

(2020) 05 PAT CK 0012

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 645 Of 2020

Uttar Pradesh Rajkiya Nirman Nigam Limited through Ved
Prakash Srivastav

APPELLANT

Vs

State Of Bihar And Others

RESPONDENT

Date of Decision : 18-05-2020

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2020) 05 PAT CK 0012

Hon'ble Judges : Ashutosh Kumar, J

Bench : Single Bench

Advocate : Y.V. Giri, Kundan Kumar, Lalit Kishore, Birju Prasad, Mrigank Mauli

Final Decision : Dismissed

Judgement

.....

Ashutosh Kumar, J",

1. Heard Mr. Y.V. Giri, learned Senior Advocate for the petitioner, Mr. Lalit Kishore, learned Advocate General for the State of Bihar as well as",

Respondent Nos. 3 to 7 and Mr. Mrigank Mauli, learned Advocate for respondent No. 8.",

2. The petitioner, Uttar Pradesh Rajkiya Nirman Nigam Limited, a company registered under the provisions of Indian Companies Act and a Uttar",

Pradesh Government Undertaking (ISO 9001-2000 Certified), has sought quashing of the decision of the Technical Tender Evaluation Committee of",

Bihar Medical Services and Infrastructure Corporation Limited, Patna (hereinafter referred to as the BMSICL), dated 24.12.2019, whereby the",

petitioner has been declared disqualified for Item No. 3 of the NIT No. BMSICL/Infra/22/2019 dated 10.06.2019, which decision was taken without",

appreciating the objections of the petitioner which was submitted on 19.12.2019 against the notice of disqualification dated 13.12.2019. By the,,,,,,

aforesaid order, the petitioner has been non-suited for not having fulfilled the criteria provided in Clause 4.5 (B)(a) of the concerned NIT. Additionally," ,,,,,,

it has been prayed that the concerned respondents be directed to open the financial tender, grant the award and execute the agreement with respect to" ,,,,,,

Item No. 3 of the NIT relating to construction of Government Medical College & Hospital and campus alongwith B.Sc. Nursing College, Sitamarhi," ,,,,,,

Bihar, comprising college building, 500 bedded hospital, hostels, faculty and staff residences and other supporting blocks etc. at Mouza - Murarpur," ,,,,,,

Block - Dumra in the district of Sitamarhi.,,,,,,

3. The reason for making such prayer, it has been asserted, is that the Technical Evaluation Committee has misconstrued the provision contained in" ,,,,,,

Clause 4.5(B)(a) of the concerned NIT and that the petitioner is the lowest bidder who has quoted a rate above 14.49% whereas the respondent No.,,,,,,

8 who has been found technically qualified and responsive to the NIT has quoted a rate about 17.24%.,,,,,,

4. The BMSICL, Patna had floated a tender with respect to six tender works including the work for which the petitioner has approached this Court." ,,,,,,

The NIT was issued on 10.06.2019, whereas the tender documents had to be uploaded by 29.07.2019. The physical copies of the tender papers were" ,,,,,,

required to be deposited on 31.07.2019. The date and time for opening of the tender was fixed on 31.07.2019 at 03:30 P.M. on the website,,,,,,

www.eproc.bihar.gov.in. The aforesaid date was extended to 19.11.2019.,,,,,,

5. It appears from the records and from the submissions advanced on behalf of the parties that the petitioner submitted its tender for Item Nos. 1, 2, 3," ,,,,,,

5 and 6. As noted above, the present writ petition is but confined to the work designated in Serial No. 3, i.e., the work relating to construction of" ,,,,,,

Government Medical College & Hospital and other buildings in the district of Sitamarhi.,,,,,,

6. It is the case of the petitioner that since the last date for uploading the tender document was extended to 19.11.2019, an authorized representative" ,,,,,,

of the company was designated for signing the bid documents and uploading the same. This designation of the officer concerned was by way of,,,,,,

power of attorney issued by the petitioner/company.,,,,,,

7. However, the Technical Tender Evaluation Committee found the tender papers of the petitioner with respect to all the items for which it had applied" ,,,,,,

to be non-responsive by its decision dated 13.12.2019 (Annexure-3 to the writ petition). The Committee did not accord sanction for opening the ,,,,,,

financial bid of the petitioner. By the aforesaid decision, it was also held by the Committee that the decision referred to above be uploaded on the" ,,,,,,

departmental website and if any objection to such decision is filed on or before 23.12.2019 by 05:00 P.M., such objection ought to be brought before" ,,,,,,

the Technical Committee for further consideration. ,,,,,,

8. The reason assigned for treating the tender papers of the petitioner to be non-responsive is that the Power of Attorney issued by the company in ,,,,,,

favour of Mr. V.P. Srivastav, Project Manager, authorizing him to submit tender papers was issued on 16.11.2019, but the affidavit regarding supply" ,,,,,,

of tools and plants (tie-up agreement) was found to be dated 18.09.2019. Such tie-up agreement, which was one of the essential conditions of the NIT," ,,,,,,

was not signed by any authorized representative of the petitioner/company. However, the uploaded documents, which included the tie-up agreement" ,,,,,,

referred to above, were signed by the authorized representative of the petitioner/company. Apart from this, in the physical/HARD copy submitted by" ,,,,,,

the petitioner, there was no signature of the authorized representative on the tie-up agreement dated 18.09.2019." ,,,,,,

9. Mr. Y.V. Giri, the learned Senior Advocate has drawn the attention of this Court to the fact that the decision of the Tender Evaluation Committee" ,,,,,,

dated 13.12.2019 was uploaded on the official website of BSMICL on 18.12.2019, i.e., after five days of the decision in that regard, leaving the" ,,,,,,

petitioner and other non-responsive bidders with only three working days for submission of their explanation/objections. ,,,,,,

10. However, the petitioner/company submitted its explanation/objection on 19.12.2019, but the same was again rejected vide decision of the Technical" ,,,,,,

Tender Evaluation Committee dated 24.12.2019. ,,,,,,

11. Mr. Giri, while challenging the decision of the Technical Evaluation Committee referred to above has submitted that according to the condition in" ,,,,,,

the Clause 4.5(B)(a) of the NIT, a tenderer was required to obtain/procure mobilization advance or necessary tools/machines and equipments from" ,,,,,,

any third person. The petitioner/company had an agreement with M/S Badri Ray

and Company, Station Road, Dibrugarh, Assam promising and",,,,,,

affirming that the relevant plants and machinery required for executing the work of the concerned NIT shall be made available on long term lease/hire,,,,,,

basis to the petitioner/company in case the work is awarded to them.,,,,,,

12. The aforesaid agreement was brought on record by the petitioner/company by way of an affidavit of one Arun Kumar Ray, partner and power of",,,,,,

attorney holder on behalf of M/S Badri Ray and Company. The details of the machinery/tools/equipments have also been specified in the aforesaid,,,,,,

affidavit. The assertion of the petitioner is that such an affidavit is not an agreement, but an ex-part affidavit/undertaking for providing machine on",,,,,,

lease or hire basis. Since the last date for submission of tender was 19.11.2019 and an officer of the company was designated by way of power of,,,,,,

attorney on 16.11.2019, such power of attorney holder could not have countersigned the tie-up affidavit dated 18.09.2019. However, the tender papers",,,,,,

which were uploaded on behalf of the petitioner/company which also included the tie-up agreement dated 18.09.2019, was signed by the designated",,,,,,

Project Manager of the petitioner/company. The hard-copy which was received by the aforesaid designated officer of the company was also,,,,,,

submitted physically, but it could not be signed inadvertently.",,,,,,

13. In this context, it has been averred that the NIT clearly prescribed that the entire bid shall be considered through E-Procurement. It was thus not",,,,,,

justified for the Technical Tender Evaluation Committee to have found the petitioner's papers to be non-responsive, only because the physical",,,,,,

copy of one of the documents, viz., the tie-up agreement dated 18.09.2019 could not be signed by the designated officer. The NIT did not prescribe",,,,,,

any condition of non-suiting the tenderers/bidders in case of any discrepancy in the documents uploaded and the hard-copy submitted.,,,,,,

14. The other challenge to the decision of the Technical Tender Evaluation Committee is that it has not followed the directions issued by the Road,,,,,,

Construction Department, Government of Bihar, Patna which is binding on all the Works Departments and Government tenders, requiring the meeting",,,,,,

Descript

ion of Items",,,Requirement,,Availability Proposals,,Remarks (from

whom to be

purchased)

,No.,Capacity,"Owned/Leased/ to be

Procured",Nos./Capacity,Age/Condition,

1,2,3,4,5,6,7

case. (Refer to Sita Ram Goel v. The Municipal Board, Kanpur and Ors. : (1958) SCC 1036)." ,,,,,,

28. It was vehemently argued that the petitioner has not at all complied with the requirements of Clause 4.5(B) (a) of the instruction to the bidders of ,,,,,,

the concerned NIT. The petitioner has not demonstrated that it owns any of the key and critical equipments nor is there any evidence of the ,,,,,,

petitioner/company having entered into any lease agreement showing procurement of key and critical equipments. What has been relied upon by the ,,,,,,

petitioner is only an affidavit sworn by one Arun Kumar Ray that the equipment and machinery shall be provided to the petitioner/company when ,,,,,,

desired and demanded. Thus, the petitioner/company cannot be said to have owned, leased or having procured against mobilization advances and the" ,,,,,,

necessary/critical equipments. The affidavit of Arun Kumar Ray, therefore, is absolutely insufficient and, therefore, it has not been accepted by the" ,,,,,,

Technical Tender Evaluation Committee. ,,,,,,

29. It was further pointed out by Mr. Mrigank Mauli, learned Advocate that there is a self-admission of the petitioner/company that the affidavit" ,,,,,,

referred to above is not an agreement. The failure of the petitioner/company to initiate the construction work of Ramjanki Medical College & Hospital," ,,,,,,

Samastipur has also been cited by respondent No. 8 in support of the contention that the petitioner/company is most non-suited for being entrusted ,,,,,,

with any big project. In the aforesaid work also, the same person, viz., Arun Kumar Ray, a partner of M/S Badri & Company, Dibrugarh, Assam had" ,,,,,,

sworn an affidavit in compliance of Clause 4.5(B)(a) of the concerned NIT. ,,,,,,

30. The fact that the petitioner/company has requested to return the earnest money deposit pertaining to the other works for which also it was held to ,,,,,,

be non-responsive, has been reiterated by respondent No. 8 and it has been argued that the petitioner, in that event, would be estopped by its conduct" ,,,,,,

to challenge the decision of the Technical Tender Evaluation Committee with respect to the present work which in no way different from the other ,,,,,,

works for which the petitioner/company had participated in the bid. As a matter of information, it has been pointed out on behalf of respondent No. 8",,,,,,

that it has quoted 14.49% above the par and not 19.01% as informed by the petitioner/company. Whatever may be the case, it has not been urged, the",,,,,,

price difference of the tenderers cannot be, the only consideration for choice of the tenderer. There is no arbitrariness in the decision making process",,,,,,

and the work order has been issued to respondent No. 8 on being declared as L-1.,,,,,,

[Refer to M/S Omega Elevators v. The Union of India and Ors. (decision dated 04.05.2020 passed in C.W.J.C. No. 5607 of 2020)].,,,,,

31. In order to appreciate the contention of the parties, it would be necessary to refer to Clause 4.5(B)(a) of the NIT which is as follows:",,,,,,

4.5 (B) Each bidder should further demonstrate :,,,,,

(a) availability (either owned or leased or by procurement against mobilization advances) of the following key and critical equipment for this work:,,,,,

(emphasis provided),,,,,,

Based on the studies, carried out by the Engineer the minimum suggested major equipment to attain the completion of works in accordance with the",,,,,,

prescribed construction schedule are shown in the Availability of the testing equipment required for establishing field laboratory to perform mandatory,,,,,

tests e.g. those stated in Appendix to ITB.,,,,,,

The bidders should, however, undertake their own studies and furnish with their bid, a detailed construction planning and methodology supported with",,,,,,

layout and necessary drawings and calculations (detailed) as stated in clause 4.3(1) above to allow the employer to review their proposals. The,,,,,

numbers, types and capacities of each plant/equipment shall be shown in the proposals along with the cycle time for each operation for the given",,,,,,

production capacity to match the requirements.,,,,,,

(b) availability for this work of personnel with adequate experience as required; as per,,,,,

(c) liquid assets and/or availability of credit facilities of no less than amount indicated in Appendix (Credit lines/letter of credit/certificates from Banks,,,,,

for meeting the funds requirement etc.-usually the equivalent of the estimated cash flow for 3 months in peak construction period.),,,,,,

32. From a reading of the aforesaid clause in the NIT, it is evident that the bidder

is required to demonstrate that it either owns or has leased or has" ,,,,,,

procured against mobilization advances the key and critical equipments for the work based on the studies, carried out by the Engineer and the" ,,,,,,

minimum suggested major equipments to attain the completion of the work in accordance with the prescribed construction schedule. In the event of ,,,,,,

the petitioner accepting that the affidavit in question is not a bilateral agreement but a personal affidavit of the maker, the Technical Tender Evaluation" ,,,,,,

Committee cannot be faulted for non-suiting the petitioner/company for being non-responsive to the aforesaid agreement. An affidavit of one of the ,,,,,,

partners of a company does not serve the requirement put-forth in Clause 4.5(B) (a). There could be only one purpose behind incorporating the ,,,,,,

aforesaid clause in the NIT, viz., testing the capacity of a tenderer to undertake and complete the construction work." ,,,,,,

33. The decision of the Technical Tender Evaluation Committee, on further scrutiny, does not appear to be bad in the eyes of law as the" ,,,,,,

petitioner/company and all others who were held to be non-responsive on technical grounds were given an opportunity to explain their cause and only ,,,,,,

thereafter, a decision has been taken reiterating the earlier decision of disqualification of the petitioner/company dated 13.12.2019." ,,,,,,

34. There also does not appear to be any vagueness in the requirement as envisaged in Clause 4.5(B)(a) of the NIT and, therefore, it ought to have" ,,,,,,

been strictly complied with for being held to be technically responsive. ,,,,,,

35. A tenderer/bidder participating against a tender notice has no other right except the right to equality and fair treatment in matters of evaluation of ,,,,,,

competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from hidden agenda. There is ,,,,,,

also no obligation to accept any one of the tenders, even the lowest tender. The decision to enter into any contract is solely with the authority issuing" ,,,,,,

the tender. (Refer to Rishi Kiran Logistics Pvt. Ltd vs. Board of Trustees of Kandla Port Trust & Ors. : (2015) 13 SCC 233 and State of Jharkhand ,,,,,,

and Ors. vs. M/S CWE-SOMA Consortium : (2016) 14 SCC 172). ,,,,,,

36. While exercising the powers of judicial review in respect of contracts entered into on behalf of the State, the Courts have to be cautious and have" ,,,,,,

to be focused on finding out whether there has been any infirmity in the decision making process. Any interference by Courts of law has to be on the ,,,,,,

grounds of the decision making process being unreasonable, irrational, arbitrary or being violative of Article 14 of the Constitution of India. (Refer to",,,,,,

Sterling Computers Ltd. v. M & N Publications Ltd. : AIR 1996 SC 51; Tata Cellular v. Union of India : AIR 1996 SC 11; Raunaq International Ltd.,,,,,,

v. I.V.R. Construction Ltd. AIR : 1999 SC 393; Air India Ltd. v. Cochin International Airport Ltd. : [2000] 1 SCR 505; Association of Registration,,,,,,

Plates v. Union of India : AIR 2005 SC 469; B.S.N. Joshi v. Nair Coal Services Ltd. : AIR 2007 SC 437; Jagdish Mandal vs. State of Orissa and Ors.,,,,,,

: [2007] 14 SCC 517; Siemens Public Communication Networks Pvt. Ltd. and Ors. vs. Union of India (UOI) and Ors. : (2008)16 SCC 215; Afcons,,,,,,

Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. and Ors. : (2016) 16 SCC 818; Municipal Corporation, Ujjain and Ors. Vs. BVG India",,,,,,

Limited and Ors. : (2018) 5 SCC 462 and The Bharat Coking Coal Ltd. and Ors. Vs. AMR Dev Prabha and Ors. : MANU/SC/0317/2020),,,,,,

37. After having perused the decision of the Technical Tender Evaluation Committee and noting the case laws with regard to the scope of judicial,,,,,,

interference in matters of Government contracts, I find that the petitioner had challenged the decision of the Technical Tender Evaluation Committee" ,,,,,,

dated 13.12.2019 by way of a writ petition which was dismissed as withdrawn. The present writ petition has been filed seeking quashing of the order,,,,,,

dated 24.12.2019, which is only a sequel order and not the basic order which has been passed on 13.12.2019. The writ petition referred to above was",,,,,,

directed against the petitioner/company being declared non-responsive for all the five group of works that it had participated in. The only reason for,,,,,,

the petitioner/company to have limited the present challenge to the work of construction of Government Hospital in Sitamarhi and not the other groups,,,,,,

for which it had participated is that in the present work, the petitioner's tender is the lowest. The aforesaid ground appears to be rather specious",,,,,,

and not acceptable as there is no proof of the fact that the petitioner/company had offered the lowest rate or lower than respondent No. 8. The,,,,,,

financial bid of the petitioner/company had never been opened and, therefore, any statement in that regard is of no consequence." ,,,,,,

38. Assuming but not admitting that on a post-decisional analysis, the petitioner/company found his tender to be lowest (lower than respondent No. 8),",,,,,,

then also it would be of no avail to him as the rate of a tender is not the only relevant consideration for the tender issuing authority. There is no right to,,,,,,

any bidder, be he the lowest or the highest. As noted above, all that is required to be seen is whether there is any mala fides or arbitrariness in the" ,,,,,,

decision making process of the tender authority. In that view of the matter, it would be difficult to accept the proposition of the petitioner/company that" ,,,,,,

the dismissal of the earlier writ petition would not be a bar for entertaining of the present writ petition.,,,,,,

39. On other aspects also, the decision of the Technical Tender Evaluation Committee does not seem to falter. Demonstrating the capability of a" ,,,,,,

bidder to mobilize its resources for key and critical equipments for undertaking and concluding the work is an essential condition of a contract and the ,,,,,,

same cannot be tinkered with. There is no violation of any public policy and there is no vagueness in the clause on which the petitioner/company has ,,,,,,

been found to be non-responsive. An affidavit of a partner of a company assuring the availability of the key and critical equipments with it and the ,,,,,,

willingness to deploy the same on hire purchase basis or lease to the petitioner, in case a contract is awarded to it, is not sufficient to meet the" ,,,,,,

requirement of Clause 4.5(B)(a). There is no agreement between the petitioner/ company and the company of which Mr. Arun Kumar Ray is a ,,,,,,

partner, who has only sworn a personal affidavit." ,,,,,,

40. Absence of signature of any authorized representative of the petitioner/ company on the aforesaid affidavit or absence of signature of the ,,,,,,

authorized representative of the petitioner on the physical/hard copy of the aforesaid affidavit may not be of much relevance but the affidavit of Arun ,,,,,,

Kumar Ray itself, when seen in the perspective of testing the capability of the petitioner/company as a bidder, falls completely short of the required" ,,,,,,

standard.,,,,,,

41. In the estimation of this Court, it would have been highly unsafe and not prudent for the Technical Evaluation Committee to have accepted such an" ,,,,,,

affidavit as an evidence of the capability of a bidder.,,,,,,

42. That the petitioner has not been able to deploy sufficient plants and equipments in some other tender in which also there was a similar assurance ,,,,,,

from Mr. Arun Kumar Ray of M/S Badri & Company does not appear to have weighed with the Technical Tender Evaluation Committee and," ,,,,,,

therefore, even if it has been taken as a ground against the contentions raised on behalf of the petitioner/company by the respondents, it would not" ,,,,,,

make the decision of the Technical Tender Evaluation Committee suspect in terms of the decision of the Supreme Court in Mohinder Singh Gill &,,,,,,

Anr. v. Chief Election Commissioner, New Delhi and Ors. : (1978) 1 SCC 405, which has ruled that if an order is based on certain grounds, the" ,,,,,,

validity of those grounds have to be judged and the correctness of the decision cannot be made to hinge on other factors which are not in the recorded,,,,,,

reasons of the order which has been challenged.,,,,,,

43. It is a matter of great public interest that public money be expended properly, as in the present case which concerns the construction of Medical" ,,,,,,

College & Hospital, the public would be directly interested in timely completion of the contract so that medical services become available to the public" ,,,,,,

expeditiously. Keeping this in mind also, the order challenged in the present writ petition does not appear to be bad in the eyes of law." ,,,,,,

44. Thus, for the reasons aforestated, viz., the petitioner/company not challenging the basic order of disqualification from participating in the financial" ,,,,,,

bid, the decision being fair and not arbitrary, discriminatory or violative of Article 14 of the Constitution of India and the limited scope of judicial" ,,,,,,

interference in matters of Government contracts, this Court finds that the claim of the petitioner/company is absolutely untenable and is not required to" ,,,,,,

be acceded to.,,,,,,

45. This writ petition therefore fails and is, accordingly, dismissed." ,,,,,,