

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9688 of 2018

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Kashish Developers Limited, Registered office at- 87 Old AG Colony, Kadru, Ranchi, Jharkhand- 834002, Local address at- 201, Kamla Sadan Apartment, Punaichak, District- Patna, through Chandan Kumar, DGM Administration, Son of Sri Indradev Singh, Resident of Village- Barauni, P.O. and P.S.- Teghra, District- Begusarai.

... .. Petitioner

Versus

1. The State of Bihar through Principal Secretary, Building Construction Department, Government of Bihar, Patna.
2. The Principal Secretary, Road and Construction Department, Government of Bihar, Patna.
3. The Principal Secretary, Finance Department, Government of Bihar, Patna.
4. The Principal Secretary, Law Department, Government of Bihar, Patna.
5. The Chairman, Bihar Medical Services & Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna.
6. The Managing Director, Bihar Medical Services & Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna.
7. The G.M. (Project & Design), Bihar Medical Services & Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna.

... .. Respondents

with

Civil Writ Jurisdiction Case No. 8626 of 2018

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Kashish Developers Limited, Registered office at- 87 Old AG Colony, Kadru, Ranchi, Jharkhand- 834002, Local address at- 201, Kamla Sadan Apartment, Punaichak, District- Patna, through Chandan Kumar, DGM Administration, Son of Sri Indradev Singh, Resident of Village- Barauni, P.O. and P.S.- Teghra, District- Begusarai.

... .. Petitioners

Versus

1. The State of Bihar through Principal Secretary, Building Construction Department, Government of Bihar, Patna.
2. The Principal Secretary, Road and Construction Department, Government of Bihar, Patna.
3. The Principal Secretary, Finance Department, Government of Bihar, Patna.
4. The Principal Secretary, Law Department, Government of Bihar, Patna.
5. The Chairman, Bihar Medical Services & Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna.
6. The Managing Director, Bihar Medical Services & Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna.



7. The G.M. (Project & Design), Bihar Medical Services & Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna.

... .. Respondents

with

Civil Writ Jurisdiction Case No. 10395 of 2018

M/s R. S. Construction (A Partnership Firm) Official Address, At- Kali Asthan Chowk, P.O. +P.S. & District- Begusarai, through its Authorized representative Deepak Kumar, Son of Sri Rameshwar Prasad Singh, Resident of Village Sihma Dih, Ward No. 2, Sihman Barari, Begusarai, P.S. Begusarai, District- Begusarai, at Present residing at Shashi Palace, Memra, Road, Ward No. 20, P.O. +P.S.- Begusarai, District- Begusarai.

... .. Petitioner

Versus

1. The State of Bihar through Principal Secretary, Building Construction Department, Government of Bihar, Patna.
2. The Principal Secretary, Road and Construction Department, Government of Bihar, Patna.
3. The Principal Secretary, Finance Department, Government of Bihar, Patna.
4. The Principal Secretary, Law Department, Govt. of Bihar, Patna.
5. The Chairman, Bihar Medical Services & Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna.
6. The Managing Director, Bihar Medical Services & Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna.
7. The G.M(Project & Design), Bihar Medical Services & Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. Bimal Kirti Singh, Advocate Mr. Sidharth Kumar, Advocate Mr. Ranjeet Kumar, Advocate
For the Respondent/s	:	Mr. Lalit Kishore, Sr. Advocate Mr. Prabhat Kumar, Advocate
For the State	:	Mr. Swapnil Kumar, Singh, AC to GP-19 Mr. Mahendra Prasad Verma, AC to SC-20

CORAM: HONOURABLE JUSTICE SMT. NILU AGRAWAL
C.A.V. JUDGMENT

Date : 09-08-2018

Heard Mr. Bimal Kirti Singh along with Mr. Sidharth

Kumar, learned counsels for the petitioners, Mr. Lalit Kishore,

learned Senior Counsel assisted by Mr. Prabhat Kumar for the



Bihar Medical Services and Infrastructure Corporation Limited (hereinafter referred to as the BMSICL) and learned counsel appearing for the State of Bihar.

2. Since the question of law to be adjudicated is identical in all cases, all the three writ applications are taken up together.

3. Petitioners in the three writ applications have challenged the restricted Clause 4.5 of the NIT by insertion of Clause 4.5(A)(b)(i) in the NIT issued by the Respondent-BMSICL for construction of medical college and hospitals in the district of Nalanda and Purnea.

4. C.W.J.C. No. 9688 of 2018 has been filed for setting aside the said Clause 4.5(A)(b)(i) in NIT No. BMSICL/Infra/14/2018 dated 16.04.2018 relating to construction of Government Medical College at Purnea district while C.W.J.C. No. 10395 of 2018 and C.W.J.C. No. 8626 of 2018 relate to challenge of the said Clause 4.5(A)(b)(i) of the NIT No. BMSICL/Infra/12/2018 dated 09.04.2018 relating to Nalanda district.

5. The facts of the case is that the Respondent- BMSICL floated tenders by way of NIT No. 14/2018 dated 16.04.2018 and NIT No. 12/2018 dated 09.04.2018 for construction of Government dental and medical college and hospital at Purnea and



Nalanda districts respectively. The terms of the NIT were identical in both the projects. The petitioners have challenged the legality of eligibility criteria in Clause 4.5 (A)(b)(i) of the NITs. The main ground of challenge is whether the BMSICL being a Department of the State Government, the Standard Bidding Document (hereinafter referred to as the SBD), which is the model bidding document, formulated and published on 12.08.2006 vide notification no. 9545(5) by the Road Construction Department, will be applicable to all Works Department in the State approved by the Cabinet of the State Government is binding or not and secondly whether the terms and conditions regarding eligibility criteria as contained in Clause 4.5 of the SBD could be modified by the Respondent-BMSICL in the NIT without approval of such modification with the Cabinet of the State Government.

6. For the sake of convenience C.W.J.C. No. 9688 of 2018 is being referred with its Annexures. The original SBD as contained in Annexure-3 Clause 4.5 is as follows :

ORIGINAL SBD CLAUSE 4.5

“ 4.5 A. To qualify for award of the contract, each bidder in its name should have in the last five years as referred to in Appendix :-

(a) Achieved in any one year a minimum annual financial turnover (in all classes of civil engineering construction works only) volume of construction work of at least the



amount equal to the 50%(fifty percent) estimated cost of works for which bid has been invited. The turn over will be indexed at the rate of 8% for a year.

(b) Satisfactorily completed as a prime contractor (or as a nominated subcontractor, where the subcontract involved execution of all main items of work described in the bid document, provided further that all other qualification criteria are satisfied) at least one similar work (Building) of value not less than amount indicated in Appendix(usually not less than 50%(fifty percent) of estimated value of contract);”

7. The modified Clause in the present case NITs 4.5 (A)

(b)(i) is as follows :

“(b) The contracting firm/agency/JV should have “satisfactorily completed” in India as a prime contractor during the last 7 years ending last day of the month previous to the month of date of tender i.e. 30 April, 2018 construction of :-

i. At least one hospital or composite Hospital campus having college/hostel residential building (including seven works along with services like plumbing, electrical, HVAC etc.) having total cost not less than 40% of the estimated value (i.e. Rs. 122.39 cr.) of the project put to tender.

“Or”

At least one hospital or composite Hospital campus having college/hostel/residential building (including civil works along with services like plumbing, electrical HVAC, etc.) having total built-up not less than



40% of the project (i.e. 31084 sqm) put to tender.”

8. He submits that the SBD was a policy decision of the Cabinet of the State Government and could have been altered by the Cabinet or with the approval of the Cabinet. Such inclusion of special criteria has led to imposition of restrictions and made the tender more stringent preventing wider participation. BMSICL is a Department of the State Government and resolution was passed by the Health Department of the State Government to form the BMSICL for purchase of medicines and medical equipments and for construction of medical hospitals by the Government resolution dated 18.05.2010 as contained in Annexure-9. The BMSICL was created as a State Purchase Organisation under Rule 129 of the Bihar Finance (Amendment) Rules, 2005 with a seed capital of Rs. 10 crores from the State exchequer. As per Clause 5 of the said resolution, the Articles of Association would be approved by the State Government and the Development Commissioner would be the Chairman, the Managing Director would be an appointee of the State Government and the Committee members would be the Principal Secretaries of the Finance and the Health Department and the other 4 functionaries of the Committee would also be the employees of the State Government. As per Clause 5(gha) any change in the Board of the BMSICL would require prior approval



of the State Government. From Clause 7 of the said resolution, it is apparent that the Health Department, Government of Bihar, Patna is the Administrative Department of the BMSICL. He further submits that the said State Purchase Organisation i.e. the BMSICL was created with a seed capital of Rs. 10 crores from the State Government, and, accordingly, a Memorandum of Association was prepared. From perusal of Articles of Association, relevant Chapter XXVI (General) Clause 128 and Chapter XXI Clause 143(1), the State control over the BMSICL is evident as the State Government could issue directives to conduct the business of the Corporation and could vary and annul any directive which the BMSICL had to give effect to such directives immediately. As per Chapter XXXI Clause 143 the State Government had power to review the work and progress of the Corporation having its account audited and issue directions which it would deem appropriate to the Corporation. Hence, he submits that the BMSICL was created as an instrumentality of the State which conducts its business in its administrative department i.e. the Health Department in the Government of Bihar. He further contends that the SBD, which is the model document, is binding on all the departments and the BMSICL in its 31st Board meeting dated 02.04.2018, Annexure-B



to the counter affidavit, had already adopted the SBD wherein

Agenda 4.31 states as follows :

“Members of the Board were informed that the Standard Bidding Document(SBD) for infra related works was originally prepared by the Road Construction Department and was notified through notification no. 9545(5) of 12/08/2006...

Clause 4.5(b) of the Standard Bidding Document deals with qualification criteria for “Similar Nature” work but does not define “Similar Nature Work” and the CVC guidelines state that “Similar Nature Work” should be clearly defined. It is hereby interpreted that “Similar Nature Work” should be clearly defined by Notice Inviting Tender....”

and thereafter resolved to carry out amendment in Clause 4.5 of the SBD by inserting Clause 4.5(b). He submits that if the answer is in the affirmative then the BMSICL is a creation of the State Government and under the control of the State Government and such restrictions as per CVC guidelines could not have been incorporated because in the meeting dated 02.04.2018 it was resolved to substitute the SBD Clause 4.5 (b) (i) to the extent of CVC guidelines in order to define similar work and to remove any vagueness. The relevant CVC guidelines as contained in Annexure-B/1 of the counter affidavit is as follows :

“A) For Civil/Electrical Works



i) Average Annual financial turnover during the last 3 years, ending 31st March of the previous financial year, should be at least 30% of the estimated cost.

ii) Experience of having successfully completed similar works during last 7 years ending last day of month previous to the one in which applications are invited should be either of the following :-

a. Three similar completed works costing not less than the amount equal to 40% of the estimated cost.

Or

b. Two similar completed works costing not less than the amount equal to 50% of the estimated cost.

Or

c. One similar completed work costing not less than the amount equal to 80% of the estimated cost.

iii) Definition of “similar work” should be clearly defined.”

9. However, the counsel for the petitioners submits that similar nature of works have been defined in the NIT, which is as follows :

“Similar Nature” shall mean :-
Construction of :-

a) Dental College/ Medical College & Hospital Building ‘or’

b) Institutional Building more than 15 mtr in height ‘or’

c) Educational Building more than 15 mtr. in height ‘or’

d) Residential Building more than 15 mtr in height



On composite basis i.e. civil works along with associated MEP services like plumbing, electrical, HVAC Etc. for Central/State Govt./ PSU/Private Sector.”

But before defining similar nature of work in terms of CVC guidelines the BMSICL on its own volition has inserted a mandatory criteria, which is Clause 4.5 (A)(b)(i). He submits that the similar nature of work has been defined subsequently in Clause 4.5 (A)(b). The insertion of the restricted clause of condition to have experience to construct a hospital would render the subsequent similar nature of works defined subsequently in the same very clause 4.5 (A)(b) would make it redundant and otiose which amounts to flouting the CVC guidelines. He submits that as a result of this restricted insertion of mandatory requirement of a participant to have completed hospital building to be eligible to participate in the tender is restrictive and against underlying objective of competitive tender where several participants can participate in the tender process. He submits that once SBD published by the Road Construction Department is applicable to all Works Department and adopted by the BMSICL, it cannot be altered by the Respondent-BMSICL which is a creation of the State Government and its instrumentality under the direct control of its administrative department i.e. the Health Department and such restriction and alteration of the policy cannot be done by the



BMSICL. For the said proposition, he relies on the judgment of the Supreme Court in the case of ***Lloyd Electric and Engineering Ltd. vs. State of Himachal Pradesh*** since reported in **(2016) 1 SCC 560, at paragraph 14**, which is extracted hereinbelow :

“14. The State Government cannot speak in two voices. Once the Cabinet takes a policy decision to extend its 2004 Industrial Policy in the matter of CST concession to the eligible units beyond 31.03.2009, up to 31-3-2013, and the Notification dated 29-5-2009, accordingly, having been issued by the Department concerned viz. Department of Industries, thereafter, the Excise and Taxation Department cannot take a different stand. What is given by the right hand cannot be taken by the left hand. The Government shall speak only in one voice. It has only one policy. The departments are to implement the government policy and not their own policy.”

10. He also submits that such alteration and substitution of the SBD by insertion of restrictive and stringent eligibility criteria in the NIT without approval from the Cabinet of the State Government is in the teeth of the decision of the Apex Court in the case of ***State of Jharkhand and others vs. CWE-SOMA Consortium*** since reported in **(2016) 14 SCC 172, paragraph-9**, which is extracted hereinbelow :

“9. Every tender above the estimated value of Rs. 250 lakhs has to be in consonance



with standard bidding documents (SBD) which has got its approval from the Cabinet. The entire exercise of complying with the general conditions of SBD is to ensure that the tender is not stringent and restrictive in nature so that it can enable many tenderers to participate and facilitate a wider fair play competition. Any variation from SBD needs prior approval from the department which is done after considering the viability of inserting that clause and whether or not the same is restrictive and stringent in nature.”

11. It is relevant to mention here that both the NITs of Nalanda and Purnea were above 250 crores.

12. He further submits that the petitioner in C.W.J.C. No. 9688 of 2018 had participated in an earlier tender issued by the BMSICL being NIT No. BMSICL/Infra/34/2017 dated 09.11.2017 for construction of Government Dental College and Hospital in the district of Nalanda, which contained same Clause 4.5 (A)(b)(i) and the petitioner had participated, but it represented against inclusion of said clause and the Respondent-BMSICL on its own withdrew the said NIT 34/2017 for reasons best known to them and on the same day on 09.04.2018, the BMSICL came out with the same Clause 4.5 (A)(b)(i) identical to the said NIT 34/2017, which is Annexure-5 to the writ application. He, thus,



submits that the said Clause 4.5 (A)(b)(i) is discriminatory, arbitrary and unreasonable.

13. However, Mr. Lalit Kishore, learned Senior Counsel appearing for the BMSICL submits that the present writ application is not maintainable and the BMSICL being not a department of the State Government the SBD is not binding upon tendering process of the BMSICL. He submits that unless the terms and conditions of the SBD are adopted by the BMSICL, the same would not be *ipso facto* binding on the BMSICL. He submits that the opening lines of the resolution of the State Government, as contained in Annexures-1 and 2 of the writ application, relate to all Works Department of the State Government as issued by the Road Construction Department. He further submits that identical issue has been raised in C.W.J.C. No. 20145 of 2016 in the garb of Public Interest Litigation, which has been disposed of on 03.11.2017 by the Division Bench of this Court, and, although, the BMSICL is a Government Corporation sponsored by the Government of Bihar, but as per Clause 82 of the Articles of Association, the Board of Directors of the Corporation is entitled to exercise all such powers and to do all such acts and things as the Corporation is authorised to exercise. It is not a department of the State Government. Hence, considering the specific nature and



work, the NIT calling upon tender approved by the Board of Directors, which is a legal entity and governed and guided by its own bye-laws and regulation, the said NIT with necessary amendments to facilitate proper quality education of Public Works was incorporated. He submits that such terms and conditions are neither arbitrary nor unreasonable nor it amounts to discrimination or classification and it is within the domain of the employer to put terms and conditions for tender and any judicial interference or review is limited only in cases where there is arbitrariness and unreasonableness in the decision making process of the employer. In this connection, he has relied on the decision of the Hon'ble Supreme Court in the case of Directorate of Education and others vs. Educomp Datamatics Ltd. and others since reported in (2004) 4 SCC 19, paragraphs 9, 12, in the case of Global Energy Ltd. and another vs. Adani Exports Ltd. and others since reported in (2005) 4 SCC 435, paragraphs 8, 9 and 10 and in the case of Michigan Rubber (India) Limited vs. State of Karnataka and others since reported in (2012) 8 SCC 216, paragraphs 14, 17, 19 and 23(c). He further submits that 5 bidders participated in Purnea project and 8 bidders participated in Nalanda project and there was a competitive bidding and sufficient number of persons participated in the tender, hence, insertion of Clause 4.5(A)(b)(i) is neither



restrictive nor stringent. Such incorporation of the terms by the Bihar Rajya Pul Nirman Nigam Limited, one of the Corporation in the State of Bihar, having issued NIT with similar eligibility criteria in its NIT for construction of Vardhman Institute of Medical Science at Pawapuri, District Nalanda with the same eligibility criteria has not been challenged and the work is in progress. He further submits that the petitioner did not participate in NIT 12/2018 which relates to Nalanda district even after the interim order passed by this Court on 29.05.2018.

14. Learned counsel for the petitioner in C.W.J.C. No. 8626 of 2018 in reply to the said statement submitted that the petitioner went to participate in NIT 12/2018 relating to Nalanda district, however, on the date of filling up the form the website of the respondent crashed for technical reasons and, as such, the petitioner was not able to participate and a letter to this effect has been written by the petitioner dated 19.06.2018, although he participated in the NIT relating to Purnea district.

15. After hearing the rival submissions of the parties, this Court is of the opinion that on the resolution passed by the Health Department of the State Government BMSICL was created as a State Purchase Organisation under Rule 129 of the Bihar Finance (Amendment) Rules, 2005. A seed capital of Rs. 10 crores



was paid from the State exchequer. The Development Commissioner of the Government is the Chairman of the BMSICL. The Principal Secretary, Finance, Principal Secretary, Health are the members and the other four functionaries of the Committee are also employees of the State Government. The resolution as contained in Annexure-9 also states that any change in the Board of the BMSICL would require prior approval of the State Government. Clause 7 of the resolution is that the Administrative Department of the BMSICL is the Health Department, Government of Bihar. Even the Memorandum of Association Chapter XXVI Clause 128 and Chapter XXI Clause 143(1) gives power over the BMSICL to issue directives, conduct business, vary and annul any directive, review the work and progress of the Corporation, have its account audited and issue directions which it would deem appropriate to the Corporation. All these ingredients in the resolution dated 18.05.2010 and the Articles of Association show that the BMSICL is under direct control of the Health Department of the State Government and created as a State Purchase Organisation under the aegis of the Health Department. The SBD, which is a model bidding document is binding on all the departments of the State Government and the BMSICL being State Purchase Organisation under the control of



the Health Department has all its obligations to follow the SBD. The BMSICL in its 31st Board meeting dated 02.04.2018, Annexure-B to the counter affidavit has discussed the SBD in its Agenda 4.31 taking into consideration the SBD and following the CVC guidelines of defining clearly similar nature work in Clause 4.5(A)(b)(i) which is as follows :

“Similar Nature” shall mean :-
Construction of :-

- a) Dental College/ Medical College & Hospital Building ‘or’
- b) Institutional Building more than 15 mtr in height ‘or’
- c) Educational Building more than 15 mtr. in height ‘or’
- d) Residential Building more than 15 mtr in height

On composite basis i.e. civil works along with associated MEP services like plumbing, electrical, HVAC Etc. for Central/State Govt./ PSU/Private Sector.”

But imposing a further criteria before defining similar nature of work in the NIT in Clause 4.5 (A)(b)(i) that a contracting firm/ agency would have an experience of construction of one hospital or composite hospital campus is restrictive and stringent eligibility criteria in the NIT deviating from the SBD without approval from the Cabinet of the State Government and any variation from the SBD need prior approval from the Department which is done after considering the viability of inserting that clause as held in the case



of ***CWE-SOMA Consortium*** (supra). The said restrictive terms and conditions in Clause 4.5 (A)(b)(i) imposing such restrictions and stringent eligibility criteria when the nature of work has already been defined in the same said clause as per the CVC guidelines adopting the SBD in its meeting dated 02.04.2018 and deviating from the SBD without approval of the Cabinet, would be implementing their own policy and giving a go by to the Government policy i.e. SBD, as held in the case of ***Lloyd Electric and Engineering Ltd.*** (supra).

16. Accordingly, the said restrictive Clause 4.5(A)(b)(i) that the contracting firm/ agency should have satisfactorily completed one hospital or a composite hospital campus is set aside. Since the petitioner has already participated in the tender in pursuance to the earlier interim order dated 29.05.2018, the tenders of the petitioner will be considered along with other tenders without taking into consideration the restrictive clause 4.5 (A)(b) (i) that a contracting agency would have satisfactorily completed at least one hospital or composite hospital campus as postulated in Clause 4.5 (A)(b) of the tender as similar nature of work has already been defined subsequently in the same said clause. Order dated 03.11.2017, passed by the Division Bench in C.W.J.C. No. 20145 of 2016 where challenge of allotment of construction work



by BMSICL to various construction agencies pointing out the illegality was by way of Public Interest Litigation and not applicable in the present case.

17. Writ applications are, accordingly, allowed.

(Nilu Agrawal, J)

Rajesh/-

AFR/NAFR	AFR
CAV DATE	27.07.2018
Uploading Date	09.08.2018
Transmission Date	NA

