

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.21403 of 2018

=====

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

... .. Petitioner/s

Versus

1. The State Of Bihar through the 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 and Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna
6. The Managing Director, Bihar Medical Services and Infrastructure Corporation Limited, Patna,. 4th Floor, BSSBCCL Building, Hospital Road, Shastri Nagar, Patna
7. The G.M. (Project and Design), Bihar Medical Services and Infrastructure Corporation Limited, Patna, 4th Floor, BSSBCCL Building, Hospital Board, Shastri Nagar, Patna

... .. Respondent/s

=====

Appearance :

For the Petitioner/s	:	Mr. Bimal Kirti Singh, Advocate Mr. Ranjeet Kumar, Advocate
For the Respondent/s	:	Mr. Lalit Kishore, A.G. Mr. Raj Ballav Pd. Yadav -AAG11

=====

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
CAV JUDGMENT

Date : 14-02-2019

The present writ petition has been filed for setting aside the decision of the technical tender committee of the Bihar Medical Services and Infrastructure Corporation Ltd., Patna dated 14.09.2018 whereby and whereunder the petitioner company has been declared to be non responsive / disqualified as also for quashing the decision of the said committee dated 05.10.2018, affirming the rejection of the tender of the



petitioner on technical grounds. It is further prayed that the respondent-corporation be directed to reconsider the technical qualification of the petitioner in light of his representation dated 15.10.2018.

2. The brief facts of the case are that a notice inviting re-tender dated 09.04.2018 was issued by the respondent corporation for construction of Government Dental College and Hospital, campus comprising of College building, 100 bedded Hospital, Auditorium, Guest House etc. at Paithna, Nalanda, Bihar. According to the said N.I.T. dated 09.04.2018, the last date of time of receipt (upload) of tender was 23.05.2018 and the tender was to be opened on 25.05.2018.

3. The learned counsel appearing for the petitioner has submitted that as per the circular of the Government of Bihar dated 17.11.2006, in cases of tender above a sum of Rs. 50 lacs, it would be appropriate for the purposes of adhering to the principles of nature justice that the technical bid is evaluated on the declared date so that the contractors can be present at the appointed date and time. It is also submitted that the said circular further provides that only after hearing the contractor, it can be declared unsuccessful, however, the respondent-corporation, in the present case, did not announce the date of



opening / consideration of the technical tender of the petitioner hence, the entire decision making process is vitiated and fit to be set aside. It is further submitted that the impugned decision of the technical committee dated 14.09.2018, as far as the petitioner is concerned, is also vitiated inasmuch as the bid of the petitioner has been held to be technically non responsive on erroneous grounds i.e. on the ground that though Clause 4.5(A) (b)(ii) of the N.I.T. defines “similar works” and also includes the work of HVAC, but the experience certificate uploaded by the petitioner does not show that it had executed the work of HVAC and secondly, on the ground that the electrical license submitted by the petitioner, as issued by the Government of Jharkhand, was valid only upto 31.12.2017, as such the petitioner does not comply with the qualification mentioned under Clause 4.5(A) (d). The learned counsel for the petitioner has submitted that if the respondent authority had informed the petitioner about the date of consideration of the technical bid, the petitioner-company would have definitely satisfied the authorities inasmuch as the petitioner was possessing the experience of executing the work of HVAC and further, though the electrical licence had expired on 31.12.2017, it had submitted an application for renewal of the electrical licence which had



subsequently been renewed. It is submitted that though the respondents did not inform the petitioner about the decision of the technical tender committee, but the petitioner company, immediately upon coming to know about the decision of the technical tender committee dated 14.09.2018, submitted an application dated 03.10.2018, however, the said application of the petitioner was rejected by the technical tender committee by a decision dated 05.10.2018, without providing an opportunity of hearing to the petitioner herein.

4. Per contra, the Ld. Advocate General (A.G.) appearing for the respondents has, at the outset, submitted that the present case has become infructuous in view of the fact that the tender in question has already been finalized, after opening the financial bid and letter of acceptance has already been issued to the L1 bidder for construction of Government Dental College and Hospital, Rahui District- Nalanda by a letter dated 01.11.2018. The Ld. A.G., appearing for the respondent-corporation, has further submitted that the impugned decision of the committee dated 05.10.2018 itself would show that the committee has duly considered the objection of the petitioner company relating to the deficiencies in question which are obvious in nature inasmuch as the uploaded electrical licence of



the petitioner company issued by the Government of Jharkhand was valid only till 31.12.2017, hence, the same was not acceptable as per the eligibility / qualification of the bidder, as envisaged under Clause 4.5(A)(d) of Section I of the tender document, which clearly stipulates that the contractor and / or his identified sub contractor should possess the required valid electrical licence for executing the building electrification work whereas the petitioner company was not having a valid electrical licence on the last date of submission of the tender in question. Moreover, the experience certificates submitted by the petitioner pertaining to similar work done by it i.e. the construction of residential building of Sail City, Ranchi, nowhere mentions about the execution of HVAC work by the petitioner. It is further submitted that the principles of natural justice has duly been complied with inasmuch as the objection submitted by the petitioner company was duly considered by the technical tender committee, as is reflected in its decision dated 05.10.2018 wherein there is a clear finding regarding ineligibility of the petitioner herein. The learned A.G. has further submitted that the respondent corporation is following the guidelines issued by the Water Resources Department, Government of Bihar as contained in Memo No. 536 dated



13.06.2013 relating to procedure to be adopted for disposal of the technical bid of the tenderers in case of works in excess of Rs. two crores based on the standard bidding document. It is evident from the aforesaid guidelines that technical bid has to be responsive at the very first stage on the following points:-

- (i) Registration (IFB & NIT)
- (ii) Earnest Money (ITB-cl-16 & IFB)
- (iii) Experience: Similar Nature of Work Executed (ITB-cl-4.5(A)(b) (Financial Value).
- (iv) Turn over {(ITB-cl-4.5(A)(a)}
- (v) Legal Identity-Affidavit {section 2-sl-2.1(i)}

And in case of any deficiency at the first stage technical bid will be rejected and will not be considered.

It is submitted that the aforesaid guidelines further provides that the opportunity of clarification and modification shall only be given at second stage on the following points.

- (i) Technical personnel*
- (ii) Key plant & Equipment*
- (iii) Experience in terms of quality*
- (iv) Bid capacity*
- (v) Programme of construction*
- (vi) Labour License.*
- (vii) Power of Attorney*
- (viii) Liquid asset & Credit Facility.*

The learned A.G., appearing for the respondents has submitted that in view of the aforesaid guidelines, it is apparent that since the petitioner company has failed at the first stage of eligibility qualification criteria, no opportunity of



clarification / modification, as demanded by the petitioner company, is either warranted or required to be extended to the petitioner. Nonetheless, it is submitted that the objection submitted by the petitioner company was duly considered in the meeting of the tender committee dated 05.10.2018, thus, ample opportunity has been given to the petitioner company in this regard, as such, the petitioner company should have no grievance on this score. Lastly, the learned A.G. has submitted that the standard bidding document of the Road Construction Department is not binding upon the respondent-corporation. It is further submitted that the circular being relied upon by the learned counsel for the petitioner which is dated 17.11.2006 is of no value to the petitioner inasmuch as earlier, there was no process of e-tendering and moreover, executive instructions do not have statutory character, as such, do not have the force of law.

5. I have heard the learned counsel for the parties and perused the materials on record. From the arguments advanced by the learned counsel for the petitioner, it is apparent that only two issues have been raised, firstly that the petitioner was not informed about the date of opening of the tender as also about consideration of its technical bid and further no



opportunity was given to it by the technical tender committee before holding its bid to be technically non responsive, hence, the entire decision making process is vitiated and fit to be set aside. The second issue raised by the petitioner is that even on merits, the petitioner had the experience of executing the work of HAVC and though the electrical licence of the petitioner had expired on 31.12.2017, it had submitted an application for renewal of the same which was renewed, subsequently.

6. Now, coming to the second issue raised by the petitioner first, at the outset, it would be apt to reproduce Clause No. 4.5(A)(b) to (e) of Section 1 of the tender document hereinbelow:-

“(b) 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 April, 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. 143.89 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. 35161 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.”

➤ *“Similar Nature” shall means:-
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.

The completion certificate shall be issued by employer not below the rank of Executive Engineer or Project Manager. In case of private client the completion certificate issued by employer should be certified by CA and supported with TDS certificate. The bidders shall have to also submit good quality digital photographs of the completed projects.

(c) executed in any one, the minimum quantities of the following items of work as indicated in Appendix to ITB.

(i) Cement concrete (including RCC and PCC):- Cum

(ii) Brick Work:- Cum

(iii) Flooring (Vitrified



/Mosaic/Marble/Kota/Ceramic):- Sqm.

(usually 80%) of the expected peak rate of construction)

(d) The contractor or his identified sub-contractor should possess required valid electrical licence for executing the building electrification works and should have executed similar electrical works for a minimum amount as indicated in Appendix in any one year.

(e) The contractor or his identified sub-contractor should possess required valid license for executing the water supply /sanitary engineering works and should have executed similar water supply/sanitary engineering works for a minimum amount as indicated in Appendix in any one year.”

It is apparent from the aforesaid Clause 4.5(A)(b)(i) and 4.5(A)(d) that the bidder / contractor should have the experience of satisfactorily completing in India as a prime contractor, the construction of at least one hospital etc. including the civil works along with services like plumbing, electrical, HVAC etc. and should be possessing the required valid electrical licence for executing the building electrification works, which obviously should be on or before the last date and time for receipt (upload) of tender. Admittedly, the experience certificate uploaded by the petitioner along with his bid regarding execution of work at Sail City, Ranchi did not depict that the petitioner had



executed the HVAC work and moreover, the electrical licence issued by the Government of Jharkhand to the petitioner, as uploaded by the petitioner, had already expired on 31.12.2017, hence, the petitioner admittedly did not comply with the qualification as mentioned under Clause 4.5 (A)(b) & (d). In fact, the respondent-corporation had also uploaded the proceedings of the technical tender committee dated 14.09.2018 on 27.09.2018, as also admitted by the petitioner herein, giving an opportunity to the bidders to make representation regarding technical qualification / disqualification on or before 03.10.2018 till 5 PM. The petitioner had also availed this opportunity and had submitted a letter dated 03.10.2018, which is at Annexure-5 to the writ petition, however, no clarification whatsoever on facts was submitted in context of the deficiencies found in its bid by the Technical Tender Committee in terms of Clause 4.5(A)(b) and Clause 4.5(A)(d). The petitioner has relied upon various certificates issued by the Ranchi Municipal Corporation, Ranchi, by the Executive Engineer (Retd.), Technical Adviser, Kharkai, Dam Circle, by one architect namely, Anil Kumar Singh, by one chartered Accountant Firm, namely, K.C.Tak & Co., by one Engineer, namely,



Subas Kumar, by yet another Chartered Accountant Firm, namely, N.K.Kejriwal & Co., by the Jharkhand Police Housing Corporation Ltd., which can be found at page nos. 16 to 29 of the supplementary affidavit filed by the petitioner on 01.11.2018 and appear to have been issued in between the years 2015 to 2017, however, a bare perusal of the said certificates shows that there is no mention of the petitioner having executed and completed the work of HVAC. The petitioner appears to have made a belated attempt to cover up his lacuna by bringing on record a certificate issued by the same Chartered Accountant Firm, namely, K.C.Tak & Co. dated 04.10.2018, who had earlier issued a certificate dated 22.04.2015 and though, in the certificate dated 22.04.2015, there is no whisper of the petitioner having successfully executed the work of HVAC, surprisingly, the certificate dated 04.10.2018, issued after the expiry of the last date for filing representation regarding technical qualification / disqualification of the participating bidders before the Respondent Corporation, shows that the scope of work regarding construction of Sail City, Phase I Building also included HVAC works.

7. From the discussions made hereinabove in the preceding



paragraphs, as also considering the submissions made by the learned counsel for the parties as also considering the materials available on record, it is apparent that as on the last date of submission of the bid, the petitioner admittedly did not have a valid electrical licence and further on the date of filing of the representation / objection to the findings of the technical Tender Committee dated 14.09.2018, i.e. on 03.10.2018 also, the petitioner did not possess a valid electrical licence, hence, the bid of the petitioner was rightly declared to be technically non responsive on account of it not possessing requisite qualification as per Clause 4.5 (A)(d) of Section 1 of the tender documents. Similarly, on its own showing, the petitioner had failed to upload any experience certificate showing that it had satisfactorily completed in India as a prime contractor at least one hospital or composite hospital campus having college / hostel / residential building wherein the HVAC work had also been executed by it, hence, the Technical Tender Committee could not have presumed or dreamt that the petitioner had also executed the HVAC work, thus, the Technical Tender Committee of the Respondent Corporation had rightly declared the petitioner's bid to be technically non responsive in absence of possessing qualification under Clause



4.5(A)(b)(i). Thus, this Court finds that the petitioner has been rightly declared to be technically non responsive and consequently unsuccessful and to that extent, no fault can be found either with the proceedings of the Technical Bid Committee of the Respondent Corporation dated 14.09.2018 or the one dated 05.10.2018.

8. The other issue raised by the petitioner that the guidelines contained in the circular of the Government of Bihar dated 17.11.2006 has not been complied with in its letter and spirit and the petitioner has not been granted an opportunity of hearing is also fit to be rejected inasmuch as firstly, executive instructions / circulars do not have any statutory character and therefore, they cannot be termed as 'law' within the meaning of Article 13 of the Constitution of India and moreover, the petitioner has admittedly been granted an opportunity of filing a representation against the proceedings of the Technical Tender Committee of the Respondent Corporation dated 14.09.2018, which, in fact, was also availed of by the petitioner by filing a representation dated 03.10.2018 whereafter, the representation of the petitioner was considered afresh by the Technical Tender Committee and by its proceedings dated 05.10.2018, the



petitioner was again found to be technically non responsive / unsuccessful in view of the fact that neither any objection was raised by the petitioner with regard to it having been declared to be not possessing a valid electrical licence nor any evidence was annexed by the petitioner along with its representation with regard to it having executed HVAC work.

9. Having regard to the facts and circumstances of the case and for the reasons mentioned hereinabove, I find that due opportunity has been given to the petitioner to represent against the proceedings of the technical tender committee of the Respondent Corporation dated 14.09.2018, which had in fact also been availed by the petitioner, hence, this Court finds that the principles of natural justice have fully been complied with and there is no error in the decision making process. This Court further comes to a finding that even on merits, the petitioner has not fulfilled the eligibility criteria as contained in Clause 4.5 (A)(b)(i) and Clause 4.5(A)(d) of Section 1 of the tender documents, hence the bid of the petitioner has rightly been held to be technically non responsive / unsuccessful by the tender bid committee of the Respondent Corporation by proceedings dated 14.09.2018 as upheld by the proceedings dated 05.10.2018. Accordingly, this Court finds



that there is no merit in the present writ petition, hence, the same is dismissed, however, without any order as to costs.

(Mohit Kumar Shah, J)

ajay gupta/-

AFR/NAFR	AFR
CAV DATE	26.11.2018
Uploading Date	14.02.2019
Transmission Date	NA

