

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7054 of 2020

M/s B. N. Enterprises, through its partner cum Authorized Signatory, Bhola Nath Prasad, aged about 58 years, Male, son of Late Lakhi Chand Prasad, resident of Village Nechua Jalalpur, P.S. Kuchaikote, District Gopalganj, Bihar.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Bihar State Tourism Development Corporation Ltd. (A Government of Bihar undertaking), Kautilaya Hotel, Birchand Patel Path, Patna, Bihar, through its Managing Director.
3. The Managing Director, Bihar State Tourism Development Corporation Ltd. (A Government of Bihar undertaking), Kautilaya Hotel, Birchand Patel Path, Patna, Bihar.
4. The Chief Engineer, Bihar State Tourism Development Corporation Ltd. (A Government of Bihar undertaking), Kautilaya Hotel, Birchand Patel Path, Patna, Bihar.
5. The Executive Engineer, Bihar State Tourism Development Corporation Ltd. (A Government of Bihar undertaking), Kautilaya Hotel, Birchand Patel Path, Patna, Bihar.

... .. Respondent/s

Appearance :

For the Petitioner	:	Mr.Prabhat Ranjan, Advocate
For the State	:	Mr.Ajit Kumar, G.A.-9
For the Corporation	:	Mr.Abhimanyu, Advocate

CORAM: HONOURABLE MR. JUSTICE MADHURESH PRASAD
ORAL JUDGMENT

Date : 28-08-2020

Heard learned counsel for the petitioner and the learned counsel for the Bihar State Tourism Development Corporation as well as the learned counsel for the State.

2. A Notice Inviting Tender (NIT) was issued on 15.01.2019. The advertised work was for development of BABA Ganinath Temple Mahnar, Vaishali at an estimated cost of



Rs.762.65 lacs. The duration of the contract was 24 months, subsequently modified to 18 months under a Corrigendum dated 04.02.2019. Initially five bidders participated in the tender process. Three stood qualified. Technical bid of the remaining two bidders, including that of the petitioner, was declared responsive. On 31.07.2019 without assigning any reason, the tender process was declared cancelled. Re-tender was notified on the same day having the same terms and conditions with respect to estimated cost and duration of the contract being 18 months. Bid validity in terms of the NIT was to expire on 30.01.2020. Technical Bid Evaluation Committee scrutinized the technical bid of three bidders.

3. The petitioner's assertion is that only his technical bid was the single tender found responsive, the financial bid was opened. It is his assertion that the rates quoted by the petitioner was below the Schedule of Rates (hereinafter referred to "SOR") and that he was declared L-1.

4. Apprehending lapse of bid validity period on 03.01.2020, the petitioner expressed his intention for extension of bid validity for 30 days with a request to finalize the bid process within the extended time.

5. It is submitted by the petitioner's Counsel that thereafter also he has been requesting extension of bid validity



period. Till date, the petitioner is more than willing to execute the works on the rates tendered by him in response to the tender notice dated 31.07.2019. In the aforesaid circumstance, he filed the instant writ petition seeking a direction upon the respondent-authorities for issuance of work order and also for disposal of his request for extension of bid validity period, lastly made on 01.02.2020 (Annexure 6).

6. During pendency of the instant proceedings, an office order contained in Notification dated 07.07.2020 has been issued by the Chief Engineer based on the notification dated 30.09.2016 as there was a single tender in respect of the NIT dated 31.07.2019. It was decided that a fresh tender process should be initiated after a reassessment of the work based on a revised estimate as per new SOR. This office order dated 07.07.2020 has been assailed by the petitioner by filing I.A. No.1 of 2020.

7. It is submitted by the petitioner's Counsel that the authorities had opened the financial bid of the petitioner in response to NIT dated 31.07.2019. By doing so, secrecy and sanctity of the bid process was lost. The bid of the petitioner was known to all and therefore the authorities could not be permitted to cancel the tender process in this manner, to the prejudice of the petitioner. It is also submitted that cancellation, if at all could have



been done only by assigning reasons. His further submission is that if fresh tender process is initiated, based on a fresh estimate and based on the revised SOR, the cost of the work would increase. Such increase would not only be prejudicial to the petitioner, but also to the public interest as the State exchequer would be burdened with a higher cost for the same work, which the petitioner is ready and willing to execute on the amount tendered in response to the NIT dated 31.07.2019.

8. *Per contra*, State Counsel submits that the petitioner had initially approached this Court with a prayer for finalizing the tender process dated 31.07.2019 and award of work order in connection with the said tender. The office order dated 07.07.2020 shows that now entire process has been abandoned. A decision has been taken to proceed for tender process afresh after a revised estimate based on new revised SOR. The office order dated 07.07.2020 is a fresh cause of action for which the petitioner is required to file writ petition afresh. Assailing the same by filing an I.A. should not be allowed as it would change the nature of the case and introduce a fresh cause of action. It is also submitted that the actions have been taken are in public interest, which would best be served by going for development of the temple on basis of a new revised SOR. If the authorities were to have the work



executed as per the earlier SOR, quality of work would be adversely affected in view of price rise of all material and service inputs in the meantime. The clear and specific mandate of the Finance Department under the Notification dated 30.09.2016 (Annexure 8) was that in case of a single tender, there was a requirement to go for a re-tender.

9. The petitioner's Counsel has placed reliance on an earlier judgment of this Court in CWJC No.8025 of 2016 (Annexure 9) in the case of *M/s Parmar Enterprises Vs. The State of Bihar & Ors.* as also a judgment of this Court in CWJC No.6293 of 2013 in the case of *M/S Technofab Engineering Ltd. Vs. The Bihar State Power (Holding) Company Limited & Ors.* Page 30 of the judgment of this Court in the case of *M/S Technofab Engineering Ltd. (supra)* has been heavily relied upon by the petitioner. The same reads as follows :

“The said action also does not appear to be in public interest. As an identical tender as the Part-A portion of the previous tender has now been floated after more than eight months of the previous tender, there is every likelihood that the margin of inflation may lead to higher bids. This Court also finds that all the actions taken by the respondents upon opening the financial bids of the petitioners may work serious injustice upon them. The details of the entire bidding process of the tenders of the petitioners are now open before every one and thus the sanctity of entire



process is destroyed by going for a fresh bidding on exactly the same terms and conditions without any variation at all, that too without any justifiable reasons for the same.”

10. This Court has considered the submissions advanced on behalf of the parties. There is no dispute that the mandate of the Finance Department contained in Notification dated 30.09.2016 applies to the petitioner. There is also no dispute that the same mandates for a re-tender in case of a single tender in response to NIT.

11. The three objections raised by the petitioner's Counsel are, therefore, being dealt with by this Court in the aforesaid background.

12. As regards secrecy and sanctity being lost on account of opening of the petitioner's financial bid, this Court would observe that the apprehension of the petitioner is wholly unfounded. The fresh tender process initiated under the office order dated 07.07.200 is to be initiated after preparing a revised estimate on basis of current/revised SOR. This is not a case where on the basis of same SOR and estimate, which formed the basis of NIT dated 31.07.2019, fresh tender process is being initiated. If fresh bidding was invited on the same terms and conditions without any variation, the petitioner might have the opportunity to



allege that since his technical and financial bids stand revealed to all, he would be prejudiced by a re-tender. The office order dated 07.07.2020 clearly records for initiating tender process afresh, and only after a revised estimate is prepared based on current/new SOR. It is not a case where fresh tender process is to commence based on the same SOR based on which the petitioner had submitted his earlier bid in response to NIT dated 31.07.2019. Disclosure of his financial bid based on outdated and discarded SOR would in no way prejudice his participation in the fresh tender process under order dated 07.07.2020 based on new and revised SOR. The issue of prejudice to the petitioner on account of disclosure of his financial bid is therefore wholly misconceived and baseless.

13. The Notification dated 30.09.2016, issued by the Finance Department, which mandates for re-tender in case of single tender being received, is the reason for issuance of the office order dated 07.07.2020. The respondents therefore have come out with a valid reason, based on which the office order dated 07.07.2020 has been issued. Such reason satisfies the scrutiny of this Court exercising judicial review under Article 226 of the Constitution of India.



14. It may also be noted that the petitioner was himself conscious that bid validity period has lapsed long back on 30.01.2020. No extension of bid validity period was ever granted, in spite of the petitioner's repeated requests. The petitioner therefore was conscious that bid validity period has lapsed. This aspect of the matter, coupled with the reasons assigned in the office order dated 07.07.2020, does not leave any room for the petitioner to raise a grievance that cancellation of his earlier tender initiated under NIT dated 31.07.2020 and decision to go for a fresh tender process was in any way unreasonable, arbitrary or to his prejudice.

15. Regarding public interest, this Court would observe that the same would best be served by going for tender process afresh after preparing revised estimate based on the new SOR. This would ensure that the work of development of the temple in question could be discharged properly, based on current prevailing SOR to ensure qualitative execution of the work. Due to lapse of time and lapse of bid validity period, the earlier estimate based on earlier SOR had become irrelevant. If the works are to be re-tendered on the earlier SOR and estimate prepared on the basis of the same, surely the estimate would not provide for best execution of the work at the current rates having regard to whatever price



hike or cost variation, that may have occurred in the meantime. By going for a fresh estimate based on current SOR, the authorities are furthering the cause of best development of the temple in question, which would best serve the public interest.

16. The two judgments of this Court relied upon by the petitioner's Counsel have no application to the facts of the instant case.

17. In the case of *M/s. Parmar Enterprises* (supra), this Court has interfered with the fresh re-tender process because the amendment to the Bihar Financial Rules based on which the decision has been taken in that case was subsequent to the tender in question. It is in this context that this Court held that "any tender would be covered by the Rules prevailing at the time the notice inviting tender was issued". That is not the case here.

18. The decision of this Court in the case of *M/S Technofab Engineering Ltd.* (supra) clearly notices the fact that the fresh bidding (tender process) was on exactly the same terms and conditions without any variation at all. It is in this circumstance that this Court held that fresh tender process after opening of the single tender financial bid of the petitioner therein would operate to his prejudice. That is not the case here. In the



instant case, the fresh tender process in terms of the F.D. Notification dated 07.07.2020 was to be undertaken by preparation of revised estimate. The entire basis for preparation and submission of bids in the fresh tender process had changed so as to render the earlier bid submitted by the petitioner to be obsolete and antiquated. Disclosure of petitioner's financial bid based on earlier estimate as per old SOR, therefore, would cause no prejudice to the petitioner.

19. Both the judgments relied upon by the petitioners are distinguishable on facts and do not help the petitioner in any manner.

20. The scope of this Court exercising jurisdiction under Article 226 of the Constitution of India is confined to the concept of judicial review. By now the law is well settled. The celebrated judgment of the Apex Court is in the case of *Tata Cellular Vs. Union of India*, reported in (1994) 6 SCC 651, wherein inherent limitation in exercise of such powers was stated by the Apex Court. When the State is making endeavours to get the best person, best quotation and ensure qualitative execution of the works, it must be able to exercise its right to choose. The concept of free play in the joints, being a concomitant to the exercise of discretion by the authority in contract matters, was reiterated and recognized



by the Apex Court. It is only when the power of choice is used for collateral purposes that it offends Article 14. The Apex Court has clearly stated that mere power to choose cannot be termed as arbitrary. The long line of cases thereafter, including the judgments of the Apex Court in the case of **Raunaq International Ltd. Vs. I.V.R. Construction Ltd.**, reported in (1999) 1 SCC 492, in the case of *Jagdish Mandal Vs. State of Orissa*, reported in (2007) 14 SCC 517, and more recently in the case of *Siemens Aktiengesellschaft & Siemens Ltd. Vs. DMRC Ltd.*, reported in (2014) 11 SCC 288, wherein limited scope of judicial review under Article 266 in contractual matters has been reiterated. The limits have been imposed to allow the Government to exercise choice *bona fide* and having commercial considerations, so as to best serve the public interest. Merely because in this case, instead of awarding the work order to the petitioner, the authority decided to go for tender afresh, the decision cannot be termed as arbitrary, capricious or in any way encroaching upon the petitioner's rights under Articles 14 and 19(1)(g) of the Constitution of India.

21. Having dealt with the inherent limitation to exercise of judicial review under Article 226 of the Constitution in respect of the tenders/contract matters, this Court would also reiterate that in appropriate cases where the decision making process is found to



be unfair, unreasonable and lacking transparency so as to cause perceptible injury to public interest, the Court may exercise its discretion in the matter. Based on discussions aforesaid, this Court would observe that such circumstances do not exist in the instant case. The decision to cancel the tender process, where the petitioner was the single tenderer is based on Government policy under Notification dated 07.07.2020. The tender process afresh is to be based on a fresh estimate revised as per the new SOR. The fact that the petitioner's earlier financial bid, based on the outdated and discarded S.O.R., was opened, therefore could not have caused any prejudice to the petitioner for participating in the fresh tender process. Clearly no case has been made out for interference.

22. The writ petition being devoid of any merit is thus dismissed.

(Madhuresh Prasad, J)

PNM

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

