

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.14747 of 2018

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M/s Amit Electric and Refrigeration, Muzaffarpur, Amit Kumar (Proprietor)
Son of Mahendra Prasad, Resident of Mohalla- Sri Ram Nagar, Brahmapura,
Near P.H.E.D. Office, Muzaffarpur, P.S.- Brahmpur, District- Muzaffarpur.

... .. Petitioner

Versus

1. The Bharat Sanchar Nigam Ltd. Through Chief Engineer, B.S.N.L. Electrical Zone, 3rd Floor, C.T.O. Building, Sanchar Parisar, Budh Marg, Patna-800001
2. The Superintendent Engineer (E), B.S.N.L. Electrical Zone, 3rd Floor, C.T.O. Building, Sanchar Parisar, Budh Marg, Patna-800001
3. The Executive Engineer E, B.S.N.L. Electrical Division, Muzaffarpur.

.. ... Respondents

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Appearance :

For the Petitioner/s : Mr.Nachiketa Jha, Advocate
For the Respondent/s : Mr. Karim Anwar, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

C.A.V. JUDGMENT

Date : 15-03-2019

This writ application has been preferred for the following reliefs:-

“I. For issuance of order, direction, writ including writ of mandamus directing the Respondents concern to allow to do the work in which the firm of the petitioner filed tender who is lowest bidder.

II. For issuance of order, direction to the Respondent concern not to invite fresh tender in which the firm of the petitioner is the lowest bidder.



III. For any other relief or reliefs to which the petitioner may be found entitled in the facts and circumstances of the case.”

The petitioner is the sole proprietorship firm. It is the case of the petitioner that pursuant to a Notice Inviting Tender (in short ‘NIT’) floated by the Bharat Sanchar Nigam Limited (in short ‘BSNL’) being NIT No. 179/BED/MZP/17-18 dated 28.02.2018, the petitioner participated in the tender for providing services in Telephone Exchange Building at Ratwara under Muzaffarpur SSA (G+1) operation and comprehensive maintenance of Electromechanical. In the E-Tender only two participants submitted their tenders in which the firm of the petitioner was found lowest Bidder as he had quoted a price less than the another participant. It is the grievance of the petitioner that even though he is the lowest Bidder, the work has not been allotted to him within the prescribed period of 90 days from the date of opening of the tender.

It appears that subsequently the petitioner has filed Interlocutory Application No. 5661 of 2018 with a prayer to set aside the order dated 23.07.2018 passed by the Executive Engineer (E) BSNL Electrical Division, Muzaffarpur by which the petitioner has been communicated that his item rate tender for the above mentioned work has been rejected by Superintending Engineer (E), BSNL, Electrical Circle, Patna vide letter dated 19.05.2018. A copy of the impugned letter dated 23.07.2018 has been annexed as



Annexure-6. It is one of the contentions of the petitioner that no reason whatsoever has been provided in the impugned communication for rejecting the tender of the petitioner. The decision taken by the Superintending Engineer as contained in his letter dated 19.05.2018 has not been made available to the petitioner. Further the petitioner has brought on record a copy of the Web Notification annexed as Annexure-7 to the interlocutory application to demonstrate that the respondents have gone for a re-tender of the same work. By filing yet another Interlocutory Application being I. A. No. 5857 of 2018 the petitioner has prayed for quashing of the same.

A counter affidavit on behalf of respondents sworn by the Assistant General Manager (Legal) does not dispute the fact that the firm of the petitioner was found to be the lowest Bidder but in paragraph '8' of the counter affidavit the reason for rejection of the tender has been shown. According to the respondents, the firm of the petitioner had quoted relatively higher rates (10.55% below the estimated cost) as compared to other firms quoted more than 20 % below the estimated cost in similar other tenders during contemporary time. It is further stated that all the tenders have been scrutinized by Tender Purchase Committee (in short 'TPC') which comprises two Executive Engineer (Electrical) and one Account Officer headed by Superintending Engineer (Electrical) as Chairman



of the TPC. The TPC recommended to reject the tender and directed to go for a better comparative rate in the interest of the BSNL/Government. Reason behind the recommendation is said to be that the tender is for two years and if this tender is accepted then every month BSNL have to pay 10 % more money to the petitioner in comparison to other firms for the similar works. It is the contention of the respondents that merely dropping a tender or quoting lowest does not authorize any firm to become entitle for that work till tender is awarded after observing all nodal formalities.

One of the contentions of the respondents is that the petitioner has moved this Court without exhausting remedial channel from higher authority of BSNL and according to the respondents, the petitioner should have participated in fresh tender floated for the same work, there was no bar for him but he did not participate for the reasons best known to him.

In his rejoinder to the counter affidavit, the petitioner has contended that the statement of the respondents in paragraph '8' of the counter affidavit that deponent has found that the petitioner firm had quoted 10.55% below the estimated cost which was relatively higher than the tender quoted in respect of that work during contemporary time is a vague statement not substantiated by any evidence, moreover, the petitioner cannot be ousted on such grounds. It is submitted on behalf of the petitioner that the rejection of tender



in this case has been done on frivolous ground. The petitioner also submitted that no document has been brought on record of any E-Tender document in which the Bidder quoted 20 % below the estimated cost. It is alleged that the authorities of the BSNL are indulged in awarding tenders to person of their choice and for that reason the re-tender has been floated.

After hearing the learned counsel for the parties and upon noticing their respective contentions, this Court vide its order dated 21.01.2019 called upon the BSNL to place on record the materials in support of their stand in paragraph '8' of the counter affidavit. The matter was adjourned on 30.01.2019 and 01.02.2019, ultimately on 11.02.2019 a supplementary counter affidavit dated 31.01.2019 was brought on record along with a minute of the TPC dated 28.09.2018. On the said minute, this Court passed following orders on 11.02.2019 which is quoted hereunder for ready reference:-

“A Supplementary counter affidavit dated 31.01.2019 filed on behalf of the BSNL has brought on record a minute of T.P.C. dated 29.08.2018, which shows that one of the tenderers, who had submitted tender 58% below the estimated cost, has been selected.

The first counter affidavit filed on behalf of the BSNL is dated 21.08.2018. In paragraph-'8' of the said counter affidavit, it has been stated that the petitioner's firm had quoted relatively higher rates (10.55% below the estimated cost) as



compared to other firms who quoted more than 20% below the estimated cost in similar other tenders during contemporary time.

In the opinion of this court, in all fairness the BSNL should come on record showing the other tenders of comparative time which were quoting more than 20% below the estimated cost. The tender finalised on 29.08.2018 as appearing from the T.P.C. minutes is certainly not the tender of comparative time as it was not available before the BSNL for taking a decision in the present matter.

The second question which arises for consideration is as to whether the tender in question is a item rate tender, the tender has been submitted in terms of percentage below the estimated cost, therefore, it gives an impression to this court that it may be a 'percentage item rate tender'. Be that what it may, the BSNL is required to clarify this issue.

The third issue which arises for consideration is about the guidelines being followed by the BSNL in the matter of preparation of estimate and then what is the maximum limit below the estimated cost within which a tender may be submitted. Why is that tenders are coming more than 40% to 58% below the estimated cost, is it because of exaggerated estimated cost ?

On the next date of hearing, all the aforesaid issues must be clarified, failing which no further time shall be granted.

List this matter on 26th February, 2019.”



A third counter affidavit (it should have been mentioned as 2nd supplementary counter affidavit) came to be filed on 25th February, 2019. Along with the affidavit a copy of the estimate of the work in question has been brought on record showing that the detail estimate has been framed by the Executive Engineer (E-P) O/o the Chief Engineer (E), BSNL Electrical Zone, Patna at a probable cost of Rs. 27,47,951/- (Twenty seven lakh forty seven thousand nine hundred fifty one only) including 3% Contingencies. The 'Report' part of this estimate dated 08.02.2018 records as under:-

“History: The operation and comprehensive maintenance of all electromechanical assets in departmental buildings is entrusted with BSNL electrical Wing by C.O., Hence to maintain the healthiness of all the Electro Mechanical assets installed in the T.E. building, this detailed estimate has been framed for round the clock Operation and Comprehensive Maintenance of EI & Fans, DEA set Package AC units, Fire detection system and Substation etc. in above T.E. bldg. As per guidelines of Corporate office.....”

A perusal of the estimate shows that it has been prepared by simply taking note of the quantity of work multiplied by a rate in terms of percentage of the asset cost. For example, the item of work Type -I Qtr the number of quantity has been taken at 8 Nos., the asset



cost of this is Rs. 1,45,856/ percentage rate has been fixed at 3.3% and thereby the maintenance cost has been arrived at Rs. 4813.25/-.

In similar manner the maintenance cost of all other items have been arrived at. What is important to note is that the rate calculated is based on C.O. letter No. 16-1/EW/2007 dated 15.04.2009 whereas the labour cost has been worked out on the basis of Government of India Notification No. Vide F.No. 1/13(3)/2017-LSII Dated 06.10.2017. Apparently, according to their own case, the respondents have arrived at an estimate of the maintenance works by following the guidelines of the C.O. letter.

This Court is conscious of it's jurisdiction under Article 226 of the Constitution of India and is not going into the correctness of the estimate. This Court would, however, certainly examine as to whether in the garb of an exaggerated amount of estimates, the TPC has got an unbridled and unchannelized power to act arbitrarily by inviting tenders without fixing any maximum lower limit from the estimate. Normally in a works department considering the nature of the work and items to be used therein, in order to maintain quality of work and to avoid an uncertainty, it is provided that the maximum limit below the estimate would not go beyond 10 %. This Court has been informed by learned counsel for the BSNL that the BSNL does not provide for any maximum limit below the estimate price and therefore, tenders are being received for similar nature of works



where tenderers were in course of negotiation offering rates up to 50% below the estimated cost. Despite opportunity granted to the BSNL no tender documents showing a tenderer submitting his Bid offering the price below 20 % has been brought on record but vide Annexure-2 series to the 3rd counter affidavit the BSNL has brought on record minutes of the TPC in respect of services in Telephone Exchange Building C-DOT Siwan under Chhapra SSA. The estimate cost put to this tender was Rs. 24,48,528/-, a single tender was submitted quoting a price of Rs. 4,98,400/- i.e. 02.04% above the estimate cost but then the Tender Committee has noticed that the tenderer has reduced their quoted price by 25% vide letter dated 18.05.2018. The tender opening date was 26.03.2018, therefore, it is apparent that for about two months the minutes of the TPC were not recorded and a letter dated 18.05.2018 was produced by the tenderer by which he reduced the quoted rate by 25% . There is another reason to be surprised because the same minute says that the tenderer voluntarily reduced the tender amount comes to Rs. 23.47% below the estimated cost. The minutes talk of a letter of CO vide letter No. 6-15/2000-EB(Pt.II) dated 8th April, 2005 which provides that “A limited or single response to an open tender will not be viewed as a case of single tender, subject to condition that the competent authority will approve the tender with the concurrence of his IFA



after satisfying himself that the Tender Evaluation committee has recommended the case after verifying the following conditions:

- a) Wide Publicity was given for the subject tender.
- b) Tender specifications are generic in nature.
- c) Qualified bidder meets all the tender specifications, terms and condition.
- d) All the guidelines /policies regarding procurement of telecom equipment and stores in BSNL are observed.
- e) Rates are reasonable.
- f) In all such cases approval of single tender will be reported to the next higher authority for information.”

The TPC records that the subject tender is fulfilling all the aboveconditions.

In another minute of the TPC with regard to works at Jhanjharpur Exchange Building again a tenderer had quoted a rate 3.5 % above the estimated cost. In the same manner the TPC kept the matter pending for over two months and thereafter, the work was allotted to M/s Gupta Electrical, Hajipur at the reduced rate of 23.93% below the estimated cost. He is also said to have submitted a letter dated 22.05.2018 reducing the tender amount. In this case two tenderers had participated, one was M/s Sharma Electric Works, Patna who had quoted 07.21% above the estimated cost. It is not



known whether Sharma Electric Works was also called for any negotiation along with M/s Gupta Electrical, Hajipur.

Apart from the aforesaid minutes of the TPC, there are few other letters of the Sub-Divisional Engineer (E-Plg.) BSNL, Electrical Circle, Patna addressed to the Executive Engineer (Electrical) BSNL, Electrical Division, Patna, Bhagalpur, and Muzaffapur which are Annexure-1 series to the counter affidavit of the respondents dated 31.01.2019 (it should have been mentioned as first supplementary counter affidavit). Annexure-1 series would show that the tenders were received offering price 58% below the estimated cost which has been held to be a reasonable quote. Further there are price quoted at 47.05%, 45.04% and the like amount.

This Court has taken note of the aforesaid documents which have been brought on record by non-else than the respondents themselves. The Court would make it clear that consideration of the aforesaid documents are relevant for purpose of arriving at a just and proper conclusion in the present case but the Court has no intention to undo a work awarded to different tenderers by the aforesaid letters. The Court would, however, categorically record that the manner in which the tenders are being awarded by the respondents make it very clear to this Court that there are several infirmities and scope of huge variations in the rate at which a tender may be awarded. Sometimes a rate below 58% and 45% may be held a



reasonable quote by the same 'TPC' who agrees to award a tender to a participant two months after opening of tender by accepting his letter reducing the rate to 25% below the estimate cost. In the matter of award of tenders of these works it may, on a proper inquiry, result in a conclusion that the procedure being followed by the BSNL has no sanctity and it needs a complete and thorough revamping. This is also necessary to avoid an unbridled and unchannalised power of the TPC. This Court cannot believe that TPC will say that a price quoted 58% or 45% below the estimated cost is a reasonable amount. If it is being agreed by TPC that it is a reasonable amount, it will lead to only either of the two conclusions. It is either a case of preparation of estimate at a highly exaggerated maintenance cost which is required to be revisited or the respondents are compromising with the quality of works by accepting the tender below 58% or 45% of the estimated cost. There cannot be any other view.

Let the entire matter be brought to the notice of the competent authority having a final say in these matters in the corporate office of the BSNL. The Chief Engineer (respondent no.1) shall send all these issues to be looked into by the said competent authority within a period of 30 days from the date of receipt/production of a copy of this order who will take an appropriate view on these issues within a period of sixty days thereafter.



In the aforesaid facts of the present case, it is apparent that the petitioner had been the lowest tenderer and had quoted the rate 10.55% below the estimated cost. There was no reason for the TPC to reject the tender of the petitioner on the ground that other firms in respect of the similar other tenders during contemporary time had quoted more than 20 % below the estimated cost. This Court has noticed above how the rates have been reduced by some tenderers two months after opening of the Bid by submitting letters to that effect. The ground taken for rejection of the tender is totally irrelevant and smacks of arbitrariness on the part of the Superintending Engineer and the TPC.

This Court, thus, considering the submissions of the parties, in the background of the totality of the facts which have been placed before this Court, would come to a conclusion that in this case, the respondent authorities have acted arbitrarily which has resulted in rejection of the tender of the petitioner. This Court, thus, is willing to exercise its power of judicial review under Article 226 of the Constitution of India. The impugned order and the re-tender as contained in Annexures-6 and 7 of the Interlocutory Application No. 5661 of 2018 and Interlocutory Application No. 5857 of 2018 are hereby set aside and the TPC is directed to consider the tender submitted by the petitioner firm in accordance with the terms and



conditions of the NIT/Tender in the light of the observations of this Court made hereinabvoe.

Let the tender of the petitioner be considered and decision thereon be taken within a period of 60 days from the date of receipt/production of a copy of this order.

This writ application is allowed with the aforesaid observations and directions.

(Rajeev Ranjan Prasad, J)

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AFR/NAFR	
CAV DATE	08.03.2019
Uploading Date	19.03.2019
Transmission Date	

