

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17525 of 2018

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1. Shree Gautam Construction Company Limited, Corporate Office : 4th Floor, Amaze Tower, A.T. Road, Opp. Pan Bazar Over Bridge, Beat No. 14 Paltan Bazar, Guwahati-781001(Assam) through its Attorney Sri Anish Baid
 2. Anish Baid Son of Late Vijay Kumar Baid, Resident of Village- Shaktigarh Path, G.S. Road, Opp. Rajeev Bhawan, Guwahati, Assam holding power of Attorney from Board of Directors of Shree Gautam Construction Company Limited, Corporate Office 4th Floor, Amaze Tower, A.T. Road, Opp. Pan Bazar Over Bridge, Beat No. 14 Paltan Bazar, Guwahati- 781001 Assam.

... .. Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Department of Health, Government of Bihar, Patna.
2. The Bihar Medical Services and Infrastructure Corporation Limited, Patna, 4th Floor, BSBCCCL Building, Hospital Road, Shastri Nagar, Patna, through its Managing Director,
3. The Managing Director, Bihar Medical Services and Infrastructure Corporation Limited, Patna, 4th Floor, BSBCCCL Building, Hospital Road, Shastri Nagar, Patna
4. The Chief General Manager, Bihar Medical Services and Infrastructure Corporation Limited, Patna, 4th Floor, BSBCCCL Building, Hospital Road, Shastri Nagar, Patna
5. The Chairman, Technical Evaluation Committee, Bihar Medical Services and Infrastructure Corporation Ltd., Patna, 4th Floor, BSBCCCL Building, Hospital Road, Shastri Nagar, Patna
6. The General Manager, (P & D), Bihar Medical Services and Infrastructure Corporation Limited, Patna, 4th Floor, BSBCCCL Building, Hospital Road, Shstri Nagar, Patna

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Mahesh Narayan Parwat, Sr. Advocate
For the Respondent/s : Mr. Lalit Kishore, Sr. ADvocate

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
CAV JUDGMENT

Date : 14-02-2019

The present writ petition has been filed for quashing the resolution of the Five Members Committee of Bihar Medical Services and Infrastructure Corporation Ltd., Patna dated 13.07.2018 whereby and whereunder the technical tender



committee has taken a decision by which the petitioners' bid has been declared to be non-responsive. The petitioners have further prayed for quashing of the resolution of the aforesaid committee dated 20.08.2018 whereby and whereunder the technical tender committee has been pleased to reject the representation of the petitioners dated 06.08.2018 and has further held that the petitioners are technically incompetent to participate in the bid.

2. The brief facts of the case, according to the petitioners, is that the Bihar Medical Services and Infrastructure Corporation Ltd. Patna issued a tender notice bearing N.I.T. No. BMSICL/Infra/14/12018 dated 16.04.2018 through the E-procurement Mode for construction of Government Medical College, Purnea, Bihar. The petitioners' construction company also participated in the said tender by submitting the entire documents by uploading the same on the website. The petitioners have further averred that the Petitioner No. 1 company is a Class 1(A) Contractor and while participating in the bid, they have furnished earnest money to the tune of Rs. 3.16 crore through Bank guarantee issued by the ICICI Bank on 18.06.2018. It is submitted that the respondents have committed illegality in the scrutiny process and have wrongly disqualified the petitioners since they want to engage in pick and choose



method to favour a particular contractor.

3. The petitioners have submitted that the decision of the aforesaid committee dated 13.07.2018, holding the bid of the petitioners to be technically non-responsive, on the ground that the petitioners do not fulfil the main qualification as per Clause 4.5 (A)(b) of the tender documents inasmuch as the requirement of the contractor having the experience of satisfactorily completing similar type of hospital construction work during the last seven years as a prime contractor is not fulfilled by the petitioners since the experience certificate submitted by the petitioners pertaining to construction of two medical colleges shows that the Petitioner No. 1 company has executed the said works as a sub contractor and not as a prime contractor, is not only wrong but also erroneous. It has been stated by the petitioners in the writ petition that the Petitioner No. 1 company has got full experience as also fulfils the entire terms and conditions of the tender inasmuch as it has successfully completed two projects of similar nature i.e. (i) Fakaruddin Ali Ahmed Medical College and Hospital at Barpeta and (ii) Tezpur Medical College and Hospital at Tezpur, Assam with its own planning, supervision, inspection, machineries, equipments, field laboratory, team of engineers, manpower, labours etc.



without any defects. It has been stated that the work order for construction of Tezpur Medical College and Hospital at Tezpur, Assam was placed on the petitioners by Engineering Projects (India) Ltd., who had got the tender from the Government of Assam, P.W.D. (Building) for construction of the said Medical College and it was the petitioners, who had constructed the said Medical College. It is stated that similarly, it had carried out the construction work of Fakaruddin Ali Ahmed Medical College and Hospital at Barpeta on behalf of Engineering Projects (India) Ltd. It is further stated in the writ petition that Clause 1.3.1 of section 2 (qualification information) provides that the work performed in the past as a nominated sub contractor will also be considered provided the sub contract involved execution of all main items of work described in the bid document, hence, the work of the petitioners as a sub contractor should also have been considered by the aforesaid committee and the case of the petitioners should not have been declared technically non responsive only on the basis of Clause 4.5(A)(b).

4. It has been further stated in the writ petition that after bid of the petitioners was declared to be technically non responsive, they had filed an objection dated 06.08.2018, however, the same has been rejected by an order dated 20.08.2018 and the bid of



the petitioners has again been held to be technically non responsive in view of Clause 4.5(A)(b) of the tender document.

5. Mr. Mahesh Narayan Parwat, the learned senior counsel for the petitioners has advanced arguments, however, only one issue has been raised to the effect that the present case is squarely covered by a judgment dated 09.08.2018 passed by a coordinate Bench of this Court in the case of Kashish Developers Ltd. vs. the State of Bihar and Ors. (CWJC No. 9688 of 2018 and other analogous cases) wherein Clause 4.5(A)(b)(i), to the effect that the Contracting Firm/Agency should have satisfactorily completed one hospital or a composite hospital campus has been set aside, hence, the petitioners could not have been non suited on the basis of the said Clause 4.5(A)(b).

6. A short notes of argument has also been filed on behalf of the petitioners and again, similar grounds have been raised to the effect that as per Clause 1.3.1 of Section 2 (qualification information), the work performed in the past as a nominated sub contractor is also required to be considered and since the petitioners had earlier done similar project pertaining to construction of Fakaruddin Ali Ahmed Medical College and Hospital at Barpeta on the basis of work order dated 27.01.2009



issued by M/s Engineering Projects (India) Ltd. as also had done the construction work of Tezpur Medical College and Hospital at Tezpur, Assam for which work order was issued by the Engineering Projects (India) Ltd. on 23.01.2009, the petitioners had sufficient experience though the same might be as a sub contractor, hence, the petitioners could not have been debarred on the ground mentioned under criteria 4.5 (A)(b) of the Tender documents. Again, reference has been made to the aforesaid judgment dated 09.08.2018 passed by a coordinate Bench of this Court and it has been stated that the respondent Bihar Medical Services and Infrastructure Corporation Ltd., Patna is not empowered in law to change / modify the eligibility criteria as provided in the standard bidding documents so far it relates to the removal of Clause 4.5(A)(b), without approval by the cabinet of the State Government.

7. Per contra, the learned Advocate General appearing for the respondents has submitted that the financial bid of the technically qualified bidders of the tender in question has already been opened on 24.08.2018 and NCC Ltd. has already been declared L-1. It is further submitted that Clause 4.5 (A)(b) clearly stipulates that the Contracting Firm / Agency / JV should have satisfactorily completed in India as a prime contractor



during the last seven years ending last day of the month previous to the month of date of tender i.e. 30.04.2018 construction of :-

“i. 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 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.

And

ii. Three works of similar nature in India each costing not less than 40% (forty percent) of the estimated cost of this project.

“Or”

Two works of similar nature in India each costing not less than 60% (sixty percent) of the estimated cost of this project.

“Or”

One work of similar nature in India costing not less than 80% (eighty percent) of the estimated cost of this project.”

It is submitted that in view of the aforesaid stipulation contained in Clause 4.5(A)(b) of the N.I.T., the Petitioner No. 1 company definitely does not fulfil the criteria as a prime contractor, hence, its bid was found to be technically non-responsive. It is further submitted that so far as Clause 1.3.1 of



Section 2 of the N.I.T. (qualification information) is concerned, the same has got nothing to do with the eligibility criteria contained in Clause 4.5 of the N.I.T. inasmuch as qualification information is sought from every bidder in order to know the background of the bidder and the kind of work which has been executed by them in the last five years in any capacity. It is further submitted that a bare perusal of the experience certificates, annexed by the petitioners, show that the petitioners have executed various captioned works as a sub contractor. Lastly, the learned Advocate General has distinguished the judgment referred to by the learned senior counsel for the petitioners i.e. the one dated 09.08.2018 passed in CWJC No. 9688 of 2018 and other analogous cases wherein the issue was regarding challenge to the legality of the eligibility criteria in Clause 4.5(A)(b)(i) of the N.I.T on the ground of deviation from standard bidding document of the Government of Bihar, however, in the present case, no such ground of challenge has been raised by the petitioners.

8. I have heard the learned Senior Counsel for the petitioners as also the learned Advocate General for the respondents and have also gone through the written submissions and the materials on record. The first issue raised by the



petitioners is that the petitioners could not have been declared to be technically non responsive in view of the petitioners having not complied the qualification required as per Clause 4.5 (A)(b) of the instruction to bidders contained in the tender documents / N.I.T. inasmuch as the petitioners have successfully completed not only one but two projects i.e the one being Fakaruddin Ali Ahmed Medical College and Hospital at Barpeta and the other being Tezpur Medical College & Hospital at Tezpur, Assam. The petitioners have averred that the entire work of the said two projects was completed by the petitioners on a back to back basis. In this regard I have gone through the materials on record and find from the documents annexed as Annexure 6 series to the writ petition that both Engineering Projects (India) Ltd. as also the office of the Chief Engineer, PWD (Building), Government of Assam, Guwahati have issued certificate stating therein that the Petitioner No. 1 company was associated with M/s Engineering Projects (India) Ltd., Delhi during the construction of Fakaruddin Ali Ahmed Medical College and Hospital at Barpeta and had completed the work successfully. Similarly, at page no. 79 of the writ petition is the work completion certificate dated 24.05.2018, which has been issued by the Executive Engineer, PWD, Tezpur Building Division,



Tezpur, Assam wherein it has been certified that the Petitioner No. 1 company has worked as sub contractor of M/s Engineering Projects (India) Ltd., Delhi.

9. From the materials available on record, this Court is of the view that the Petitioner No. 1 company has worked as a sub contractor and not as a prime contractor, hence the mandatory requirements / qualification under Clause 4.5(A)(b) of the instruction to bidders of the tender documents / N.I.T. were not admittedly fulfilled by the petitioners herein, thus the Technical Tender Committee of the Bihar Medical Services and Infrastructure Corporation Ltd. has rightly, by its decision dated 13.07.2018, held the bid of the Petitioner No. 1 company to be technically non responsive.

10. Now, coming to the issue raised by the petitioners regarding Clause 1.3.1 of Section 2 (qualification information) of the N.I.T. in question, it is clear that the said information is only for the purposes of knowing the background of the bidder as also the type of work executed by the bidder in the last five years in any sort of capacity, as is apparent from Clause 4.1 of the instruction to bidders, which is reproduced hereinbelow:-

“4.1. All bidders shall provide in Section 2, Forms of Bid and Qualification Information, a preliminary description of the proposed work method and schedule, including drawings and



charts indicating miles stones to complete the project on time.”

It is apparent that Clause 4.5(A)(b) is mandatory in nature and non compliance of the same would result in disqualification of the bidder, hence, this Court finds that Clause 1.3.1 of Section 2 of the N.I.T. is of no help to the petitioners since, the petitioners do not fulfil the prescribed qualification under Clause 4.5(A)(b) of Section 2 of the N.I.T., thus the bid of the Petitioner No. 1 company has rightly been held to be technically non-responsive by the Tender Evaluation Committee. At this juncture it may be mentioned that though the aforesaid issues were not argued by the Ld. Sr. Counsel for the petitioners but still the same have been dealt with since the same have been averred in the written notes of argument.

11. This Court, now, proposes to deal with the solitary argument advanced vehemently by the Ld. Sr. Counsel for the petitioners, during the course of Oral hearing i.e. to the effect that a coordinate Bench of this Court by an order dated 09.08.2018 passed in C.W.J.C. No. 9688 of 2018 and other analogous cases has set aside the restrictive clause 4.5(A)(b)(i), hence, the bid/tender of the petitioners should be considered without considering the mandatory conditions provided for



under Clause 4.5(A)(b)(i). In this regard, this Court finds that as far as the present case is concerned, there is no whisper in the entire writ petition to the effect that Clause 4.5(A)(b)(i) has been modified and in fact, there is no material on record of the writ petition to show that the said criteria in the N.I.T. is a deviation from the standard bidding document and that too without approval of the cabinet of the State Government, hence, the aforesaid judgment dated 09.08.2018 is clearly not applicable in the present case. In any view of the matter, the capacity of a bidder including their experience to execute a particular nature of contract cannot be said to be an unreasonable condition and moreover, the Bihar Medical Services and Infrastructure Corporation Ltd. is well within its authority to enter into a contract for the purposes of procuring work from experienced contractors for a particular purpose and Clause 4.5(A)(b) of the N.I.T specifies the eligibility of a bidder which cannot be in any way unreasonable so as to prejudicially effect any participating bidder. In any view of the matter, the aforesaid judgment dated 09.08.2018 relied upon by the Ld. Senior Counsel for the petitioners has already been set aside by a Division Bench of this Court by a judgment dated 03.12.2018 passed in L.P.A. No. 1257 of 2018, L.P.A. No. 1258 of 2018 and L.P.A. No. 1256 of



2018, paragraphs 17 to 23 whereof are being reproduced herein

below:-

“17. We have considered the rival submissions and at the very outset it may be apt to clarify that the appellant-Corporation being a Public Limited Company is also admittedly a Government Company as per the Memorandum of Association itself. However, the power of the Board of Directors gives them ample space to perform their duties in a manner which may be in the interest of the Corporation and which is, however, subject to review by the State Government. This being the position, there is no doubt that the appellant-Corporation will fall within the definition of an instrumentality so as to clothe it with obligations and responsibilities that can be subjected to judicial scrutiny in the exercise of powers under Article 226 of the Constitution of India. In the matter of award of contracts, it is no longer res integra that the scope of interference of the Court is restricted and can only be invoked if the action of the tendering authority is malafide or is a misuse of the statutory powers.

18. In the instant case there are no personal malafides alleged against any of the officers, but the allegation is that introduction of the impugned condition was with a view to favour certain contractors. We have not been able to find out any material on record nor are there any pleadings in the writ petition to the effect as to who were those favoured contractors for whom the aforesaid condition had been introduced and in what manner. In the absence of any such material it is not established that the tender conditions were tailored to suit the requirement of any individual or favoured contractor. The allegations being bald and unsupported by any evidence, the same do not even have a persuasive impact.

19. The introduction of the terms have been castigated by the respondent-petitioners as being contrary to the Government decisions and the adoption of the Standard Bidding Documents by



the Corporation itself. The learned Single Judge has placed reliance on the Apex Court decisions relied on by the respondent petitioners to conclude that the introduction of clause 4.5 A (b) (i) was a stringent eligibility criteria which was without the approval of the Cabinet that will amount to giving a go-bye to the Government policy.

20. We are unable to accept the aforesaid reasoning inasmuch as the Corporation has the authority to enter into a contract for the purpose of procuring work from experienced contractors for a particular purpose. The purpose clearly here is the construction of a Medical and Dental College as well as a Hospital. The specific nature of the constructions required have been specified in the impugned clauses and, to our mind, the same is only an explanation relating to the nature of the work and the expertise relating thereto which was required that of a bidder. This, therefore, specifies the eligibility of a bidder and which does not, in any way, indicate unreasonableness or any malicious intention to purposely eliminate anyone. The appellant-Corporation being a contracting agency can take a decision for the completion of a project by specified nature of contractor and, as already stated above, there being no material that any favoured contractor had been kept in mind to impose the condition, there is no sign of unreasonableness in the aforesaid decision making process of the Corporation. As noted above, the decision dated 2nd April, 2018 has not been questioned in any of the writ petitions, nor any relief has been prayed for quashing of the same. The said condition may cause inconvenience to the respondent-petitioners as they have no experience of building or raising constructions of a Medical College, Dental College and Hospital as a project. Merely because, that the conditions contained in the Standard Bidding Documents would have been favourable to the respondent-petitioners, or it would have been wiser or more logical to adopt the same does not render the decision of the Corporation to have a bidder of a specified nature of work to be unreasonable or arbitrary. The



capacity of a bidder, including his experience to execute a particular nature of contract, cannot be said to be an unreasonable condition in the absence of any mala fides or material to that effect. The Board took a decision which, in our opinion, was a valid decision and a conscious decision keeping in view the CVC guidelines as also the National Building Code, 2016. They have taken the aid of the standard procedure adopted and which, in no way, deviates or abrogates the condition of the Standard Bidding Documents as adopted by the Government of Bihar. The restriction, therefore, so defined, is in consonance with the object and purpose of the contract that has to be awarded and the imposition of the definition of the words, 'similar nature of work' by the Board, in our opinion, did not require any prior approval as it did not violate any of the decisions of the Government of Bihar. The imposition of specialised nature of experience in executing a work relating to a project of Medical College and Hospital, in no way, could be said to be a deviation from the terms and conditions so as to prejudicially affect any participating bidder. The impugned conditions do not reduce or depreciate the Standard Bidding Document. They are clearly intended to ensure the qualitative capacity of a bidder.

21. The learned Single Judge, in our opinion, completely overlooked the principles that have been laid down by the Apex Court in this regard, more particularly, the judgement in the case of Michigan Rubber (India) Limited (supra) that answers the aforesaid proposition. The learned Single Judge heavily relied on the judgment relating to the construction of a Dam in the State of Jharkhand, in the case of State of Jharkhand and others Versus CWE-SOMA Consortium (supra). The said decision that was rendered on 12th July, 2016 even though has taken notice of the Apex Court judgement in the case of Tata Cellular Versus Union of India, (1994) 6 SCC 651, yet the judgment in the case of Michigan Rubber (India) Limited (supra), which is closer to the point in issue, has not been discussed. In our opinion, the



ratio of the judgement in the case of Michigan Rubber (India) Limited (supra) applies squarely on the facts of the present case inasmuch as this is not a case where any pre-bid qualifications had been negotiated or any decisions were taken. In the instant case, even before issuing tender notice, a conscious decision was taken by the Corporation, and as is evident and remains undisputed, that the Government of Bihar has not taken any objection to the issuance of the said tender notices.

22. The State Government has the power to review decisions of the nature as specified in Clause 143 of the Articles of Association. The decision making process, if at all vitiated, could have been judicially scrutinized, but the learned Single Judge, in our opinion, committed an error by quashing the conditions so as to make it convenient for the respondent-petitioners to participate in the bid. This course was not open to be adopted in the exercise of jurisdiction under Article 226 of the Constitution of India in view of the judgements of the Apex Court as referred to hereinabove. The condition that was introduced was in the interest of the Corporation and the work to be executed by the Corporation. Nothing prejudicial has been shown and rather the attempt of the respondent-petitioners was to project as if the Corporation has acted arbitrarily and whimsically. The contention of Sri Singh, learned counsel, on behalf of the respondent petitioners that there cannot be any dual standard for adopting Standard Bidding Documents cannot be appreciated for the simple reason that there is no duality or caprice discernible on the facts of the present case and rather to the contrary, the notices inviting tender dated 09.04.2018 and 16.04.2018 are free from the vice of any unreasonableness or arbitrariness.

23. Thus, no prayer having been made to quash the decision dated 2nd April, 2018, the consequential tender notices for all the reasons recorded hereinabove did not suffer from any such infirmity so as to warrant exercise of jurisdiction under Article 226 of the Constitution of India. The learned Single Judge, therefore, fell in error in



allowing the petition. Consequently, we allow the appeals and set aside the impugned judgement dated 09.08.2018. The writ petitions stand dismissed.”

12. Having regard to the facts and circumstances of the case as also for the reasons mentioned hereinabove in the preceding paragraphs and also considering the fact that the very basis of the arguments advanced by the Ld. Senior Counsel for the petitioners no longer exists inasmuch as the judgment relied upon on behalf of the petitioners i.e the one passed by a coordinate Bench of this Court dated 09.08.2018 passed in C.W.J.C. No. 9688 of 2018 has already been set aside by the learned Division Bench of this Court by a judgment dated 03.12.2018 passed in L.P.A. No. 1257 of 2018 and other analogous cases, I do not find any merit in the present writ petition, hence, the writ petition is dismissed, however, without any order as to costs.

(Mohit Kumar Shah, J)

ajay gupta/-

AFR/NAFR	AFR
CAV DATE	11.10.2018
Uploading Date	14.02.2019
Transmission Date	NA

