

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16903 of 2017

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D.B.S Constructions Pvt. Ltd. through its Director, Sunil Kumar Singh, son of Sri Daroga Singh, resident of mohalla Samdika Nagar, P.S. Dehri, District Rohtas, Bihar.

... .. Petitioner/s

Versus

1. The State Of Bihar through the Principal Secretary, Road Construction Department, Government of Bihar, Patna.
2. The Engineer in Chief cum Additional Secretary-cum-Special Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Chief Engineer, South Bihar Sub Division, Road Construction Department, Government of Bihar, Patna.
4. The Executive Engineer, Road Construction Department, Road Division, Dehri On Sone, Rohtas, District Rohtas, Bihar.
5. M/S Surendra Prasad and Company through its Partner Anup Kumar, Son of Surendra Prasad, Resident of Anandpura, P.S. Kadirganj, District-Nawada.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr.Prabhat Ranjan, Adv.
For the Respondent/s	:	Mr.Shailendra Kumar, AC to PAAG-2.
For the Respondent No.5:		Mrs. Namrata Mishra, Adv.
		Mr. Pankaj Kumar, Adv.
		Mr. Alok Ranjan, Adv.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date : 22-01-2019

Heard learned counsel for the petitioner, learned counsel representing the State and learned counsel representing respondent no.5 at length. With the consent of the parties the matter has been heard at length for final disposal.

The petitioner in the present case is seeking following reliefs:-

“(i) Quashing of the decision/direction dated 20.10.2017 (Annexure 4) contained in Memo No. 5926 whereby the Departmental Tender Committee Road



Construction Department has cancelled the tender process and has directed for issuance of fresh tender after revision of the estimate; and

(ii) Direction upon the respondents to issue the Letter of Acceptance and execute the agreement in pursuance of the earlier decision of the Departmental Tender Committee as contained in Memo No. 3366 dated 07.07.2017 (Annexure 2)."

During pendency of the writ application since the respondent-State came out with a fresh tender, the petitioner approached this Court by filing I.A. No. 1833 of 2018 praying for quashing of the notice inviting tender dated 01.02.2018 whereby, the work in question was re-advertised and 27.02.2018 was fixed for uploading of tender documents by the intending bidders. The petitioner also filed I.A. No. 7101 of 2018 praying for quashing of the proceedings/decision of the Departmental Tender Committee dated 06.08.2018 as contained in Memo No. 5581 whereby, during the pendency of the writ application the private-respondent no. 5 has been allotted the work in question.

During pendency of the writ application, the private-respondent no. 5 had moved this Court in I.A. No. 6813 of 2018 for adding him as a private respondent which has been already allowed.

Submissions of the petitioner

Mr. Prabhat Ranjan, learned counsel representing the



petitioner submits that the decision of the Departmental Tender Committee as contained in Annexure '4' to the writ application is bad in law and not being supported by any reason the same is liable to be set-aside.

Learned counsel submits that vide Annexure '2' to the writ application, in the draw of lots held on 04.07.2017 as provided under PWD Code Rule 163 (1) the petitioner was selected as the successful tenderer, but prior to that on 03.07.2017, one of the tenderers had lodged a complaint in office which fact is admitted in Paragraph 28 of the writ application. Again vide Annexure '3' dated 10.07.2017 to the writ application he had alleged that the estimate prepared for construction/improvement and maintenance work in Akabarpur-Yadunathpur from K.M 25 (P) to K.M 46 (P) was prepared by showing increased Bill of Quantity (B.O.Q.) Learned counsel submits that according to the complainant, the estimate was prepared by the authorities of the State with an intention to confer and make an unlawful gain of about Rs.8 to 10 Crores. The estimate was prepared taking original road crust as 200 M.M but, in fact, the existing road crust was 550 M.M. The complainant had also alleged that the estimate was prepared for the road thickness of 350 M.M taking the existing road



thickness at 200 M.M, therefore, when the road thickness was already 550 M.M, there was no reason as to why estimate was prepared to bring the road thickness at 350 M.M. According to the complaint a faulty and exaggerated estimate was prepared.

This complaint was sent for an inquiry to the Flying Squad Division No.4. The complaint was examined and a detailed report was prepared by the Department Letter No. 4125 dated 18.07.2017. The said report was examined by the Departmental Tender Committee and upon examination of the report it was found that the Flying Squad had reported an average existing crust of 200 M.M between K.M 24.5 to 33 K.M but the average existing crust between K.M 33.0 and 45.6 K.M was found at 373.21 M.M, therefore, even though, the road thickness between K.M. 33.0 to 45.6 was not 550 M.M but it was certainly more than the crust thickness sought to be achieved under the estimate. In other words, the crust thickness of 350 M.M for which the estimate was prepared was already existing between K.M 33.02 at 45.06, taking note of the report of the Flying Squad the action as contained in Annexure '4' was taken whereby the entire tender process under which the petitioner was selected as the successful bidder was allegedly found suffering from several infirmities and vitiated, as a result



of this finding arrived by the Tender Committee the tender was canceled and it was decided to go for re-tender.

Learned counsel submits that the Departmental Tender Committee was not justified in cancellation of tender process and re-tendering and in any case, the re-tender has not brought down the total cost which were alleged to be 8-10 crores more than what it should have been in the first B.O.Q.

While challenging the order as contained in Annexure '4' he has also challenged the award of tender to respondent no. 5 on mainly two grounds:-

(I) Respondent no.5 has been shown a favour by the respondent State authorities by taking into consideration his bid validity period as 195 days whereas, infact, the bid validity period of respondent no. 5 was only 120 days;

(II) The value of the tender has remained the same and the rate at which the respondent no. 5 has been allowed to work is an increased rate which should not have been allowed when the petitioner had already given its offer to work at the same old rate.

Submissions of the State

On the other hand, learned counsel representing the State submits that on record it is an admitted position and



evident from the B.O.Q. as contained in Annexure '10' to the reply on behalf of the petitioner to the affidavit dated 25.10.2015 filed by the Department that the quantity estimated against the item of work such as excavation for roadwork in soil was quantified much more than what have been actually quantified in the BOQ in re-tendering. For example, for excavation for roadwork in soil with hydraulic excavator the quantity is 149365.75 m³ and the total amount estimated for this work was Rs.1,82,53,988.00 whereas, for the same work in the BOQ of revised tender the quantity is 41617.06 m³ for which the total amount estimated is Rs.56,74,486.00, it is, thus, apparent that the first tender had provided an increased cost of about Rs.1,25,00,000.00. The tender process had gone vitiated because estimate was not as per the need of site condition. It is submitted that because the rate of the work had increased, and had gone up over the period, the rate provided in the revised tender against some of the items of work are more than what were provided in the first tender but that would not be a guiding factor because it is virtually the quantity of work required at site is the basis on which the estimate is prepared taking into consideration the prevailing rate. Learned counsel for the State, therefore, submits that the complaint as contained in Annexure



‘3’ had got substance which was further strengthened from the report of the Flying Squad. Once the complaint has been found to have substance it is totally immaterial that the complaint was received just before the draw of lots. Learned counsel submits that in the given circumstance, the Departmental Tender Committee has rightly taken a decision to cancel the entire tender process and to go for re-tendering in terms of Clause 29 of the terms of conditions.

Learned counsel submits that in the catena of decisions of the Hon’ble Supreme Court such as:- ***Maa Binda Express Carrier v. North-East Frontier Railway, (2014) 3 SCC 760, State of U.P. v. Al Faheem Meetex (P) Ltd. (2016) 4 SCC 716*** and further in the case of ***NTPC Ltd. v. Ashok Kumar Singh, (2015) 4 SCC 252***, the scope and ambit of judicial review in the matter of award of contracts have been discussed and it has been laid down that in such cases the bidders participating in the tender process cannot insist for award of work only because their tender has been found to be the lowest. Learned counsel further submits that so far as award of work to respondent no. 5 is concerned, since the petitioner has not participated in the tender process, this Court need not examine challenge to the award of tender to respondent no. 5 at his



instance.

Learned counsel for the State has further pointed out that earlier the petitioner has obtained an interim order dated 18.08.2018 from this Court by making a false statement in Paragraph 19 of the writ application whereunder the petitioner claimed that Flying Squad No. 4 of the Road Construction Department had given an inquiry report in which the Flying Squad had recommended to the Departmental Tender Committee to take work from this petitioner on a revised estimate and only in case of denial of the petitioner to work at the revised estimate, the tender should be floated. Learned counsel submits that from Annexure 'R/3' to the supplementary counter affidavit filed on behalf of the Executive Engineer, it would appear that there was no such recommendation of the Flying Squad No. 4 at any point of time, therefore, the petitioner has simply misled this Court and obtained an interim order staying the fresh tender. Learned counsel submits that much before the interim order dated 18.08.2018 vide Annexure 'B' to I.A. No.6813/2018, the private respondent no. 5 had been declared successful tenderer and had been allotted the work. The Letter of Acceptance (LOA) was issued on 18.08.2018 itself. It is further submitted that since the petitioner had not participated



in the re-tender, there is no reason for the respondent State to call upon the petitioner to do this work at the same rate at which he had participated in the first tender.

It is submitted that there was no illegality in floating fresh tender. The bid validity period of 120 days was the minimum period prescribed. It was extended to 195 days by R-5 by giving an undertaking as brought on record.

Submissions of the Respondent No.5

Learned counsel representing respondent no. 5 has also opposed the writ application on several grounds. It is submitted that the R-5 had not participated in the first tender, therefore, R-5 was not a rival tenderer. Learned counsel representing respondent no. 5 has also reiterated that on 18.08.2018 on the strength of a completely false pleading in Paragraph '19' of the writ application, the petitioner had obtained an interim order. Learned counsel submits that the respondent no. 5 has already incurred huge amount in mobilization of the resources towards execution of the work. Learned counsel submits that the fresh tender was floated as per approved BOQ passed on a scheduled rate effective from 13.02.2018. It is pointed out that the first tender was floated on the approved BOQ based on a scheduled rate from 17.03.2017.



The difference of Rs.22.57 Lacs has occasioned because of new taxation system (GST) which has been implemented by the Government of Bihar with effect from 01.07.2017. It is pointed out in Paragraph '8' of the second supplementary counter affidavit of R-5 that there was a 11,000.52 M³ (meter cube) for Non Bituminous Work about which the complaint was made (in 1st BOQ- the quantity of GSB-(Granular Sub base) was 22313 M³ and Water Bound Macadam (WMM) was 26,262.38 M³ total amounting to 48,376.38 M³ at the rate of Rs.3070/M³ whereas, in the 2nd BOQ which has been prepared after due verification, the quantity of GSB (Granular Sub Base) was 17868.77 M³ thus this has brought down the difference by Rs.3.7 Crores.

Learned counsel submits that there is much decrease in the quantity of some items but due to change in specification of some items and increase of schedule of rate due to introduction of new taxation system, the total cost of work has enhanced by 0.57%. It is submitted that in the reply on behalf of respondent nos. 2 and 4 to the rejoinder filed by the petitioner, the respondent State has brought on record Annexure 'R/7' dated 01.08.2018 whereunder this petitioner had extended the bid validity period to 195 days, thus, the issue raised by the petitioner with regard to the bid validity period is nothing but a



mere pretext. Learned counsel further submits that in terms of Clause 29 of the ITB, the State respondent were fully competent to cancel the first tender when it was found to be suffering from several infirmities and had gone vitiated due to preparation and approval of an estimate of work which were not required at the site.

In course of hearing when the State as well as the private respondent agitated the issues as to the statements made in Paragraph '19' of the writ application which was the basis of obtaining the interim order from this Court, Mr. Prabhat Ranjan, learned counsel representing the petitioner instead of accepting that the statements with regard to the report of the Flying Squad No. 4 as made in Paragraph 19 of the writ application is a wrong statement, came out in support thereof by taking out a two page photostat paper in his possession which he offered to this Court to see and take a view. Learned counsel submitted that he had made his statement in Paragraph 19 in view of Xerox paper available with the petitioner. The source from which this paper has been obtained has not been disclosed to this Court. It is further clear that the paper has not been obtained under Right to Information Act. The two page Xerox paper is claimed to be a note sheet of the official departmental file and it contains a



recital which gives an impression that it is subsequent to page no. 11. The note sheet has been prepared by the respondent-authorities, one name 'Anand Bhairav Prasad' is appearing on the second page, the signature has obviously been concealed while taking the photocopy from the records.

The two page xerox paper of the note-sheet of the official file shows that at one point of time there was a suggestion in the Department that the successful tenderer (the petitioner) may be allowed to work at revised rate, if he agrees, and in case he does not agree then re-tender process may be initiated.

This Court will deal with this aspect of the matter in this judgment at an appropriate stage.

Consideration

Having heard learned counsel for the parties and on perusal of the records, this Court is of the considered opinion that there were sufficient reasons for the Departmental Tender Committee to cancel the first tender and to go for a re-tendering process. It is apparent on the face of the records that the estimate based on the BOQ of the first tender was prepared on a highly exaggerated quantity of work. The report of Flying Squad No. 4 has made it clear that at least for the K.M 33.0 to



45.6, the existing crust thickness considered for preparation of BOQ was 200 MM whereas the average crust thickness present was 373.21 M.M. First tender was floated for making it from 200 M.M to 350 M.M, but the average crush thickness of this part was 373.21 MM, therefore it is apparent that the sanction estimate of first tender was based on a wrong assessment of work required to be done. The Flying Squad found that the average crust thickness of the road K.M 33.0 to 45.6 was 373.21 M.M, therefore, what was sought to be achieved under the first tender for this part of the road was misleading and the BOQ was prepared taking into consideration a huge quantity of work which was not required to be done at site. It is only for this reason that in the re-tender the revised quantity of work has gone down to a substantial extent. In the opinion of this Court, these were sufficient reasons for the Departmental Tender Committee to cancel the tender process in which the petitioner was earlier found successful in the draw of lots. No infirmity or illegality may be found in the cancellation of tender vide Annexure '4' to the writ application. In the given facts and circumstances where the complaint was admittedly received prior to draw of lot, it could not have been thrown out.

This Court is also of the considered opinion that once



it came to the notice of the Departmental Tender Committee that the estimated cost provided in the first tender/BOQ was not only wrongly provided, in fact, the estimated quantity of work mentioned in the BOQ was highly exaggerated and at the given period of time it was certainly showing exaggerated work and cost (as per then prevailing rate), the competent authority was required to take into consideration the laches and motive, if any, on the part of the authorities who had been responsible for preparation of the 'BOQ'/Estimate and approval thereof. Appropriate steps should have been taken to find out the truth and the motive behind this because it was an allegation towards an attempt to 'swallow and siphon' crores of rupees which were the government money.

The decision as contained in Annexure '4' to the writ application shows that what is stated in Paragraph '8' of Annexure '4' is only an attempt to water down the gravity of the allegations made in the complaint petition. The complainant had alleged that the existing crust thickness was 550 M.M, the Flying Squad No. 4 found that the existing crust thickness of K.M 33.0 to 45.6 was 373.21 M.M. In other words, the Flying Squad had found the average crust thickness of this area was more than what was provided in the BOQ. Thus, the complaint



as contained in Annexure '3' was not a baseless complaint, apparently the BOQ of the first tender was looking for completion of a work of providing 350 M.M crust thickness which was already there, therefore, it was an attempt to confer an unlawful gain as the quantity of work as shown in BOQ was highly exaggerated. Those persons who were looking for this gain and those who were conferring this unlawful benefit were required to be identified by the Department and in case in the internal inquiry duly constituted the people in the Department were prima-found to be involved, the matter should have been referred to an independent Investigating Agency and consequential action but unfortunately nothing has been done in this regard.

This Court also finds that the petitioner had not participated in the re-tender. Respondent No. 5 had participated and has been found successful. In this view of the matter alone, this Court is of the considered opinion that if the petitioner had not participated in the re-tender, the award of work to respondent no. 5 cannot be allowed to be challenged at his instance. This Court has already held that there was no illegality in going for re-tender vide Annexure-4 to the writ application. Thus, the challenge to award of work to respondent no. 5 by this



petitioner is rejected.

Now coming to the last but equally important aspect of the matter. It appears that earlier this petitioner had prayed for an interim order of stay of the fresh tender and relying upon the statements made in Paragraph '19' of the writ application, the petitioner gave an impression to this Court that Flying Squad No. 4 had submitted a report suggesting that the work may be taken from the successful tenderer i.e., this petitioner and at a revise rate. In fact, this Court finds that the statements recorded in Paragraph '19' of the writ application are wrong and false statements which had no basis to stand. The Flying Squad No. 4 has nowhere made any such suggestion as was given to understand to this Court.

It appears that the petitioner has indulged in obtaining the two page Xerox Copies of the note sheets from the file of the Department in which some Officer of the Department had given a suggestion and the same has been taken note of by the petitioner in Paragraph '19' of the writ application saying that it was the suggestion of the Flying Squad No. 4. The petitioner has thus not only indulged in obtaining the two page Xerox papers from the records of the Department through extraneous methods but has also misled this Court and obtained an order of stay.



This Court would deprecate such attempt of the petitioner and while holding that the interim order dated 18.08.2018 was obtained by misleading the Court, would also impose a cost of Rs.50,000/- against the petitioner which would be payable to the Member Secretary, Bihar State Legal Service Authority within a period of four weeks from today and receipt thereof shall be filed in this Court.

This Court has already expressed its opinion hereinabove that the Departmental Tender Committee should not have stopped by merely canceling the tender vide Annexure '4' to the writ application. The truth as to how and under what circumstances a highly exaggerated BOQ was prepared while inviting the first tender was required to be examined and then appropriate steps were required to be taken to bring the truth particularly as it involved allegations of corruption, attempts to confer unlawful gain and abuse of public money.

For the reasons stated above, this Court would direct the Principal Secretary, Road Construction Department, Government of Bihar to look into the entire matter, examine the mode and manner in which the BOQ/Estimate was prepared and approved while floating the first tender, the persons responsible behind the same and then in case it is prima-facie found that



there was an attempt to siphon government money, an independent, dispassionate and judicious view be taken to refer the matter to an “independent Investigating Agency to investigate” into the matter, take consequential action and proceed in accordance with law. This exercise be taken by the Principal Secretary, Road Construction Department and the same must be completed within a period of sixty days from the date of receipt /production of a copy of this order. The Principal Secretary of the Department shall be free to take assistance of independent officers.

This writ application is disposed of in terms stated hereinabove. The Interlocutory Applications are also disposed of accordingly.

Let the two page Xerox papers produced in this Court by learned counsel for the petitioner be placed on the record of this case for future reference in a sealed envelope.

(Rajeev Ranjan Prasad, J)

R.R.Ojha/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	23.01.2019
Transmission Date	

