

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9851 of 2018

=====

Raj Nandan Yadav Son of Sri Ram Bilash Yadav, Resident of Mohalla-Khajurbari Road, Ward No.07, Neta Ji Chowk, P.O.+P.S.- Jogbani, District-Araria, Pin- 854328.

... .. Petitioner/s

Versus

1. The State Of Bihar through the Principal Secretary, Urban Development & Housing Department, "Vikash Bhawan," Bailey Road, Patna-15.
2. The Principal Secretary, Urban Development and Housing Department, Vikash Bhawan, Bailey Road, Patna-15
3. The Chief Engineer, Bihar Urban Development Agency, Urban Development and Housing Department, "Vikash Bhawan," Bailey Road, Patna-15.
4. The Superintending Engineer, Bihar Urban Development Agency, Urban Development and Housing Department, "Vikash Bhawan," Bailey Road, Patna-15.
5. Bhagalpur Nagar Nigam through its Municipal Commissioner, Bhagalpur.
6. The Municipal Commissioner, Bhagalpur Nagar Nigam, Bhagalpur.
7. The Executive Engineer, District Urban Development Agency (DUDA)-cum in charge Nagar Nigam, Bhagalpur

... .. Respondent/s

=====

Appearance :

For the Petitioner/s : Mr.Manish Sahay, Adv.
Mr. Anil Kumar Sinha, Adv.
For the State : Mr. Ravish Chandra, AC to SC-6
For the Bhagalpur Municipal Corporation: Mr. Manish Kumar, Adv.

=====

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

6 05-09-2019 This writ application has been preferred for the following reliefs:-

“(I) For quashing of letter No.-11 नॉवि0अभि0(को0) 161/2017-472 नॉवि0एवं आ0वि0, dated 20.04.2018, issued by Chief Engineer (i.e. Respondent No.3), as contained in Annexure-P-8 (to the extent of cancellation of entire tender only), whereby and where under the said authority has cancelled the entire tender relates to Re-Tender Notice for Inviting Tender (in short NIT) No.-07 of



2017-18 in most arbitrary manner and directed the Respondent No.6 (The Municipal Commissioner, Bhagalpur) and Respondent No.7 (i.e. The Executive Engineer) to invites fresh tender for the same work.

(II) For further quashing of Re-Tender Notice for Inviting Tender (in short NIT) No.-01 of 2018-19, as contained in Annexure-P-9, issued by respondent no.6 (i.e. The Municipal Commissioner, Bhagalpur) for the same work which has been cancelled earlier in pursuant to letter dated 20.04.2018 of the Chief Engineer.

(III) For commanding and directing the concerned respondent to consider the tender of the petitioner (declared L-2) and allot the same in his favour in accordance with law.

(IV) For declaring that the actions of the respondents are arbitrariness, colourable exercise of powers, malafide and against the law.

(V) For passing such an order or orders for which the petitioner is entitled under the law in the facts and circumstances of this case.”

Learned counsel for the petitioner had on earlier occasion made a submission based on Clause 28.1 of the Instruction to Bidders (ITB) and taking note of the submissions of the learned counsel for the petitioner, this Court passed the order dated 29.03.2019 which reads as under:-

“Learned counsel for the petitioner submits that in the tender in which he had participated earlier and was declared L2, one Sri Ajay Kumar Choudhary was L-1, but on a complaint submitted by this petitioner that said Sri Ajay Kumar Choudhary had used forged documents in order to participate in the bid, the same was enquired into and ultimately the work order issued in favour of



Ajay Kumar Choudhary was cancelled vide Annexure-‘8’ to the writ application.

Learned counsel submits that in such circumstance petitioner being L-2 was required to be awarded with the work in question by applying the principles as contained in Clause 28.1 of the Instruction to Bidders (ITB). It is submitted that instead of awarding the work to the petitioner the department proceeded to float a fresh tender (Annexure-P/9). It is submitted that the action of the State respondents would show that they had no reason to go into re-tender when L-2 was willing to work. Learned counsel further submits that the petitioner is willing to match the amount on which the L-1 had been awarded the work.

In the given circumstance since the counter affidavit is totally silent as to why a re-tender has been floated instead of awarding work to L-2 who is willing to match the amount with the L-1, an opportunity is being granted to the State as well as Bhagalpur Nagar Nigam to come out with a specific affidavit as to why the work should not be allotted to L-2 and what fruitful purpose will be served by re-tender particularly when the L-2 is willing to execute the work on the same amount at which the L-1 was given work order which is the maximum below i.e. 10%.

List this case under the same heading on 9th April 2019 when learned counsel for the State as well as the Bhagalpur Nagar Nigam shall inform this court about the instruction which they would have from the respective parties.”

Pursuant to the aforesaid order, Bhagalpur Municipal Corporation has filed a supplementary counter affidavit. A statement has been made in paragraph 8 of the supplementary counter affidavit that for the work above 50 lacs to 2 crores the Superintending Engineer is the sanctioning authority and for the work over and



above Rs.2 crores the Chief Engineer grants the technical sanction. The power of granting technical sanction lies with the Urban Development and Housing Department which would be apparent from the resolution issued vide memo no.3580 dated 13.07.2015 (Annexure-R5/6).

The State-respondents have also filed a supplementary counter affidavit. In paragraph 9 and 10 of the supplementary counter affidavit following statements have been made:-

“9. That it is pertinent to mention here that as per the Rule 164 of the Bihar P.W.D. Code, “the negotiation of rates should be done with the lowest tender only, if his tender is considered to be too high” thus the authority concerned is under obligation only to make rate negotiation with L-1 bidder.

10. That it is pertinent to mention here with regard to rate negotiation with L-1, a letter dated 20.01.2010 has also been circulated by the Central Vigilance Commission, Government of India to all the concerned Ministers/Department, Government of India, the Chief Secretaries to all Union Territories and other concerned authorities, whereby and where under Attention is invited to the Commission’s Circular No.4/3/07 dated 03.03.2007 on the issue of “Tendering Process Negotiation with L-1.”

In the said Circular it has, among other things been stated “As post tender negotiation could often be a source of corruption, it is directed that there should be no post tender negotiation with L-1, except in certain exception situation.” It has come to Commission’s notice that this has been interpreted to mean that there is a ban on post tender negotiations with L-1 only and there could be post tender negotiations with other than L-1, i.e. L-2, L-3 etc. This is not correct.

It is clarified to all concerned that there should normally be not post tender negotiation.”



Learned counsel for the State submits that in fact the petitioner cannot derive any benefit from clause 28.1 of the tender document. It is submitted that in the facts of the present case where L-1 was awarded the tender but later on his work order was cancelled on the ground that he had used forged documents while participating in the bid, the petitioner cannot automatically become entitle for getting work in question.

Having heard learned counsel for the parties and on perusal of the records, this Court finds that the whole case of the petitioner is based on clause 28.1 of the tender document which reads as under:-

“28.1. Subject to Clause 29, the Employer will award the Contract to the Bidder whose bid has been determined

(i) to be substantially responsive to the Bidding documents and who has offered the lowest evaluated Bid Price; and

(ii) to be within the available bid capacity adjusted to account for his bid price which is evaluated the lowest in any of the packages opened earlier than the one under consideration.

In no case, the contract shall be awarded to any bidder whose available bid capacity is less than the evaluated bid price, even if the said bid is the lowest evaluated bid. The contract will in such cases be awarded to the next lowest bidder at his evaluated bid price.”

In the present case the facts situation are different. It is not a case where the contract was awarded to any bidder whose available bid capacity was less than the evaluated bid price. Clause 28.1 does not apply to the case of present nature where work has already been awarded to the lowest evaluated bid, but thereafter the work order



was cancelled because of the complaints that the lowest tenderer had used forged documents while participating in the bid. Learned counsel for the State is correct in saying that in the present circumstance in fact it would amount to negotiating with L-2 for purpose of award of the work which is not permissible.

In the given facts and circumstances of the case, this writ application has no merit. It is dismissed accordingly. The challenge to the re-tender consequently fails.

(Rajeev Ranjan Prasad, J)

arvind/-

U			
---	--	--	--

