

(2018) 03 PAT CK 0102

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No.15623 of 2017

Adya Raj Developer Private Limited

APPELLANT

Vs

The State of Bihar & Ors

RESPONDENT

Date of Decision : 06-03-2018

Acts Referred:

Citation : (2018) 3 PLJR 472

Hon'ble Judges : Vikash Jain

Bench : Single Bench

Advocate : Raju Giri; Santosh Kumar Mishra; Tej Bahadur Singh; Brisketu Sharan Pandey;

Final Decision : Allowed

Judgement

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

2. The present writ petition has been filed for quashing the letter no. 3064 dated 06.10.2017 issued by the respondent no. 5 by which the petitioner is

being forced to accept the Tender at 10 percent below the estimated rate (BOQ Rate) as contained in Annexure-6; and for a direction to the

respondents to immediately issue Letter of Acceptance (LOA) and thereafter work order for construction of Anjuman Islamiya Hall, Ashok Rajpath,

Patna.

3. The short facts of the case according to the petitioner are that on 10.07.2017, an NIT No. 19/17-18 was issued by the respondent-Bihar State

Building Construction Corporation Limited, Patna (hereinafter "the Corporation") for reconstruction of Anjuman Islamia Hall at Ashok Rajpath,

Patna for an estimated cost of Rs. 38,95,78,357/-. In the absence of any bids

being uploaded, however, the NIT was cancelled and a re-tender was issued in NIT No. 33/17-18 on 20.07.2017 for the said work which was to be completed in 18 months on the said estimated cost of Rs. 38,95,78,357/-.

Pursuant to the re-tender, the petitioner along with one other tenderer, M/s B. Rai Construction Company, participated but the latter was disqualified

at the stage of technical bid. The petitioner alone remained in the price bid and after scrutiny by the Tender Committee of the Corporation in its

meeting dated 19.09.2017, the Technical Bid Appraisal Committee declared the petitioner to be the successful bidder in respect of its bid of 0.78%

below the BOQ rate.

4. The Letter of Acceptance was however not issued in favour of the petitioner and instead, the Chief General Manager of the Corporation issued the

impugned letter no. 3064 dated 06.10.2017 by which the petitioner has been asked whether he would be willing to do the work at 10% below the

estimated rate, in the light of the Finance Department's Letter No. 7806 dated 30.09.2016 and the decision taken subsequently in the 37th Board

Meeting of the respondent Corporation held on 25.08.2017.

5. Mr. Raju Giri, learned counsel for the petitioner submits that the action of the respondents is wholly arbitrary and illegal. It is submitted that the

reason cited by the respondent no. 5 for not proceeding with the work on the basis of the price bid of the petitioner is completely foreign to the tender

documents as no such condition was stipulated in the NIT, the SBD or the general conditions of contract. Reliance placed on the Finance

Department's letter dated 30.09.2016 and the minutes of the 37th Board Meeting amounts to imposition of a new condition which is impermissible.

The petitioner admittedly qualified in the technical bid and thereafter its price bid submitted as 0.78% below the estimated rate was duly scrutinized by

the Tender Committee and the petitioner was declared to be the successful bidder. The impugned letter amounts to coercing the petitioner to accept

the lowest possible rate contemplated under the terms of the tender, below which the bid was liable to be rejected in terms of Clause-23 of the re-

tender notice itself. It is further stated that the respondents have acted in an arbitrary and discriminatory manner inasmuch as the Corporation itself

had awarded work to one M/s Shanti Construction & Company at a rate of 10% above the estimated rate (Annexure-8).

6. Learned counsel for the respondent-Corporation relies on the counter affidavit filed on behalf of the respondent nos. 2 to 5 to oppose the writ

petition. The action of the respondent Corporation is sought to be justified, reiterating the reliance placed on the resolution of the Board of Directors

taken in the 37th Board Meeting on 25.08.2017 on the basis of the Finance Department's Notification dated 30.09.2016. Such resolution

contemplated that in the case of single tender remaining, a certificate was required from the recommending authority to the effect that "In case of

recall of tenders for the present work, the rates lower than already received in this tender, are not likely to be received". In this background

therefore, a meeting was convened by the Tender Committee on 20.10.2017 which took the decision to cancel the re-tender.

7. Having heard the parties and on a consideration of the materials on record, this Court finds merit in the writ petition. It is not in dispute that there

was no condition in the tender documents which was made known to the bidders at the time of issuance of the NIT that they would be required to

submit their acceptance to do the work at the minimum possible rate, namely 10% below the estimated rate. It is well settled that once the NIT has

been issued, no new conditions can be introduced unilaterally. While the re-tender was issued on 20.07.2017, the 37th Board Meeting was held

subsequently on 25.08.2017 and any decision taken in such subsequent meeting could not have been made retrospectively applicable to the re-tender.

The decision requiring a certificate as aforesaid was taken in the 37th Board Meeting which has been made the foundation for issuance of the

impugned letter and cannot be sustained.

8. Even otherwise, it appears to this Court that the action of the respondents requiring the petitioner to accept the tender at the minimum possible rate

of 10% below the estimated BOQ rate is tinged with arbitrariness. If that be the manner for proceeding in the matter of award of tenders and if work

had to be allotted only at the minimum possible rate below which the tender itself was liable for rejection, the need for inviting tenders and opening of

price bids itself would be rendered superfluous. The Corporation has also not come forward with any basis whatsoever in order to justify its

expectation that in future some bidder may offer such minimum rate. It is a matter of record that pursuant to the first tender issued on 10.07.2017, no

bids were uploaded and the tender had to be cancelled. The instant retender attracted only two tenderers of which one was disqualified in the technical bid, leaving the petitioner as the single valid bidder who quoted only marginally below the estimated rate. The Corporation has clearly acted in an arbitrary and unreasonable manner in taking the view that there would always remain a possibility of receiving a tender with a price bid of 10% below the estimated rate in future, as past experience showed only a lukewarm response to its tenders. On the contrary, the more the delay in execution of the work, the less the likelihood of receiving lower bids in view of the inevitable escalation of costs as time passes. Delay in execution of any project which is meant for the benefit of the public would itself be opposed to public policy.

9. There is also substance in the submission on behalf of the petitioner that once the Tender Committee had scrutinized the price bid of the petitioner and the Technical Bid Appraisal Committee declared the petitioner to be the successful bidder, there could be no occasion for the Chief General Manager, Patna (respondent no. 5) to issue the impugned letter as the final decision had to be taken by the superior authority, namely the Tender Committee. The respondents have also not controverted the stand of the petitioner that earlier, work had been given to one M/s Shanti Construction and Company on a price bid of 10% above the estimate rate whereas the petitioner's price bid of 0.78% below the estimated rate was not being accepted.

10. At this point, it will be proper to refer to the decision of the Hon'ble Supreme Court in the case of Haryana Urban Dev. Authority & Ors. vs. Orchid Infrastructure Developers P. Ltd., 2017(2) PLJR (SC) 26 relied upon by the respondents. It is submitted that no relief can be granted to the petitioner in a case of the present nature where there is no concluded contract in the absence of acceptance of bid and issuance of allotment letter. It

has been observed in paragraph-14 of the said judgment as follows:

¶14. It is a settled law that the highest bidder has no vested right to have the auction concluded in his favour. The Government or its authority could validly retain power to accept or reject the highest bid in the interest of public revenue. We are of the considered opinion that there was no right acquired and no vested right accrued in favour of

the plaintiff merely because his bid amount was highest and had deposited 10% of the bid amount.

11. It may be pointed out here however that the proposition discussed in the above judgment was in the context of a suit. The principles guiding judicial review require a writ court to test arbitrariness in action, and no judgment has been cited by the respondents to show that the discretionary power of the writ court is curtailed in absence of a concluded contract.

12. This Court is mindful of the limitations of judicial review and the scope for interference in matters relating to tender contracts. The writ court cannot substitute its own view merely because it disagrees with the view taken by the Corporation. However, the instant case is a fit one which calls for interference on grounds of arbitrariness and unreasonableness being manifest in the decision making process.

13. In the above circumstances, the impugned letter no. 3064 dated 06.10.2017 (Annexure-6) issued by respondent no. 5 is hereby quashed with a direction to the respondents to proceed in the matter in accordance with law.

14. The writ petition stands allowed. |