IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17348 of 2024

Onextel Media Pvt Ltd. a Company Incorporated Under the Companies Act, 2013 through its Authorized Signatory, Mohd. Anish, S/o Md. Irshad, Male, Aged-20 Years, having its registered office at C-802, ATS Bouquet, Sector-132 Noida-201308.

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Main Secretariat, Patna, Bihar-800015.
2. South Bihar Power Distribution Company Limited through Chief Engineer (Commercial) Regd. Office Second Floor, Vidyut Bhawan, Bailey Road, Patna- 800001

... ... Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Y. V. Giri, Sr. Advocate
		Ms. Archana Sinha @ Archana Shahi, Advocate
For the Respondent No. 2:		Mr. Umesh Prasad Singh, Sr. Advocate
		Mr. Kumar Manish, Advocate
		Mr. Kumar Gaurav, Advocate
		Mr. Vaibhav Veer Shankar, Advocate
		Mr. Arun Kumar Prasad, Advocate
		Ms. Aishwarya Shankar, Advocate

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
ORAL JUDGMENT
(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date : 17-04-2025

We have heard Mr. Y. V. Giri, the learned Senior Advocate for the petitioner and Mr. Umesh Prasad Singh, the learned Senior Advocate assisted by Mr. Kumar Manish, Advocate for the respondent No. 2.

2. The petitioner, who is a "non-telecom" operator, but a leading business communication solutions platform, enabling brands to build connected consumer experiences with the core focus on integrated telecommunications, has prayed for quashing of the Request For Proposal (RFP) bearing NIT No. 40/PR/SBPDCL/2024 dated 10.04.2024 issued by South Bihar Power Distribution Company Limited (SBPDCL) for the reason of the RFP containing onerous conditions for participating in the bid, which ousts most of the participants as also for the reason that it is tailor-made to accommodate a favoured company.

2. Be it noted that pursuant to the RFP, the tender work stood allotted to a third party, viz., M/s Pinnacle Teleservices Private Limited on 03.10.2024

i.e. before the filing of the instant writ petition, who was never made a party; though an effort was made by the petitioner to have the company impleaded as a party respondent which was not necessary and, therefore, was not allowed.

3. The SBPDCL (respondent No. 2), for selecting and engaging an agency to provide SMS gateway for Push SMS Services, Pull SMS Services, Missed Call Services, Voice SMS Services and Voice Call Services for itself and for its associate company, *viz.,* North Bihar Power Distribution Company Limited (NBPDCL) had floated RFP bearing NIT No. 40/PR/SBPDCL/2024 dated 10.04.2024.

4. The estimated cost of services was Rs. 42.52 Crores.

5. The proposal required an earnest money deposit of Rs. 52,52,000/-. A bidder was required to fulfil technical, financial and general criteria set out in the bid papers and only successful bidders

were to be allowed to participate in the financial bid.

6. In the pre-qualification criteria of the tender, a bidder was required to be an Official WhatsApp Business Solution Provider and in support of such a claim, a valid business/channel partner certificate/agreement from WhatsApp, valid as on bidding submission date, was to be filed. There was yet another condition in the tender that at any time prior to the deadline for bid submission, the tenderer could for any reason, whether on its own or in response to a clarification requested by a prospective bidder/proposer, could modify/cancel the bidding document by issuing amendments.

7. The petitioner attended the pre-bid meeting convened by respondent No.2 and raised its concern with respect to the necessity of qualifying the condition of being an official WhatsApp Business Solution Provider. It was flagged by the petitioner that out of the five services for which the tender was floated,

three pertained to SMS, Voice SMS and OBD Services constituting 90% of the estimated traffic volume, whereas only two works related to WhatsApp services, constituting only 10% of the estimated traffic volume. It was, therefore, not in consonance with the public policy to float a single tender for two separate kinds of services, *viz.,* Bulk SMS and WhatApp Services.

8. The queries and concern of the petitioner were brushed aside and the conditions were not changed.

9. Precisely for that reason, the petitioner could not participate in the tender, but has challenged the correctness of the policy of respondent No. 2 in making the RFP restrictive by limiting it to Official WhatsApp Business Solution Providers.

10. The contention of the petitioner is that it is a non-telecom operator but has nine (9) years of experience within the telecommunication sector and has the capacity to deliver more than fifty crores SMS in a

day for PSU clients. The petitioner is directly connected with leading telecom operators and has been able to provide efficient and reliable communication solution for its clients. It was also submitted that very recently, in other States, tenders have been floated without such onerous conditions.

11. Obviously therefore, it was argued that such restrictive condition was kept in the RFP only for the purposes of favouring few of the bidders, thereby eliminating competition for them.

12. Since, in the assessment of the petitioner, the conditions of the bid are in itself arbitrary, not aligned to common industry practices and overtly restrictive, the petitioner chose to challenge the RFP without impleading the party which has been awarded the contract under the RFP.

13. The petitioner is willing to offer competitive prices and it is its assurance that the price offered by it would be significantly lower than the third

party referred to above.

14. In support of the afore-noted contentions, Mr. Giri has submitted that the terms of the tender are not completely foreclosed for judicial scrutiny if it is found that terms have been tailor-made to benefit any particular tenderer or class of tenderers. Even though, in matters of formulating condition of a tender document and awarding a contract, latitude is required to be conceded to the State but if the State does not act validly, for a discernible reason, but whimsically, for an ulterior purpose, then the same could be questioned.

15. Contesting the aforenoted submissions the tender floating authority / respondent No. 2 represented by Mr. Umesh Prasad Singh, learned Senior Advocate has submitted that the petitioner would have no locus to have this petition maintained without having participated in the tender and knowing fully well that a third party right has already been created, which party

was not impleaded as a respondent. The writ petition, it has been contended, ought to be dismissed on this score only.

16. Even otherwise, on merits, it has been submitted that the scope of judicial review in these matters have long been settled. A bidder, whether a participant or a non-participant in a tender process, cannot insist for any particular conditions of tender. All that they are entitled to, is a fair, equal and nondiscriminatory treatment in the matter of evaluation of their tenders. The award of a contract is essentially a commercial transaction, which must be determined on the basis of consideration that are relevant to such commercial decision.

17. In ***Maa Binda Express Carrier and Another vs. North East Frontier Railway and Other; 2014 (3) SCC 760,*** it has clearly been held that the terms, subject to which tenders are invited, are not open to the judicial scrutiny, unless it is found that the

same have been tailor-made to benefit any particular tenderer or class of tenderers.

18. In ***Michigan Rubber (India) Limited vs. State of Karnataka and Others; 2012 (8) SCC 2016,*** it has clearly been held that an action of the State in the field of commercial transaction would be amenable to judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose; fixation of value of tender is entirely within the purview of the executive, with no role attributed to the Courts except when the action of the executive is proved to be arbitrary or unreasonable; conditions of a tender document is in the exclusive domain of the tenderer unless the exercise of such power; is found to be malicious and a misuse of statutory powers; pre-conditions or qualification for tenderers only ensure the capacity and the resources of a bidder to execute the work and the interference of the Court must be minimum (also refer to ***Directorate of***

Education v. Educomp Datamatics Ltd., (2004) 4 SCC 19; Meerut Development Authority vs. Association of Management Studies and Another, AIR 2009 SC 2894; and Airport Authority of India vs. Centre for Aviation Policy, Safety and Research, AIR 2022 SC 4749).

19. The requisite condition in the RFP for a bidder to be an Official Business Service Provider of WhatsApp, though may be onerous but not so restrictive as to hold that the terms of the tender have been made strict only for the benefit of a few.

20. The afore-noted condition does not appear to be arbitrary, whimsical or by any standard unattainable or impossible to qualify, which is clearly reflected by a third party having obtained the contract.

21. It matters not whether such a condition, according to the assessment of the petitioner is not required, when 90% of the work is regarding SMS and not WhatsApp. The conditions of a tender are

purely in the domain of the tenderer, who should be given maximum latitude for framing the conditions for the reason that it knows best about its requirements.

22. The long line of decisions which have been referred to in the earlier paragraphs clearly stipulate that unless the action of the State/instrumentalities is proved to be arbitrary, fanciful or malicious, the Courts must keep its hands off.

23. That apart, we do not wish to interfere in the matter also for the reason that the contract has already awarded to a third party.

24. The petitioner has not been able to prove that the pre-requisite qualification of being an Official WhatsApp Business Service Provider for any bidder to participate in the tender, is ultra-restrictive and has been tailor-made for suiting others.

25. The petition, thus, has no merits and is, therefore, dismissed.

26. Interlocutory application(s), if any, also stands disposed off.

(Ashutosh Kumar, ACJ)

(Partha Sarthy, J)

Sunilkumar/
manoj-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.04.2025
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