

**(2012) 11 PAT CK 0048**

**In the Patna High Court**

**Case No :** Civil Writ Jurisdiction Case No. 9155 of 2012

M/S Mother India Construction Private Limited

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

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**Date of Decision :** 29-11-2012

**Acts Referred:**

**Citation :** AIR 2013 Patna 63 : (2013) 1 PLJR 255

**Hon'ble Judges :** Jayanandan Singh, J

**Bench :** Single Bench

**Advocate :** Shashi Anugrah Narain, Mr. Shivendra Kishore, Mr. Jai Kishore Poddar and Mr. Rajeev Ranjan, in CWJC No. 9155 of 2012 and Mr. Shashi Anugrah Narain, Mr. Shivendra Kishore, Mr. Jai Kishore Poddar and Mr. Rajeev Ranjan, in CWJC No. 9273 of 2012, for the Appellant; Sunil kr. Mandal SC24, AOR No. 02995 and Mr. Bipin Kumar, AC to SC-24, AOR No. 03211 for the Respondent and Mr. Ashok Kumar Chaudhary, AOR No. 00973 and Mr. Raghwendra Kumar, AOR No. 03353 for the Intervener in CWJC No. 9155 of 2012 and Mr. Jaishankar Barnwal, SC-1, AOR No. 03166 in CWJC No. 9273 of 2012, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Honourable Mr. Justice Jayanandan Singh

1. These two writ applications have been filed by the same petitioner challenging the orders passed by the respondent Engineer-in-Chief canceling the decision of the Departmental Tender Committee in respect of two tenders on identical grounds. Except for the date of NIT and number, and few other dates, the facts are identical. Hence, the matters were taken up for hearing together for being disposed of by a common judgment. In both the writ applications the representation of the petitioner before the Principal Secretary of the Department was pending. Hence, this Court allowed time for its disposal while adjourning the matter for another date. The representations were disposed of and rejected by the Principal Secretary which were placed on record through I.A. applications filed in the respective cases with a prayer for liberty to challenge the same also

which were allowed in both the writ applications.

2. In the first writ application, the impugned orders are: (i) Annexure-1, i.e. the letter no. 1009 dated 13.04.2012 of Engineer-in-Chief addressed to the Chief Engineer, Water Resources Department, Siwan, informing him that the decision of Departmental Tender Committee dated 11.04.2012 was being annulled, as per the direction, in terms of clause 15.1 of Section 1, i.e. Instruction to Bidders (in short "the ITB Section") of Standard Bid Document (in short "the SBD") of the Water Resources Department of the Government of Bihar, for the reasons that (a) the last date of receipt of tender was 09.12.2011 and it was disposed of on 11.04.2012 i.e. beyond bid validity period of 120 days and Chief Engineer had not brought to the notice of the Departmental Tender Committee, in its meeting on 11.04.2012, that the validity of tender had expired and that (b) no application of the contractor was obtained for extension of his bid validity period and placed in the Tender Committee meeting; (ii) Annexure-2, the fresh NIT No. 1/2012-13 dated 24.04.2012 issued under the signature of the respondent Executive Engineer, Saran at Chapra, and (iii), with the permission of Court, Annexure-9, the order of Principal Secretary dated 18.07.2012 rejecting the representation of the petitioner. In the 2nd case, the impugned orders are (i) its Annexure-1, letter no. 1010 dated 13.04.2012, also issued by the Engineer-in-Chief addressed to the Chief Engineer, Water Resources Department, Muzaffarpur, annulling the decision of the Departmental Tender Committee on the same grounds; (ii), with the permission of the Court, Annexure-7, the fresh NIT No. 1/2012-13 dated 2.05.2012 issued under the signature of the respondent Executive Engineer, Flood and Water discharge Division, Lalganj (Vaishali) and (iii), also with the permission of Court, Annexure-8, the order of Principal Secretary dated 01.08.2012, rejecting the representation of the petitioner. In both the cases further prayer of petitioner is for a direction to the respondents to issue work order to it, in terms of the decision of the Departmental Tender Committee dated 11.04.2012 in its favour.

3. The short facts of the 1st case are that 3rd NIT No. 06/2011-12 was issued under the signature of the respondent Executive Engineer, vide annexure-4, on 23.11.2011 inviting tender for construction of black top road on Saran Embankment at right bank of river Gandak between 35.20-80.00 Kms and some other related work. The last date for receipt of tender was 09.12.2011 till 3.00 PM and technical bid was to be opened on the same day at 3.30 PM. The validity of tender was fixed as 120 days. In the 2nd case, NIT No. 2/2011-12, was issued under the signature of the respondent Executive Engineer, vide Annexure-3, on 12.11.2011 for construction of Bituminous road over Tirhut Embankment between 0 to 39.61 Kms on the left bank of river Gandak. The last date for receipt of bids in this case was also 09.12.2011 till 3.00 pm and the technical bid was to be opened on 3.30 PM on that very day. The period of bid validity in this case was also fixed as 120 days. In response to both the notices, petitioner submitted its tender papers in terms of the notices, as scheduled. The technical bids of all the applicants were opened on 09.12.2011 at 3.30 PM and the same

was placed before the Technical Bid Evaluation Committee on 21.02.2012, which found the technical bid of the petitioner and one party of Jharkhand only as successful in the technical bid evaluation, vide resolution of the Technical Bid Committee, annexed as Annexure-A with the counter affidavit of the Executive Engineer filed on 10.07.2012 in the 1st case. In the 2nd case the Technical Bid Evaluation Committee met on 23.12.2011 and, vide its resolution annexed as Annexure-A with the counter affidavit of the Executive Engineer filed in this case on 05.07.2012, the technical bid of the same two applicants were found successful. Accordingly, in the first case, the financial bid of the two successful applicants were opened on 22.02.2012 at 2.45 PM and, vide bid details annexed as Annexure-5 with the writ application in the first case, petitioner's financial bid was found lower to the other bidder. In the 2nd case the financial bid of the successful two bidders were opened on 06.02.2012 and in this case also the petitioner's bid was found lower. The results of the financial bid in both the matters were placed in the meeting of the Departmental Tender Committee dated 11.04.2012. In the meeting besides Principal Secretary, the concerned Chief Engineers, internal Financial Advisor and the Engineer-in-Chief, Water Resources Department, Patna participated. The Departmental Tender Committee examined the results of evaluation of the technical bid as well as financial bid evaluations and found that the petitioner's rate quoted in the first case was 6.86% lower than the scheduled rate (Annexure-6) and in the 2nd case it was 6.87% lower (Annexure-5). Accordingly, the Committee accepted the tenders of the petitioner and resolved to allot both the work to the petitioner. The respondent Chief Engineer of the Department was therefore directed to get certified the bank guarantees and take steps for issue of work orders in accordance with law. However, only two days after, the Engineer-in-Chief, who had participated in the meeting of the Departmental Tender Committee, issued the impugned orders contained in letter nos. 1009 and 1010 dated 13.04.2012 (Annexure-1 in both the cases), annulling the decision of the Departmental Tender Committee in the light of clause 15.1 of the ITB Section of the SBD. The grounds mentioned in the letter were that the last date for receipt of tender papers was 09.12.2011 and the tender was disposed of on 11.04.2012 i.e. beyond the bid validity period of 120 days. It was also mentioned that the concerned Chief Engineers had not pointed out in the Departmental Tender Committee meeting on 11.04.2012 that the validity period of tender of 120 days had already expired. It was also mentioned that no application from the contractor was obtained for extending his bid validity period and placed in the meeting. Thereafter, in the first case, a fresh tender notice was issued on 24.04.2012 on the same terms and conditions, copy of which is annexed as Annexure-2 with the writ application. Petitioner filed his representation before the Principal Secretary in both the cases, expressing its willingness in extending the tender validity period and requesting for allotment of work. The application having not been considered by the Principal Secretary, it has filed the present two writ applications with a prayer as mentioned above. In the 2nd case, a fresh tender notice dated 02.05.2012, with same terms and conditions, was published

in newspaper on 09.05.2012, which was brought on record through I.A. No. 3450 of 2012, with a prayer to challenge the same also, which I.A. was allowed by this Court by order dated 11.05.2012 and the said tender notice was stayed. In the first case also this Court, while granting time to learned counsel for the respondents to seek instructions and file counter affidavit, by order dated 09.05.2012, directed the respondents not to open the tenders pursuant to the tender notice dated 24.04.2012.

4. Mr. Narayan, learned senior counsel, appearing in both the cases for the petitioner, submitted that the validity of the tender of the petitioner for both the works and its acceptance on the ground of being lowest in rate is not at all an issue before this Court. He submitted that only question which arises for consideration by this Court in these two writ applications are whether the decision of the Departmental Tender Committee could be annulled by the Engineer-in-Chief alone and more so on the ground that the validity period of 120 days of the tender had expired and the petitioner's application extending the bid validity period of its bid had not been obtained. He submitted that provisions of clause 15.1 of the ITB Section of the SBD have only been invoked by the Engineer-in-Chief for annulling the decision of the Departmental Tender Committee. He submitted that no procedural irregularity or any error in any decision of any Committee was pointed out by the Chief Engineer for annulling the decision of the Departmental Tender Committee. Hence, the validity of entire procedure does not, at all, fall for consideration by this Court. He submitted that only question which this Court is called upon to consider in these cases is the true effect and import of clause 15.1 of the ITB Section of the SBD and the true letter and spirit for insertion the clause 15 in the ITB, laying down Bid Validity period for the bids submitted by the prospective bidders. He further submitted that it was the duty of the respondents to hold the meeting of the Departmental Tender Committee within time or to get the bid period extended from the petitioner in terms of clause 15.2, for which it was always ready. Hence, for this lapse of the respondents, petitioner cannot be made to suffer. He submitted that, in the first case, financial bid was opened on 22.02.2012 and, in the second case, on 06.02.2012. He submitted that there is no explanation on record as to why the meeting of the Departmental Tender Committee could not be held prior 11.04.2012 and why it could be held only on that date. He submitted that, if there was any plausible reason for not holding the meeting earlier, it could be taken as "exceptional circumstances" and the provisions of clause 15.2 could be invoked by the respondent. He submitted that, in any case, sub-clause 1 of said clause 15 was for bidders and it had nothing to do with the validity of the tender process and its finalization, unless and until, the bidder objected to consideration of his bid beyond 120 days without getting his consent for extending its validity. He submitted that, in the present two cases, petitioner was always ready to extend the validity period of its bids, which it had clearly conveyed to the Principal Secretary also through its representations.

5. Learned counsel for the respondents also did not dispute that the entire

dispute in both the cases revolves around the interpretation of the said clause 15 and its sub-clauses 1 and 2, and letter and spirit behind insertion of such a clause in the ITB Section of bid document. Counter affidavits have been filed in both the cases, but they hardly contain any relevant factual statement which requires independent notice by this Court, though the decision of Engineer-in-Chief has been supported on the ground of the same having rightly been taken in terms of the said clause 15.1 of the ITB Section of the SBD.

6. Petitioner has filed reply to the counter affidavit in which it has referred to clause 16.2 of the ITB Section also, taking a stand that the same also ought to have been considered by the Engineer-in-Chief together with the said sub-clauses 15.1 and 15.2.

7. In the first case an intervention application has also been filed by one party who had also submitted his tender papers in response to the said tender notice dated 23.11.2011. In the intervention application, as well as in its counter affidavit, the said party has taken a stand that the technical bid of the petitioner was wrongly accepted as valid and, therefore, its financial bid was wrongly considered. The said intervener has also supported the impugned decision of the Engineer-in-Chief and issue of fresh tender notice, claiming that he has submitted his tender papers in response to the fresh tender notice, whereas petitioner has not submitted its tender papers in response to it.

8. Petitioner has filed rejoinder to the said intervention application and counter affidavit in which it has stated that the intervener's technical bid had been rejected by the Technical Bid Evaluation Committee itself which he never challenged before any authority or before this Court nor did the intervener has challenged the decision of the Financial Evaluation Committee in favour of the petitioner and decision of the Departmental Tender Committee resolving for allotment of work to the petitioner. Hence, the intervener has no locus standi to intervene in the matter and contest. However, the intervention application was allowed by this Court by order dated 18.07.2012 for allowing him also to be heard in the matter.

9. The orders of the Principal Secretary in both the cases, by which the representations of the petitioner have been rejected, shows that he has found the decision of the Engineer-in-Chief as valid and justified in the light of the said clause 15.1 (mentioned as 15.2 in the order) of ITB Section of the SBD. With the example cited by the petitioner in its representation, the Principal Secretary has drawn distinction that in that case the tenderer had submitted an application informing his agreement to extend the validity of his bid from 120 days to 180 days, whereas petitioner had not submitted any such request and the tender of said case has still been cancelled.

10. Noticing the entire facts and circumstances of both the cases and the stand of the parties, appearing from the pleadings as well as from the impugned orders of the Engineer-in-Chief and also from the impugned decision of the Principal

Secretary, it is quite clear that the entire issue arises around the interpretation, effect and import of the two sub-clauses of clause 15 of the ITB Section of the SBD. Hence, it will be appropriate to reproduce herein itself the entire clause 15 of the ITB Section of the SBD for convenience of its appreciation:-

#### 15 Bid Validity

15.1 Bid shall remain valid for a period not less than 120 days after the deadline date for bid submission specified in Clause 20. A bid valid for a shorter period shall be rejected by the Employer as non-responsive. In case of discrepancy in bid validity period between that given in the undertaking pursuant to Clause 12.1 (v) and the Form of Bid submitted by the bidder, the latter shall be deemed to stand corrected in accordance with the former and the bidder has to provide for any additional security that is required.

15.2 In exceptional circumstances, prior to expiry of the original time limit, the Employer may request that the bidders may extend the period of validity for a specified additional period. The request and the bidders responses shall be made in writing or by cable. A bidder may refuse the request without forfeiting his bid security. A bidder agreeing to the request will not be required or permitted to modify his bid.

11. It may be pointed out that this clause 15, laying down period of "Bid Validity", has been inserted in Section 1 of the SBD, with heading as "Instruction to Bidders". The very heading of this section shows that it contains instructions to the bidders only and apparently no clause of this section has anything to do with any action of the "Employer." It appears to this Court that this clause 15 has been inserted in the ITB Section of the SBD for a definite purpose. It appears that, while inserting this clause 15 containing the two sub-clauses in the ITB Section of the SBD, the respondents were conscious of the fact that the process of acceptance of bids and allotment of work, consequent upon the receipt of tenders from the desirous applicants in response to tender notice, may take some time. The drafter of the ITB Section was also conscious that, in the meanwhile, there may be some price variations. Hence, the bidders, having quote their price in the tender papers submitted before the deadline for submission of bids as per clause 20 indicated in the tender notice, should not be allowed to back out, as and when they desired, while process for final decision was on. Hence in clause 15.1 it was laid down that the bids submitted by the applicants had to remain valid for a period of not less than 120 days after the deadline for bids submission as specified in clause 20. It was also made clear in the clause that, a bid, valid for a shorter period, was to be rejected as non-responsive. Therefore, if a bidder desired his bid to be considered on merits, he had to give an undertaking, in terms of clause 12.1 (v) of the ITB Section for its being valid for 120 days. The sub-clause also provides that in case of any discrepancy in the validity period in the undertaking given in terms of clause 12.1 (v) and the Form of bid submitted by the bidder, the Form of bid was to be deemed stood corrected in terms of the undertaking and the bidder was to

provide additional security as may be required. This 2nd sentence of the said sub-clause 1 shows that it was not open to the bidder to give an undertaking in terms of clause 12.1(v) in respect of the validity of his bid for less than 120 days and, in any case, his Form of bid submitted by him was to be treated as corrected and valid for that period, notwithstanding anything contrary indicated therein. The two sentences of sub-clause 1, read together, thus make it clear that they do not relate to validity of the tender process in any manner. The entire import of this condition, contained in the said sub-clause, is in respect of minimum period of validity of the bid submitted by a bidder in respect of which he has to give an undertaking in terms of clause 12.1 (v) for it being treated as valid for at least 120 days. The use of expression "not less than" in this sub-clause also makes it clear that it is open to a bidder to submit an undertaking for treating his bid as valid for any period beyond 120 days also, but he could not restrict its validity for less than 120 days from the deadline date, in any case. In this entire clause there is no role of the authorities inviting tender or of "Employer" and there is nothing in the clause restricting it from continuing the process of finalization of bid beyond 120 days. Of course, if the process continues beyond 120 days, it is the bidder only who has the liberty to take objection in respect of consideration of his bid without getting the validity extended by him in terms of sub-clause 2. The drafter of the ITB Section appears to have visualized the situation where, though bidder may have made his bid valid through an undertaking for 120 days, but the "Employer" may not be in a position to complete the entire process within that period. Hence, to cope up with that situation, it has been provided under sub-clause 2 that before expiry of the bid "Employer" may request the bidder for extension of the bid for specified additional period which had to be responded by the bidder in writing or by cable. In this sub-clause a bidder has been granted liberty to refuse the request for extension of the bid also without forfeiting his bid security, but a bidder agreeing to the request is not permitted to modify his bid. The language of this sub-clause makes it clear that the original rates quoted by a bidder in his financial bid, on the basis of prevailing price of the materials etc., was not open to any change by the bidder, if he agreed to extend the validity of the bid. It is also clear from the wordings of this sub-clause that in case, in view of price escalation or other factors, he did not find his offer economically viable for him any more it was open to him to refuse the extension without forfeiture of his security. Hence, under this sub-clause option was for the bidder to extend his bid on the same terms and conditions for specified period, or refuse and claim for refund of the security.

12. Thus, reading the two sub-clauses of said clause 15, makes it clear that the true import of clause 15 of ITB Section of the SBD is only in respect of delay in the process of the finalization of the tender and its resultant effect on a bidder. The two sub-clauses make it clear that the bid of a bidder had to remain valid for minimum 120 days, subject to any extension by him on request on the same terms and conditions. Nothing stops a bidder to allow his bid to be considered beyond 120 days also and, if necessary, inform the "Employer," even after 120

days, to treat it valid for the purpose and let the "Employer" complete the process and issue work order. The clause 15 only puts a restriction on the powers of the "Employer" to forfeit the security of the bidder if his bid is accepted after 120 days, but he refuses to receive the work order on the ground that he had not extended the bid. This clause does not provide for automatic invalidation of the bid of a bidder unless he refuses to extend it or raises an objection to its consideration after 120 days. If the bidder does not raise any objection in this regard or withdraws his bid or refuses to accept the decision of the "Employer" to allot work to him, the clause does not empower the "Employer" to treat the bid of the bidder as having expired and refuse its consideration on that count or to hold any final decision on the bid, taken after 120 days, as invalid. Sub-clause 2 provides for request by "Employer" to the bidder for extension of period of validity of his bid for specified additional period in exceptional circumstances. Thus provision has been made for extension of the validity of the bid by the bidder on request. This Court is of the view that, this opportunity to the bidder cannot be held as restricted only upon a request being made by the "Employer" in this regard and, if he finds that the process could not be completed within 120 days, it has to be treated as always open to him to communicate extension of his bid on his own to the "Employer," by writing or by cable, which has to be treated as valid extension of the bid for the specified additional period by the bidder in terms of the said sub-clause 2. This Court is of the view that the sub-clause 2 calls for its substantial compliance and not a technical compliance in the form of a request necessarily "prior to the expiry of the original time limit" and for the bidder to await, in all circumstances, for a formal request in this regard.

13. In the present two cases, the deadline of submission of tender, in terms of clause 20 of ITB Section of SBD was 09.12.2011. Counting from that day, the last date of 120 days falls on 07.04.2012. This Court finds that in both the cases financial bid was opened within that time and the petitioner was found to be the lowest bidder. In the first case, the meeting of the Financial Evaluation Bid Committee was held on 22.02.2012 and in the 2nd case it was held on 07.02.2012. Thereafter the respondents themselves delayed the matter and the Departmental Tender Committee finally met on 11.04.2012 i.e. four days after expiry of 120 days from the deadline for submission of bids. In the meeting, the Engineer-in-Chief was himself present, besides respective Chief Engineers, and it was presided over by the Principal Secretary of the Department, an authority higher to the Engineer-in-Chief. The delay of four days in holding the meeting of the Departmental Tender Committee was squarely on account of the respondents. In the meeting nobody objected to the consideration of the decision of the Technical Bid Committee and Financial Bid Committee and comparative consideration of the bids of the two successful bidders. In the circumstances, it was not open to the Engineer-in-Chief to annul the decision of the Departmental Tender Committee from his own level only two days after. Four days' delay was not such a serious matter that the entire process was required to be put at naught, resulting into wastage of public money and valuable time. If at all, the

Chief Engineer was of the view that there could be possibility of petitioner refusing the work order on account of this four days delay, he ought to have first asked the petitioner whether he was agreeable to extend his bid for these four days, beyond 120 days. This step, the Engineer-in-Chief was required to take in the matter in public interest and to save the valuable time and public money. Having himself participated in the meeting and endorsed the decision of allotment of work to the petitioner, it was not open to him to put the entire blame on the respective Chief Engineers of having not pointed out in the meeting of the Departmental Tender Committee that the meeting was being held four days beyond 120 days. In fact in the impugned order the Engineer-in-Chief has made an attempt to throw the blame on the respective Chief Engineers of his own fault.

14. In the circumstances, this Court finds that the decision of the Engineer-in-Chief to annul the decision of the Departmental Tender Committee was not legally correct and beyond his jurisdiction.

15. So far as intervener is concerned, he having not challenged the rejection of his technical bid and having not challenged the acceptance of the technical bid of the petitioner and having not filed any independent writ in this Court in this regard, is held, not entitled for his case to be entertained and considered in this matter.

16. As a result, these writ applications are allowed. The impugned communications of the Engineer-in-Chief, as contained in Annexure-1 of both the cases, are quashed. The consequential fresh tenders, as contained in Annexure-2 in the first case and Annexure-7 in the second case, are also quashed. Consequently the orders of the principal Secretary, rejecting the representations of the petitioner in both the cases are also quashed.

17. Learned senior counsel for the petitioner, on instructions, in very clear terms, has stated that the petitioner is ready to work at the old rate itself as quoted in its initial bid documents and finally accepted by the Departmental Tender Committee. He has further submitted, in very categorical terms, that the bid of the petitioner in both the cases may be treated as extended for the purpose by the respondents. In the circumstances, this Court directs the respondents to treat the validity of the period of the bid of the petitioner in both the cases as extended for the required period and issue work order to it. Since time has elapsed considerably, the respondents shall extend the period of completion of the work suitably which shall be specifically mentioned in the work order and, for the purposes of extending the period of completion of the work, they shall also take into account the fact that the work is of laying down a bituminous road on embankments which may get hampered during the rainy season.