

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5093 of 2019

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M/s Bhardwaj Construction through its Partner Kamlesh Kumar, aged about 41 years (Male), Son of Ramashray Singh, Resident of 286, A.P. Colony, P.S.-Rampur, District- Gaya.

... .. Petitioner/s

Versus

1. The State of Bihar
2. The Principal Secretary, Road Construction Department, Bihar, Patna.
3. The Engineer-in- Chief, Road Construction Department, Bihar, Patna.
4. The Chief Engineer, Sorth Bihar Wing, Road Construction Department, Bihar, Patna.
5. The Superintending Engineer, Road Construction Department, Road Circle, Patna.
6. The Executive Engineer, Road Construction Department, Road Division, Hilsa.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sanjeev Kumar, Advocate
For the Respondent/s : Mr. Manoj Kumar Ambastha SC 26

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CORAM: HONOURABLE MR. JUSTICE PARTHA SARTHY
CAV JUDGMENT

Date : 06-07-2021

Heard learned counsel for the petitioner and learned counsel for the respondents.

The petitioner has filed the instant writ application praying therein for quashing the order contained in memo no. 1692 dated 26.2.2019 by the Departmental Tender Committee, Road Construction Department, Bihar, Patna whereby the tender bearing no. OPRMC 02/01 with respect to the work namely long term output and performance based road assets maintenance work for the roads under package no.



40A/OPRMC-H/Hilsa has been cancelled and a direction for retender has been given to the Chief Engineer, South Bihar Wing, Road Construction Department, Bihar, Patna.

The case of the petitioner is that a notice inviting tender (hereinafter referred to as 'the NIT') bearing NIT no. -CE (South)/RCD/OPRMC-02/01 dated 26.11.2018 was issued by the Road Construction Department, Government of Bihar with respect to long term output and performance based road assets maintenance work for the roads under package no. 40A/OPRMC-H/Hilsa. As per the the NIT the last date for uploading document by the bidder was 26.12.2018, the technical bid was to be opened on 28.12.2018 at 1530 hours and the final bid on 4.1.2019 at 1700 hours. The period of completion of the work was seven years and the estimated cost value was Rs. 9251.4584 lacs.

It is the case of the petitioner that being interested in the work and having requisite qualification, he submitted his bid document as required under the NIT along with all supporting documents, certificates and earnest money. Thereafter, on the scheduled date and time the technical bid of the bidders as also of the petitioner were opened and the petitioner and four other bidders were declared successful by order dated 16.1.2019 after



the technical bid was evaluated by the Departmental Tender Committee. One Ramjee Singh Construction Pvt. Ltd who had also succeeded in the above technical bid filed a complaint before the technical bid evaluation committee for cancellation of the tender. On 26.2.2019 the Departmental Tender Committee after considering the recommendation of the above Technical Bid Evaluation Committee accepted the recommendation regarding rejection of the above complaint filed by Ramjee Singh Construction Pvt. Ltd, but gave direction to the Chief Engineer to retender the work. It is against this order dated 26.2.2019 of the Departmental Tender Committee that the petitioner has preferred the instant writ application for the reliefs stated above.

It is submitted by learned counsel for the petitioner that as per the NIT the technical bid was opened on 28.12.2018 wherein the petitioner and four other bidders were declared successful. By order dated 16.1.2019 the Departmental Technical Bid Committee observed that if any objections are received by 4 pm on 21.1.2019 (wrongly printed as 21.1.2017), then the Chief Engineer, South Bihar Wing would once again call the meeting of the Technical Bid Committee wherein final decision would be taken. It was observed that in case no



objection was received by the said date, the financial bid would be opened and the Chief Engineer would place the same before the Departmental Bid Committee with his recommendations. No objection was received by the cut of date of 21.1.2019 and the financial bid was opened on 21.1.2019. It was on 24.1.2019 that an objection was filed by one Ramjee Singh Construction Pvt. Ltd. i.e. 3 days after opening of the financial bid and which has led to passing of the impugned order. It is further submitted by learned counsel for the petitioner that the Model Bidding Document (MBD in short) issued by the Road Construction Department, Government of Bihar contains the Instructions to Bidders (ITB in short). Clause 26.1 thereof provides that the employer shall correct arithmetical errors and if there is any discrepancy between the unit price and the total price that is obtained by multiplying the unit price and the quantity, the Unit price shall prevail. Similarly, an error in a total corresponding to the addition or subtraction of sub-totals, the sub-total shall prevail and if there is a discrepancy between the words and figures the amount in words shall prevail. With respect to evaluation of bids the relevant Clause 27.1 and 27.2(a) relied on behalf of the petitioner are being quoted herein below for ready reference :-



“Evaluation of Bids

27. 1 The Employer shall use the criteria and methodologies listed in this Clause.

No other evaluation criteria or methodologies shall be permitted.

27.2 To evaluate a bid, the Employer shall consider the following :

(a) the bid price, excluding Provisional Sums.

.....”

It is submitted by learned counsel for the petitioner that the MBD provides for provisional sums which means a sum included in the contract for use in emergency works and contingencies when authorized by the employer. Clause 27.2 of the ITB categorically provides that the employer shall consider the bid price excluding the provisional sums. However, by mistake the Executive Engineer while considering/totaling the different amounts bid by the petitioner and four others added the contingency/provisional amount in the total. It was submitted that although the same was in violation of Clause 27.2(a) of the ITB, nevertheless from perusal of the chart of financial bid it would transpire that the Executive Engineer, Road Division, RCD, Hilsa by his note dated 23.1.2019 (in Annexure-B series to the 2nd supplementary counter affidavit of the respondents) recommended for approval of grant of tender in favour of the



petitioner being the first lowest bidder, and this was done excluding the provisional/contingency sum. The said recommendation of the Executive Engineer was approved by the Superintending Engineer and the financial bid was forwarded for necessary action. It was thus, submitted by learned counsel for the petitioner that even if it is taken that a mistake was committed while preparation of chart and the provisional sum had been included in the bid, as the said provisional sum had been excluded in accordance with the Clause 27.2(a) of the ITB, recommendation had rightly been made in favour of the petitioner and thus, the respondent authorities have committed an error in coming out with the impugned order dated 26.2.2019 cancelling the bid and directing the Chief Engineer to proceed for re-tender. It is submitted that the order impugned dated 26.2.2019 be quashed and the petitioner being the lowest tenderer having bid the lowest, a direction be issued to the respondents to allot the work in favour of the petitioner. Learned counsel for the petitioner in support of his contentions relied on the judgment in the case of Tata Cellular vs. the Union of India (AIR 1996 SC 11) and M.I. Builders Pvt. Ltd vs. Radhey Shyam Sahu and others [(1999) 6 SCC 464].

A counter affidavit was filed on behalf of the respondents.



As per the case of the respondents, in the year 2013, the Road Construction Department of Government of Bihar launched a new concept of Road Assets, Management and Maintenance based Programme known as 'long term output and performance based road assets maintenance contract' (OPRMC in short). After completion of first phase of 5 years, tenders were invited for second phase of OPRMC II and under Annexure -1 tender was invited for package no. 40A pertaining to roads under Road Division Hilsa. The OPRMC consists of four components of management of service i.e. ordinary maintenance service (OM), initial rectification works (IR), periodic maintenance work (PM) and minor improvement work (MI). Estimated cost of each of the four components were mentioned in the template. Besides the four components mentioned in Schedules 1 to 4, Schedule 5 contains provisional sums under two heads i.e. (a) emergency works and (b) contingency works. The bidders were required to provide their financial offer for the four components of service. As per Clause 27.2(a) of the ITB the employer was to evaluate the bid considering the bid price and excluding the provisional sums. The provisional sum under contingency head was part of Schedule 5. Inadvertently the different rates quoted by the bidders for contingency work were incorporated in Schedule 4



as well along with other items of minor improvement work (MI). The incorporation of the provisional sum of contingency in Schedule 4 resulted in duplication of items as the same was already incorporated in Schedule 5. This was an error in financial bid sheet and as per the case of the respondents it vitiated the tender in question. The same could not have been corrected under the provisions of Clause 26.1 of the ITB treating it to be an arithmetical error. There being no other provision of making appropriate corrections in the bid document, on the same coming to the notice of the Departmental Tender Committee, the Committee rightly took a decision and by its order dated 26.2.2019 proceeded to cancel the tender itself and has rightly directed the Chief Engineer, South Bihar Wing to take steps for re-tender. It is submitted by learned counsel for the respondents that there is no illegality in the order under challenge in the instant application.

Learned counsel for the respondents in support of his contentions has relied on the judgments in the case of Afcons Infrastructure Ltd vs Nagpur Metro Rail Corporation Ltd (AIR 2016 SC 405), Montecarlo Ltd vs. NTPC Ltd (AIR 2016 SC 4946), Master Marine Services Pvt. Ltd vs. Metcalfe & Hodgkinson (P) Ltd. & Anr. [(2005) 6 SCC 138].



Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

The facts in brief are that an NIT dated 26.11.2018 was issued by the Road Construction Department of the Government of Bihar with respect to long term output and performance based road assets maintenance work for the roads under package no. 41A of the Road Division, Hilsa. The petitioner as also others submitted their bid documents as required under the NIT with all supporting documents. On the scheduled date and time the technical bid of all the bidders including the petitioner was opened. By order dated 16.1.2019 the petitioner and other four bidders were declared successful in the technical bid evaluated by the Departmental Tender Committee. It was further decided that the decision of the Committee would be put up on the website of the department and in case by 4 pm on 21.1.2019 (wrongly typed as 21.1.2017) any objection is received, the Chief Engineer would convene a meeting of the Technical Bid Evaluation Committee. In case no objection is received by the said date, the Chief Engineer would place the financial bid before the Departmental Bid Committee.

Admittedly, no objection was received till the due date, on 21.1.2019 the financial bid was opened and the petitioner



was found to be the lowest bidder. Three days after the cut of date fixed by the order dated 16.1.2019 as also three days after opening of the financial bid, an objection from Ramjee Singh was received by the Technical Bid Evaluation Committee. Taking into consideration the contents of the objection, the Departmental Tender Committee accepted the recommendation of the Technical Bid Evaluation Committee and by order dated 26.2.2019 rejected the objection filed by Ramjee Singh Construction Pvt Ltd. However, taking into consideration the fact that in the financial bid item wise bids/rates had been called for which was contrary to Schedule 5 of the MBD, the Departmental Tender Committee by the order impugned dated 26.2.2019 gave direction to the Chief Engineer to retender the work.

In submissions made on behalf of the respondents as also from the contents of the counter affidavits filed, the contention of the respondents in brief is that the description of the work required to be carried out by the contractor was given in four schedules being ordinary maintenance service ('OM' in short), initial rectification works ('IR' in short), periodic maintenance work ('PM' in short) and minor improvement work ('MI' in short). These four works were to be mentioned in Schedule nos.



1, 2, 3 and 4 respectively. So far as Schedule 5 is concerned, the same was to contain provisional sums under two heads namely (a) Emergency work, and (b) Contingency work.

It would be relevant to mention here itself that Clause 27.2(a) of the MBD clearly provided that to evaluate a bid, the employer shall consider the bid price, excluding the provisional sums. It is the contention of the respondents that while provisional sum under contingency head was part of Schedule 5, but inadvertently it was incorporated in Schedule 4 as well, along with other items of minor improvement work (MI). Thus, there was an error in the financial bid sheet and it vitiated the tender in question. As the same could not be corrected under Clause 26.1 of the MBD, which is being quoted herein below for ready reference, the respondents were left with no option and as such the Departmental Tender Committee rightly took a decision by the order impugned dated 26.2.2019 to order for retender.

Clause 26.1 of the MBD reads as follows:

“26.1 Provided that the bid is substantially responsive, the Employer shall correct arithmetical errors on the following basis:

(a) if there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price



and the quantity, the unit price shall prevail and the total price shall be corrected unless in the opinion of the Employer there is an obvious misplacement of the decimal in the unit price, in which case the total price as quoted shall govern and the unit price shall be corrected;

(b) if there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected; and

(c) if there is a discrepancy between words and figures, the amount in words shall prevail, unless the amount expressed in words is related to an arithmetic error, in which case the amount in figures shall prevail subject to (a) and (b) above.”

Here itself it may be mentioned that so far as the order impugned date 26.2.2019 is concerned, the reason given therein by the Departmental Tender Committee for its direction to retender is that item wise rates had been called for, for the provisional sum (contingency) which was in violation of Schedule 5 of the MBD.

Before proceeding to test the reasoning given by the Departmental Tender Committee in the order impugned and the submissions made on behalf of the respondents in support thereof, it would be relevant to refer to the judgments relied on



by the parties.

Learned counsel for the petitioner has relied on the judgment in the case of Tata Cellular v Union of India (supra). It is submitted by learned counsel for the petitioner that although it may not be for the Court to determine whether a particular policy is fair or not, however, an administrative action would be subject to judicial review on besides other grounds, in case the same is irrational or unreasonable. Paragraph nos. 93, 94 and 95 of the judgment is quoted herein below :

“93. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. whether a decision-making authority exceeded its powers?
2. committed an error of law.
3. committed a breach of the rules of natural justice.
4. reached a decision which no reasonable Tribunal would have reached or.
5. abused its powers.

94. Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have



been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (ii) Irrationality, namely, Wednesbury unreasonableness.
- (iii) Procedural impropriety.

95. The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex parte Brind* (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, 'consider whether something has gone wrong of a nature and degree which requires its intervention'.

Learned counsel appearing for the petitioner further relies



on paragraph nos. 59 and 64 of the judgment in the case of M.I Builders Pvt. Ltd. vs Radhey Shyam Sahu [(1999) 6 SCC 464] :

“59. When we keep in view the principles laid by this Court in its various judgments and which we have noticed above, it has to be held that the agreement dated 4-11-1993 is not a valid one. The agreement defies logic. It is outrageous. It crosses all limits of rationality. Mahapalika has certainly acted in fatuous manner in entering into such an agreement. It is a case where the High Court rightly interfered in exercise of its powers of judicial review keeping in view the principles laid by this Court in Tata Cellular vs. Union of India. Every decision of the authority except the judicial decision is amenable to judicial review and reviewability of such a decision cannot now be questioned. However, a judicial review is permissible if the impugned action is against law or in violation of the prescribed procedure or is unreasonable, irrational or mala fide. On the principle of good governance reference was made to a decision of Division Bench of Bombay High



Court in State of Bombay v. Laxmidas Ranchhoddas (AIR Bom at p. 475) (Para 12). It was submitted that bad governance sets a bad example. That is what exactly happened in the present case.

.....

64. The reason for the construction of underground shopping complex given was that it would remove the congestion in the area. We have report of the Local Commissioner, which says that it would rather lead to more congestion. We think Mr. Dave is right in his submission that a decision to construct underground shopping complex by M.I. Builders had already been taken and that the whole process was gone into to confer undue benefit to M.I. Builders and the bogie of congestion was introduced to justify the action of the Mahapalika. It is wholly illegal and smacks of arbitrariness, unreasonableness and irrationality.”

On the other hand, learned counsel for the State relies on the judgment in the case of Afcons Infrastructure v. Nagpur Metro Rail Corporation Ltd. (AIR 2016 SC 4305) to submit that unless there is malafide or perversity in understanding the



application of the terms of the tender conditions, the Courts should not interfere. Paragraph no. 15 of the judgment which is being quoted herein below was reiterated by the Hon'ble Apex Court in paragraph no. 23 in the case of Monte Carlo Ltd v. NTPC Ltd. (AIR 2016 SC 4946).

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.”

Learned counsel for the respondents further relied on the judgment in the case of Master Marine Services Pvt. Ltd vs. Metcalfe & Hodgkinson Pvt. Ltd. [(2005) 6 SCC 138] to submit that even when some defect is found in the decision making process, the Court must exercise its discretion with great caution



and only in furtherance of public interest. It was submitted that this decision was reiterated by the Hon'ble Apex Court in its judgment in the case of Monte Carlo Ltd. (supra).

“15. The law relating to award of contract by State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.* and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires



interference, the Court should interfere.”

Having heard learned counsel for the parties and on going through the judgments cited, the question to be tested is as to whether in the facts and circumstances of the instant case, the decision as contained in the order impugned dated 26.2.2019 by the Departmental Tender Committee is arbitrary, unreasonable and/or irrational or whether the same is just and proper.

From perusal of the order dated 26.2.2019 it would transpire that the Departmental Tender Committee proceeds to reject the complaint/objection filed by Ramjee Singh Construction Pvt Ltd, and for the reason that contrary to the provisions contained in Schedule 5 to the MBD, item wise rates for provisional (contingency) sum had been called for and thus the Committee gave direction to the Chief Engineer for retender.

As per the case of the respondents the error which occurred was that as per Clause 27.2(a) of Section-1 (ITB) of the MBD, the provisional sum was to be excluded from the bid price for the purpose of financial bid evaluation, but the provisional sum under contingency head having inadvertently been included in Schedule 4 also, all the bidders quoted different rates for contingency work. The same was required to be constant and at Schedule 5.

The question which would thus arise is that even though



the error may have occurred in calling for bids also of the provisional (contingency) sum and including them in Schedule 4, was there any illegality in deciding the financial bid or was any of the bidders prejudiced as a result thereof.

The C/s of financial bid has been brought on record both by the petitioner as Annexure -8 (running page 110) as also by the respondents as Annexure-B series (running page 139). From perusal of the said document it transpires that though it is true that the provisional sum under the contingency head has been included in Schedule 4 also, however, while evaluating the financial bid of the five bidders the contingency amount was excluded and the financial bid was decided strictly in accordance with Clause 27.2(a) of MBD which states that to evaluate a bid the employer shall consider the bid price, excluding provisional sums.

Here itself it would be relevant to quote the hand written notes of the Assistant Engineer (DAO-II Road Division, Hilsa, Nalanda), the Executive Engineer (Road Division, RCD, Hilsa) and the Superintending Engineer (Road Construction Department, Central Circle, Patna) in the C/s of financial bid (Annexure-B series at page 139).

“EE.
C/s of financial bid checked and



found that –

All five bidder qualified in Technical bid evaluation. Bharadwaj Construction quoted 9.67 % below of Ecv bi (OM+PM+IR+MI) bid price, which is lower than other in financial bid evaluation.

C/s of financial bid forwarded for further n/a.

Sd/
23.01.2019
DAO-II
Road Division, RCD,
Hilsa, Nalanda.

SE Central Circle

Financial bid opened and rate quoted by the five bidders (a) Mother India Construction Pvt Ltd (b) Ms Surendra Prasad and Company (c) Shristi Developers Pvt Ltd (d) Ramjee Singh Construction Pvt (e) Bharadwaj Construction have been checked. Mother India Const. Pvt Ltd found Non-responsive due to lower than 10 % in MI. Rest four bidders are responsive. Bharadwaj Construction has quoted total bid price of Rs 75340150.40 which is 9.67% below sanctioned (OM+IR+MI+PM). Ramjee Construction Pvt has quoted bid price of Rs. 812534506.06 (-2.58%), Shristi Developers Pvt Ltd has quoted bid price of Rs. 864557318.22 which 3.65 % above, Ms. Surendra Prasad and Company has quoted Rs. 867823153.70 which is 4.05% above sanctioned (OM+IR+MI+PM).

Bharadwaj Construction being first lowest bidder hence CS may be approved in favour of Bharadwaj Construction.



Sd/
23.01.19
EE Road Division, RCD
Hilsa

C. Engg. South, RCD, Patna

Among five technically qualified Bidders Rates quoted by Bharadwaj Construction is the lowest. Hence financial bid is forwarded for necessary action.

Sd/
Superintending Engineer,
Road Construction Department,
Central Circle, Patna.”

Having heard the contentions of the parties and on having gone through the records of the case specially the C/s of financial bid, it is clear that though error may have been committed in asking for bid of provisional (contingency) sum or in the paper work done in the office of the respondents while preparing the chart for purpose of evaluating the financial bid, however when it came to actual evaluation of the financial bids, as would be evident from the notes of the Assistant Engineer, the Executive Engineer and the Superintending Engineer quoted above, the same was done by the respondents not taking into account the provisional sum (contingency) but was correctly done in accordance with the provisions of clause 27.2(a) of the MBD. Thus, in the opinion of the Court the action of



respondents in coming out with the order impugned as contained in memo no. 1692 (E) dated 26.2.2019 under the signature of the Departmental Tender Committee cancelling the tender for the reasons stated therein and directing the Chief Engineer to take steps for retender is unreasonable and irrational.

The Court does not find the reasoning given in the order impugned dated 26.2.2019 by the Departmental Tender Committee to be sound or sustainable. The order dated 26.2.2019 is set aside and the respondents are directed to take consequential steps in the matter, the petitioner being the lowest tenderer, within a period of six weeks from receipt of a copy of this order.

The writ application stands allowed.

(Partha Sarthy, J)

Prakash/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

