

Level 9 Biz Pvt. Ltd.
v.
**Himachal Pradesh Housing and Urban
Development Authority & Another**
(Civil Appeal No. 4626 of 2024)
02 April 2024
[Bela M. Trivedi* and Pankaj Mithal, JJ.]

Issue for Consideration

Matter pertains to the correctness of the order passed by the High Court disposing the writ petition by accepting the statements of the respondent no. 1-tenderee and respondent no. 2-successful bidder, permitting the respondent no.1 to withdraw the cancellation of initial tendering process order and permitting the respondent no. 2 to execute the project on the same terms and conditions as in the initial tender, though the said tender was already withdrawn by the respondent no.1 in view of the report of the independent Committee confirming gross irregularities and illegalities committed by the officers of the respondent no.1.

Headnotes

Tender – Notice inviting tender – Issuance of letter of intent in favour of the successful bidder by the tenderee – Challenge to, by the unsuccessful bidder – Cancellation of initial tender process by the tenderee and withdrawal of the letter of intent issued in favour of the successful bidder on account of pending litigations in the High Court – Thereafter, issuance of fresh NIT by tenderee – Challenge to – High Court disposed of the writ petition by merely accepting the statement of the tenderee that it had no objection to go ahead with the initial tendering process and the statement of the initial successful bidder that it was ready to execute the project on the same terms and conditions as initially agreed, though the said tender was already withdrawn by the tenderee in view of the irregularities and illegalities committed by it, as recorded by an independent committee appointed by the High Court in earlier writ petitions – Correctness:

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Held: No right whatsoever created in favour of the respondent no. 2-successful bidder, and the respondent no. 1 HIMUDA-tenderee cancelled the tender and issued fresh NIT, as such the respondent no. 1 could not have agreed to allow the respondent no. 2, who was found to be not technically qualified, to go ahead with the execution of the project in question and that too without giving the other two parties any opportunity to negotiate – Respondent no. 1 in collusion with the respondent no. 2, took the High Court for a ride and misused the process of law for covering up the irregularities and illegalities committed in the tender process by the officers of the respondent no. 1 – High Court also could not notice the ill-intention of the respondent nos. 1 and 2 and disposed of the petition, permitting them to go ahead with the original tender – Thus, the impugned order having been passed without proper application of mind and without assigning any cogent reason for brushing aside the findings recorded by the Independent Committee and the observations made by the Single Bench, is quashed and set aside – Also, the respondent no.1, though ‘State’ within the meaning of Art. 12, acted malafide and in collusion with the respondent no.2, and took the High Court for a ride, heavy cost of Rs. 5,00,000/- imposed on the respondent no. 1 – Constitution of India – Art. 12. [Paras 11-14]

Tender – Notice inviting tender – Letter of Intent – Nature of:

Held: Letter of Intent is merely an expression of intention to enter into a contract – It does not create any right in favour of the party to whom it is issued – There is no binding legal relationship between the party issuing the LOI and the party to whom such LOI is issued – Detailed agreement/contract is required to be drawn up between the parties after the LOI is received by the other party. [Para10]

List of Acts

Constitution of India.

List of Keywords

Cancellation of initial tendering process; Tender; Irregularities and illegalities; Notice inviting tender; Letter of intent; Burden on the public exchequer; Misuse process of law; Cost; Fresh tender process; Agreement/contract.

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Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4626 of 2024
From the Judgment and Order dated 18.10.2022 of the High Court of
Himachal Pradesh at Shimla in CWP No. 1481 of 2021

Appearances for Parties

P.S. Patwalia, Sr. Adv., Ritesh Khatri, Ms. Deveshi Chand, Advs. for
the Appellant.

Anoop G. Chaudhari, Navin Pahwa, Sr. Advs., Shankar Divate, J. P.
Mishra, D. K. Thakur, Rajeev Kumar Gupta, Tavleen Singh, Joginder
Mann, Ms. Vallabhi Shukla, Divyansh Thakur, Bimlesh Kumar Singh,
Kanwal Chaudhary, Neeraj Agarwal, Santosh Kumar Yadav, Ms.
Niharika, Nishant Anand, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Bela M. Trivedi, J.

1. Leave granted.
2. The Appellant – Level 9 BIZ Pvt. Ltd., who was not a party to the proceedings, being Civil Writ Petition No. 1481 of 2021, filed by the Respondent No.2 – M/s. Vasu Constructions in the High Court of Himachal Pradesh at Shimla, has challenged the impugned order dated 18.10.2022 passed by the High Court in the said proceedings. The High Court passed the impugned order disposing of the said CWP by merely accepting the statement made on behalf of the Respondent No.1 – Himachal Pradesh Housing and Urban Development Authority (HIMUDA) that it wanted to withdraw the cancellation of initial tendering process order dated 05.02.2021, and the statement made on behalf of the Respondent No. 2 that it was ready to execute the project on the same terms and conditions and the rates as per the initial tender dated 15.11.2018, though the said tender was already withdrawn by the Respondent no. 1 HIMUDA in view of the irregularities and illegalities committed by it, as recorded by an independent committee appointed by the High Court in earlier writ petitions filed by the present appellant and one Dalip S. Rathore.

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3. The broad facts giving rise to the present appeal may be stated as under: -

DATES	EVENTS
15/16.11.2018	Notice Inviting Tender (NIT) was issued by HIMUDA (R-1) for the construction of proposed commercial complex of Vikas Nagar, Shimla, at estimated cost of Rs.45,05,62,074/-
15.12.2018	Technical Bids were opened and on the same day Financial Bids were also opened. (Appellant & R-2 were the only found to be qualified – But the Appellant was L2)
17.12.2018	LOI was issued by the R-1 in favour of R-2.
24.12.2018	One Unsuccessful bidder Dalip S Rathore filed Writ Petition being CWP 3021 of 2018 challenging the technical specifications & ineligibility of Respondent No.2, also seeking cancellation of the Tender. The High Court issued notice.
02.01.2019	R-1 HIMUDA withdrew the LOI dated 17.12.2018 of R-2 M/S Vasu Constructions stating that the case is pending in the High Court and the work will be awarded only as per the decision of the High Court.
05.01.2019	R-1 HIMUDA constituted a committee, which reviewed the tender process and concluded that there were many lapses which warranted actions against the erring officials.
07.01.2019	Another Committee constituted by R-1 submitted a report that Shri Dalip Singh was not qualified and M/s. Vasu Constructions was qualified.
23.02.2019	Appellant – Level 9 BIZ Pvt. Ltd. filed a writ petition CWP 363 of 2019, praying for rejection of Technical Bid and Financial Bid of the R-2 M/s. Vasu Constructions

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25.11.2020	<p>High Court passed a detailed order on 25.11.2020 in CWP No. 3021/2018 and 363/2019.</p> <p>In Para 29 High Court observed-</p> <p><i>“[.] this Court is prima facie of the view that some of the officers manning high positions in HIMUDA have not acted responsibly and in the interest of organization, rather have attempted, directly or indirectly, to give undue benefit to some of the contractors. Having seen the record, this Court is compelled to draw a conclusion that the officers responsible for evaluation of the tender in question, did not scrutinize the documents submitted by the tenderers along with their bids properly and, with a view to ensure ouster of some eligible contractors and awarding the same to their favourites, have made an attempt to justify their action by giving totally implausible reasoning.”</i></p> <p>In para 31, High Court observed-</p> <p><i>“But, for the reasons, best known to the authority, it still proceeded to award the tender in favour of M/s. Vasu Construction Company.”</i></p> <p>The High Court therefore to instill confidence in the general public and to ensure transparency in the system, constituted an independent committee to enquire into the tender process in question, and directed the committee to submit its report in a sealed cover to the Court.</p>
02.01.2021	Committee constituted by High Court filed its report.
08.01.2021	High Court disposed of both Petitions being Nos. 3021/2018 and 363/19 and directed registry to initiate separate proceedings against erring officials, observing as under: -

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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.

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	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.
05.02.2021	Respondent No.1 cancelled the Tender in view of the Order dated 08.01.2021 passed by the High Court.
03.03.2021	Respondent No.2 filed a new Writ Petition against Respondent No.1, i.e., CWP 1481 of 2021 challenging order dated 05.02.2021. Respondent no. 2 also filed separate two LPAs being LPA No. 6/2021 and 12/2021 against the common order dated 08.01.2021 passed in CWP No. 3021/2018 and CWP No. 363/2019 by the Single Bench.
17.11.2021	R-1 HIMUDA issued fresh NIT for the same work.
01.12.2021	The Division Bench of High Court passed an interim order in LPA No. 6/2021, 12/2021 and CWP No. 1481/2021 staying the NIT dated 17.11.2021 till further orders.
18.10.2022	The Division Bench disposed of the Writ Petition No. 1481/2021 upon statement of the Executive Engineer of Respondent No.1 observing as under: 7. Learned counsel for the respondent on instructions of Mr. Rajesh Thakur, Executive Engineer, HIMUDA, Division, Shimla-9, has submitted that the competent authority wants to withdraw the cancellation of initial tendering process order dated 5th February, 2021, bearing No. 5806-11, as the public is deprived from the facilities, which would have been available to them after completion of the project. The project cost is going to be enhanced due to delay in execution of the project, which will cause additional burden

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	<p>on the public exchequer. The various Government departments/PSUs are facing acute shortage of office accommodation, therefore, in larger public interest, the authority has no objection to go ahead with initial tendering process, in case the petitioner is ready to execute the work at the same rate and terms and conditions as were agreed at the time of finalization of the initial NIT dated 15.11.2018 (Annexure P-2). The time period for execution of work will start from date of fresh award letter which will be issued in favour of the petitioner within 15 days.</p> <p>8.Learned Senior counsel for the petitioner, on instructions from the petitioner, has submitted that offer made by the respondent is acceptable to the petitioner and petitioner is ready to execute the project on the same terms and conditions and rates as per initial tender dated 15.11.2018 (Annexure P-2).</p>
Nov. 2022	Contract Agreement was signed between Respondent 1 & 2. Work started.
12.12.2022	The Appellant filed the SLP challenging the impugned order dated 18.10.2022 and the Court while issuing notice, granted stay of operation of the impugned order dated 18.10.2022.

4. The question that has been posed before us in the instant appeal is, whether the High Court could have disposed of the CWP filed by the respondent no. 2 by simply accepting the statements made on behalf of the learned advocates for the respondent no. 1 and respondent no. 2, virtually permitting the respondent no.1 HIMUDA to withdraw the cancellation of initial tendering process order dated 05.02.2021 and permitting the respondent no. 2 M/s Vasu Constructions to execute the project on the same terms and conditions and at the rates as per the initial tender dated 15.11.2018, though the said tender was already withdrawn by the Respondent No.1 HIMUDA in view of the report made by the independent Committee constituted by the High Court confirming gross irregularities and illegalities committed by the officers of

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HIMUDA and in view of the order dated 08.01.2021 passed by the Single Bench?

5. As could be seen from the chronology of events, the appellant and the respondent No. 2 were declared qualified in the Technical Bids opened on 15.12.2018 and on the same day, the financial bid of the said two parties were also opened. The respondent no.2 being L-1, the Letter of Intent dated 17.12.2018 was issued by the Respondent No.1 in favour of the respondent no.2. Subsequently, an unsuccessful bidder M/s Dalip Singh Rathore filed a writ petition being No. 3021/2018 in the High Court, alleging irregularities and illegalities in the tender process and challenging the eligibility of the respondent no. 2, also seeking cancellation of the Tender. The appellant also filed CWP No. 363/2019 praying for the rejection of the Technical and Financial Bids of the respondent no.2. The respondent no.1 HIMUDA in the meantime appointed a committee on 01.01.2019 to review the tender process. The respondent no.1 also vide the letter dated 02.01.2019 withdrew the Letter of Intent issued in favour of the respondent no.2. Subsequently, the High Court also appointed an Independent Committee to look into the alleged illegalities and irregularities vide the order dated 25.11.2020, in order to instill confidence in the general public and to ensure transparency in the system.
6. As transpiring from the order dated 08.01.2021, the said Independent Committee submitted the report, arriving at a definite conclusion that the officers responsible for evaluation of the tender had not acted responsibly and fairly, as a consequence of which both M/s Vasu Constructions Company (respondent no.2 herein) and M/s Level 9 Biz Pvt. Ltd. (the appellant herein) were wrongly declared eligible in the Technical Bid. The Committee had concluded that since both the bidders were not technically qualified as per the terms and conditions of the NIT, the tender needed to be cancelled. The recommendations made by the said Committee, except the recommendation for deletion of condition with regard to NPA, were stated to have been accepted by the Enquiry Committee of the respondent no. 1 HIMUDA. The High Court recorded the statements of the concerned counsels for the parties and disposed of the petitions being CWP Nos. 3021/2018 and 363/2019 vide Order dated 08.01.2021 observing that the petitions had been rendered infructuous, however reserved a liberty for the parties to file fresh petition(s), if any, if they still remained aggrieved.

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7. Subsequently, the respondent no.1 HIMUDA cancelled the tender on 05.02.2021 in view of the said order dated 08.01.2021 passed by the High Court. The said action of the respondent no.1 came to be challenged by the Respondent No.2 M/s Vasu Constructions by filing a petition being CWP No. 1481/2021. The respondent no. 2 also filed two LPAs being 6/2021 and 12/2021 being aggrieved by the common Order dated 08.01.2021 passed by the Single Bench. The Division Bench of the High Court disposed of the CWP No. 1481/2021 vide the impugned order dated 18.10.2022 accepting the statements made by the learned counsels for the respondent nos. 1 and 2 as stated hereinabove.
8. We are at loss to understand as to how the said petition filed by the respondent no.2 could have been disposed of by the Division Bench by merely recording and accepting the statements of the learned counsels for the respondent nos. 1 and 2, when the tender in respect of NIT dated 15.11.2018 was cancelled by the respondent no.1 HIMUDA on account of the gross irregularities and illegalities in the tender process found by the Independent Committee constituted by the High Court and on account of the order passed by the High Court on 08.01.2021? We are also at loss to understand as to how the Executive Engineer of HIMUDA, could have made the statements before the Division Bench that the competent authority of the respondent no.1 wanted to withdraw the cancellation of the initial tendering process order dated 05.02.2021 and that the respondent no. 1 had no objection to go ahead with the initial tendering process, in case the respondent no.2 was ready to execute the work on the same terms and conditions as were agreed at the time of finalization of NIT dated 15.11.2018, when the respondent no. 1 itself had decided to cancel and in fact cancelled the initial tendering process vide its order dated 05.02.2021 accepting the findings of the committee constituted by the High Court to the effect that there were irregularities and illegalities committed by the officers of the HIMUDA in processing the tender and that the respondent no. 2 was not technically qualified?
9. When the common order dated 08.01.2021 was passed in the Writ Petition No. 3021 of 2018 filed by the petitioner Dalip Singh and Writ Petition No.363 of 2019 filed by the present appellant, recording the said findings of the committee appointed by it, pursuant to which order, the respondent no.1 had cancelled the tender on 05.02.2021,

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and had issued a fresh NIT on 17.11.2021, it was incumbent on the part of the respondent no. 2 to implead the said two petitioners as the party respondents in the new petition filed by it i.e. 1481/2021, and it was also incumbent on the part of the High Court to give opportunity of hearing to the said petitioners before passing the impugned order disposing of the said petition merely recording the statements of the learned counsels for the respondent nos. 1 and 2, and permitting the respondent nos. 1 and 2 to go ahead with execution of the work as per the initial tender which was already cancelled by the respondent no.1.

10. Though it is true that initially an LOI was issued by the respondent no. 1 in favour of the respondent no. 2 on 17.12.2018, but the same was withdrawn by the respondent no. 1 as per the letter dated 02.01.2019 on account of pending litigations in the High Court. In any case, it hardly needs to be reiterated that the Letter of Intent is merely an expression of intention to enter into a contract. It does not create any right in favour of the party to whom it is issued. There is no binding legal relationship between the party issuing the LOI and the party to whom such LOI is issued. A detailed agreement/contract is required to be drawn up between the parties after the LOI is received by the other party more particularly in case of contract of such a mega scale.
11. Since, there was no right whatsoever created in favour of the respondent no. 2, and since the respondent no. 1 HIMUDA had already accepted the recommendations of the Committee appointed by the High Court and the order dated 08.01.2021 passed by the High Court, and had cancelled the tender and issued fresh NIT on 17.11.2021, the respondent no. 1 could not have agreed to allow the respondent no. 2, who was found to be not technically qualified, to go ahead with the execution of the project in question and that too without giving the other two parties any opportunity to negotiate. If the respondent no. 1 was so keen to provide the facilities to the public without causing any additional burden on the public exchequer, all the three parties who had participated in the original tender should have been given the opportunity to negotiate with it.
12. Having regard to the entire chain of events, and the conduct of the respondent nos. 1 and 2, we have no hesitation in holding that the respondent no. 1 in collusion with the respondent no. 2, had

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taken the High Court for a ride and misused the process of law for covering up the irregularities and illegalities committed in the tender process by the officers of the respondent no. 1, and for anyhow awarding the contract to the respondent no. 2 under the guise of the court's order. It is a matter of surprise for us that the High Court also could not notice the ill-intention of the respondent nos. 1 and 2 and disposed of the petition, permitting them to go ahead with the original tender, ignoring the reports of the independent committee and the observations made by the Single Bench in the Order dated 08.01.2021 with regard to the irregularities and illegalities committed by the officers of the respondent no. 1 HIMUDA.

13. The impugned order having been passed without proper application of mind and without assigning any cogent reason for brushing aside the findings recorded by the Independent Committee and the observations made by the Single Bench in the order dated 08.01.2021, the same deserves to be quashed and set aside. Since, we have found that the respondent no.1 HIMUDA, though 'State' within the meaning of Article 12 of the Constitution of India, had acted *malafide* and in collusion with the respondent no.2, and had taken the High Court for a ride, the present appeal deserves to be allowed with heavy cost.
14. In that view of the matter, the impugned order passed by the High Court is set aside. The appeal is allowed with cost of Rs. 5,00,000/- to be deposited by the respondent no. 1 HIMUDA with the Supreme Court Advocates-on-Record Association, within two weeks from today. However, it is clarified that the respondent no.1 shall be at liberty to initiate a fresh tender process in accordance with law and after following the due process of law.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeal allowed.