

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Order : December 05, 2018**

+ **W.P.(C) 9906/2017, C.M. APPL.40355/2017**

BPL-KPL (JV)

..... Petitioner

Through: Sh. Anusuya Salwan and Ms.
Nikita Salwan, Advs.

versus

MINISTRY OF ROAD TRANSPORT AND HIGHWAYS
AND ANR. Respondents

Through: Mr. Anurag Ahluwalia, CGSC
with Mr. Sumit Rajput, G.P. and Mr.
Abhigyan Siddhant, Adv. for UOI/R-1.

Sh. Krishnand Pandey, Sh. Jayesh Gaurav
and Sh. Gopal Jha, Advocates, for
Respondent No.2.

Sh. Shaurya Sahay, Advocate, for
Respondent No.3

Sh. Muneesh Malhotra and Ms. Vanya
Khanna, Advocates

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J.

1. The writ petitioner has sought appropriate directions from this court, to quash a tender notification 16-10-2017 (hereafter “impugned NIT”) in respect of the subject matter (i.e. widening of 2 lanes with paved shoulder and geometric improvement of NH 114-A from 141 km to 184 km under NH division Deoghar) (hereafter “the work”). The work was also the subject of a previous tender (hereafter “the first NIT”), pursuant to which the petitioner had participated and was declared successful in the bidding process.

2. The facts essential to decide the case are narrated as follows. The first respondent Central Government (hereafter “UOI”), decided to rehabilitate and augment a stretch of the National highway, in Jharkhand. It issued the first NIT on 29-11-2016. Bidders were asked- apart from indicating their technical expertise, etc, to furnish a security of ₹158.01 lakhs refundable not later than 180 days from the bid date – except in the case of the select bidders, in whose case, the security was to be retained till it provided the performance security in the terms stipulated. The technical bids of 9 bidders were opened by the respondents, on 16-03-2017. After evaluation, it was discerned that offers of only four bids (of the petitioner, Ms. Rajbir Construction Pvt. Ltd, Ram Kirpal Singh and M/s Rani Construction) qualified for consideration at the second (i.e financial bid) stage. The financial bids were opened on 10-08-2017; the petitioner was adjudged the lowest bidder for the first NIT and was so declared. Thereafter, it appeared that Rajbir Construction, one of the unsuccessful bidders complained of fraud by the petitioner, allegedly committed in belated bid submission and in manipulation of dates. The petitioner was notified about the discrepancies which the respondents stated (in their letter to it, on 03-10-2017) with respect to date of the documents furnished – which appeared to be after the date of bid submission.

3. The petitioner clarified – by its letter dated 09-10-2017 that all the relevant documents were uploaded and submitted online before the time prescribed for furnishing the bids expired and that the dates appearing on the documents, were the result of an error in the system

date setting in the computer. It was explained that the documents were uploaded within time; however, the documents were created earlier and also modified before their uploading. According to the petitioner, all documents were uploaded on 05-03-2017 at 12:54 PM. It was further stated that document creation date could not have been modified. The documents included some which contained *file property dates which appeared to be as of 04-03-2017 and 05-03-2017*. The petitioner concluded by saying that the *“file creation date and modified dates that is appearing is due to a technical error in the system/computer date. Thus, if scrutiny of all bid (technical bid & financial bid) is made, the anomaly in dates appearing in technical bid & financial bid would have been clear and understood.”*

4. The petitioner alleges that the unsuccessful tenderer, Rajbir Construction, complained alleging that the documents submitted by it (i.e the petitioner) were later and that consequently, the process was tainted. According to the petitioner, despite its clarification in its letter and the supporting opinion of information technology provider, that the documents were uploaded fully before the date of closure of tender, the respondents did not award the contract formally. Instead, they kept asking the petitioner to extend the validity of its bid security, which it did. In these circumstances, submits the petitioner, the publication of the impugned tender is utterly arbitrary and amounts to an illegal cancellation of a valid bid that had been accepted. It is also argued, on behalf of the petitioner, that the complainant, Rajbir Construction, had managed and manipulated local officials and

ensured that no competition survived in the state, where it operated. The petitioner's counsel also points out that once the respondents became aware that the complaint had no substance, they should have proceeded to award the contract and permitted it to take further steps, envisioned in the tender documents. Instead, by giving credence to the complaint and proceeding to issue the impugned NIT, they acted illegally and arbitrarily.

5. The state of Jharkhand, i.e. the second respondent, which is the implementing agency, confirms, in its affidavit, that the petitioner was the successful tenderer whose bid was accepted. It however, says that after declaration of bid acceptance, a complaint was made by one of the unsuccessful bidders, i.e. Rajbir Construction. The complaint was that the tender process was vitiated since the petitioner had not furnished all documents, but rather substituted a few later, after bid submission. According to the complaint, the petitioner's documents, uploaded on the concerned portal, indicated that they were of a later date, than the last date of bid submission (i.e. 06-03-2017). Counsel for Jharkhand, therefore submitted that a report was sought from the National Informatics Centre, a UOI agency. The report of 29-08-2017 stated that

“The PDF (Financial Bid Document) property shows document creation date as 05-04-2017 i.e. later than tender closing date. Whereas the file creation date is shown in file property as on 05-03-2017. Prima facie, it seems that PDF document has been created on 05-04-2017, then uploaded/created on server. Date manipulation at server end seems suspected at first instance.”

6. It is submitted that pursuant to the above report, a committee meeting was held, where it was decided to cancel the bid, invite fresh tenders and take appropriate action. This stand is also confirmed by the UOI.

7. After hearing parties, this court had impleaded the complainant as third respondent. The court was *prima facie* of the opinion that the petitioner's explanation about computer error, in the date setting seemed plausible. It therefore also restrained the first two respondents from going ahead with the impugned NIT.

8. The third respondent, Rajbir Construction urged, in its affidavit, that the materials which appeared on the concerned web portal indicated that the tender documents furnished by the petitioner were of a date later than its bid submission, establishing manipulation *post* tender filing. It was contended that this was unacceptable; consequently, it complained. The action of the second respondent, urges Rajbir Construction, in re-tendering the work is justified and legal.

9. By order dated 24-08-2018, this court had recorded as follows:

“The petitioner has relied upon Annexure P-11 (page 176) as per which the price bid and technical qualification bid were uploaded on the server of C1 India Private Limited on 5th March, 2017 at 12.55 and 12.54 P.M.

2. The respondent No. 3 has filed screen shots enclosed as Annexures R- 3/2 and R-3/5 as per which the file on

uploading the technical bid file was created/modified on 5th March, 2017 at 11.30.04. As per Annexure R-3/5, the financial bid was uploaded and the relevant file was created on 5th April, 2017 at 12.35.37 P.M. Thus, there is difference in the date and time mentioned in Annexure P-11 and Annexures R-3/2 and R-3/5.

3. We may note that after the technical bids were opened and examined on 16th March, 2017, the financial bids were opened on 10th August, 2017.

4. Annexures R-3/2 and R-3/5 and the timing and date mentioned thereon, it is claimed, were self-generated by the computer. Respondents state that possibility of tampering or even wrong date and time being recorded was remote, if not impossible. Modification would have required access to the server.

5. The petitioner, however, relies upon letter dated 25th August, 2017 written by C1 India Private Limited on whose server the tender documents were uploaded. They have stated that wrong PDF creation issues were recognised on internet and it was possible that wrong date and time may have been captured by the server as the vendor had wrong date and time set on their system when the PDF was transferred and uploaded on the C1 India Private Limited server.

6. Question would arise whether the said explanation is technically acceptable and is correct, as the date and time downloaded by the petitioner as per Annexure P-11 does not tally and match with Annexures R-3/2 and R- 3/5.

7. The petitioner has also relied upon letter dated 1st September, 2017 and report of the internal committee enclosed as Annexure P-9, English translation copy of which is enclosed at pages 148 to 158.

8. The respondents, i.e., the respondent No. 2 would produce the original records. We also feel that M/s C1 India Private Limited should be impleaded as a party. They would give their explanation as to how the computer generated date and time could be incorrect or undergo a change because of the wrong date mentioned in the scanned copy, which was uploaded.

9. Notice will be issued to M/s C1 India Private Limited on steps being taken by the petitioner within seven days.”

10. C1 India (P) Ltd. (hereafter referred to as “CI”) was represented in court; its position is that in August 2017, after receiving Rajbir Construction’s complaint, the second respondent sought its report. That agency (C1 India) manages the web portal on which tenders are invited and accepted. Its report- dated 23-08-2017 states that :

“We will like to kindly inform you that we have verified the claim of the vendor firm and would like to ensure you that there is not only any post uploading or manipulation done from C1 India Side. Vendor has submitted the bid in valid way before closing the tender bid time. Also the PDF file of the financial bid submitted has the date creation time “5-04-2017” is a result of incorrect time set at the vendor computer which has passed the wrong creation date in to the file.

On the portal there is no any such facility by which any document can be replaced, each document is validly signed by Dsc and then got encrypted, this manipulation cannot be done in anyway.

We can also find such wrong pdf creation issues over the internet, hence it is a coincidence that vendor had wrong time set in his system from which the PDF has been created and then transferred to the other system through which it got uploaded.

Vendor Price quotations are also same in Web and Price bid PDF with Same DSC details, in no circumstances vendor price can be decrypted before the opening by the officer key.”

11. It is submitted by C1's counsel that the explanation given by the petitioner, with respect to wrong time and date setting on its computer systems and the fact that once submitted, documents are encrypted, with no possibility of manipulation, rules out any malpractice. It is also pointed out that unless the corresponding key to decrypt the document is available, a bidder cannot manipulate the submission. It is further pointed out that the financial bids were in fact uploaded before the last date and time specified in the first NIT.

12. The question which this court is to address is whether given the circumstances presented, the respondents' action, which they justify in these proceedings, in cancelling the first NIT, on the ground that the petitioner, as the successful bidder indulged in dubious practices, to wit, in placing documents that qualified its tender, *after the last date of bid submission* was warranted or not. The State of Jharkhand, relies on the NIC report, which talks of suspected manipulation. On the other hand, the petitioner states that all documents were furnished or submitted well before the last date stipulated and that the tender was accompanied by all relevant documents. It contends that there was error in the clock or time setting of its devices, which was reflected so as to show that the financial documents were created on 5-04-2017.

13. The NIC report appears to be based on a *prima facie* and facial appraisal of what was furnished to that agency. However, on the other

hand, the portal manager – which the respondents had engaged to manage tender submission (and their later evaluation by the second respondent) clearly show that C1 India had fairly unambiguously ruled out manipulation. Its report, confirming the petitioner's submission about an error in the setting is not only a plausible explanation for the date discrepancy, but also quite reasonable – and can be considered normal. It is the equivalent of writing a wrong date, manually on an essential bid document. As long as the possibility of post bid manipulation (substitution of the document after submission of the bid) on the portal was ruled out- as it was in this case, there ought to have been no further debate. There is nothing on record- nor could Rajbir Construction point out to something – suggestive of the fact that C1's report is suspect or inaccurate.

14. No doubt, the state or its agency has circumstantial flexibility in the matter of award of public contracts; so long as the decision is not *mala fide*, or illegal or procedurally irregular, and is arrived at after proper application of mind to the relevant facts, it is not susceptible to judicial scrutiny. In the facts of this case, what is apparent, is that there was hardly any material to back a fair decision that the bidding process was tainted by manipulation by the petitioners. The NIC's report- at best tentative, indicated suspected manipulation. However, a clear report of the portal manager, C1 India clearly indicated what the problem was: date and time setting inaccuracy in the petitioner's system. However, what equally is undeniable is that the bids

(including the documents in question) were furnished to the respondents, well before the last date and time.

15. In view of the above discussion, it is held that the respondent's decision that the petitioner's bid had to be cancelled precipitously, was without considering the relevant materials. These vitally showed that the petitioner was not in any manner, blameworthy. Therefore, the impugned NIT and the previous decision to cancel the petitioner's bid in the first NIT, suffer from arbitrariness. They are liable to be quashed. Consequently, the respondents are hereby directed to process the petitioner's successful tender, pursuant to the first NIT and take all further steps to award the contract. The writ petition is, therefore, allowed. There shall be no order on costs.

16. Order *dasti*.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

DECEMBER 05, 2018