

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3913 of 2023

M/s Prasad Construction and Company, Lila Mohan Niwas Naisarai Bihar Shariff Nalanda through its Partner Laxman Prasad, aged about 55 years, Male, Son of Madan Mohan Sahu, Resident of House No. 702, Lalpur Tharphakna, Opposite Ajay Singh, Girls Hostel, Ranchi, P.S. Town District Ranchi (Jharkhand).

... .. Petitioner/s

Versus

1. The State of Bihar through the Additional Chief Secretary, Home Police Department, Government of Bihar, Patna.
2. The Chairman-Cum-Managing Director, Bihar Police Building Construction Corporation, BSAP-05 Campus, Patna- 800014.
3. The Chief Engineer, Bihar Police Building Construction Corporation, Patna.
4. The Superintendent of Police, Nalanda.
5. The Superintending Engineer, Work Circle 1, Bihar Police Building Construction Corporation, Patna.
6. Realty Advance Structure Enterprises Pvt. Ltd., 2nd Floor, House No. 955, Maurya Path, Khajpura Near Pillar No. 15, Bailey Road, Patna.
7. M/s Dipanshu Promoter and Builder Pvt. Ltd., 2B, Vatika Apartment Line Tank Road, Ranchi.
8. Shree Balaji Engicons Ltd., Jharsuguda Orissa.
9. M/s GC-AK (JV)/M/S Govinda Construction, at Sheo Govinda Construction Pvt. Ltd., 65 Gandhi Nagar, West Boring Canal Road, P.S.- Sri Krishna Puri, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Ranjeet Kumar, Advocate Mr. Ayush Kumar, Advocate Mr. Yogesh Kumar, Advocate Mr. Mohit Srivastava, Advocate
For the BPBCC	:	Mr. Prasoon Sinha, Advocate
For the State	:	Mr. Manish Kumar, G.P.-4 Mr. Deepak Kumar, AC to GP-4
For the respondent no. 7	:	Mr. Amish Kumar, Advocate Mr. Krishna Chandra Jha, Advocate
For the respondent nos. 8 & 9	:	Mr. Prabhat Ranjan, Advocate Mr. Chandan Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT



(Per: HONOURABLE MR. JUSTICE ARUN KUMAR JHA)

Date : 18-10-2023

I.A. No. 1 of 2023

The present interlocutory application has been filed for amendment in the instant writ petition by adding one another prayer, i.e., prayer no. 1 (v) which is as under :

“1.(v) For setting aside the Letter no.1994 dated 06.02.2023 issued with the signature of the Chief Engineer, Bihar Police Building Construction Corporation, Headquarter, Patna whereby the work in question arising out of Tender No.15 SBD 2022-23 dated 10.11.2022 with respect to construction of 4,000 constable barrack building and class room at Bihar Police Academy, Rajgir in the District of Nalanda has been allotted”

2. For the reasons stated in the interlocutory application, the same is allowed and the averments made therein will be treated to be a part of the writ petition.

CWJC No.3913 of 2023

3. Learned counsels for the respective parties have been heard on the previous dates of hearing.

4. Instant writ petition has been filed by the petitioner



seeking the following reliefs :-

“i. For setting aside the decision of the Technical Bid Committee dated 24.01.2023 headed by Superintending Engineer, Work Circle 1, Bihar Police Building Construction Corporation, Patna whereby the private respondents No.7, 8 and 9 have been declared qualified in Re-tender No.15/SBD/2022-23 dated 26.10.2022 on receiving of either additional documents which were not submitted with the BID documents or by ignoring submission of relevant documents required in the NIT and SBD.

ii. For setting aside the Financial Bid of the said work and consequential declaration of L1 to the contractor namely M/S GC-AK (JV)/M/S Govinda Construction (Respondent No.9).

iii. For that the petitioner further prays that after setting aside the aforementioned two impugned documents, the respondents authority be directed to award the work to the petitioner on the basis of the decision of the Technical Bid Committee Dated 10.01.2023 wherein only the petitioner was declared responsive/qualified.

iv. For any other relief/reliefs for which the petitioner may be deemed entitled too”.

5. Briefly stated, the case of the petitioner is that he is



a registered Class-I contractor, who participated in NIT No.26/SBD/2021-22 which was floated under the signature of Engineer-In-Chief, Bihar Police Building Construction Corporation, Patna (in short 'BPBCC') for construction of four thousand constable barrack building and class rooms at Bihar Police Academy, Rajgir, Nalanda with electrification. In the said tender, though a number of contractors participated, but except for one, all were declared ineligible and for this reason, due to single tenderer remaining in the fray, the said tender was cancelled. Thereafter, the authorities issued a Re-tender No.15/SBD/2022-23 dated 26.10.2022 with respect to the aforementioned works. The date for uploading of the bid documents was 12.11.2022 till 5:00 P.M. and the date for opening of technical bid was 14.11.2022 at 04:00 P.M. The NIT provided that bid was to be submitted through online mode and not in any other manner. The requirement of submission of bid documents has been prescribed in Clause 34 of the NIT. Apart from the petitioner, four other contractors, namely, Realty Advance Structure Enterprises Pvt. Ltd. (respondent no.6), M/s Dipanshu Promoter & Builder Pvt. Ltd. (respondent no.7), M/s Balaji Engicon Ltd. (respondent no.8) and M/s GC-AK (JV) (respondent no.9) also participated in the tender process. The



Technical Bid Committee evaluated the technical bids of all the five tenderers in its meeting dated 10.01.2023 and declared the bids of four tenderers to be non-responsive and only the bid of the petitioner was declared to be responsive.

6. Further case of the petitioner is that the minutes dated 10.01.2023 of the Technical Evaluation Committee shows that the bids of other participants were found to be non-responsive due to non-submission of certain documents. Thereafter, in a meeting held on 24.01.2023, the Technical Bid Committee reconsidered the eligibility of three out of four technically disqualified tenderers and declared the bids of the respondent nos. 7, 8 and 9 to be responsive and, thus, they were declared qualified along with the petitioner.

7. Further case of the petitioner is that this decision of the respondent authorities is arbitrary, illegal and the result of colourable exercise of power. The petitioner has further submitted that the bid of the respondent no.7 was earlier declared non-responsive because of non-submission of Tax Audit Report in terms of Clause 4.5 (A) (a) of the SBD as well as in terms of Clause 34 of the NIT. But the Technical Bid Committee ignored the same and declared its bid to be responsive as the respondent no.7 has submitted ITR of five



years mentioning the Audit Report UDIN Number which is arbitrary, unfair and colourable exercise of power since the Clause 4.5 (A) (a) of the SBD and Clause 34 of the NIT make it mandatory to submit all the soft copies of the Audit Report of five years and merely mentioning of the Audit Report UDIN Number would not suffice for eligibility criteria. Similarly, the bid of the respondent no.9 which was declared non-responsive because of non-submission of experience certificate of one of the joint venture partners M/S Arvind Kumar, was later on declared responsive as the authorities took into account the fresh certificate, which was not part of the bid document submitted by the respondent no.9, which is in the teeth of the conditions of the NIT, SBD and the Bihar Finance rules. Even the Hon'ble Supreme Court in a number of decisions has held that tender committee would decide the tender strictly on the basis of documents submitted along with bid documents and on no other documents submitted at the subsequent stage.

8. Further case of the petitioner is that the respondent no.8 was also declared qualified though he was earlier disqualified for not having minimum experience to work with respect to brick work, RCC/PCC, stone tiles and pile foundation. In this regard, the Technical Bid Committee



considered that the respondent no.8 had experience of pile foundation on the basis of document already on record, but this respondent was declared eligible without considering any other document with respect to brick work, RCC/PCC, Stone tiles in gross violation of the conditions of the NIT, SBD and the Bihar Finance Rules. Thus, the petitioner has submitted that the other three tenderers who were earlier declared ineligible were later on declared eligible erroneously, maliciously and in connivance with the authorities without availability of relevant documents/certificates/reports and the respondent authorities opened the financial bid wherein the respondent no.9 was declared L-1 and the petitioner was declared L-2. Since the other tenderers have been declared qualified against the express condition of the NIT, SBD and the Bihar Finance Rules and in aberration of the decisions of the Hon'ble Supreme Court, the petitioner, being the only contractor, who was declared eligible by the Technical Bid Committee in its meeting dated 10.01.2023, deserves to be awarded the contract of Re-tender No.15/SBD/2022-23.

9. Two sets of counter affidavit have been filed; first on behalf of the official respondent nos. 2, 3 and 5 and second on behalf of the respondent no.9.



10. In their counter affidavit, the official respondents have submitted that there exists three categories of tenders. The first category is 'Single Bid System' which is for works up-to Rs.40 lacs. The second category is 'Two Bid System' which is for works of more than Rs.40 lacs and up-to Rs. 2 crores. The third category is 'Standard Bid Document (SBD)' which is for works of more than Rs. 2 crores. The tenders were invited on e-procurement portal, i.e., www.eproc.bihar.gov.in and since October, 2022, the 'BPBCC' started using E-Proc2 portal and the NIT No.15/SBD/2022-23 was the first tender which was floated through E-Proc2. The E-Proc2 has advanced inbuilt security features which makes the tender procedure safe and secure, ensuring high level of transparency and it facilitates healthy competition.

11. It has been further submitted on behalf of the official respondents that NIT No.15/SBD/2022-23 is having estimated cost of Rs.12,551.82 lacs and it comes under the third category and the said tender was invited on the basis of SBD. The SBD was first published in the year 2006 and subsequently revised in the year 2008 by the Road Construction Department (RCD), Govt. of Bihar and also some guidelines were issued vide letter no. 6/Niyam-02/2010-8131 (S)w dated 24.07.2012



which is applicable to all Works Departments and State Public Sector Undertaking. The technical evaluation of bids is done as per the conditions and procedure mentioned in the SBD and the technical bids of all five bidders were opened on the stipulated date, i.e., 14.11.2022. Having downloaded all the documents, the same were scrutinized and a comparative evaluation chart was prepared. The Technical Evaluation Committee evaluated the technical bids of all the five bidders in its meeting dated 10.01.2023. The official respondents admitted that during the primary evaluation, only the document of the petitioner was found to be in order, whereas the documents submitted by the remaining four bidders were not found in order for want of information as contained in their documents. The Committee recommended to upload its proceeding on the website as well as to inform the bidders on their E-mails. The whole exercise was done under Clause 22.4 of the SBD. A corrigendum was published by the Technical Bid Evaluation Committee vide letter no.1889 dated 11.01.2023 mentioning therein that a copy of the bid evaluation sheet along with the proceedings of the Technical Bid Evaluation Committee pertaining to NIT No.15/SBD/2022-23, Gr.No. 01 was uploaded on the website but due to typing error, the bid evaluation sheet of M/s Gobinda



Construction & Arvind Kumar (Joint Venture) at Sl.No.23 was inadvertently typed as Responsive instead of Non-responsive and hence, it should be read as Non-responsive. After the decision of the Technical Bid Evaluation Committee was communicated to the respondent nos. 6 to 9, only the respondent nos. 7 to 9 submitted their objections, clarifications and explanation within the stipulated period before the Chief Engineer, BPBCC, Patna. Thereafter, the Technical Bid Evaluation Committee in its second meeting held on 24.01.2023 examined the clarifications/explanations received from the bidders and after assigning reasons, the Committee accepted the clarifications/explanations submitted by the three bidders (respondent nos. 7, 8 & 9) as valid and thus, the bid of the petitioner and these three respondents were declared responsive in the technical bid evaluation.

12. The official respondents have further submitted that the respondent no.9 was declared unsuccessful in the first technical bid evaluation meeting as one of the partners, namely, M/s Arvind Kumar was found to have not done the minimum required work of pile foundation by the Committee. However, initially the bidder-respondent no.9 had uploaded two experience certificates with the tender documents. One has been



issued under the signature of the Executive Engineer, Construction Division No.1, Building Construction Department, Bihar, Patna bearing letter no. 1423 dated 08.10.2022 and second experience certificate has been issued by letter no.1434 dated 28.09.2022 under the signature of Deputy General Manager, Bihar State Building Construction Corporation Limited, Patna. In the experience certificate dated 08.10.2022, the quantity of pile foundation work done by M/S Govinda Construction is described as 27775.00 meter which is more than the minimum quantity of pile work which was required to be executed in one year, i.e., 2020-21 as prescribed in Clause 4.5A (c) read with Appendix G to ITB of the SBD. In the experience certificate dated 28.09.2022, the quantity of pile foundation work done by M/S Gobinda Construction was shown as 13788.00 meter for the year 2019-20, i.e., the proposed construction of Multi-storied Residential Quarters (G+7) for Presiding Officers of this Court at Chhajubagh, Patna. Thereafter, pursuant to E-mail dated 11.01.2023, the bidder-respondent no.9 submitted its explanation with regard to re-evaluation of tender committee dated 11.01.2023 before the Chief Engineer, BPBCC, Patna along with the certificate issued by the Deputy General Manager, BSBCCL, Patna, certifying



that Arvind Kumar, a Sub-contractor of M/S Gobinda Construction has completed 6894 meters pile work in connection with the proposed construction of Multi-storied Residential Quarters for Presiding Officers of this Court at Chhajubagh, Patna against Agreement No.09/SBD/2019-20. The official respondents have further submitted that the certificate in this regard dated 28.09.2022 as contained in letter no.1434 had already been uploaded along with the bid documents by the bidder-respondent no.9 in connection with the present NIT, which is more than 25% of the minimum pile foundation work prescribed under Appendix-G to ITB in the financial year 2019-20 read with the guidelines issued by the Road Construction Department by letter dated 24.07.2012 in connection with the conditions for participating as Joint Venture in the tenders based on Standard Bidding Documents. Clause 5.2 of the aforesaid guidelines prescribes the following criteria:

“5.2 Each of the remaining partners shall meet not less than 25% of all the qualifying criteria given in Sub-clause 4.2, 4.5A, 4.5B, 4.7 and 4.8 of ITB”.

13. The official respondents have further submitted that the financial bids of the bidders who qualified in the technical bid in the second meeting held on 24.01.2023, were



opened on 25.01.2023. The work was awarded to the lowest bidder, namely, respondent no.9 as L-1, who has quoted the rate 5.33% below the estimated cost. The respondent no.7 was declared L-2 who has quoted rate 3.99% below the estimated cost and the rate quoted by the petitioner was 3.51% below the estimated cost. Thus, the official respondents have submitted that everything was done in a transparent and competitive environment providing the opportunity to all eligible and willing bidders.

14. The official respondents have further submitted that the first meeting was held on 10.01.2023 in which bids of four bidders were declared non-responsive in technical bid evaluation. The allegations made by the petitioner are not correct and the action has been taken by the respondent authorities in accordance with the provisions of the SBD and the guidelines issued by the Road Construction Department. The averments made by the petitioner contain distorted and misleading facts. No fresh certificate of M/S Arvind Kumar was considered by the Technical Bid Evaluation Committee, rather letter no.GC-AK/2022-23/121 dated 01.10.2022 was attached by M/S Gobinda Construction with its clarification which was an explanation of experience certificate which had already been



attached with the technical bid and was uploaded on the website. Similarly, the respondent no.7 was declared as qualified after comprehensive bid evaluation and this is reflected from perusal of the report of the Committee dated 24.01.2023.

15. Thus, the official respondents have submitted that all the averments and submissions made by the petitioner are misconceived, imaginary, baseless and devoid of merit and the same are not sustainable in the eyes of law.

16. In its counter affidavit, the respondent no.9 has admitted that only the petitioner's bid was declared responsive in the meeting dated 10.01.2023 and the respondents have invited objection from bidders through E-mail on 11.01.2023 and the respondent no.9 had explained about experience of pile foundation work duly signed by the Engineer-in-Charge for remaining partner which was reconsidered in the meeting. The respondent no.9 submitted its clarification under Clause 22.4 of the SBD in the aforesaid tender which allows to get the clarification about tender documents from the bidders. The respondent no.9 submitted its explanation with evidence based on documents already submitted and this fact was reconsidered in the meeting dated 24.01.2023 of the Tender Committee and the bid of the respondent no.9 was declared responsive. The



respondent no.9 had not submitted extra document but earlier submitted documents were explained to the Tender Committee, which examined the bids under the clause of NIT & SBD. After opening the financial bids of all bidders, the bid of the respondent no.9 was found lowest and it was awarded the work. The bid of the petitioner was found to be L-3, so the petitioner is raising the dispute which is not maintainable. The respondent no.9 has further submitted that it has already commenced the work.

17. Reiterating the contention of the petition, learned counsel for the petitioner submitted that the official respondents acted against the provisions of NIT/SBD and declared the technical bids of the respondent nos. 7, 8 and 9 to be responsive. The learned counsel pointed out that in case of the respondent no.7, though the requirement was for submission of character certificate of all the contractors and Tax Audit Reports, but due to non-furnishing of these documents, the bid of the respondent no. 7 was earlier declared non-responsive. The explanation of the Technical Bid Evaluation Committee that the respondent no. 7 produced some letter of the Road Construction Department wherein it has been mentioned that there was no requirement of furnishing character certificate of the contractors at the time of



submission of bid and the same could be done prior to execution of agreement, was taken into consideration which was completely extraneous material and beyond the last date of submission of bid. Similarly, the submission of Tax Audit Report has been waived as it has been said that Audit Report with UDIN No. along with ITR of five years have been submitted. Obviously, these documents could not substitute the requirement of Tax Audit Report. Still the bid of the respondent no.7 was found to be responsive.

18. Similarly, in case of the respondent no.8, explanation regarding pile foundation work seems to be satisfactory. But regarding other criteria like brick work, RCC/PCC, stone tiles, the Technical Bid Evaluation Committee did not offer any explanation and just stated that the respondent no. 8 was having sufficient experience in other criteria. The aforesaid facts have not even explained in the counter affidavit of the official respondents.

19. The learned counsel for the petitioner further assailed the action of the authorities in finding the technical bid of the respondent no.9 to be responsive, but such recording of finding is based again on extraneous material as is apparent from Annexure-R-2/J which is letter dated 13.01.2023 which



shows the respondent no.9 has submitted the experience of pile work of Arvind Kumar with covering letter dated 13.01.2023. That means a subsequent document was taken into consideration. The learned counsel relied on Clause 22.4 of the SBD under the heading of 'Bid Opening and Evaluation' to stress the fact that the opportunity given to the bidders was only to clarify or modify the technical bid whenever necessary with respect to any rectifiable defects and after receipt of such clarifications, the Evaluation Committee was required to finalize the list of responsive bidders with existing materials as on the last date of submission of bid. The said clause does not provide for submission of any document subsequent to submission of bid and the same could not be taken into consideration.

20. Thus, learned counsel for the petitioner submitted that the respondent nos. 7, 8 & 9 have been wrongly declared qualified finding their technical bid to be responsive.

21. The learned counsel appearing on behalf of the official respondents vehemently contended that there is no merit in the submission made on behalf of the petitioner. The learned counsel submitted that the Technical Bid Evaluation Committee has properly evaluated the documents and did not rely on any subsequent document as alleged by the petitioner. The learned



counsel further submitted that the SBD itself provides for submission of clarification/modification under Clause 22.4 and only explanation submitted by the respondent nos. 7, 8 & 9 were considered by the Technical Bid Evaluation Committee and the same could not be said to be wrong. The learned counsel further submitted that so far as the claim of the petitioner about the Committee considering the subsequent document in case of the respondent no.9 is concerned, the same was merely an explanation as the respondent no.9 has already completed the pile foundation work to the tune of 27775.00 meters which was much more than the minimum requirement of 21114.75 meters and when the defect was pointed out that experience of other partners M/S Arvind Kumar has not been submitted, the respondent no.9 just furnished the certificate which was prior to the date of bidding showing that M/S Arvind Kumar worked as a sub-contractor and was also involved in pile foundation work for M/S Govinda Construction. The learned counsel further submitted that as the NIT was governed by letter no.6/Niyam-02/2010-8131 (S)w dated 24.07.2012, the joint venture partners were required to furnish their respective experience and for considering their eligibility, the respective experience of the joint venture partners were required to be added. In the facts and



circumstances, no illegality has been committed by the official respondents.

22. Supporting the contention of learned counsel for the official respondents, the leaned counsel for the respondent no.9 vehemently contended that there is no infirmity in allowing the technical bid of the respondent no.9 as responsive. The learned counsel submitted that proper explanation has been furnished in the proceedings of the Technical Bid Evaluation Committee dated 24.01.2023 wherein it has been specifically mentioned that the decision was taken on perusal of the documents which were submitted with the bid and prior to the date of bid.

23. The learned counsel for the respondent no. 9 further submitted that the explanation was furnished in terms of Clause 22.4 and bid evaluation sheet shows one of the partners on his own was fulfilling the eligibility clause of minimum requirement towards the pile foundation work. The learned counsel further submitted that there was no requirement for furnishing the experience of the other partners in this joint venture since clause 4.5 (A) (c) of the SBD did not provide that each of the partners were required to furnish the experience certificate as it only mandates each bidder should have executed



in any one year the minimum quantities of the items of work as indicated in Appendix to the ITB. The learned counsel further submitted that the aforesaid letter dated 24.07.2012 is not part and parcel of the SBD and the Clause 15 of the Invitation for Bid makes it amply clear that disposal of the tender was to be done according to the SBD Rules. The learned counsel further submitted that the petitioner has wrongly submitted in paragraph 21 that the contract has not been awarded to L-1, i.e., respondent no.9 as letter of award was issued on 06.02.2023 to the respondent no.9 and subsequently, the contract was signed on 07.03.2023 and the work is in full swing. Thus, learned counsel submitted that there is no merit in the submission of the petitioner and the instant writ petition be dismissed with cost.

24. Perused the record.

25. The issues arising out from the rival contention appear to be as follows :

(i) Whether the letter no. 8131 dated 24.07.2012 could be considered as part and parcel of SBD of NIT No.15/SBD/2022-23 dated 26.10.2022?

(ii) Whether the official respondents could have considered the waiver of furnishing character certificates of Directors on the basis of some letter and could have accepted Audit



UDIN No. with return of five years in place of Tax Audit Report in respect of disqualification of technical bid of respondent no.7?

(iii) Whether in the case of respondent no.8, the official respondents could have taken U-turn and put aside their objection regarding experience in the field of brick work, RCC/PCC, stone tiles by merely saying that the concerned respondent was having sufficient experience?

(iv) Whether the official respondents could have accepted the explanation of respondent no.9 based on furnishing of certain document which was apparently not filed at the time of submission of bid with regard to work of pile foundation done by the joint venture partner M/S Arvind Kumar?

26. Generally, the Writ Courts are not required to look into the nitty-gritty of the administrative decisions related to work contract/tender matter as has been held by the Hon'ble Supreme Court in the case of *N.G. Projects Ltd. v. Vinod Kumar Jain*, reported in *(2022) 6 SCC 127*.

27. However, the writ jurisdiction can always be invoked if official action in the matter of tenders is seemingly arbitrary and violates fair play in action. The Hon'ble Supreme Court in the case of *Reliance Energy Ltd. & another v.*



Maharashtra State Road Development Corporation Ltd. and others, reported in ***(2007) 8 SCC 1*** has held in paragraphs 36 and 38 as under :

“36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of “non-discrimination”. However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to “right to life”. It includes “opportunity”. In our view, as held in the latest judgment of the Constitution Bench of nine Judges in I.R. Coelho v. State of T.N. [(2007) 2 SCC 1] , Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. “Level playing field” is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of “level playing field”. We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of “level playing field” is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed



to bid so as to subserve the larger public interest. “Globalisation”, in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of “globalisation”. Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of “level playing field” embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of “equality” should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of “level playing field”. According to Lord Goldsmith, commitment to the “rule of law” is the heart of parliamentary democracy. One of the important elements of the “rule of law” is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of “reasonableness”, then such an act or decision would be unconstitutional.

38. *When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This “legal certainty” is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of “level playing field”.*

28. In the instant case, the NIT was issued on



26.10.2022. The modalities have been provided in the Standard Bidding Document (SBD) of the aforesaid NIT. Clauses 4.2, 4.5A, 4.5B, 4.7 and 4.8 of ITB of the SBD provide as under :-

“4.2 All bidders shall also furnish the following information in Section 2.

(i) Evidence of access to or availability of credit facilities (minimum 10% of estimated cost) certified by the bankers.

(ii) Undertaking that bidder would be able to invest a minimum of cost upto 25% of the contract value of work, during implementation of contract.

(iii) Proposals, if any, for sub contracting of elements of work, costing more than 10% of the bid amount. (for all contracts over Rs. 2 crore)

(iv) Power of attorney, if any.

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 of value not less than amount indicated in Appendix (usually not less than 50% (Fifty percent) of estimated value of contract);

(c) Executed in any one year, the minimum quantities of the following items of work as indicated in Appendix.

cement concrete (including RCC and PSC)

..... cum

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

** To be deleted for projects costing Rs. 10 crores or more.*

**(d) The contractor or his identified sub-contractor should possess required valid electrical license 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.*

B. Each bidder should further demonstrate:

(a) availability (either owned or leased or by procurement against mobilization advances) of the following key and critical equipment for this work:

Based on the studies, carried out by the Engineer the minimum suggested major equipment to attain the completion of works in accordance with the prescribed construction schedule are shown in the Annexure-1.

Availability of the testing equipment required for establishing field laboratory to perform mandatory tests e.g. those stated in Appendix to ITB.

The bidders should, however, undertake their own studies and furnish with their bid, a detailed construction planning and methodology supported with layout and necessary drawings and calculations (detailed) as stated in clause 4.3(1) above to allow the employer to review their proposals. The numbers, types and capacities of each plant/equipment shall be shown in the proposals along with the cycle time for each operation for the given production capacity to match the requirements."

(b) availability for this work of personnel with adequate experience as required; as per



Annexure-II.

(c) liquid assets and/or availability of credit facilities of no less than amount indicated in Appendix (Credit lines/letter of credit/certificates from Banks for meeting the fund requirement etc- usually the equivalent of the estimated cash flow for months in peak construction period.)

C. To qualify for a package of contracts made up of this and other contracts for which bids are invited in the IFB, the bidder must demonstrate having experience and resources sufficient to meet the aggregate of the qualifying criteria for the individual contracts.

4.7 Bidders who meet the minimum qualification criteria will be qualified only if their available bid capacity is more than the total bid value. The available bid capacity will be calculated as under:

*Assessed Available Bid capacity = (A*N*3-B)*

Where

A = Maximum value of civil engineering works executed in any one year during the last five years (updated to the price level of the year Indicated in Appendix) taking into account the completed as well as works in progress.

N= Number of years prescribed for completion of the works for which bids are invited.

B= Value (updated to the price level of the year indicated in Appendix) of existing commitments and on-going works to be completed during the next..... years (period of completion of the works for which bids are invited)

Note : The statements showing the value of existing commitments and ongoing works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the Engineer in charge, not below the rank of an Executive Engineer or equivalent.

4.8 Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they have:



*made misleading or false representations in the forms, statements and attachments submitted in proof of the qualification requirements; and/or
have record of poor performance such as abandoning the works. not properly completing the contract, inordinate delays in completion, litigation history, or financial failures etc; and/or
participated in the previous bidding for the same work and had quoted unreasonably high bid prices and could not furnish rational Justification to the employer”.*

29. The bidders were required to furnish the information as sought under the aforesaid clauses, but there has been no mentioning about the manner in which a joint venture was required to furnish the particulars like experience etc. in terms of the aforesaid clauses. Here comes the aforesaid letter no.8131 dated 24.07.2012 in play. It is the unequivocal contention of the official respondents that this letter is part and parcel of the SBD. Though the SBD does not mention about the bids to be submitted in terms of aforesaid letter no.8131 dated 24.07.2012, yet it is obvious from the contention of the parties that they were acting under the presumption that the letter dated 24.07.2012 is part and parcel of the SBD. The respondent no.9 submitted his bid in terms of the letter dated 24.07.2012 and none of other bidders objected such submission and never questioned the fact that there was no applicability of aforesaid letter dated 24.07.2012 in the present NIT. Hence, the



contention of the petitioner on this account is devoid of any merit. Even though the letter dated 24.07.2012 has not been specifically made part and parcel of the SBD, but for all practical purposes, it is there and could be considered as part of the SBD. The petitioner and the respondent nos. 7, 8 and 9 were bidders in the NIT No.15/SBD/2022-23 and only the respondent no.9 is a joint venture and other bidders were not required to comply the directions contained in the letter dated 24.07.2012 for joint ventures. The respondent no.9 acted upon the letter dated 24.07.2012 and has furnished the details in terms of paragraph 5 of the aforesaid letter wherever it was required.

Paragraph 5 of the letter dated 24.07.2012 reads as under :-

“5. If bidder is Joint venture, the partners would be limited to three (including lead partner). Joint venture firm shall jointly and severally responsible for completion of the project. Joint venture must fulfil the following minimum qualification requirement.

5.1. The lead partner shall meet not less than 50% (fifty percent) of qualification) criteria given in sub-clause 4.2, 4.5A 4.5B, 4.7 & 4.8 of ITB.

5.2. Each of the remaining partners shall meet not less than 25% (Twenty five percent) of all the qualifying criteria given in sub-clause 4.2, 4.5A, 4.5B, 4.7 & 4.8 of ITB.

5.3. However in case one of the joint ventures partner is proposed to be included primarily to provide financial strength to the joint venture, such joint venture partner shall have to commit to provide liquidity support to the project to the extent of 10% of the value of contract.



5.4. The joint venture must also collectively satisfy the subject of the criteria of clause 4.2, 4.5A, 4.5B, 4.7 and 4.8 of ITB for this purpose the relevant figures for each of the partners shall be 100% or more.

5.5. In the event that the Employer has caused to disqualify under clause 4.8 of ITB and the constitutions stated below all of the Joint Venture partners will be disqualified.

5.6. Joint venture applicants shall provide a certified copy of the Joint venture Agreement in demonstration of the partners undertaking joint and several liabilities for the performance of any contract entered into with the bid.

5.7. The available bid capacity of the JV as required under clause 4.7 of ITB below will be applied for each partner to the extent of his proposed participation in the execution of the work. The total bid capacity available shall be more than estimated contract value.”

30. On the conjoint reading of the Clauses 5.1, 5.2 and 5.4 of the aforesaid letter dated 24.07.2012, it is clear that the lead partner is required to meet not less than 50% of qualification criteria given in sub-clause 4.2, 4.5A, 4.5B, 4.7 and 4.8 of ITB and at the same time, each of the remaining partners is required to meet not less than 25% of all the qualifying criteria given in the aforementioned sub-clauses of ITB. The joint venture is also required to collectively satisfy the subject of the criteria of the aforementioned clauses of the ITB for this purpose the relevant figures for each of the partners shall be 100% or more.



31. Now, under the pile foundation work, the relevant experience of the joint venture partner of M/S Gobinda Construction & Arvind Kumar has been shown to be 27775.00 meters against M/S Gobinda Construction, whereas, it has been shown as '0 meter' against M/s Arvind Kumar, which means there was no certificate in terms of paragraph 5.2 of the letter dated 24.07.2012 at the time of submission of bid on behalf of M/s Arvind Kumar to satisfy the minimum qualification for pile foundation. The contention of the learned counsel for the respondent no.9 that M/S Gobinda Construction on its own was having more than the requisite qualification in respect of pile foundation work cannot be appreciated since the said contention will hold good for paragraph 5.4, but it does not meet the qualification of paragraph 5.2 of the letter dated 24.07.2012. The explanation given by the official respondents as well as the respondent no.9 that qualification certificate of M/S Gobinda Construction was already on record and the Annexure R2/J dated 13.01.2023 explaining the shortfall in terms of certificate dated 01.10.2022 which has been attached with Annexure-R2/J appears to be window dressing the shortcoming and to meet the objection. If there were no requirement, then the respondent no.9 could have merely submitted that it was fulfilling the



criteria of minimum requirement of pile foundation work through one of the joint venture partners and there was no requirement for furnishing certificate for the other joint venture partners. Annexure R2/J reads as under :

“GOBINDA CONSTRUCTION- ARVIND KUMAR (JV)

Date: 13.01.2023

To,

THE CHIEF ENGINEER

*BIHAR STATE POLICE BUILDING
CONSTRUCTION CORP. KAUTILYA NAGAR, PATNA-14.*

Sub: -Request to accept our reply cum explanation with regard to the the evaluation of Tender Committee dated 11.01.2023. letter no-1889 dated 12.01.2023.

Sir,

Most humble we have to reply with our best explanation with regard to your objection/quarry in our technical bid of Short re-tender NIT no- 15/SBD/2022-23, Group no.01.

1. That we reply your objection, now we are submitting experience of Pile work of Arvind Kumar, which may be accepted.

2. That we are thankful to you that you have given opportunity to explain and submit required papers.

You are therefore requested to accept our reply cum explanation and declare our technical bid qualified and open our financial bid.

For GC-AK(JV)

For GC-AK (JV)

(Munna Kumar)

Authorised Signatory”

32. It is obvious that when the objection was raised, the respondent no.9 submitted the experience of pile work of Arvind Kumar and requested for its acceptance. Therefore, the certificate of experience of M/S Arvind Kumar, one of the joint venture partners of respondent no.9 is an ex post facto document



and the official respondents were not supposed to take into consideration. The official respondents clearly committed an error on this account when they accepted this document and declared the bid of the respondent no.9 to be responsive.

33. Similarly, the respondent no.7 submitting a letter of Road Construction Department dated 11.04.2022 seeking waiver from furnishing character certificates of Director of the company is against the provisions of NIT since the said letter was never a part of the NIT and on its basis, the official respondents could not have waived furnishing of character certificates of the Directors in terms of Clause 32 of the NIT. On the other hand, non-furnishing of Tax Audit Report with UDIN No. along with ITR of five years be considered as an alternative is also not appreciable.

34. Similarly, in the case of respondent no.8, without explaining how the respondent no.8 was fulfilling the minimum requirement of qualification regarding brick work, RCC/PCC, stone tiles, it was declared eligible for technical bid though earlier on the same documents the technical bid was found to be non-responsive.

35. Further, there is no explanation on these issues by the official respondents in their affidavit or in their submission



at the time of argument. Merely saying that on the basis of some document, the respondent no.8 was initially declared disqualified, would not suffice since no explanation is forthcoming on this point.

36. It is well settled principle of law that the Writ Courts must interfere if there appears manifest arbitrariness in the administrative action. The Hon'ble Apex Court in the case of ***Tata Cellular v. Union of India, (1994) 6 SCC 651*** has laid down the basic principles which still hold the field. Para 77 of the said judgment reads thus :-

“77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly



put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind [(1991) 1 AC 696] , Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, “consider whether something has gone wrong of a nature and degree which requires its intervention”.

37. From the aforesaid discussions, we have no hesitation in holding that the official respondents acted arbitrarily and such action must be deprecated in strongest terms and the same calls for interference by this Court.

38. Accordingly, Re-tender no.15/SBD/2022-23 dated 26.10.2022 (Annexure-2), the decision of the Technical Bid Committee dated 24.01.2023 (Annexure-4) and the Letter no.1994 dated 06.02.2023 (Annexure-7) are set aside. The



respondent authorities are directed to proceed afresh in accordance with law.

39. It goes without saying that pending bills of the respondent no.9, if any, pursuant to re-tender no.15/SBD/2022-23 and work order dated 06.02.2023 be paid to him by the concerned authorities, as the respondent no. 9 has taken a plea in its counter affidavit that the bills amounting to Rs.8.50 crores for the work done by him have already been submitted for its payment before the concerned authority.

40. With the aforesaid observations and directions, this writ petition stands allowed.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
CAV DATE	11.10.2023
Uploading Date	18.10.2023
Transmission Date	N.A.

