crores which is far more than 40% required out of a total project cost of Rs. 812.8 crores. Learned counsel submits that this being the position, there was substantial compliance of the eligibility criteria required relating to past experience. Learned counsel submits that the same officer and the Committee having initially taken a decision in favour of the petitioner not once but twice after getting clarification relating to the completion certificate cannot take a different view *suo motu* and that too without any intimation to the petitioner. He also submits that the decision in favour of the petitioner was taken by the Committee whereas the decision to go for re-tender has been taken by an individual which also is not



permissible as the requirement of fair play was that the matter should have been sent to the Committee for any reconsideration which may have been required. Thus, there being no occasion for the officer to review the previous decisions, the exercise undertaken is arbitrary and cannot be sustained. Learned counsel submits that once the Committee had taken a decision in his favour, a right had accrued to the petitioner and thus he had a legitimate expectation of the work being allotted to him for which he has made investment and also incurred expense. Learned counsel submits that the petitioner was also not heard before taking a unilateral decision of going for re-tender. Learned counsel submits that the petitioner was not even communicated any reason for his offer not being accepted and there being a decision to go for re-tender. For the aforesaid proposition learned counsel has relied upon a decision of the Hon'ble Supreme Court in the case of **Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Ltd.** reported in **(2007) 8 SCC 1**, the relevant being at paragraphs 16, 37 and 38, where it has been held that there should be a level playing field and in contractual matters any policy or action has to satisfy the test of reasonableness. Learned counsel has also relied on a decision of a Full Bench of this Court in the case of **Bhimraj Madan Lal Vs. State** reported in **1984 BBCJ 636**, the relevant being at paragraph no. 15, in which it has been held that having second thoughts on the same material was not permitted. Learned counsel has also relied on a decision of a co-ordinate Bench of this



Court in the case of **United India Insurance Company Limited vs. State of Bihar** reported in **2015(1) PLJR 772**, the relevant being at paragraphs 13 and 14. Learned counsel has also relied on an unreported decision of a co-ordinate Bench of this Court in the case of **M/s Deo Construction vs. State of Bihar & Ors.** (C.W.J.C. No. 10319 of 2015) dated 09.10.2015, where it has been held that once the bid of the petitioner has been accepted, the respondents cannot be permitted to cancel the exercise.

Learned counsel for the Corporation submits that the facts of the case would clearly demonstrate that the ultimate view taken by the authorities is strictly in accordance with law settled and cannot be faulted. He submits that the objection of the petitioner that once the Committee has taken a decision in his favour, the Managing Director in his individual capacity cannot overturn that and go in for fresh tender is misplaced for the reason that Clause 4(9) of the Notice Inviting Pre-qualification as well as Clause 8 of the General Conditions of the Notice Inviting Price Bid itself, clearly stipulate that the Managing Director reserves the right to reject any or all the tenders without assigning any reason. He next submits that merely because the process of settling the tender has passed through various stages will not give an unfettered right to the petitioner or the party concerned and if the authority is justified on facts that a mistake or oversight has been committed, the same can always be set right and there is no estoppel against correcting a *bona fide* error. It is submitted that the moot point involved in the present case relates to whether the



petitioner satisfies the basic eligibility criteria of having the requisite experience of having '*satisfactorily completed*' the construction of a similar project. He submits that the admitted facts are that such experience should have been relating to a project which the tenderer was required to have '*satisfactorily completed*', prior to 31st January, 2014. Learned counsel draws the attention of the Court to the certificate submitted by the petitioner which is dated 10.02.2014 and clearly mentions that '*the entire scope of work is **virtually completed** on 31st January, 2014*'. He further points out that in the said certificate the contract amount shows that the same, after revision, was of more than Rs. 812.80 crores out of which the petitioner up to end of January, 2014 had done the work of little over Rs. 792 crores. He further refers to the details of major quantity of work executed from which it would be clear that *Cement Concrete for VRCC slabs and Lifts (16 passenger capacity) and Lifts (service lift)* were not installed. It is submitted that as far as the completion certificate from the Hindustan Steelworks Construction Limited (hereinafter referred to as the 'HSCL'), is concerned, the query from the Corporation was specific as to whether the work by the petitioner was '*actually completed as on 31.01.2014 or not*'. He then refers to the reply sent by the HSCL under letter dated 04.12.2014 in which there is only confirmation of the project having been '*actually completed*' and the same being inaugurated in February, 2014. Learned counsel further submits that the certificate itself was dated 10.02.2014 and mentions the work to be '*virtually*



completed on 31st January, 2014’ which leaves no scope for any further interpretation with regard to the project not having been finally completed moreso, when clearly work as per the revised contract amount had not been executed. It is submitted that the subsequent clarification being silent on whether the petitioner had *‘actually completed the work on 31.01.2014’* cannot be given an interpretation to mean that the work was completed within the same period after comparing it with the certificate dated 10.02.2014. Learned counsel relies on a decision of a Division Bench of this Court in the case of **M/s Indian Oil Corporation Limited vs. Raj Kumar Jha** reported in **2012(2) PLJR 783**, the relevant being at paragraph 9, for the proposition that once the standard is set out in the advertisement, the Corporation has to adhere to the said standard without any variation. Learned counsel has also relied upon a decision of a Division Bench of this Court in the case of **M/s B.B.Q. Construction vs. State of Bihar** reported in **2015 (1) PLJR 480**, the relevant being at paragraphs 64 and 68 for the proposition that in Government contract N.I.T. an authority inviting tender is bound to give effect to every term mentioned in the notice and is not entitled to waive even a technical irregularity of little or no significance.

Learned counsel submits that the contention of the learned counsel for the petitioner of having a level playing field in fact goes against him for the simple reason that the petitioner had not *‘satisfactorily completed’* the project and even though he may have done it at a subsequent stage, had his bid been accepted

then it would have given him an undue advantage as many similarly situated tenderers were prevented from even applying pursuant to the N.I.T. who also may have '*almost*' completed all works and would have been on the '*verge*' of '*satisfactorily completing*' their other project(s).

Having considered the rival contentions, the Court, without going into the finer details, finds that the condition of the tenderer having '*satisfactorily completed*' in India as a prime contractor at least one hospital project is as essential component and character of the tender which cannot be relaxed and unless he satisfies the said clause he cannot be said to be even qualified under the basic eligibility criteria to even apply pursuant to the N.I.T. in question. In the present case, the interpretation given to Clause 7(i) of the pre-qualification bid document with regard to the concerned having '*satisfactorily completed*' the construction of at least one hospital project having cost not less than 40% of the estimated value of the project put to tender cannot be construed to mean that he should have completed not less than 40% of the value of the contract of the other project for which the experience certificate has been provided. The obvious and clear meaning of the said clause is that the entire/whole project which was required to be '*satisfactorily completed*' in India by the tenderer should not have been for a value less than 40% of the value of the tender for which the N.I.T. was issued.

Moreover, once it is held that '*satisfactory completion*' of the project as on 31st January, 2014, is an essential



qualification, the Court is only required to give a finding as to whether the certificate submitted by the petitioner issued by the HSCL dated 10.02.2014 satisfies the said eligibility criteria. From a plain reading of the said document it is clear that though the same was issued on 10.02.2014, the word used is '*virtually completed*' and not just '*completed*' or '*satisfactorily completed*'. This clearly leaves no scope for any ambiguity to the position that the petitioner had not finally '*completed*' the project. The Court would clarify here that the petitioner not completing the project was not to his disadvantage for the said project for it was clearly indicated in the certificate itself that the stipulated period of completion was up to 31.03.2014 and thus the petitioner may have done it within time with regard to completion of the said project, but for considering the present case and eligibility, clearly the said experience or requirement of not only having '*completed*' the project but also doing it '*satisfactorily*' does not seem to be reflected from the certificate. The contention of learned counsel for the State that upon a subsequent query from the HSCL as to whether the petitioner had '*actually completed the work as on 31.01.2014 or not*', the reply on 04.12.2014 clearly skirts the query and only says that the project is '*actually completed*' without mentioning the cut off date and even the fact that the project may have been formally inaugurated in February, 2014, would not amount to the petitioner having '*satisfactorily completed the work by 31.01.2014*'. Moreover, the said interpretation is further fortified for the reason that in the reply sent by the HSCL dated



04.12.2014, it is written that the medical college is functioning since last two academic sessions and admittedly only in early 2014 the work is said to have been completed. Thus, mere running of the medical college would not amount to being proof of the '*entire project*' having been '*completed*' as the inauguration or functioning or starting of a college is not dependent on the entire construction or project having been fully completed. The Court is thus of the considered opinion that the certificate enclosed by the petitioner pursuant to the N.I.T. clearly did not put him in the category of persons eligible on the basis of work experience to even apply for the said tender. The contention of learned counsel for the petitioner that the authority was not entitled to have a re-look at the matter is also not justified when before the Court it has been shown that the tender of the petitioner was inherently incapable of passing the test of satisfying the eligibility criteria right from the beginning and eligibility going to the root of the matter, being an essential character of the contract, any error or oversight committed by the authorities earlier would not give the petitioner an absolute or indefeasible right and the authorities, being instrumentality of the State are not bound to go ahead and award the contract to the petitioner once they have realised the basic fault and irregularity in clearing the tender submitted by the petitioner at the initial stage. The Court would also like to observe that the contention of the petitioner that a right had accrued to him is also not very correct for the simple reason that the law stands settled that any decision taken in a file unless

communicated to the party will not confer any right or otherwise saddle any person with any liability unless communicated to the person concerned. In the present case, even if it is assumed that initially the Committee had taken a decision in favour of the petitioner but lateron, if they have given a re-thinking to the matter, which is based on sound legal principles and also justified on fact, the Court in its power of judicial review relating to such contract would not interfere when it is satisfied that the decision taken is justified both on facts as well as in law.

For the reasons aforesaid, the Court does not find any error in the action of the respondents and the writ petition accordingly stands dismissed.

(Ahsanuddin Amanullah, J.)

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