

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.8929 of 2020

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M/S EMS Infracon Pvt. Ltd. M/s Technocraft Construction Pvt. Ltd. (JV), a Joint Venture Between tow Private Limited Companies, Regd. Office of Lead Partner at 701, DLF Tower A Jasola, New Delhi 110025 through its Authorized Signatory, Namely, Pankaj Kumar Srivastava (Male) aged about 50 Years Son of Prakash Chandra Srivastava Resident of 397/C, Raj Colony, Hussenabad, Jaunpur, Jaunpur, Kty, Uttar Pradesh, P.S. Line Bazar Jaunpur, Town and District jaunpur

... .. Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Main Secretary, Patna.
2. The Development Commissioner, Bihar-Cum-Chairman, Bihar urban Infrastructure development Corporation Ltd. (BUIDCO), Main Secretariat, Patna.
3. The Secretary, Urban Development and Housing Department (UD and HD), Government of BIhar Cum Project Director, State Program Management Group (SPMG) Vikash Bhavan Bailey Road, Patna.
4. The Bihar Urban Infrastructure Development Corporation Ltd. (BUIDCO), near rajapur PUI, West Boring Canal Road, Patna-800001 through its Managing Director
5. The Managing Director, BUIDCO, near Rajapur Pul, West Boring Canal Road, Patna-800001
6. The Chief Engineer, Design, Planning and Monitoring, BUIDCO, Patna.
7. The Union of India, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation through its Secretary having its Office at Shram Shakti Bhavan Rafi Marg, New Delhi-110001
8. The National Mission for Clean Ganga, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchan Stadium, India Gate, New Delhi through its Director Genral.
9. The Director General National Mission for Clean Ganga, Ministry of Water Resources, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchand Stadium, India Gate, New Delhi
10. The Executive Director, Technical, National Mission for Clean Ganga, Ministry of Water Resources, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India 1st Floor, Major Shyanchand Stadium, India Gate, new Delhi.



11. The Executive Director, Projects, National Mission for Clean Ganga, Ministry of Water Resources, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India 1st Floor, Major Dhyanchand Stadium, India Gate, new Delhi.
12. M/s Toshiba Water Solutions Pvt. Ltd. in JV With Kevadiya Construction Pvt. Ltd, a Joint Venture Between two Private Limited Companies Having the office at 4th Floor, Tower-D, PIoneer Urban Square, Sector-62, Gurugram, Haryana.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. S.D. Sanjay, Sr. Adv
Mr.Parul Prasad, Adv.
For the Respondent/s : Mr.Lalit Kishore (Ag)
For UOI : mr. Manoj Kumar Singh

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 04-02-2021

1. Heard Mr. S.D. Sanjay, learned senior counsel for the petitioner and Mr. Lalit Kishore, learned senior counsel/Additional Advocate General for the respondents. Mr. Manoj Kumar Singh, learned counsel for Union of India has also rendered his assistance.

2. The petitioner has challenged the order of blacklisting dated 04.11.2020 passed by the respondent/ BUIDCO on the ground of the same being arbitrary, malafide and only for the purpose of deliberately disqualifying the petitioner from participating in any future bid, particularly



the present bid, so as to provide advantage to a private respondent/ M.S. Toshiba Water Solutions Private Limited.

3. The sum and substance of the argument of the petitioner is that the rejection of the technical bid of the petitioner on the sole ground of his having furnished misleading information with respect to the experience in setting up of sewage treatment plant, is absolutely unwarranted, unjustified and is not borne out by the facts of the case. In the Standard Bidding Document (S.B.D.), qualification criteria has been set forth in Annexure –A of part-H thereof. It specifically delineates that a bidder's qualification would be evaluated on compliance with all the minimum pass / fail criteria fixed by the authorities regarding their general design, build, construct, operation and maintenance experience of sewerage network, financial strength, personnel and management capabilities etc. The bidders are required to submit their bid either as a stand-alone firm / legal entity or a joint venture upto a maximum of three partners. With respect to experience in construction and operation and maintenance of sewage treatment and sewerage network, a successful bidder is required to provide



evidence of its designing, developing, building, testing and commissioning of at least one sewage treatment plant of 22 M.L.D. capacity of secondary treatment of sewage during the last seven years preceding the bid submission date. It further specifies that such experience should have been of the bidder or of his nominated sub – contractor.

4. Learned senior counsel for the petitioner has submitted that with this requirement of a bidder to become technically responsive to the bid, certain evidence was required to be furnished. The petitioner has furnished his technical capabilities of having constructed, designed and maintained sewage treatment plant of higher capacity than what is required in the present bid. Apart from this, the information provided by the firm/petitioner in form 2 and 3B are also correct and is not in any manner misleading. Form 2 and 3B, which are the part of S.B.D. solicit information with respect to general design, build, operation and maintenance experience information. The first column specifies that the name of the bidder or participant of a joint venture ought to be stated. The individual firms and all participants of a joint venture are further required to



complete the information in the form with regard to their experience in designing, building, operating etc. of sewage networks. In form2, there is a column which requires to be filled up by the bidder regarding the nature, role and extent of participation. This column has not been filled up by the petitioner but a certificate of U.P. Jal Nigam, the authority under which such work was conducted by the petitioner, has been annexed along with the bid document. Similar information has been solicited under form 3A in which also, the petitioner has given the exact details sans its contribution, responsibility and the extent of participation in such project.

5. The argument raised on behalf of the petitioner, therefore, is that such information was only in the nature of an additional information (as in form 2 and 3B of the S.B.D.) which may or may not have been relied upon by the authorities. Additionally, it has been submitted that no wrong statement has been given in these forms. There could have been no intention of misleading any authority as the certificate of the concerned authority, namely, U.P. Jal Nigam has also been annexed, which endorses the fact that



the entire work was completed by the petitioner, notwithstanding its initial participation to the extent of only twenty percent in the joint venture.

6. Mr. Sanjay has further argued that the explanation furnished by the firm is self explanatory but the same has not at all been taken into account before passing the order of blacklisting. It has also been urged on behalf of the petitioner that a very short time was given to the petitioner to respond to the show-cause notice. Blacklisting for one year has been ordered by invoking the provisions contained in Section 11(a)(vii) of the Bihar Registration of Contractors Rules, 2007, which calls for a penalty in case of subletting of work entrusted to a firm without seeking permission from the authority which had given the contract. It has been argued that the order is absolutely without application of mind in as much as there could have been no allegation of subletting the work when the petitioner was declared technically unresponsive in the first instance.

7. Apart from this, it has been submitted that blacklisting a firm entails very serious consequence and is akin to civil death of a firm. A decision to blacklist a firm



could not have been taken in such cavalier manner. It has also been harped upon by the learned counsel for the petitioner that the entire exercise was to oust the petitioner from his participation in the bid so as to provide benefit to another competing firm.

8. As opposed to the aforesaid contention, Mr. Lalit Kishore, learned senior counsel for the respondents has submitted so far as notice to the petitioner is concerned, that cannot be faulted with as relevant information in form 2 and 3B have not been furnished. The authorities cannot then be said to have taken an unnecessary harsh view of the matter by noticing the petitioner, seeking his explanation for not coming up with correct facts as non disclosure of those details viz. the extent of participation in the joint venture could be misleading. He has further argued that the Standard Bidding Document was filled and furnished by the petitioner as a bidder and, therefore, he was required to furnish all information / disclosure regarding its experience. The experience details solicited from the petitioner or any competing firm is not without any purpose. Such information is to be evaluated for the purposes of selection of agent /



concessionaire. Any information which is incomplete could lead to distorted / incorrect decision. In this manner, Mr. Lalit Kishore has argued that the documents furnished by the petitioner were misleading.

9. Repelling the argument by the petitioner that the explanation furnished by it in response to the show-cause notice has not been taken into account, it has been submitted that such open ended statement cannot be accepted. The explanation has been taken into consideration which is evident from paragraph -7 of the order, which incorporate the explanation offered by the petitioner and only thereafter the respondents came to the conclusion that missing out on vital information relating to nature and extent of participation in the joint venture is misleading.

10. The law with respect to black-listing is too well settled to be recounted. Black-listing has the effect of depriving a person of equality of opportunity in the matter of public contract. Nobody may have a right to enter into contract with the Government or Government agencies but everyone is entitled to equal treatment with others. The cascading effects of black-listing and the need to be extra



cautious in ordering such black-listing has been aptly explained by the Hon'ble Supreme Court in **Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and Anr. (1975) 1 SCC 70**, which reads as hereunder:-

"12 The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

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15... The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The black lists are instruments of coercion.



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20. *Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."*

(Also refer to ***Patel Engineering Ltd. Vs. Union of India 2012 (11) SCC 257; Kulja Industries Ltd. Vs. Chief General Manager, Western Telecom Project, BSNL 2014 (14) SCC 731; Southern Painters vs. Fertilizers and Chemicals Travancore Ltd. 1994 Supl. (2) SCC 699; B.S.N. Joshi & Sons vs. Nair Cole Services Ltd. 2006 (11) SCC 548), Daffodils Pharmaceuticals Ltd. & Anr. vs.***



***State of U.P. & Anr 2019 (12) JT 283 ;
UMC Technologies Pvt. Ltd. vs. Food
Corporation of India, Civil Appeal No. 3687
of 2020 ; Raghunath Thakur vs. State of
Bihar 1989 (1) SCC 229; Gorkha Securities
Services vs. NCT of Delhi 2014 (9) SCC
105).***

11. The blacklisting of the petitioner for one year has been ordered by invoking the provisions contained in Section 11 of the Bihar Registration of Contractors Rules, 2007, which reads as under:-

"11. Black-Listing and Suspension:-

(a) Contractors registered in any of the classes shall be liable for black-listing or demotion to a lower class or suspension for a specified period if he personally or any partner of the firm or company, or any of its director (s) or employee (s) or representatives (s) indulge (s) in any of the following malpractices:-

(i) Indisciplined behaviour with any officer or employee of the concerned department.

(ii) Creating law & order problem in Government Office during receipt of tender papers, opening of tenders or any work related thereto.



(iii) *Threatening or attacking any officer or employee of the department.*

(iv) *Participating in or boycotting tenders by forming a cartel.*

(v) *On failure to execute the agreement within the stipulated period after allotment of work if repeated on more than one occasion.*

(vi) *Failure to abide by conditions of Agreement and standing instructions therein during execution of work.*

(vii) *Subletting any work without consent of the department to another contractor or any other individual.*

(viii) *Selling Government material like Cement, Steel and Bitumen etc.*

(ix) *On submission of false or forged security as earnest money and forged documents.*

(x) *On being convicted for any criminal activity.*

(xi) *Submission of tender in such circle in which his close relative (s) is/are posted as divisional accountant or any office not below the rank of junior engineer. Close relative means husband/wife/mother/father/brother and sister.*

(xii) *In the event of a contractor being blacklisted by any other Government department.*

(b) (i) *If any person as mentioned in*



clause 11 (a) of this rule indulges in any malpractice as described in sub clause (I) to (v) of 11(a) then the registration of the concerned contractor may be demoted to a lower class permanently. If he indulges in more than one malpractices as described in sub clause (i) to (v) of 11 (a) then the concerned contractor may be blacklisted.

(ii) If any person as mentioned in clause 11 (a) of this rule indulges in any malpractice as described in sub clause (vi) to (xii) of 11(a) then the concerned contractor may be black listed"

(c) Before black-listing or demoting or suspending any contractor, he shall be given an opportunity to show-cause.

(d) The order for black-listing / suspension shall be passed by the officer who is competent to register the contractor or by the officer under whom the registering officer works.

(e) The contractor can file an appeal within thirty days against the punishment related black – listing / demotion/suspension before the Commissioner and Secretary/Secretary of the Department".

(emphasis provided)

12. The argument of Mr. S.D. Sanjay that the order reflects non application of mind in as much as this could not have been a ground for blacklisting the petitioner has



substantial force. The petitioner was incapacitated to participate in the tender after the technical stage because it was held to be technically unresponsive for having furnished misleading information.

13. This court is of the considered view that assuming but not admitting that the relevant information furnished by the petitioner with respect to the extent /percentage of participation in the joint venture may not be complete but it surely did not call for an action in the nature of blacklisting for one year.

14. The order, therefore, cannot be sustained in the eyes of law as it has been passed on invoking of a provision which does not at all relate to the deficiency in the document furnished by the petitioner at the technical stage.

15. The order, therefore, is set aside.

16. The authority concerned is directed to pass order afresh taking into account the explanation offered by the petitioner and all other attendant / relevant factors within a period of sixty days from the date of receipt / production of a copy of this order. It would be highly appreciated if such order is passed before any final decision is taken with



respect to selection of the concessionaire for the project for which the petitioner had submitted its tender. If it is done so, it would only reflect that the apprehension of the petitioner that he has been disqualified for helping out another competitor, would evaporate in the air.

17. The petition stands allowed with the aforesaid observation.

(Ashutosh Kumar, J)

sunilkumar/-

AFR / NAFR	AFR
CAV DATE	N/A
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Transmission Date	N/A

