

(2021) 01 SHI CK 0123

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 3021 Of 2018, 363 Of 2019

Dalip Singh Rathore And Others

APPELLANT

Vs

Himachal Pradesh Housing And Urban Development Authority
And Others

RESPONDENT

Date of Decision : 08-01-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2021) 01 SHI CK 0123

Hon'ble Judges : Sandeep Sharma, J

Bench : Single Bench

Advocate : K.D. Shreedhar, Sameer Thakur, Ajay Vaidya, Shrawan Dogra,
Sameer Thakur, Tejasvi Dogra, Anoop Rattan, Sandeep Sen

Final Decision : Disposed Of

Judgement

Sandeep Sharma, J

1. Since both the petitions arise out of same tender process, same were clubbed together and are being disposed of vide this common judgment.

2. Precisely the facts relevant for the adjudication of the cases at hand are that the Himachal Pradesh Housing and Urban Development Authority

(hereinafter, "HIMUDA") in the year 2017 floated tenders vide Notice Inviting Tender (hereinafter, "NIT") dated 5.8.2017 for the work

"Construction of proposed Commercial Complex at Vikas Nagar (near Petrol Pump) Shimla HP (SH:- Construction of 102 Nos Shops, 7 Nos

Kiosk, Food Court, Offices, Coffee Shop, Stores, Multiplex halls, Parking floors for 217 Nos. Vehicles, development of land Scaping area, Boundary

wall including internal & external services, fire fighting works (internal & external), Electrical works (internal & external), HVAC work (air

Conditioning), BMS (Building Management System) and Lifts & escalator etc. (Eleven storied Pre-fabricated building using E.P.S. Technology)â?.

The estimated cost of tender was Rs.85,30,43,091/-. However, for the reasons best known to HIMUDA, aforesaid NIT was not taken to its logical

end, rather HIMUDA, vide NIT dated 4.10.2018 (page 17 of CWP No. 363 of 2019), invited e-tender for the aforesaid work, putting the estimated

cost of Rs.45,44,66,273/- only. Though, as per the terms and conditions contained in the NIT, contractors enlisted with the Government of Himachal

Pradesh and its agencies as well as neighbouring States of Punjab and Haryana and Chandigarh (UT) could participate in the aforesaid tendering

process of HIMUDA, but, subsequently, the successful bidder was required to get itself registered with HIMUDA under appropriate class before

signing the contract.

3. Respondent HIMUDA yet again did not take any action pursuant to aforesaid NIT dated 4.10.2018, rather issued another NIT for the same work

but eligibility condition of participation in tender came to be changed/modified. Pursuant to tender of November 2018, petitioners Dalip Singh Rathore,

M/s Level 9 Biz Pvt. Ltd. and respondent No.2 M/s Vasu Construction Company participated in the tender process alongwith other eligible

contractors. Technical bid submitted by the petitioner Dalip Singh Rathore primarily came to be rejected on the ground that he has only submitted

work done certificate qua civil engineering work and not qua the works executed by him, if any, under E.P.S. technology.

Technical Bids submitted by respondent No.2 Vasu Construction Company and other contractor M/s Level 9 Biz Pvt. Ltd., were accepted as a

consequence of which Financial Bids submitted by aforesaid parties were approved by the Tender Evaluation Committee (hereinafter, â??TECâ??)

Respondent Vasu Construction Company being lowest bidder became entitled for award of work in question. Petitioner in CWP No. 3021 of 2018,

being aggrieved on account of rejection of Technical Bid approached this court in the instant proceedings with following reliefs:

â??i) Quashing the Notice Inviting Tender issued by the respondent no. 1 at annexure P-5.

ii) Quashing the decisions of the respondent taken pursuant to the NIT at annexure P-5.

iii) For holding that condition of having carried out construction work in past using EPS technology and similar such conditions cannot be incorporated

as an essential eligibility condition of bidding for the work involved in annexure P-5, in view of submissions made in the writ petition.

iv) For holding that condition of having carried out 1 work of 80%, 2 works of 50% and 3 works of 40% of the estimated value of tender work could

not be diluted to just 1 work of 40% of estimated value of tender work in question.

v) For holding that the respondents cannot remove the general required condition from the tender that a bidder should not have Non Performing

Assets or disputes with banks, which was also there in the original tender at annexure P-1.

vi) For directing the respondent to produce the entire record of tender in question and bids made by the tenderers in the Hon'ble Court and to see the

compliance of conditions by those who have been declared as qualified as to the knowledge of the petitioners even those who are declared as qualified

do not satisfy the eligibility conditions and had not submitted the required documents including the Joint Venture documents at the time of submission

of the bids.â??

4. M/s Level 9 Biz Pvt. Ltd., which was declared successful in Technical Bid alongwith M/s Vasu Construction Company also filed CWP No. 363 of

2019, praying therein for rejection of Technical and Financial Bids of the successful bidder i.e. M/s Vasu Construction Company. Besides this, above

named contractor also prayed in its petition that after rejection of Technical Bid/ Financial Bid of M/s Vasu Construction Company, it be awarded

work being successful bidder.

5. Hon'ble Division Bench of this Court, while issuing notice in the petitions, directed HIMUDA to make available record of Vasu Construction

Company and Level 9 Biz Pvt. Ltd. alongwith their applications. On 1.1.2019, Hon'ble Division Bench having perused the record, observed that

â??The nature of bilateral agreement between Vasu Constructions and Birdshell, to which HIMUDA is not a party and there is no commitment by

Birshell by way of an agreement with HIMUDA, has also minutely been perused.â? Subsequently, the case at hand came to be clubbed with the

petition having been filed by M/s Level 9 Biz Pvt. Ltd. and, vide order dated

9.4.2019, Hon'ble Division Bench of this court stayed the allotment of tender till next date of hearing. After admission, both the matters came to be listed before this court for hearing.

6. On 22.9.2020, case at hand alongwith other petition came to be heard at length. Since during proceedings of the case, this Court found lot of discrepancies and illegalities committed by the HIMUDA, while evaluating tender in question, this Court deemed it necessary to cause presence of Chief Executive Officer, HIMUDA as well as Superintending Engineer, HIMUDA in the court. On 24.9.2020, this court again scanned record made available to this court in the presence of abovesaid officers and matter came to be adjourned for 25.9.2020, on the request of Mr. Ajay Vaidya, learned counsel for HIMUDA.

7. On 25.9.2020, while this court was in the process of hearing submissions made by Mr. Ramakant Sharma, learned Senior Advocate earlier appearing for respondent No.2 i.e. M/s Vasu Construction Company, Mr. Ajay Vaidya, learned counsel for respondent-HIMUDA, made available communication dated 24. 9.2020 addressed to him by Chief Executive Officer-cum-Secretary, HIMUDA, perusal whereof revealed that HIMUDA, after having reviewed the matter and perused the record of the case, has decided to cancel the tender in question. However, this court, after having taken aforesaid communication on record, passed following order on 25.9.2020:

â??Mr. Ramakant Sharma, learned Senior Counsel representing respondent No.2 i.e. Vasu Constructions Co., have completed his arguments, but before matter could be heard further, Mr. Ajay Vaidya, learned counsel for HIMUDA made available communication dated 24.9.2020, addressed to him by CEO-cum-Secretary, HIMUDA, perusal whereof reveals that HIMUDA has reviewed the matter after going through the records of the case and has proposed to cancel the tender in question. Though aforesaid communication is taken on record, but before considering aforesaid proposal made on behalf of HIMUDA, this Court deems it necessary to peruse the record so that responsibility of erring officials, if any, is fixed and it is ascertained whether matter needs to be investigated by an independent agency and as such, learned counsel representing HIMUDA is directed to make available complete records of the case on the next date of hearing.

Mr. Sandeep Sain, Executive Engineer, HIMUDA, who is present in the Court

categorically states before this court that letter dated 17.12.2018, whereby M/s Vasu Construction Company was given letter of intent to commence the work in question, was issued after having obtained necessary permission from CEO-cum-Secretary HIMUDA. He further states that letter dated 2.1.2019, whereby letter of intent issued in favour of the Vasu Construction Co., was withdrawn, was also issued by him under the instructions of CEO-cum-Secretary HIMUDA. Since CEO cum Secretary, HIMUDA, who had authorized Mr. Sandeep Sain, Executive Engineer, HIMUDA to write aforesaid communication has retired, let Mr. Sandeep Sain place aforesaid facts on record by way of an affidavit on or before the next date of hearing.

Ms. Anjoori Kapoor, Superintending Engineer (South), HIMUDA, who is also present in the Court states that report of preliminary inquiry placed on record along with reply filed by the HIMUDA (Annexure R1-C) is not the report, which was submitted by the committee constituted under her chairmanship, rather she by way of her report had informed the CEO cum Secretary HIMUDA that either tender of M/s Vasu constructions can be considered for awarding the work subject to clarification as suggested by the Committee in bid capacity, work done & J.V. agreement or the entire bid process may be cancelled and fresh bids be called. Let aforesaid facts be also placed on record by Ms. Anjoori Kapoor, Superintending Engineer (South), HIMUDA, by way of an affidavit, on or before the next date of hearing. While filing affidavit, as referred herein above, officer concerned may also place on record report submitted by her to the CEO cum Secretary, HIMUDA, copy whereof was made available to this Court during the proceedings of the case.

List on 12.10.2020.â??

8. Vide aforesaid order, this court also directed the officers involved in the evaluation of tender to file their respective affidavits. Pursuant to aforesaid order dated 25.9.2020, officers as detailed in the aforesaid order, filed their respective affidavits, which are on record. Besides above officers, Mr. Surender Vashisht, Superintending Engineer, North as well as Mr. Umesh Sharma, the then Chief Executive Officer-cum-Secretary, HIMUDA also filed their respective affidavits pursuant to the directions issued by this Court. This court after having scanned the records and perused various

affidavits filed by the officers as detailed in earlier part of judgment, deemed it necessary to constitute a committee to look into the illegalities and irregularities committed by members of Tender Evaluation Committee as well as officers manning responsible positions in HIMUDA and the allegations and counter-allegations made by the officers of HIMUDA against each other, and to fix the responsibility of such officers. But before any order in this regard could be passed by this Court, respondent HIMUDA, while seeking permission of this court to cancel the NIT in question, proposed to constitute a committee to look into the illegalities and irregularities, if any committed in the tender in question. However, this Court having realized that great injustice to public at large and public exchequer would be caused, in case the illegalities and irregularities, if any, committed by officer of HIMUDA are not brought to the fore and they are not held accountable for the same, passed a detailed order on 25.11.2020, constituting an enquiry committee. It would be apt to reproduce relevant portion of the order dated 25.11.2020 herein-below:

43. It is quite appreciable that the HIMUDA, at its own level has decided to constitute an internal Committee, as has been averred in the application, as referred to supra, but this Court, with a view to instill confidence in the general public and to ensure transparency in the system, deems it fit to Constitute an independent Committee to enquire into the tender process in question. Since this court lacks technical expertise in tender matters of higher magnitude as well as crimes related thereto, following committee is hereby constituted:

1. Chief Executive Officer-cum-Secretary, HIMUDA as Chairman
2. Inspector-General rank officer of State Vigilance and Anti Corruption Bureau to be nominated by Director-General, State Vigilance and Anti Corruption Bureau as Member

3. Engineer-in-Chief, Himachal Pradesh Public Works Department, as Member

4. Engineer-in-Chief, Irrigation and Public Health, Himachal Pradesh as Member

44. Aforesaid Committee, while working under the Chairmanship of the Chief Executive Officer-cum-Secretary, HIMUDA, would conduct an in-

depth enquiry in the tender process of commercial complex, Kasumpti as well as other aspects of the matter, as have been discussed in the instant

order, within a period of four weeks from the date of receipt of this order.

Committee, while fixing responsibility of officers found responsible for the lapses, would also suggest remedial measures/steps to prevent such lapses in tender/bidding evaluation in future, so that the system is improved for the times to come and no loss is caused to the public exchequer. The Committee, after conclusion of the enquiry, would submit its report in a sealed cover to this Court, enabling it to pass appropriate orders on the next date of hearing. Needless to say, the Committee, while conducting enquiry in terms of instant order, would not be influenced by the observations/findings, if any, made by this Court, in the instant order, with regard to illegalities and irregularities and conduct of any officer, rather, it would conduct enquiry on the basis of record available with HIMUDA as well as affidavits and counter affidavits filed by the officers in the case at hand, pursuant to directions issued by this Court. Decision, if any, with regard to recalling of tender, shall be taken after receipt of enquiry report from the Committee on the next date of hearing.

44. Chairman of the Committee would coordinate with all the members of the Committee, so that needful is done well within the stipulated time.

45. Registry of this court to supply copies of this order to the Chief Secretary to the Government of Himachal Pradesh, Director-General of Police and

the Chairman/members of the Committee constituted by this Court, immediately, enabling the Committee to take further action. Needless to say, the

Committee may apply to this court for the documents, especially the affidavits filed by the officers/officials of HIMUDA, which are on record of the

present writ petitions and Registry shall supply the same to the Committee, expeditiously.

List on 29.12.2020.â??

9. In the aforesaid order, this court categorically observed that the permission sought by HIMUDA for cancellation of tender would be considered

after receipt of report of enquiry committee.

10. Pursuant to order dated 29.11.2020, report of enquiry committee came to be placed on record, perusal whereof reveals that the aforesaid

Committee arrived at a definite conclusion that the officers responsible for evaluation of tender have not acted responsibly and fairly as a consequence

of which both, M/s Vasu Construction Company (respondent No.2 in CWP No. 3021 of 2018) and M/s Level 9 Biz Pvt. Ltd. (petitioner in CWP No.

363 of 2019) wrongly came to be declared eligible in the Technical Bid. Committee has concluded that since both the bidders were not technically qualified as per terms and condition of the NIT, tender needs to be cancelled. On 30.12.2020, this Court after having perused report of enquiry committee, which runs into 17 pages directed registry to make available copies of enquiry report to all the stake-holders and posted the matter for hearing on 4.1.2021.

11. Today, during the proceedings of the case, learned Counsel appearing for the petitioner(s) in both the petitions, stated before this Court that since all the irregularities and illegalities allegedly committed by HIMUDA while evaluating tender, save and except, deletion of condition with regard to NPA, have been accepted by enquiry committee, and pursuant to that recommendation has been made to cancel the tender, their petitions have been rendered infructuous and same may be disposed of accordingly. However, Ms. Shalini Thakur, learned Counsel appearing for the petitioner in CWP No. 3021 of 2018, further contended that since it is compulsory under CVC guidelines to incorporate condition of NPA, especially in tenders of this magnitude, necessary directions may be issued to HIMUDA to incorporate the same in tenders of higher magnitude. However, learned Counsel appearing for the petitioner in CWP No. 363 of 2019, states that his petition may be disposed of reserving liberty to lay challenge, if any, to the decision proposed to be taken by HIMUDA with regard to cancellation of tender.

12. Mr. Shrawan Dogra, learned Senior Advocate appearing for M/s Vasu Construction Company, while opposing proposal of HIMUDA to cancel the tender in question, vehemently argued that since the findings returned by enquiry committee with regard to eligibility of successful bidder i.e. Vasu Construction Company are totally contrary to record, great prejudice would be caused to respondent M/s Vasu Construction Company, in case tender in question is allowed to be cancelled at this stage. With a view to substantiate his aforesaid argument, Mr. Dogra, apprised this court that an application enclosing there with certain documents has been filed but same is not on record. Besides above, Mr. Dogra, learned senior counsel, while inviting attention of this Court to judgments reported in (2007) 14 SCC 1035, (2016) 15 SCC 272, (2019) 14 SCC 81, (2016) 15 SCC 272 and (2020) SCC Online 1035, contended that a writ court, while exercising power under Art.

226 of the Constitution of India, cannot question the terms and conditions of Notice Inviting Tender and also cannot interpret the terms and conditions of a tender.

13. There cannot be any quarrel qua the aforesaid proposition of law laid down in the judgments referred to by learned senior counsel appearing for

M/s Vasu Construction Company, as such, this Court, while proceeding to constitute the enquiry committee vide order dated 25.11.2020, has very

carefully concluded in para 33 of its order that it is the exclusive domain of the tender inviting authority to prescribe terms and conditions of the tender

and Court cannot question the terms and conditions incorporated in the tender document, unless the same are totally unreasonable and unexecutable.

But, definitely, this Court, while exercising power under Art. 226 of the Constitution of India, is within its power to ascertain whether the TEC has

evaluated the tender in question in light of the terms and conditions contained in the tender document or not and whether or not the same have been

interpreted with a view to benefit someone? Otherwise also, if order dated 25.11.2020 is read in its entirety, it nowhere reveals that this court directed

enquiry committee to conduct enquiry in terms of observations/findings given in the aforesaid order, rather, in para 44 of said order, this court

categorically observed that the Committee, while conducting enquiry in terms of instant order, would not be influenced by the observations/findings, if

any, made by this Court, in the instant order, with regard to illegalities and irregularities and conduct of any officer, rather, it would conduct enquiry on

the basis of record available with HIMUDA as well as affidavits and counter affidavits filed by the officers in the case at hand, pursuant to directions

issued by this Court.

14. Since the committee, after having perused the records, has arrived at a definite conclusion that on account of shortcomings/irregularities, tender in

question requires to be cancelled, nothing much is left for this court to adjudicate in these matters. Leaving everything aside, learned counsel for the

petitioners in both the petitions, being satisfied with the findings of enquiry committee as well as suggestions made therein, are not willing to prosecute

the cases further and have prayed to dispose of the same as having been rendered infructuous.

15. In view of aforesaid, both the petitions are disposed of as infructuous

alongwith all pending applications. Interim directions, if any, stand vacated.

However, liberty is reserved to the parties to file fresh petition(s), if any, if they still remain aggrieved.

16. However, this court, having taken note of the fact that the enquiry committee despite having found officers lacking in discharge of their duties, has

failed to fix responsibility and recommend action, criminal or departmental, deems it necessary to direct the Registry of this Court to register separate

proceedings, enabling this Court to pass appropriate orders so as to ensure strict compliance of recommendations given in the report of enquiry

committee and pass appropriate orders with regard to initiation of criminal/departmental proceedings against the erring officials. Registry is directed to

register separate proceedings and list the same on 17.3.2021. The order dated 25.9.2020, this judgment and the enquiry report submitted by the

committee constituted by this Court, shall form part of the fresh proceedings.