

(2018) 12 PAT CK 0007

In the Patna High Court

Case No : Letters Patent Appeal No.1257, 1258, 1256 of 2018 Civil Writ
Jurisdiction Case No.10395, 8626, 9688 of 2018

Managing Director, Bihar Medical Services & Infrastructure
Corporation Limited and Ors

APPELLANT

Vs

State of Bihar through Principal Secretary and ors

RESPONDENT

Date of Decision : 03-12-2018

Acts Referred:

Companies Act, 1956 — Section 617
Constitution Of India, 1950 — Article 14, 226

Citation : (2019) 1 PLJR 238

Hon'ble Judges : Amreshwar Pratap Sahi, CJ;Anjana Mishra, J

Bench : Division Bench

Advocate : Lalit Kishore, Prabhat Kumar Singh, Raj Ballabh Pd, Bimal Kirti
Singh, Sidhartha, Ranjeet Kumar

Final Decision : Allowed

Judgement

Anjana Mishra, J.

1. These appeals are directed against the impugned judgment dated 9th August, 2018 by a learned Single Judge in relation to three writ petitions, being CWJC Nos.10395 of 2018, 8626 of 2018 and 9688 of 2018, filed by the respondent-petitioners impugning the conditions in the tender notices dated 9th April, 2018 and 16th April, 2018 in respect of introduction of the definition of 'similar nature of work' and the specifications relating thereto in the Standard Bidding Document.

2. The respondent-petitioners allege that the introduction of the impugned conditions in the tender notices dated 09.04.2018 and 16.04.2018 were restrictive clauses that resulted in eliminating the participation of the respondent-petitioners which is arbitrary and irrational inasmuch as there is no rational nexus with the object sought to be achieved by the introduction of a new definition of similar nature of work. The respondent-petitioners claim to have the entire experience that is required in respect of the nature of the work to be

carried out, but by making it condition specific, the right of the respondent-petitioners to participate in the bid has been arbitrarily taken away that violates Article 14 of the Constitution of India. This, according to the respondent-petitioners, could not have been done contrary to the Standard Bidding Document that have already been finalized by the Building Construction Department, Government of Bihar vide a Resolution dated 12th of August, 2006 followed by the Resolution dated 12.03.2008 of the Road Construction Department, Government of Bihar and which has been adopted by the appellant-Corporation. Thus, any deviation therefrom ought to have been with the prior approval of the Government of Bihar as the adoption for Standard Bidding Document under a decision of the Cabinet, which is a policy decision, could not have been avoided or altered by a decision of the appellant-Corporation on its own.

3. The constructions for which the tenders were invited are Government run Dental and Medical Colleges and Hospitals in two districts of Bihar, namely, Nalanda and Purnea. The tender has been floated by the appellant-Corporation which is a Public Limited Company, limited by shares and is also a Government Company as understood under Section 617 of the Companies Act (Act No.1 of 1956). The appellant-Corporation was constituted as such with a Memorandum of Association and Clause 23 of the Memorandum confers authority on the Company to enter into contracts. The Company has its Articles of Association and under Chapter XIII, Clause 83 (19), the power of the Board of the Directors to enter into contracts and to perform all such activities on behalf of the Company are defined. The activities of the Corporation and its decisions can be reviewed by the Government under Clause 143 of the Articles of Association. The Memorandum of Association and the Articles of Association read together confer autonomous powers on the Company to function as such and accordingly, the appellant-Corporation floated the tenders on 9th April, 2018 for Nalanda and on 16th April, 2018 for Purnea. The said tender notices contained the disputed clause defining 'similar nature of work' that was pursuant to a decision by way of a resolution taken by the Board of Directors in the meeting dated 2nd of April, 2018. It may not be out of place to mention that the Directors of the Company are all Government officials, namely, the Development Commissioner, Government of Bihar is the Chairman, Principal Secretary, Finance, Principal Secretary, Health, Executive Director, State Health Society, Managing Director of the appellant-Corporation, Director-in-Chief (Administration), Health Department, Government of Bihar, and the Chief General Manager (Project) of the appellant-Corporation are member Directors of the Board. Vide Agenda No.4/31 dated 02.04.2018, the Board resolved as under:-

"Agenda 4/31: Change of clause 4.5b of Standard Bidding Document (SBD) for infra for projects costing more than 50 Crores :

Members of Board were informed that the Standard Bidding Document (SBD) for infra related works was originally prepared by the Road Construction Department

& was notified through notification no. 9545(5) dated 12/08/2006 and has been taken into practical application by other departments after approval of State Government.

Clause 4.5 (b) of Standard Bidding Document deals with qualification criteria for "Similar Nature Work" but does not define "Similar Nature Work" and the CVC guidelines states that "Similar Nature Work" should be clearly defined. It is hereby interpreted that " Similar Nature Work" should be clearly defined by Notice inviting Tender authority in accordance with National Building Code, 2016. Clause 3.1 of National Building Code, 2016 classifies building construction into nine groups i.e. Group A to J and the hospital building falls under Group 'C' (Institutional Category).

Board was further informed that for the procurement of works of value more than Rupees 50 Crore, Building Construction Department has issued a letter no. 3462 dated 25/03/2014 which states that " ,l?ch?Mh dh dafMdk& 4?5 ch ds izko/kkuksa ds vuqlkj leku izd`fr ds dk;Z vuqHko ds fy;s fufonk vkea=.k lg rduhdh ewY;kadu gsrq :i;s 50?00 ¼ipkl½ djksM ls vf/kd dh jkf"k dh ;kstukvksa ds fy, lhåHkhålhå ds fn"kk&funsZa"k ds vkyksd izd`fr ds ,d iw.kZ dk;Z ftldh izkDdfyr jkf"k fufonk dh jkf"k dk 80 izfr"kr nks iw.kZ dk;Z ftlds vyx&vyx izdfyr jkf"k fufonk dh jkf"k dk 60 izfr"kr ,oa rhu iw.kZ dk;Z ftldh vyx&vyx izdfyr jkf"k dk 40 izfr"kr gks ekU; gksxkA ;g dk;Z foxr ikip o'kksZa ds vUrxZr Hkkjrh; iz{ks= esa fd;k x;k gksuk pkfg,A

"

The Board took note of the same and passed the following resolution:

"Resolved that for the selection of agency through notice inviting tender for procurement of works related to construction of medical colleges and hospitals having value more than Rupees 50 Crore & in order to ensure wider participation of bidders, Clause 4.5b of Standard Bidding Document may be substituted to the extent of CVC guidelines and letter no. 3462 of Building Construction Department as below:

Existing SBD Clause for similar nature work

Substituted SBD Clause for similar nature work

Remarks

(4.5b) Satisfactorily completed as a prime contractor (or as a nominated subcontractor, where the subcontract involved execution of all main items of described in the bid document, provided further that all other qualification criteria are satisfied least one similar work of value not than amount indicated in Appendix (usually not less than 25% (twenty five percent) of estimated value of contract)

(4.5b) 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 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 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 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 each costing not less than 80% (eighty percent) of the estimated cost of this project. "Similar Nature" shall mean:- Construction of:- a) Dental College / Medical College & Hospital Building 'or' b) Institutional Building more than 15 mtr in height 'or' c) Education 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 associated MEP services like plumbing, electrical, HVAC Etc. for Central/ State Govt. /PSU/Private Sector.

Seven years as per CVC guideline no. 12-02-1-CTE-6) i. As per CVC guideline no. 12-02- 1-CTE-6 ii BCD Letter No. 3462, Dated 25.03.2014

"Resolved further" that clause 4.5b of SBD will remain same for the works having value less than Rupees 50 crore and similar nature work will be defined by BMSICL under provisions of National Building Code, 2016. "

4. The aforesaid Resolution was passed keeping in view the National Building Code, 2016 as also the CVC guidelines that have been referred to in the aforesaid Resolution.

5. From a perusal of the record of CWJC No.10395 of 2018, it appears that the prayer made in the writ petition is for quashing of the tender notice dated 09.04.2018, but there is no prayer made therein to quash the said Resolution of the Board dated 2nd April, 2018, nor there is any such relief prayed for in CWJC No.8626 of 2018 nor in CWJC No.9688 of 2018.

6. The aforesaid fact is to be stated necessarily inasmuch as the bone of contention as agitated by the respondent-petitioners is that the impugned tender notices dated 09.04.2018 and 16.04.2018 are contrary to Clause 4.5 of the instructions to bidders enclosed along with the notice inviting tenders, i.e. in accordance with the standard bidding documents approved by the Government of Bihar through the Building Construction Department and the Resolution dated 12.08.2006 as well as the Resolution of the Road Construction Department dated 12.03.2008. It is urged that the aforesaid Resolutions have the prior approval and assent of the Finance and Law Departments and, therefore, any addition or alteration in the said Standard Bidding Documents as contained in the impugned tender notices are contrary to the above.

7. It is further submitted that earlier also a tender notice had been issued on 09.11.2017, but on a representation being made, the same was withdrawn, yet almost the same conditions have been re-introduced with a malafide intention and in connivance with some favourable contractors which amounts to a colourable exercise of power.

8. The legal submission is that once a policy decision was taken by the Cabinet and the Standard Bidding Documents stood adopted by the appellant-Corporation as well, there could not have been any deviation and that too even for no valid reason. The appellant-Corporation could have done this only after any approval of the Government of Bihar from the concerned Department, but by altering the definition of 'work of similar nature', an arbitrary clause has been introduced which deserves to be set aside. It is also alleged by the respondent-petitioners that when the tender notice was earlier issued on 09.11.2017, they made all attempts to obtain documents through the Right to Information Act, yet they remained unsuccessful and the appellant-Corporation once again issued the advertisement containing the impugned clauses.

9. Shri Bimal Kirti Singh, learned counsel for the respondent-petitioners has supported the impugned judgment and has urged that the learned Single Judge has rightly quashed the impugned condition in the tender notices being not in conformity with the standard bidding document as approved by the Government of Bihar.

10. Questioning the correctness of the reasonings given by the learned Single Judge, the learned Advocate General Shri Lalit Kishore has urged that the introduction of the impugned eligibility condition is not contrary to the Standard Bidding Documents and it rather specifies and classifies the nature of similar work that are required to be clearly defined keeping in view of the provisions of the National Building Code, 2016 and the Central Vigilance Commission Guidelines which are to be compulsorily observed. He submits that there is no such bar or prohibition inasmuch as by specifying a similar nature of work experience, the appellant-Corporation has made it condition specific as the construction involves an essential public facility relating to health, namely, a complete hospital project, which is a Medical College and a Hospital both. Thus, the requirement of the contractor to have an experience of exclusively constructing a Medical College and Hospital does not, in any way, contravene, override or supersede the provisions of the Standard Bidding Documents which otherwise also are in relation to Government Departments and not for Corporations. He submits that the Resolution of the Government categorically records as follows:

"fcgkj ljdkj

iFk fuekZ.k foHkkx

AA ladYi AA

fo'k;% dk;Z foHkkxksa esa 2-00 djksM ls vf/kd ykxr okyh ifj;kstukvksa esa Standard Bidding Document dks ykxw djus ds lacak esaA

1- jkT; ds lHkh dk;Z foHkkxksa esa iFk fuekZ.k foHkkx ds ladYi Kkikad 9545 ¼,½ fnukad 12-08-2006)kjk ljdkj ds fu;ekuqlkj 5-00 djksM ls vf/kd dh ykxr dh ifj;kstukvks ds fy, Standard Bidding Document (S.B.D.) ykxw fd;k x;k gSA 5-00 djksM :i;s ls de dh ykxr ds ifj;ksukvksa ds fy, ,Q 2 ,djkujekek izi= ykxw gSA

2- Standard Bidding Document jk"Vªh; ekud dk Bidding Document gS ftlesa Condition of Contract dk foLrkj iwoZd fooj.k fn;k x;k gS rkfd vR;k/kqfud rduhd vk/kfjr ;a=&la;a=ksa ls fuekZ.k dk;Z esa xq.kork lqfuf'pr djksr gq, Rofjr xfr ls fØ;kUo;u lqfuf'pr gks ldsA bu Contract Conditions ds vk/kkj ij dispute dh laHkkouk de jgrh gS rFkk laosndksa dks Hkh dk;Z djus esa lgqfy;r feyrh gSA bu Contract Condition dks 5-00 djksM ds uhps ds dk;ksZa ij Hkh ykxw djus dk izLrko ljdkj ds fopkj/khu Fkka

3- IE;d fopkjsijkar Standard Bidding Document O;oLFkk 2-00 djksM ds Åij ds Contracts ij ykxw djus dk fu.kZ; fy;k x;k gSA

4- mDr izLrko esa ekuuh; ea=h iFk fuekZ.k foHkkx iVuk dk vuqeksnu izkIr gSA

5- mDr izLrko esa for foHkkx@fof/k foHkkx dh lgefr izkIr gSA

vkns'k%& vkns'k fn;k tkrk gS fd bls jkti= ds vlk/kkj.k vad esa izdkf'kr fd;k tk; rFkk bldh izfr ljdkj ds lHkh foHkkx ,oa foHkkxk/; {k @lHkh ize.Myh; vk;qDr rFkk egkys[kkdkj] fcgkj] iVuk dks lwpuk ,oa tkudkjH gsrq Hksth tk;A

fcgkj jkT;iky ds vkns'k ls]

g-

ldkj ds la;qDr lfpo]

iFk fuekZ.k foHkkx]fcgkj] iVuk

iVuk] fnukad 12-03-08

Kkikad & Á-& 6@fu;e 02-08 3451 (S)

izfrfyfi& egkys[kkdkj] fcgkj] iVuk dks lwpuk ,oa vko';d

dkjZokbZ gsrq izf'krA

ldkj ds la;qDr lfpo]

iFk fuekZ.k foHkkx]fcgkj] iVuk

11. A perusal thereof would indicate that this was a Resolution passed in pursuance to the earlier Resolution dated 12th August, 2006 of the Road Construction Department whereby the Standard Bidding Document as approved therein was made applicable to contracts of all Government Departments.

12. Sri Lalit Kishore submits that neither the Resolution dated 12th August, 2006

nor the Resolution dated 12th March, 2008 relate to its applicability to the appellant-Corporation which is not a Government Department and even assuming for the sake of argument that the appellant-Corporation was abiding by the Standard Bidding Documents, it was not precluded or denuded of its powers to impose such conditions that were necessary for the purpose of procuring specified nature of experience from bidding contractors. This autonomy of imposing a specific condition and defining the 'similar nature of work' does not contravene the Standard Bidding Documents and is rather a refined expression of the words, 'similar nature of work' in order to have the best of the contractors in the field of construction of Medical Colleges and Hospitals.

13. Shri Lalit Kishore submits that the contention of the respondent-petitioners that they have ample experience of all types of civil construction work generally, and that they would be deprived of participation in spite of having the experience of such civil construction does not in any way come to their aid inasmuch as if the appellant-Corporation requires contractors who have experience in the building of projects as presently involved, then it does not seek to exclude the participation of bidders for any mala fide intention, and rather it is for ensuring that the contractor who bids for the work in question possesses the expertise of constructing a project like that of a Medical College and Hospital. Thus, the condition becomes a specification within the same generic requirement of similar nature of work and consequently, the learned Single Judge without appreciating the aforesaid facts has arrived at an incorrect conclusion.

14. It is further submitted that the Board of Directors took a conscious decision which they were empowered to do under the provisions referred to hereinabove keeping in view the Memorandum of Association and the Articles of Association and even otherwise the Government of Bihar has not raised any objection to the same. He contends that withholding of the process earlier would be of no avail, inasmuch as, a well deliberated decision was taken on 2nd of April, 2018 by the Board of Directors and it was not necessary to seek any approval from the Government as it did not tend to any way dilute the adoption of the Standard Bidding Documents as enforced by the Government of Bihar in Government Departments. The learned Advocate General, however, still maintains that the said decisions about the Standard Bidding Documents are applicable to Government Departments only where an approval on deviation may be required, but in the present case, firstly, there is no such deviation and secondly, the Corporation is not prohibited from taking any such decision which otherwise is in the interest of procuring the best bidders for the nature of the work to be performed under the contract.

15. Shri Lalit Kishore has relied on the judgement in the case of Michigan Rubber (India) Limited Versus State of Karnataka and others, (2012) 8 SCC 216 to urge that the decision taken to introduce the definition of the words, 'similar nature of work' does not suffer from any infirmity and does not call for interference as the decision making process does not otherwise violate any provision of law. He has

also relied on a judgement in the case of Directorate of Education and others Versus Educomp Datamatics Ltd. and others, (2004) 4 SCC 19.

16. Responding to the said submissions, Sri Bimal Kirti Singh, learned counsel for the respondent-petitioners urges that the Standard Bidding Documents had to be adhered to as held by the Apex Court in the case of State of Jharkhand and others Versus CWE-SOMA Consortium, (2016) 14 SCC 172, and as per the ratio of the judgement in the case of Lloyd Electric and Engineering Limited Versus State of Himachal Pradesh and others, (2016) 1 SCC 560.

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.

24. The appeals stand allowed accordingly.