

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.12597 of 2018

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Rishikesh Kumar Singh Son of Sri Deo Kumar Singh, resident of Village-
Baghuwa Tola, P.S. Pirpanti, District- Bhagalpur, Bihar.

... .. Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Rural Works Department, Government of Bihar, Patna.
2. The Engineer in Chief cum Additional Commissioner cum Special Secretary, Rural Works Department, Government of Bihar, Patna.
3. The Chief Engineer, Rural Works Department Government of Bihar, Patna.
4. The Superintending Engineer, Rural Works Department, Works Circle, Bhagalpur, District- Bhagalpur, Bihar.
5. The Executive Engineer, Rural works Department, Works Division, Kahalgaon, District Bhagalpur, Bihar.
6. Swapnil Kumar Singh, son of Ram Kumar Singh, resident of Hanumanpath, P.S. – Tilkamanjhi, Distt. Bhagalpur.

... .. Respondents

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Appearance :

For the Petitioner/s	:	Mr.Prabhat Ranjan, Advocate
For the Respondent/s	:	Mr.Kumar Alok -SC7
For the Intervenor	:	Mr. P.K. Shahi, Sr. Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date : 29-01-2019

This writ application has been preferred seeking the
following reliefs:

“(i) Quashing of the proceedings
of the Technical Bid Evaluation
Committee dated 21.06.2018 (in so far
as it relates to the petitioner) as
contained in Annexure-1 whereby the
Technical Bid of the petitioner has
been rejected for lack of eligibility in
terms of Clause 3.1.3 of the
Departmental Letter No. 4842 dated



14.11.2014;

(ii) Direction upon the Respondents to consider and open the Financial Bid of the petitioner after its Technical Evaluation; and

(iii) Further direction upon the Respondents restraining them to finalize the Tender and/or restraining them from creating any third party interest / right during the pendency of the instant writ application.”

It appears that during pendency of the writ application the financial bid was opened and one Swapnil Kumar Singh became the successful Bidder and he was declared successful. The work order was issued to him, he started the work and completed about 16 % of the work as on 14.07.2018. For this reason he filed Interlocutory Application No. 5782 of 2018 to allow him to join the writ application as respondent no. 6. The Interlocutory Application being No. 5782 of 2018 has already been allowed vide order dated 16.08.2018. The respondent no. 6 has also filed one I. A. No. 2 of 2019 for vacating the order of stay dated 17.07.2018 passed by this Court while hearing the present writ application.



With consent of the parties, this matter has been heard for final disposal.

Mr. Prabhat Ranjan, learned counsel representing the petitioner submits that the petitioner fulfilled all the terms and conditions of the Notice Inviting Tender (NIT) Document at the Technical Bid stage but his Technical Bid of the petitioner has been rejected on the ground that he lacks the eligibility in terms of Clause 3.1.3 of the Departmental Letter No. 4842 dated 14.11.2014.

Learned counsel submits that the reliance of the Department on the Departmental Letter is wholly misconceived, illegal and unsustainable for the following reasons:-

- “(i) The Departmental Letter No.4842 dated 14.11.2014, which is being relied upon by the respondents for rejecting /disqualifying the petitioner was neither the part of the Notice Inviting Tender or the SBD and could not have been relied upon for disqualifying the petitioner;
- (ii) Even the reliance on the Clause 3.1.3 of the Departmental Letter for rejecting the Technical Bid is also misplaced in as much as the Clause is not attracted in



the admitted facts of the case;

(iii) The rejection order is completely non-speaking, vague and cryptic.

(iv) Before rejecting the technical Bid on the issue of the eligibility of key equipment etc., the petitioner was entitled as a matter of right, one opportunity of clarification and modification in terms of the Letter No. 536 dated 13.06.2013.”

Learned counsel has placed before this Court the statements made in the counter affidavit to demonstrate that so far as the documents as contained in Annexure-3 are concerned, those were admittedly uploaded with the Tender, therefore, the respondents were not justified in rejecting the case of the petitioner on the ground that he was not having required certificate in terms of para 3.1.3 of the letter no. 4842 dated 14.11.2014.

Learned counsel submits that para 3.1.3 of the Bid Document contains one of the evaluation criteria at the Technical Bid stage which provides that tenderer should make available the certificate of availability of the minimum essential key equipments for the said work. The Tenderer who either



'owned' or 'leased' or procured such minimum essential equipments should submit a certificate thereof and the same is required to be uploaded. Learned counsel submits that the petitioner had uploaded the certificate of M/s Baba Bateshwar Construction Private Limited wherein the said company had promised to make available minimum required equipments to the petitioner in case he succeeds in getting the work in question. In this regard learned counsel relies upon the affidavit of one Shushil Kumar, the Managing Director of Baba Bateshwar Construction Private Limited as contained in Annexure-'3' wherein it is declared and confirmed that he will provide all major equipments (lab and construction equipments) to Rishikesh Kumar Singh (the petitioner) if any work is awarded to him. It is submitted that vide letter no. 7832 dated 19.07.2018 the respondents have debarred M/s Baba Bateshwar Construction Private Limited. Learned counsel submits that apparently the debarment order against the said company was passed much after rejection of the Technical Bid of the petitioner.

Learned counsel submits that in case the respondent authorities had any query with regard to the nature of



arrangement between the petitioner and said M/s Baba Bateshwar Construction Private Limited, a clarification could have been sought for but that was not done.

Learned counsel further submitted that the respondent no. 6 has been unduly favoured by the respondent authorities. It is submitted that the private respondent who has been declared successful had submitted a Bank Draft in drawn in favour of EX. ENGG WORKS DIVISION, KAHALGAON payable at Bhagalpur as contained in Annexure-‘6’ to the rejoinder filed on behalf of the petitioner to the counter affidavit. It is submitted that the said Bank Draft which was furnished as cost of BOQ could not have been accepted because the name mentioned in the Bank Draft is not only in variation with the requirement of the ‘NIT’ but otherwise also as no such Account existed in the Department. The Demand Draft should have been payable at ‘Kahalgaon’ whereas the same has been made payable at Bhagalpur. Learned counsel further submits that in like manner the other successful Bidder namely, M/s Arun Kumar Verma had furnished a Demand Draft as a cost of BOQ in favour of EE. RWD Works Division, Bhagalpur in place of EE. RWD Works Division, Kahalgaon. Learned counsel submits that those Bank



Drafts could not have been accepted. It is submitted that the Tender Document of the private respondent was accepted illegally. It is further submitted that the agreement has been executed subsequent to the interim orders dated 17.07.2018 passed by this Court.

Contesting the submission of learned counsel for the petitioner, learned Senior Counsel representing the private respondent as well as learned counsel representing the State have taken a common stand. Attention of this Court has been drawn towards Clause 3.1.3 of the Tender Document. It is submitted that the plea of the petitioner that the Departmental Letter No. 4842 dated 14.11.2014 was not a part of the N.I.T. is not correct. It is submitted that Clause 32 of the NIT No. (RWD/GTSNY/HQ/09/2-17-18) specifically states that letter no. 4842 dated 14.11.2014 is applicable for disposal of the Technical Bid. Thus, it is submitted that the said letter is very much part of the NIT. It is pointed out that in Clause 3.1.3 of the letter no. 4842 dated 14.11.2014 a certificate with respect to availability of minimum necessary key equipment (either owned or leased or by procurement) has to be submitted with the Bid Document but the petitioner failed to submit any



certificate of the required nature. It is pointed out that the affidavit of the Managing Director of M/s Baba Bateshwar Construction Private Limited is nothing but a mere promise to make available the equipments in future whereas Clause 3.1.3 mandates that the minimum key equipments must be either 'owned' or 'leased' or by procurement available with the petitioner.

Learned Senior Counsel further submits that the interim order of this Court was passed on 17.07.2018 but before passing of the order and the communication thereof, on 03.07.2018 itself the work had already been allotted to the private respondent no. 6 which would be apparent from Annexure-M to the reply on behalf of respondent nos. 1 to 5 to the rejoinder filed by the petitioner. It is submitted that even before passing of the order dated 17.07.2018 by this Court, the Tender had already been finalized and therefore, the prayer made in the writ application had become infructuous on 17.07.2018. The specific statement in this regard has been made in paragraph 5 (ix) of the counter affidavit filed on behalf of respondent nos. 1 to 5. It is further submitted that so far as black listing of M/s Baba Bateshwar Construction Private



Limited is concerned, that is totally irrelevant for the purpose of the adjudication of this case.

Learned Senior Counsel has further submitted that the allegations of the petitioner that the private respondent has been shown favour by the State respondents are wholly false and baseless. In this connection attention of this Court has been drawn towards the statements made in reply on behalf of respondent no. 1 to 5 to the rejoinder filed by the petitioner. In paragraph '9' of the said rejoinder it is categorically stated that the cost of BOQ has already been deposited vide Demand Draft No. 389339 dated 24.05.2018 and Demand Draft No. 496118 dated 24.05.2018, in the Account of the Executive Engineer, RWD, Works Division, Kahalgaon. It is submitted that all the process has been strictly followed and thereafter, the Letter of Acceptance (LOA) was issued vide letter no. 1066 dated 03.07.2018 issued by the Executive Engineer.

Consideration

Having heard learned counsel for the parties and on perusal of the records, this Court finds that the petitioner filed this writ application with a prayer to set aside the decision of the State respondents taken on 21.06.2018 vide Annexure-1 to



the writ application whereby Technical Bid of the petitioner had been rejected for lack of eligibility in terms of Clause 3.1.3 of the Departmental Letter No. 4842 dated 14.11.2014. He prayed for a direction upon the respondents to consider and open the Financial Bid of the petitioner and then a further prayer was made to restrain the respondents from finalizing the tender and /or from creating any third party right and interest.

It is also evident that during pendency of the writ application the Financial Bid was opened and the Tender was finalized and LOA was issued on 03.07.2018 itself in favour of one Swapnil Kumar Singh who himself intervened in the writ petition and got added as party respondent. The fact that the private respondent has been awarded the work and he has started carrying out the work were brought to the notice of the petitioner by non-else than the private respondent himself through an intervention petition. Despite this knowledge, the petitioner did not challenge the decision of the Tender Committee by which the Tender was finalized and the work was awarded to the private respondent no. 6. At this stage there was no interim order of this Court. In such circumstance where the petitioner has not amended his writ application to



challenge the award of work to respondent no. 6, the submissions made at the Bar as against the award of work to respondent no. 6 are not fit to be considered much less can succeed. This Court has already taken note of the response of respondent no. 1 to 5 against the submissions of the petitioner but fact remains that the petitioner has not challenged the award of work to respondent no. 6.

The grievance of the petitioner, as regards the decision dated 21.06.2018 (Annexure-1), by which the Tender of the petitioner was rejected at the Technical Bid stage itself has also no force. His first argument that the Departmental Letter No. 4842 dated 14.11.2014 was not a part of the NIT has fallen flat as it is apparent from condition no. 32 of the NIT that there is a specific reference to the said letter there. Realising this position learned counsel for the petitioner has not given much emphasis on this issue.

The whole argument has then centered on the submission as to whether the affidavit of the Managing Director of M/s Baba Bateshwar Construction Private Limited may be taken as a certificate in terms of Clause 3.1.3 of the Departmental Letter dated 14.11.2014. The relevant part of the



affidavit as contained in Annexure-3 is quoted hereunder for ready reference:-

“I, Shushil Kumar, Managing Director of the company BABA BATESHWAR CONSTRUCTION PVT LTD, registered office at Topra Tola, P.S.- Pirpanti, Dist- Bhagalpur, Bihar, hereby declare, confirm and certify that I will provide all major equipments (lab & construction equipment) to Rishikesh Kumar Singh r/o Baghua Tola, Pirpanti, Bhagalpur if any work is awarded to him. List of machinery and lab Equipments are attached alongwith.”

Clause 3.1.3 of the Departmental Letter reads as under:-

“3.1.3 संबंधित कार्य के लिए न्यूनतम आवश्यक key equipment के availability (either owned or leased or by procurement) का प्रमाण ।”

A bare perusal of the aforesaid Clause 3.1.3 would show that it required a certificate that the minimum required key equipments are available with the Tenderer. The condition further clarifies that such certificate of availability may be in the nature of either the Tenderer owned the equipment or has got



the same on lease or has procured. A plain meaning as prescribed in the New Oxford Dictionary of English of the word 'owned' means to have something as one's own, possess. The word 'leased' would mean to have a grant of a property on lease, the word 'leased' cannot be a synonymous to mean as capable of being leased. Similarly the word 'procurement' means an action of obtaining or procuring something. 'Procurement' is a word of noun and it essentially means that only when a person has procured or obtained something with his efforts, the things so procured and obtained will be known as 'procurement'.

In the present case, this Court is unable to accept the submission of learned counsel for the petitioner that a mere promise to make available the minimum required key equipments, if any work is awarded to the petitioner would satisfy the conditions as prescribed in Clause 3.1.3 of the Departmental Letter. The affidavit as it is contained in Annexure-3 is nothing but a mere promise and such promise alone would not satisfy the conditions of eligibility under Clause 3.1.3. The essence of Clause 3.1.3 is the 'availability' the mode may be either 'owned', 'leased' or by 'procurement'. The



affidavit of the Managing Director of M/s Baba Bateshwar Construction Co. Ltd. is nothing but a mere proposal in terms of Section 2(a) of the Contract Act, 1872. It does not qualify even the definition of ‘agreement’ as provided in Section 2(c) of the Contract Act, 1872. By no stretch of imagination the ‘affidavit’ may be taken as a ‘certificate’ in terms of Clause 3.1.3 of the N.I.T.

This Court is, thus, convinced that the decision taken by the Departmental Tender Committee in its meeting held on 21.06.2018 (Annexure-1) does not require any interference. This Court is reminded of the judicial pronouncement laying down the scope and ambit of judicial review in contract matters.

This writ application has, thus, no merit. It is dismissed accordingly.

(Rajeev Ranjan Prasad, J)

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AFR/NAFR	AFR
CAV DATE	
Uploading Date	04.02.2019
Transmission Date	

