

The Bihar Offset Printers Association vs The Union Of India on 25 March, 2022

Author: Sanjay Karol

Bench: Chief Justice, S. Kumar

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.762 of 2022

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1. The Bihar Offset Printers Association through its General Secretary namely Lok Prakash Singh, aged about 64 years (Male), son of Late Atma Nand Singh, Resident of Flat No. 301, Atma Smriti Apartment, Budha Colony, P.S.-Budha Colony, District-Patna.
2. M/s Puja Printech Pvt. Ltd. through its Director namely Lok Prakash Singh, aged about 64 years (Male), son of Late Atma Nand Singh, Resident of Flat No. 301, Atma Smriti Apartment, Budha Colony, P.S.-Budha Colony, District-Patna.
3. M/s Patna Offset Press through its Partner and Authorized representative namely Amit Kumar Singh, aged about 42 years, (Male), son of Late Ram Naresh Singh, Resident of Near Dharahra Kothi, Naya Tola, P.S.-Kadamkuan, District-Patna.
4. New Ratan Priya through its proprietor namely Sudhir Prakash, aged about 55 years, (Male), son of Late Vijay Prakash Narayan Singh, Resident of Langar Toli Gali, D.N. Das Lane, Pandui Kothi, Arya Kumar Road, District-Patna.
5. Dhanaraj Printing Press through its proprietor namely Shahid Ahmad, aged about 42 years, (Male), son of Late Salauddin Ahmad, Resident of Kumkum Singh Lane, Vikhanapahari, P.S. Pirbahore, District-Patna.

... .. Petitioner/s

Versus

1. The Union of India through its Secretary, Ministry of Education, Government of India, 124-C, Shashtri Bhawan, New Delhi.
2. The Secretary, Ministry of Education, Government of India, 124-C, Shashtri Bhawan, New Delhi.
3. The State of Bihar through the Chief Secretary, Govt. of Bihar, Patna.
4. The Chief Secretary, Govt. of Bihar, Patna.
5. The Principal Secretary, Department of Finance, Govt. of Bihar, Patna.
6. The Additional Chief Secretary, Department of Education, Govt. of Bihar, Patna.
7. The Director, Primary Education, Department of Education, Government of Bihar, Patna.
8. The State Project Director, Bihar Education Project Council, Shiksha Bhawan, Saidpur, Patna-04.
9. The State Programme Officer (Quality Education), Bihar Education Project Council, Shiksha Bhawan, Saidpur, Patna-04.
10. The State Resource Person, Bihar Education Project Council, Shiksha Bhawan, Saidpur, Patna-04.
11. Telecommunications Consultants India Ltd. (TCIL) having its office at TCIL Bhawan, Greater Kailash, Part-I, New Delhi- 110048 through its Authorized

Signatory Mr. Sanjeeva Goyal working as Chief General Manager (IT and BD).

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... .. Respondent/s

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Appearance :

For the Petitioner/s :	Mr. P.K. Shahi, Sr. Advocate Mr. Vikas Kumar, Advocate Mr. Mukesh Kumar, Advocate
For Respondent Nos. 1 & 2:	Dr. Krishna Nandan Singh (ASG) Mr. Tuhin Shankar, CGC Ms. Prakritita Sharma, A.C. to ASG Mr. Sriram Krishna, Advocate Mr. Amarjeet, A.C. to ASG Mr. Devansh S. Singh, A.C. to ASG
For Respondent Nos.3-7 :	Mr. Ajay Kumar Rastogi, Senior Advocate AAG-10 Mr. Madhaw Prasad Yadav, GP-23 Mr. Arvind Kumar, AC to GP-23
For Respondent Nos. 8-10:	Mr. Anjani Kumar, Senior Advocate (AAG-4) Mr. Alok Kumar Rahi, Advocate Mr. Girijish Kumar, Advocate
For Respondent No. 11 :	Mr. Mukul Rohatgi, Sr. Advocate Mr. Pawanjit Singh Bindra, Sr. Advocate Mr. Rohitabh Das, Advocate Mr. Vinayak Marwah, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE S. KUMAR
CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date :25-03-2022

Following issues arise for consideration before this Court
in this lis:

- (i) Whether the process adopted or decision made of procuring educational material through a centralized process and short-listing the lowest tenderer is so arbitrary and irrational that the Court can say: the decision is such that no responsible authority acting reasonably and following relevant law could have reached?
- (ii) Whether by undertaking such a process public

interest is affected?

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- (iii) Whether the acts of Additional Chief Secretary, Department of Education, Govt. of Bihar, as also the Director, Primary Education, Govt. of Bihar-cum- Nodal Officer, FLN, in finalizing the policy for implementing the Foundational Literacy and Numeracy (FL&N) scheme by calling a tender can be said to be illegal?
- (iv) Are the conditions laid down in the Request for Proposal (RFP) tailor-made to either oust the petitioners or favour others? If so, can such an action be said to be mala fide?
- (v) Can the terms and conditions mentioned in the tender be deemed manifestly unreasonable and arbitrary?
- (vi) Whether procurement of educational materials, such as textbooks etc., to be developed and published is the procurement of goods or services under the Bihar Finance (Amendment) Rules, 2005?
- (vii) Whether successful bidders failed to fulfill the essential terms and conditions of the tender?
- (viii) Whether Respondent's actions of short-listing the tenderer can be said to be an act of malice and favouritism, thereby vitiating such process in the direction of award of the tender?
- (ix) Whether the act of Respondent No.11, namely Telecommunications Consultants India Ltd. (TCIL) in simultaneously issuing a tender for procuring components of the tender in question

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can be termed a consortium/joint venture in the commercial parlance?

National Perspective; Need For Imparting Education To The Children At The Basic Level

2. Highlighting the need for providing nutritious food

and digitizing the process of education, vis-à-vis the children in

Bihar, during the time of current Pandemic Covid-19, this Court vide judgment dated 18 September 2020 in CWJC No.7124 of 2020, titled as Court on its own motion on the basis of news item titled "School Shut, No Mid-Day Meal, Children In Bihar Village Back To Work Selling Scrap" versus The State of Bihar & Ors. had, inter alia, issued the following directions:-

"42. In light of the above, we direct for the State to consider, enforcing, to the extent possible:

a. Continue schemes like the Mid Day Meal Scheme and the Sarwa Shiksha Scheme to provide meals or ration as feasible along with textbooks and notebooks to government school students.

b. Ensure that statutory benefits under the Food Security Act are disbursed in a timely manner, and updated records are maintained for the same.

c. Monitor the nutritional health of children by leveraging the reach of Anganwadi workers, who can keep track of children's growth by recording the weight and height of children at regular intervals.

d. Work with the experts to procure and prepare digital lectures for students of all classes and age-groups.

e. Enhance the role of Anganwadi and NGO workers in every district, to help spread the message of the importance of continuing education via remote learning platforms. Parents to be educated, for ensuring the child's continuous engagement in education during the pandemic.

f. Install community-level television sets and distribution of Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

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radio sets, ensuring the increase of reach of remote learning platforms. Perhaps, at the community level, small batches of children can be shown lectures on televisions, while maintaining social distancing norms.

g. With mobile handset penetration and telephone penetration in the State of Bihar being greater than Television and radio set penetration, the concerned authorities to consider, devising and implementing an action plan to utilize these mediums. To ensure engagement, consider expanding the possibility of waiver of telecom charges on the mobile handset or telephone being used for accessing educational programmes.

h. Use Telecom/digital infrastructure to mark the daily

attendance of students. A call placed on the designated toll-free number may be programmed to record the daily attendance of the concerned student.

i. Organize a robust "Back to School" campaign in the wake of this pandemic, to ensure that a minimal dropout rate is achieved.

j. Further, workshops and training for teachers ought to be provided to ensure that they are well equipped in dealing with post-pandemic psychosocial needs of children.

43. The above directions, if implemented well, have the potential to provide immediate relief to more than 1 crore 19 Lakh school going children across the State, also tuned to establish long term machinery which shall support their development and care. We have no doubt that any elementary issues of data protection owing to the monitoring that may arise, would be dealt with adequately by the authorities."

(Emphasis supplied)

3. The Ministry of Education (Department of School Education & Literacy) Government of India launched the Integrated Scheme for School Education- Samagra Shiksha in 2018 by subsuming the erstwhile Centrally Sponsored Schemes of Sarva Shiksha Abhiyan (SSA); Rashtriya Madhyamik Shiksha Abhiyan (RMSA); and Teacher Education (TE). The Scheme
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treats school education as a continuum with the Sustainable Development Goal for Education (SDG-4). The Scheme provides support for the implementation of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as RTE Act) and is also aligned with the recommendations of National Education Policy, 2020 (hereinafter referred to NEP). The object is to ensure that all children have access to quality

education with an equitable and inclusive classroom environment, taking care of their diverse background, multilingual needs, different academic abilities and making them active participants in the learning process.

4. That the RTE Act mandates the appropriate Government to provide free and compulsory elementary education to every child of the age 6 to 14 years in a neighbourhood school.

5. Under the Centrally Sponsored Scheme of Samagra Shiksha, financial assistance is provided as per the fund sharing pattern as decided by the Ministry of Finance. The Central share is provided to the States and UTs as per the existing fund sharing pattern of 60:40 for all the States, except that the pattern is 90:10 for North-Eastern and three Himalayan States/UT 100% for

Union Territories without Legislature.

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6. The Scheme is implemented as a Centrally Sponsored Scheme through a single State Implementation Society (SIS) at the State level.

7. Under the Scheme, the annual plans are prepared by the States and UTs based on their requirements and priority as reflected in their Annual Work Plan and Budget (AWP &B) Proposals. These plans are then appraised and approved/estimated by the Project Approval Board (PAB) in the Department of School Education & Literacy, Government of India in

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consultation with the States and UTs as per the programmatic and financial norms of the Scheme, and physical and economic progress of the State for approved interventions. Further, the funds are released based on submission and Audited Accounts, Utilization Certificate, physical and financial progress and other documents as prescribed under the Financial Management & Procurement (FMP) Manual of Samagra Shiksha.

8. The details of funds released under Samagra Shiksha to the State of Bihar during the last three years, as of 17.2.2022, are as under:

Sl. No.	Year	Release (Rs. In Lakhs)
1	2019-20	326693.12
2.	2020-21	282822.81
3.	2021-22	246106.58

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9. Recognizing the crucial role of Foundational skills in national development, the NEP recommends that a National Foundational Literacy and Numeracy Mission (FL&N Mission) be launched to ensure that every child in the country necessarily attains FL&N in Grades 1-3.

10. Consequently, the Department of School Education and Literacy, Ministry of Education, Government of India launched the National Initiative for Proficiency in Reading with Understanding and Numeracy (NIPUN Bharat) mission on 05.07.2021

along with a detailed implementation guideline for the State to ensure that by 2026-27, every child in the country necessarily attains Foundational Literacy And Numeracy (FL&N) by the end of Grade

3. For this, the learning outcomes stood for six years in a continuum of six levels from Pre School to Grade 3 (3-9 years).

11. This mission has been launched under the aegis of the Centrally Sponsored Scheme of Samagra Shiksha, which focuses on providing access and retaining children in foundational years of schooling; teacher capacity building; development of high quality and diversified Student and Teacher Resources/Learning Materials; and tracking the progress of each child in achieving learning outcomes.

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12. Though initially, the petition filed on 13 January 2022 was limited in challenge to the terms upon which Request For Proposal (RFP)/Tender was issued, but on account of intervening developments, with the selection of the successful bidder, challenge was allowed to such a process. The successful bidder, namely Telecommunication Consultants India Limited, was also impleaded as a party-Respondent No.11- to the petition. As the case progressed, parties filed several pleadings, making the file voluminous, running into 1696 pages, expanding the scope of the present petition primarily to four vital issues, i.e. the condition of the tender being (a) tailor-made to oust the petitioners from the process of bidding -- and such action being illegal, malafide, arbitrary, unreasonable and against public interest; (b) favour the shortlisted tenderer; (c) the process of short-listing of the tenderer(s) and selecting the successful tenderer to be vitiated on account of ineligibility, malice and favouritism; (d) Whether the Authority exceeded its jurisdiction in undertaking the process of tender.

13. The Ministry of Education, Department of School Education & Literacy, Government of India, vide communication dated 29 June 2021 apprised all the stakeholders, including the Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 respective States; the Union Territories; and the Departments of Education thereunder of the launching of the National Initiative for Proficiency in Reading with Understanding and Numeracy (NIPUN Bharat) on 05 July 2021 to support and encourage the students along with all the stakeholders, i.e. schools, teachers, parents and communities for achieving the target stipulated under the scheme. (Page 246)

14. Pursuant thereto, the Department of Education, Government of Bihar issued an order dated 06 July 2021 informing State Authorities regarding NIPUN Bharat Scheme at the Centre, and correspondingly the State's scheme termed as 'Mission AADHAR' intended to achieve the stipulated target within a time-bound period. Consequently, a Notification dated 11 August 2021 was issued constituting an intra-State Steering Committee consisting of nine members along with ten special visitor members to provide guidance, review and real-time monitoring as well as to ensure effective feedback regarding the implementation of Foundation Literacy and Numeracy (FL&N) Mission (Page 1227/1557). The functions of the committee inter alia were to monitor the progress of the State FL&N Mission and provide guidance on policy issues; to achieve the targets set at the National level within the time frame (2026-27), and to prepare Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 and approve the State Action Plan based on the District Action Plan etc. (page 1227/1558).

15. Vide communication dated 17 August 2021, the Director, Primary Education, Government of Bihar requested the State Project Director, Bihar Education Project Council (hereinafter referred to as 'BEPC') to nominate experts for participating in a workshop to be conducted for implementing FL&N (Page 579/1479). This led the BEPC to convene a meeting of all the stakeholders, scheduled to be held between 31 August 2021 and 01 September 2021, evident from communication dated 26 August 2021 (Page 580/1480). The meeting was preponed, and a workshop was held on 24 August 2021 with several discussions, including orientation for capacity building of students and teachers for implementation of FL&N Mission (Page 1236/1560). Here only it is relevant to note that the Government of India, Ministry of Education, Department of School Education & Literacy, vide communication dated 07 September 2021 (Page-

253) circulated minutes of the meeting held on 15 June 2021 indicating budgetary allocation of the Samagra Shiksha for the State of Bihar concerning FL&N Mission, the relevant portion thereof reads as under:-

"2) Foundational Literacy and Numeracy: At primary level, all children in the age group of 6-9 years should have Patna High Court CWJC No.762 of 2022 dt. 25-03-2022 access to foundational schooling and achieve foundational skills by grade 3. An outlay of Rs.33023.29 lakh was estimated for various interventions for foundational literacy and numeracy and an outlay of Rs.820.00 lakh was estimated for formation of PMU as per detail given below:

(Rs. In Lakh) Activity Master Physical Unit Cost Financial Foundational Literacy and numeracy (FL&N) Teaching Learning Materials 10316695 0.003 30950.085 for implementation of Innovative pedagogies Teacher Resource Material/ 147235 0.0015 220.8525 Activity Handbook (Teacher) Capacity building of 147235 0.01 1472.35 Teachers of Grades I to V (Teacher) (New) holistic assessment of Students (District) Total 10611203 33023.29 Formation of PMU (Elementary) State Level 1 60.00 60.00 District Level 38 20.00 760.00 Total 820.00

16. The said communication dated 07 September 2021 is addressed to Sri Shrikant Shastree, State Project Director, BEPC.

17. The first meeting of the State Steering Committee held on 16 September 2021, headed by Additional Chief Secretary, Education Department, Government of Bihar, took certain decisions for implementing FL&N Mission, and minutes was circulated vide communication dated 06 October 2021 (page 1152/1523).

18. For adjudication of the present lis, it will suffice to Patna High Court CWJC No.762 of 2022 dt. 25-03-2022 observe that under said minutes, an obligation to interact with the various stakeholders publishing the material to be considered for implementing the FL&N Mission was upon the State Council of Educational Research and Training (hereinafter referred to as SCERT).

19. The record does not reveal as to whether the State Steering Committee convened any meeting or what all decisions were taken by it subsequently, but what is apparent is that the State Project Director, BEPC, with whom the Central Government was interacting, took over the reins and convened meeting(s) for effective implementation of FL&N Mission. He convened a meeting on 04 October 2021, which is apparent from communication dated 01 October 2021 addressed to the Director, SCERT (Page 592/1484). Noticeably, no objection for undertaking such an exercise was raised at any point of time, by any authority, more so by SCERT. The record of the proceedings of the said meeting reveals the committee to have taken certain decisions for timely implementation of NIPUN Bharat Mission/FL&N Mission. (Page 593).

20. Subsequently, the Additional Chief Secretary, Education Department, Government of Bihar, (respondent no.6 herein) himself convened a review meeting on 09 November Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 2021, and in terms thereof, another meeting was convened on 16 November 2021 for which vide communication dated 12 November 2021 (page 598/1491), all the stakeholders, including State Project Director, BEPC were requested to remain present. In the said meeting held on 16 November 2021, several issues were deliberated upon, and consensus arrived on the basic structure for making available the course material for implementing the FL&N mission.

21. It was decided that although the SCERT is already engaged in the creation/development of reading material for children under the FL&N Mission, owing to the time taken in this process, additional material will be procured by the BEPC under a centralized process from various institutions (page-281).

22. It appears, therefore that a decision was taken to have the work executed through a single source for which purpose Request For Proposal (RFP) was proposed to be prepared. The proposal was to include- (1) additional reading material like- (a) FL&N Graded Books, Bilingual (English & Hindi) BIG Book and Meri Pehli Kitaab; (b) Learning Bush Cards Education Charts & Storytelling Charts, (2) Stationary materials like clay & Colours, Drawing Book. Color (Crayons & Paint Box) and (3) toy-based learning material. To such effect, an office order was issued on 02 Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 December 2021 (Page-290) by State Project Director, BEPC.

23. Subsequent meetings convened on 6th and 9th December 2021 were between the functionaries of the State, including the Directorate of Primary Education; SCERT, Bihar;

BEPC; BSEIDC; and State Lead Central Square Foundation.

24. With the draft document for RFP being finalized, but before any formal decision taken inviting bids, petitioner No.1, (Bihar Offset Printers Association) vide communication dated 15 December

2021, (Page-100) addressed to the concerned Minister (Minister of Education, Government of Bihar) sought modification of the proposal. They suggested bifurcation of the work into two components, i.e. (a) supply of printed material and

(b) other educational equipment and implements. Also requesting relaxation of the eligibility criteria, specifically the requisite minimum annual financial turnover of the bidders.

25. Obviously, such a suggestion did not find favour with the authorities with the consequential finalization of the document and publication of the Notice Inviting Tender (NIT) on 23 December 2021 by BEPC captioned as "Request for proposal for "Procurement/preparation & Supply of Foundational Literacy & Numeracy (FL&N) materials for schools and children of Bihar for the year 2021-22." The prescribed Schedule of the event Patna High Court CWJC No.762 of 2022 dt. 25-03-2022 contained therein reads as under:

"III Schedule of Events:

Sl No	Event Descriptions	Timeline
1	Date of Issue of Advertisement	Date 23.12.2021.
2	Date & time of downloading the RFP	28.12.2021 to 18.01.2022 up to 03:00 PM, from the e-Procurement Portal (https://eproc2.bihar.gov.in)
3	Date of Pre-bid Meeting	06.01.2022 at 12:30 pm in SPD Chamber, BE PC Virtual/offline mode, will be intimated through E-proc portal
4	Last date & time for submission (upload) of online bidding Procurement document.	19.01.2022 till 03:00 PM, on the e-Portal (https://eproc2.bihar.gov.in).
5	Last date & time for submission	20.01.2022 by 03:00 PM, to 'The State

of Original copy of Affidavit & Project Director, Bihar Education Project sample of FLN materials Council, Shiksha Bhawan, Bihar Rashtrabhasha Parishad Campus, Saidpur- 800 004: '6 Time, Date of opening of 20.01.2022 at 03:30 PM on the e-

	Technical Bid	Procurement Portal (https://eproc2.bihar.gov.in)
7	Time, Date of opening of To be announced later on the e-Procurement Portal	Financial Bid (https://eproc2.bihar.gov.in)

26. Still, further, petitioner No.1 (Bihar Offset Printers Association) vide communication dated 03 January 2022 prompted the Bihar State Textbook Publishing Corporation Ltd.

(hereinafter referred to BSTPC) - an instrumentality of State -

engaged in the business of publication of school books, to intervene. Ensuring that the tendered work is split into two components, i.e. only school kits be made the subject of tender to the third party and the printing of study materials and textbooks be secured by BSTPC. (Page 104/1387). Acting thereupon, the latter, vide communication dated 05 January 2022, requested the Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 State Project Director, BEPC, while exhibiting its capacity to supply the textbook prescribed material, to reconsider the decision (page 105/1389).

27. Also, Petitioner no.3 (Patna Offset Press) vide communication dated 05 January 2022 (Page 115) wrote to the State Project Director, BEPC, asking him to modify the terms of the tender, more specifically on the lines of what was so done in the neighbouring State of Jharkhand. Obviously, such an endeavour did not find favour with the authorities, as is evident from the communication dated 14 January, 2022 of the State Project Director, BEPC addressed to the Managing Director, BSTPC (Page 638/1521). To similar effect is another communication dated 06 January 2022 of petitioner No.4 (New Ratan Priya).

28. The process moved on further. The record of minutes of the pre-bid meeting dated 06 January 2022 (Page 187) reveals that 20 bidders/agency/printers, including Puja Printech Pvt. Ltd.

(Petitioner no.2), Patna Offset Press (Petitioner no.3) and New Ratan Priya (Petitioner No.4) had fully participated and suggestions given were partly accepted with the partial modification of conditions of the NIT. Resultantly, Corrigendum dated 11 January, 2022 to RFP dated 23 December, 2021 was Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 issued (Page 205). Significantly successful bidder was not even party to such a process. So four out of five petitioners were party to such discussion. And three out of five had otherwise pursued the matter with the authorities, seeking change of process of procurement.

29. Adhering to the timeline, Bids were submitted by the parties, including the successful bidder.

30. Subsequently, in terms of the RFP, vide communication dated 21 January 2022, a Committee of eight members was constituted to evaluate the material submitted by the bidders (Page 515/1454). The said committee met on 28 th/29th January 2022 and submitted its report dated 29 January 2022 (page 518/1459). Significantly only three bidders, including the successful bidder, submitted their material for evaluation which was evaluated and marks awarded as under:

Summary of the score on evaluation of Presentation, submission of samples (for each grade separately) and demonstration (POC) on the proposed solution capturing the major features of FLN RFP SI. Particulars Score awarded Bidder 1- Bidder 2- Bidder

3-

ITI Telecommunications
Limited Consultants India
Limited

RailT
Corpo
of In
Ltd.

project
(Max Score - 10)

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 samples (Max Score - 10) is relevant to the understanding (Max Score-10) methodology (Max Score - 10) (out of 40)

31. As a next step, the Technical Evaluation Committee reviewed the FL&N Sample Evaluation Committee report and the documents submitted by the parties. In evaluating the technical bid, all the three bidders were declared to be duly qualified, competent, and fully compliant. However, concerning one item, i.e. bidder's quality certification: ISO Mark, the committee, while awarding 10 out of 20 marks each to two out of three bidders, left the final decision to be taken by the Purchase Committee. Also, concerning another issue, namely setting up of library etc., it was left for the Purchase Committee to decide. The relevant portion of the report of the Technical Evaluation Committee is extracted hereinunder:-

"Evaluation & Tabulation of Technical Score M/S RailTel SL Description of the Max Supporting ITI TELECOM Corporation No. Parameters Score Documents Limited CONSULT Of India INDIA LTD Limited 2 Bidder's Quality 20 Proof of 20 Marks Committee Committee Certification Supporting gives 10 marks gives 10 marks Documents for first Bullet for first Bullet point in related point in related Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 ISO 9001:2015 = Description Description 10 Marks Parameter ISO Parameter 9001:2015 & ISO 9001:201 ISO 20000- 1: :

& ISO 27001 201I is submitted

-2013 is by the Bidder submitted by ISO 27001 -2013 the bidder certification is ISO 20000- 1: :

not submitted in 201I the document certification is Instead IS ISO 9001 : not submitted in 551161 & ISO 2015 + ISO 27001 the document 14001:2015 is

-2013 + ISO Instead IS submitted by the 20000- 1: :201I 20000-1:2018 bidder =20 Marks, is submitted by Purchase the bidder Committee may Purchase take decision

on Committee the Remaining may take 10 Marks decision on the Remaining 10 Marks The bidder must One have Completed setup/implemented Work library Books/IT/ Supply, One Completed ICT Labs/IT Installation Work " MPLS educational & Network and assignments commissio Infrastructure (minimum 500 nos ning of operations of in single PO) in Smart 2200 + ESIC 20 Marks.

	Schools/Colleges/Universities/Educational Institutes under State Government/ Central Government/ Semi-Government in last seven years as on			Class Room for 881 Class in Uttar Pradesh - is submitted by the bidder	1. Work Order for 1110 schools in Delhi under ICT Schemes Implementation of Computer-Aided Education in 591 schools in Odisha	loc (Me Col Med Hos Off sub the Res are ICT equ nte WiF & 0 352 Sma Cla Pro And Pur Com tak on be
3	31/03/2020	20	Proof of Supporting Documents	Rest 3 Works are in different Universitie s regarding implementa tion of Integrated University Manageme nt System		
	01 work- 05 marks				Implementation of Virtual Classroom in 500 Schools in Uttarakhand	
	02 work- 10 marks					
	03 work- 20 marks			Purchase Committee may take Decision on the marks to be given		
4	Presentation,	40	Presentation/			

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 samples (for each grade separately) n to the and demonstration satisfaction (POC) on the of the proposed solution Technical capturing the major Committee features (Emphasis supplied) "

32. While agreeing with the evaluation carried out by the Technical Evaluation Committee, the Purchase Committee, in its wisdom, based on objective material, uniformly awarded 20 marks for ISO certification to each one of the three bidders, namely ITI Limited; Telecommunications Consultants India Limited (TCIL) and RailTel Corporation of India Ltd. Also 5 marks each were awarded to the other two parties towards past experience.

33. The proceedings dated 01 February, 2022 of the Purchase Committee are reproduced as under:-

"Letter No.: Quality/ 193/ 2021-22/ 537 Date: 01/02/2022 Proceedings of the purchase committee meeting held on dated 01 February 2022 at 10:00 AM under the Chairmanship of State Project Director, Bihar Education Project Council.

The following members of the Purchase Committee were present in the meeting:-

1. Shri Ravi Shankar Singh, ASPD (Programme)-cum-Administrative Officer, BEPC,

1. Smt. Kiran Kumari, State Program Officer, BEPC,

1. Shri Prabhat Kumar Pankaj, Deputy Director, Primary Education, Bihar,

1. Shri Raman Kumar, Chief Accounts Officer (In-Charge), BEPC Minutes of the meeting: - Execution of technical tender in the light of e-Tender RFP Reference No 7871 dated 23.12.2021 (e-Tender ID 17307).

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1. In the meeting, first in the light of REP Reference No 7871 dated 23.12.2021 (e- Tender ID 17307) published by this office, the report of the three-member internal committee constituted for the evaluation of technical tender of three bidders namely- (1) ITI Limited. 201-202. Rohit House, 3, Tolstoy Marg. New Delhi - 110001, (2) Telecommunications Consultants India Limited, TCIL Bhawan, Greater Kailash - 1, New Delhi - 110048 and (3) For evaluation of technical tender for RailTel Corporation of India Ltd, Plate - A, 6th Floor, Office Block, Tower - 2, East Kidwai Nagar, New Delhi - 110023 and the eight-member evaluation committee constituted for the evaluation of FLN material was presented.

1. After presentation by the tenderer on the sample of FLN material such as School Kit and Student Kit, marks have been given unanimously by the evaluation committee constituted for the evaluation of FLN material which are as follows:

Summary of score on evaluation of Presentation, submission of samples (for each grade separately) and demonstration (POC) on the proposed solution capturing the major features of FLN RFP SI. Particulars Score awarded Bidder 1- Bidder 2- Bidder 3-

	ITI Limited	Telecommunications Consultants India Limited	RailTel Corporation of India Limited
project (Max Score - 10)			
of samples (Max Score - 10)			
proposed is relevant to the understanding (Max Score - 10)			
methodology (Max Score - 10)			
of 40)			

1. In the light of Paragraph 2 Section III of RFP, on the basis of the report of the three-

member internal committee constituted by all the bidders for the dedicated bid and evaluation, all the three bidders such as- (1) ITI Limited, 201-202, Rohit House, 3, Tolstoy Marg, New Delhi - 110001, (2) Telecommunications Consultants India Limited, TCIL Bhawan, Greater Kailash - 1, New Delhi - 110048 and (3) RailTel Corporation of India Ltd, Plate - A, 6th Floor, Office Block, Tower - 2, East Kidwai Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Nagar, New Delhi - 110023 were found successful in Basic Pre-Qualification Criteria. Thereafter, on the basis of Section III Paragraph 3-Technical Evaluation Criteria of RFP, the following position was found after reviewing the report and the records given by the tenderer along with the technical tender and reports of evaluation committee constituted for evaluation of FLN material etc. of the internal committee constituted for evaluation of technical tender by the purchase committee :-

Evaluation & Tabulation of Technical Score SI. Description of the Max Score Awarded No. Parameters Score ITI Limited Telecommuni RailT cations el Consultants Corp India Limited oratio n of India Limit ed annual average turnover

minimum of 300 Crores generated from educational assignments i.e. Supply of library books, supply, Installation & commissioning of Smart/ Digital /Virtual Classrooms/ ICT Computer labs/ IT/ IC/ IT educational assignments in Schools/ Colleges/ Universities/ Educational Institutes etc. during each last three financial year i.e.2017-18, 2018-19, 2019-20.

Upto 300 Cr - 10 Marks More than 300 - 20 Marks

-

ISO 9001:2015 - 10

Marks

ISO 9001:2015 + ISO

27001-2013 + ISO 20000-

1.2011 + ISO 14000 = 20

Marks.

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 implemented library books /IT/ ICT Labs/ IT educational assignments (minimum 500 nos. in single PO) in Schools/ Colleges/ Universities/ Educational Institutes under State Government/Central Government/Semi-

Government in last seven years as on 31/03/2020 01 work-05 marks 02 work- 10 marks 03 works- 20 marks samples for each grade separately) and demonstration (POC) on the proposed solution capturing the major features: -

a) Understanding of the project

b) Provision specification of samples

c) How the solution proposed is relevant to the understanding

d) Work plan and methodology According to Section III Paragraph 3- Technical Evaluation Criteria of RFP, only the bidders who have secured at least 70 marks out of 100 marks will be successful in technical tender evaluation. Therefore, by the purchase committee has unanimously declared successful to all the three bidders namely- (1) ITI Limited, 201-202, Rohit House, 3, Tolstoy Marg, New Delhi - 110001,(2) Telecommunications Consultants India Limited, TCIL Bhawan, Greater Kailash - 1, New Delhi - 110048 and (3) RailTel Corporation of India Ltd., Plate - A, 6th Floor, Office Block, Tower - 2, East Kidwai Nagar, New Delhi -

110023 in the evaluation of technical tender.

1. It was decided to open the financial tender of all the three bidders who were unanimously declared successful in the evaluation of technical tender by the purchase committee on dated 04.02.2022 at 05:00 PM.

5. It was unanimously decided to upload the proceedings of the meeting on the portal <https://eproc2.bihar.gov.in>.

In the end the proceedings of the meeting were concluded with thanksgiving. Signature in English Illegible Signature in English Signature in English Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Date 1.2.2022 Illegible Illegible (Raman Kumar) Date 01.2.2022 Date 1/2/2022 Chief Accounts Officer (Prabhat Kumar Pankaj) (Kiran Kumari) (Incharge), Deputy Director, State Program BEPC Primary Education, Bihar Officer, BEPC Signature in English Illegible Signature in English Illegible Date 1.2.2022 Date 1.2.2022 (Ravi Shankar Singh) (Srikanth Shastree, IS) ASPD (P) State Project Director,

-Co-Administrative Officer, BEPC"

BEPC

34. The eligible parties had submitted their financial bids as under:

Sl. No.	Name of Bidder	Amount
1	ITI Limited	Rs. 312,75,22,148.10
2	Telecommunications	Rs. 249,75,99,115.41
3	Consultants India Limited RailTel Corporation of India Ltd	Rs.299,81,15,901.00

35. While also evaluating the financial bids, the Purchase Committee unanimously resolved that M/s Telecommunications Consultants India Limited, TCIL, respondent no.11 herein, to be the most suitable and the lowest bidder. Significantly, ITI Limited and RailTel Corporation of India Ltd. are not aggrieved of such process. They have not expressed any doubts about the decision making process.

Relevant Provision of RFP Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

36. We may now refer to several salient features contained in the Request For Proposal (RFP)/NIT. The reasoning being that petitioners allege the same to be tailor made to oust them and include others. The document is divided into five sections containing six tables and one price schedule/financial bid.

37. Section I comprises of Schedule of work, and the relevant portion thereof is extracted as under:

"II. FLN materials include:

a. Supply of School Kit • Learning tools for Maths • Learning tools for English • Learning tools for Hindi • Educational Charts • Teacher Training tools for FLN kit • Training videos b. Supply of students' Kit • Supplementary Reading/writing/practice material for Math, English and Hindi The above material have to supply to all 534 blocks headquarter for classes I to V after procurement! preparation, publishing & printing. The complete tender documents can be seen on and downloaded from the website <https://www.eproc2.bihar.gov.in>.

III. Details of Work:

Sl	Name of work	Quantity {No of Schools/ No of children	RFP Cost {In Rs}	EMD (Rs in Lakh)	Bid Processing fee	Per iod of wor k 3 mon ths
I	School-based materials: • Learning tools for Maths • Learning tools for English • Learning tools for Hindi • Educational Charts • Training Videos • Teacher Training tools	66269 schools	10.000/	300.00	As per BELTRON	

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 for FLN kit II Children based materials: 1,03,16,695 • Supplementary children Reading/writing/practice material for Math, English and Hindi for class I to V "Special conditions:-

1. Joint venture / consortium is not allowed."

38. Section II gives background of the project and the relevant portion thereof is extracted as under:

"2.2 NIPUN BHARAT will help children 'read to learn so that they don't get left behind.

2.3 The vision of the Mission is to create an enabling environment to ensure universal acquisition of foundation literacy and numeracy so that by 2026-27 every child achieves the desired learning competencies in reading, writing and numeracy at the end of Grade III and not later than Grade V.

3. FLN (Foundational Literacy and Numeracy) 3.1 Foundational Numeracy means

the ability to reason and to apply simple numerical concepts in daily life problem solving. The pre- existing knowledge of language helps in building literacy skills in languages.

3.2 The major aspects and components of FLN are on Oral Language Development, Decoding, Reading Fluency with Comprehension, and Writing.

3.3 FLN will ensure holistic development of the child by focusing on different domains of development of Physical and motor development, Socio-emotional development, Literacy and Numeracy development, Cognitive development, Life skills etc."

39. Section III is titled as instructions to bidder and under clause 2 contains pre-qualification criteria. The relevant portion thereof reads as under:-

"2. Basic Pre Qualification Criteria SL Pre-Qualification Criteria Documents to be submitted in online Technical Bid.

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 1 The bidder should be an Indian Registered • Certificate of Company under Companies Act 1956 or 2013/ Incorporation Proprietorship/ Partnership Firm /PSU/ Agency and /Partnership deed or should be at least 7 years old entity as on as applicable. 31/03/2020. • GST Registration Copy of Certificate of Incorporation/ Registration / Certificate. Partnership Deed or any other relevant document, • Copy of PAN Card as applicable, should be submitted along with a copy of address proof.

Note: - Consortium of any kind shall not be acceptable for this project. Any deviation would lead to disqualification or termination of the same. 2 The bidder must have an annual average turnover CA Certificate of minimum Rs. 300 Cr. from educational OR assignments i.e. Supply of library books supply, Extracts from the Installation & commissioning of Smart/ Digital/ audited balance sheet Virtual Classrooms/IT/ICT/IT Computer labs/ IT and profit & loss for educational assignments in Schools / Colleges / last three financial Universities / Educational Institutes etc. during years i.e.2017.-18, each last three financial year i.e.2017- 18, 2018-19, 2018-19, 2019-20. 2019-20.

3 The net worth of the bidder in the last three Copy of Balance financial years, (as per the last published audited Sheet and CA balance sheet) should be positive. The bidder Certificate for net should be profitable and should not be in loss in last worth three years (as per the last published audited balance sheet) i.e. 2017-18, 2018-19, 2019-20. 4 The bidder must not have been blacklisted for Affidavit/Undertaki fraudulent practices by any of its clients. Central ng in the prescribed Government / State Government / UT format Government / Government Undertakings / University / Educational Institutions / Government Bodies / PSUs in India, as on the date of

submission of the bid.

5 The bidder must have successfully undertaken at Copy of work order least the following numbers of educational supplemented by assignments of value during last 7 years as CA certificate. specified herein :- One project of educational assignment, not less than the amount of Rs 240 , 00,00,000/- (Two Hundred Forty Crores Only) OR Two projects of educational assignment not less than the amount of Rs 120,00,00,000/- (One Hundred Fifty Crores Only) OR Three projects of educational assignment not less than the amount of Rs 120,00,00,000/- (One Hundred Twenty Crores Only) Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Educational assignment is defined as: Supply of library books supply, Installation & commissioning of Smart! Digital! Virtual Classrooms/IT/ ICT/IT Computer labs/ IT educational assignments in Schools / Colleges / Universities / Educational Institutes etc. under State/ Central Government as on 31/03/2020. 7 The bidder should have the below certifications: Copy of valid • ISO 9001 : 2015 certification Certificate(s) (Emphasis supplied)"

40. Technical Evaluation Criteria is prescribed as under:

"3. Technical Evaluation Criteria Technical Proposal for only those Bidders who have been found to be in compliance with the Pre-Qualification Criteria mentioned above would be taken up for further evaluation. Client Department reserves the right to check / validate the authenticity of the information provided in the Pre-qualification and Technical Evaluation criteria and the requisite support should be provided by the bidder. The Technical bid shall be evaluated as per the mandatory technical compliance as per the following: -

Evaluation & Tabulation of Technical Score SI. Description of the Parameters Max Supportin No. Score g Document 1 Bidder should have related annual average turnover 20 Proof of minimum of Rs.300 Crores generated from educational Supporting assignments i.e. Supply of library books/ supply, Documents Installation & commissioning of Smart/ Digital/ Virtual Classrooms/ ICT Computer labs/IT /ICT/IT educational assignments in Schools / Colleges / Universities/ Educational Institutes etc. during each last three financial year i.e.2017-18, 2018-19, 2019-20 Upto 300 Cr = 10 Marks More than 300 Cr = 20 Marks 2 Bidder's Quality Certification: - 20 Proof of Supporting • ISO 9001 :2015 = 10 Marks Documents • ISO 9001 :2015 + ISO 27001-2013 + ISO 20000- 1 : 2011 + ISO 14000 = 20 Marks.

3 The bidder must have setup/implemented library 20 Proof of Books/IT/ICT/Labs/IT educational assignments Supporting (minimum 500 nos. in single PO) in Schools/ Colleges/ Documents Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Universities/ Educational Institutes under State Government/ Central Government/ Semi-Government in last seven years, as on 31/03/2020.

01 work- 05 marks 02 work- 10 marks 03 works- 20 marks 4 Presentation, submission of samples(for each grade 40 Presentatio separately and demonstration (POC) on the proposed n/ solution capturing the major features: - demonstrati on to the

a) Understanding of the project satisfaction

b) Provision/specification of samples of the

c) How the solution proposed is relevant to the Technical understanding Committee

d) Work plan and methodology Presentation will take place "Online" or "Offline" at SPD office, Bihar Education Project Council, Shiksha Bhawan, Bihar Rashtrabhasha Parishad Campus, Said pur, Rajendra Nagar, Patna- 800004 The minimum qualification marks for technical evaluation stage are 70 out of

100. The bidders who score 70 or more during the technical evaluation stage would qualify for the Commercial evaluation stage."

41. In terms of Clause 6.4 of the said Section, modification of the bid document is permissible. Bids are required to be submitted in separate form, i.e. technical bid and commercial bid, which is required to be evaluated by the Technical Evaluation Committee in terms of Clause 27 of the said Section. Relevant portion of the said clause reads as under;

"27. Evaluation and Comparison of Bids 27.1 The Technical Evaluation Committee (comprising of technical experts) constituted by the Purchaser will evaluate the substantially responsive Technical Bids in pursuant of the Basic Qualification Criteria. The committee on their discretion, may inspect the premises of the bidder for evaluation their capability with reference to physical infrastructure available and other technical capabilities etc"

"27.3 The Purchase/Technical Evaluation Committee will evaluate the technical competency of the prospective Bidders and prepare a panel of Bidders, technically qualified to carry Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 out the assignment of supply of Foundational Literacy & Numeracy Materials in 534 blocks of Bihar. The assessment by the Purchase/Technical Evaluation Committee constituted by the purchaser as to the Technical Competency of the bidder will be final and binding to all substantially responsive Bidders. An expert committee may be formed for evaluation of FLN material samples and its specifications submitted by the bidders and its recommendation will be the basis of technical evaluation."

(Emphasis supplied)

42. Section IV deals with the contract's description and scope, and Section V deals with the terms of the agreement.

43. With the contents of the RFP suitably set out, we may now proceed to the virtual pre-bid meeting dated 06 January 2022, the proceedings of which are reproduced hereinunder, communicated vide letter dated 10 January 2022. (page 187-191) "Bihar Education Project Council Shiksha Bhawan; Saidpur, Patna-4 Letter No. Quality/186/221-22/ 150 Dated 10/01/2022 E-Tender ID: 17307 (RFP Reference No. 7871 Dated 23.12.2021) Proceedings of the virtual pre-bid meeting (Called for Procurement/Preparation & Supply of FLN Materials for Schools & Children of Bihar for the Year 2021-22) Approximate cost of the project - Rs. 250 Cr. Place & Venue: Office of the State Project Director, Bihar Education Project Council, Shiksha Bhawan, Saidpur, Patna -4. Date: 06.01.2022 (12:30 PM onwards) Present:

1. Shri Shrikant Shastree, IAS, State Project Director, BEPC, Patna,
2. Smt. Kiran Kumari, State Programme Officer (Quality Education), BEPC, Patna,
3. Shri Binod Kumar, State Resource Person, BEPC, Patna.

The list of attendees is enclosed as Annexure- I. At the outset, the State Project Director, BEPC welcomed all the members and representatives of the bidders/agencies present virtually and briefed about the requirements of the desired FLN materials. All written queries received via e-mail or in-person received Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 till date were read out during the meeting and were clarified to bidders/agencies who choose to be present. Thereafter, the representatives of the prospective bidders were also asked to raise their issues/doubts if any to be clarified in the meeting.

Queries of following bidders/agencies/printers were clarified in the pre-bid meeting:

SI. No. Name of Firm/Company/Their Representatives 1 Faxonics Technologies 2 ITI Limited (A Government of India Undertaking) 3 Uneecops Technologies Ltd 4 RailTel Corporation of India Limited (RailTel) 5 MIS SMN IT Products And Services Pvt. Ltd 6 Extramarks Education India Pvt. Ltd 7 Puja Printech Pvt. Ltd.

8 Aggrawal Enterprises 9 Patna Offset Press 10 New Ratan Priya 11 ICONEX (India) Pvt. Ltd 12 Paras Publication Pvt. Ltd.

After the due deliberations with the prospective bidder (s)/agency and keeping in view the end purpose that is to attract wider & larger participation of reputed and capable firms/bidders? RFP was re-visited and some modifications accepted/rejected and some were found beyond consideration, in the e-Tender/RFP, are as under:-

SL RFP Page Clause Details as per Modification(s)/change Modification(Section/Claus No RFP s requested by bidders s)/changes e No accepted/inco

incorporated 1 Section-I, 6 Sample kit of FLN Request you to Request Clause No XV material for each class, please ask the accepted.

as per the technical sample kit of FLN Technical specifications should material only as per specifications submitted separately technical specification for class I to V the "State Project and also Please Clarify has been Director, Bihar Are the FLN material revised and is Education Project kit to be provided for annexed as Council, Shiksha Class 1 to 5 with all Annexure II. Bhawan, Rashtrabhasha concepts covered?

Parishad Campus, Saidpur - 800004"

Registered Post/ Speed Post or by hand 2 Section-III, 10 The bidder must have Request you to Request Clause annual average turnover consider 300 Cr. accepted. 2{Pre- of minimum Rs. 300 Cr. turnover from IT/ICT/ Revised:-The Qualification from educational Educational bidder must criteria)- assignments i.e. Supply Assignments for have an Pt. No.2 of library books wider participation annual clause 3: /supply, Installation & average Evaluation commissioning of turnover of & Smart Digital/ Virtual minimum Tabulation of Classrooms/ ICT Rs.300 Cr.

Technical
score SI.

Computer labs/ IT
components in Schools

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 No.1 / Colleges / Universities assignments/I / Educational Institutes T /ICT / etc. during each last Supply of three financial year library books i.e.2017-18,2018-19, /supply, 2019-20. Installation & commissioning of Smart/ Digital/ Virtual Classrooms/ ICT Computer labs/ IT components in Schools / Colleges / Universities / Educational Institutes/ Govt /Semi Govt Deptts during each last three financial year i.e.2017-18, 2018-19, 2019-20.

3 Section-III, 11 Educational assignment Request you to Request Clause is defined as: Supply remove the word accepted. 2(Pre- library books,/Supply, 'educational Revised:- The Qualification Installation & assignment' and bidder criteria)- Commissioning of consider 'Similar must have Pt. No.5 Smart/ Digital/ Virtual Nature'. Similar successfully Classrooms/ ICT Nature is defined as: undertaken at Computer labs! IT IT/ICT /Educational least the components in Schools Assignments in following Colleges / Universities State/Central/Semi numbers of Educational Institutes Govt . as on assignments of under State/ Central 31/03/2020. similar Government as on nature, of 31/03/2020. value during last 7 years as specified herein :- One project of value, not less than the amount of Rs 240,00,00,000/- (Two hundred and forty crores only) or Two projects of value, not less than the amount of Rs 150,00,00,000/- (one hundred and fifty crores only) or Three projects of value, not less than the amount of Rs 120,00,00,000/- (one hundred and twenty crores only).

Similar nature is defined as educational assignments/I T / ICT / Supply of library books /supply, Installation & commissionin g of Smart/ Digital/ Virtual Classrooms/ ICT Computer labs/ IT components in Schools / Colleges / Universities / Educational Institutes/Govt /Semi Govt Deptts as on 31/03/2020.

4	Section-V	27	Terms and Conditions of Contract	Please add the point in Force Majeure clause: In case of any lockdown/ travel restrictions/ quarantine/ school closures, department shall provide a central warehouse to the vendor for delivery of material.	Request Rejecte
5	Section-V Pt. NO. 6	27	Payment	As per GFR Rule 172: Advance Payment to supplier: It is advisable that department may release 30% of the	Request Rejecte

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Contract value.

Please amend the clause as 30% advance payment and 70% on delivery and acceptance. Also In case of any Lockdown/ travel restrictions/ quarantine/ school closures, 50% payment will be released on supplying of material at central warehouse provided by the department/end user and 20% on acceptance.

Request 6 Table-III 31 Statement of Past Please amend it accepted.

Performance: (Performa last seven Financial Revised:-

for a period of ten Years, ending on Statement of financial years from 31/03/2021 as per Past PO clause of Performance:

. To considering last (Performa seven years of work for a period of
.... .) and We orders. Please seven MIS change the financial
statement for Supply years from of IT/ICT/Education (Name of
the Bidder) Assignment as per from

hereinafter called "the
Bidder" have executed
following works related
to Supply of
Foundational Literacy
and Numeracy materials
during last ten
Financial Years, ending
on 31/03/2021

PO Clause.

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 components in Schools /
Colleges / Universities / Educational Institutes/Govt /Semi Govt Deptts during the
last seven Financial Years, ending on 31/03/2021.

7 Table-III 31 Has the work entrusted Please consider self- Request completed satisfactorily
declaration from accepted.

(Attach certificate from
an officer who entrusted
the work)

bidder or certificate
from an officer for
completion.

8 Table-VI
(Point No.
15)

34

Bidder will be required
to submit Self Attested
Copies of GST return of
last three years (2018-

Request you to
amend the GST
return Financial year
as 2017-18,2018-19,

19, 2019-20 and 2020- 2019-20. required to

21) submit Self Attested Copies of GST return (Form GSTR - 9) of last three years (2017- 18,2018-19, 2019-20) 9 Section-III, 12 Bidder's Quality To be read as-

clause	Certification: ISO
3(Technical	9001:2015- 10 marks,
evaluation	ISO
criteria) Pt	9001:2015+15027001-
no-4	2013+150 20000-
	1:2011+15014000 =20
	marks

10 Financial
Bid
Format

Note: Other terms, conditions, specifications stipulated in the e-Tender/RFP shall remain unchanged.

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 All the prospective bidders are required to take cognizance of the proceedings of the pre-bid meeting before formulating and submitting their bid. Prospective bidders are also requested to take note that the notifications/Corrigendum/Addendum in this regard shall also be posted on e-Procurement Portal <https://eproc2.bihar.gov.in> as well as the official website of the BEPC <https://bepcssa.in> and shall be binding on all bidders.

The meeting ended with a vote of thanks to the chair.

(Binod Kumar) 10.01.22
State Resource Person
BEPC, Patna

(Kiran Kumari) 10.1.22
State Programme Officer
Quality Education,
BEPC, Patna

(Shrika
10.01.2
State P
Bihar E
Council
Patna"

44. Quite apparently, all concerns of the petitioners were addressed, and the amended Schedule of

Events, by way of Corrigendum dated 11 January 2022 published on the website (Page-205).

SUBMISSIONS OF THE PARTIES

45. The learned senior counsel/counsel appearing for the respective parties made detailed submissions before this Court, which are recorded in summary.

(I) Submissions Of The Petitioners

46. Sri P. K. Shahi, Senior Advocate, appearing for the petitioners, lays a challenge to the tender notice on the following grounds:-

(i) The stipulations in the tender about eligibility are tailor-made to oust the units set up within the State of Bihar from being eligible to participate in the bid (for example, annual Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 financial turnover of Rupees 300 Cr (approx)(Para 38 supra). Such a position being adopted is in contravention to the State Policy to give preference to local industry and the industries falling under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as MSME Act) (Page-1023). The petitioners who sought to be ousted are capable of executing the work to the satisfaction of the employer, but instead of giving preference to local industries, respondent no.8, namely the State Project Director, BEPC, has chosen to invite outsiders by formulating conditions of tender in such a manner that no entity, i.e. The Micro, Small and Medium Enterprises (MSMEs) situate in the State of Bihar would be able to participate.

(ii) The eligibility stipulated in the tender is largely unrelated to the task sought to be achieved with the tender.

(iii) The conditions of the tender are violative of Bihar Finance (Amendment) Rules, 2005 inasmuch as-(a) It is violative of Rule 131 H as tender is not published in the journal as required (Page-948); (b) It is violative of Rule 131O inasmuch as the prescribed amount of security amount to be 2% to 5%, is reduced to 1% (Page-950); and (c) It violates Rule 131 P where performance security is provided to be 5% to 8% but reduced to 3% (Page-950).

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

(iv) The decisions of the State Steering Committee, which was the primary decision-making body, were illegally and unauthorizedly amended/modified by respondent no.6, namely The Additional Chief Secretary, Department of Education, Government of Bihar, Patna and respondent no.8, namely, the State Project Director, Bihar Education Project Council, Patna.

(v) The decision of preparing the RFP taken by a Five Member Committee consisting of representatives of Directorate of Primary Education, Department of Education, Government of

Bihar, State Council for Educational Research and Training (SCERT), Bihar Education Project Council (BEPC), Central Square Foundation etc. was amended by two subordinate officers in the pre-bid conference, without consultation of the said Committee.

(vi) The Request For Proposal (RFP) [Section I, Clause XIX- Special Conditions:- "1- Joint Venture/Consortium is not allowed."] (Page 59) (Para 37 supra) prohibits participation explicitly by a consortium, but respondent no.11, namely Telecommunication Consultant India Ltd. (TCIL), has published a document inviting bids from suppliers for the same material. This amounts to asking partners, which, as stated, is specifically prohibited.

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

(vii) The subsequent document published by respondent no.11 is strikingly similar to the RFP published by respondent no.8 with certain conditions suitably amended, allowing MSME units' participation.

(viii) The evaluation of bids by the respondent authorities has not been done fairly, objectively, and in consonance with general information furnished in the RFP as, according to it, a minimum of three bids should be technically eligible. To achieve this, the marks allotted by the authorities have been increased contrary to the documents submitted under RFP.

(ix) The cost quoted in the RFP upon which the tender is allotted to respondent no.11 is inflated. The petitioner's estimated cost is Rs.100 Crores (approx.) which, along with GST, would be Rs. 125 Crores (approx.) and not Rs.250 Crores. Hence a large amount of public money is likely to be squandered.

(x) The scope of the tender is related mainly to the printing of textbooks and other supplementary materials. However, the experience category under the RFP mentions numerous IT-related educational activities in order to make eligible the eventual bidders and winners.

(xi) The BSTPC has been sidelined despite its already executing work of similar nature. Another branch of the Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Government, i.e. SCERT, could develop the materials in local language and context, but that has been assigned to the bidders.

(xii) The procurement of textbooks and other supplementary material in this tender is plain, the procurement of goods; however, respondents label the same as procurement of services.

47. In support of his submissions, he has referred to and relied upon the following judicial pronouncements:-

(i) Uflex Limited vs. Government of Tamil Nadu, (2022) 1 SCC 165; (ii) Meerut Development Authority v.

Association of Management Studies and another, (2009) 6 SCC 171; (iii) Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and others, (2015) 13 SCC 233;

(iv) Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216; (v) Caretel Infotech Limited v. Hindustan Petroleum Corporation Limited and others, (2019) 14 SCC 81;

(vi) Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and another, (2016) 16 SCC 818; (vii) Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and another, (2018) 11 SCC 508; (viii) Tata Cellular v. Union of India, (1994) 6 SCC 651; Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

(ix) State of U.P. v. Sudhir Kumar Singh, 2020 SCC OnLine SC 847.

(II) Submissions of Respondents no. 8,9 &10.

48. Sri Anjani Kumar, Senior Advocate, learned Additional Advocate General IV, appearing for respondents no.8, 9 and 10, has made the following submissions.

(i) That as far as the allegation of sidelining of the State Steering Committee and modification of the decision taken by a powered committee of lesser number of members is concerned - all decisions were taken in the confidence of the Additional Chief Secretary, Department of Education, Government of Bihar, who himself is a signatory to the proceedings of a workshop held on 16.11.2021.

(ii) That the draft RFP was prepared by an expert committee and after minor changes approved by the Additional Chief Secretary, Department of Education, Government of Bihar, the Project at hand amounts to 250 Crore and complying with the Central Vigilance Commission (hereinafter referred to as CVC) guidelines (Pages 292-295), the bidder has to have an annual turnover of 300 Crore as one of the Pre-Qualification conditions. The essence of the contract is not printing but the development of Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 content with skill and expertise, which the petitioners (body of private printers) lack.

(iii) That the deposit of earnest money was to prevent bidders from withdrawing their bids before the end of bid vitality. Moreover, no provision of relaxation to MSMEs can be found in the financial management manual and procurement of Samagra Shiksha.

(iv) Any enhancement of marking is vehemently denied, with the evaluation carried out on the technical compliance enumerated in RFP.

(v) The evaluation criteria were prepared after multiple rounds of discussion and consultation, and bids submitted were to be evaluated by the expert committee chaired by Director, SCERT. Doubts held by the expert committee were referred to Purchase Committee for final decision making.

(vi) That the work-experience related condition was subsequently amended is a baseless argument. All participants in the pre-bid meeting suggested upon the RFP document and after deliberation with the prospective bidders and agencies, the same was revisited, incorporating specific suggestions. This amended document was uploaded on the Official Portal. The deadline was Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 suitably extended for the prospective bidders to consider the changes.

(vii) That the rationale behind the prohibition of Consortium/Joint Venture is that the time is essence. To break this and invite tender separately would require time.

(viii) That the Bihar Finance Rule was amended in 2005. Rule 124 -134T are under the procurement of Goods, and 131U

-131ZH are Procurement of Services. Rule 124 indicates that the department procuring goods shall adhere to the general rule broadly. The present work falls dominantly under procurement of services, and therefore no relaxation of earnest money deposit is liable to be given to MSMEs.

(ix) That in the workshop dated 16 November 2021, considering the time to be consumed in the preparation of workbooks and other study materials, a decision was taken to procure such developed content by a Centralized process. The Director, SCERT, was present in the meeting and consented to this decision.

(x) That the requirement of minimum of three tenderers is not a mandatory condition and the number (3) mentioned in the general information on the e-portal was to enhance competitiveness.

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49. In support of his submissions, he has referred to and relied upon Uflex Limited (supra), particularly paragraphs 5, 27, 31.4, 39, 49 and 47.

(III) Submissions of Respondent No.6

50. Sri A. K. Rastogi, Senior Advocate, learned Additional Advocate General-X, appearing for respondent nos. 3 to 7 makes chiefly the following submissions:-

(i) That as directed by the State Steering Committee, SCERT is developing content for three months school readiness modules etc. to be distributed through the Bihar State Text Books Corporation Limited.

(ii) That time is of the essence in implementing the stipulated scheme, failing which funds received from the Government of India would lapse.

(iii) That the contention of the petitioners of bypassing the mandate of the State Steering Committee is false and that the SCERT and BSTPC are carrying out work

assigned by it and attempting to complete it within the time available. Such grant of work is with the approval of the Chairman of the State Steering Committee, namely, the Additional Chief Secretary, Department of Education, Government of Bihar, which in effect constitutes Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 approval granted by the State as per the power under Article 154 of the Constitution.

(iv) With respect to ISO certification, it pertains to quality, safety, and service, which are essential to completing the FL&N programme. Submitting an updated version of the ISO does not disqualify the party offering the document from receiving the allotted marks.

(v) The Purchase Committee is the chief decision-

making body of the BEPC, duly headed by a person of the Additional Chief Secretary rank with all other committees, acting in aid of the Purchase Committee in reaching the final decision.

(vi) That judicial review vis-à-vis tender matters lies within a narrow scope. Interference under Article 226 of the Constitution of India is on the limited ground of arbitrariness, unreasonableness or malice in law.

(vii) The present writ petition is not public interest litigation but a writ petition under works contract. Petitioners cannot be said to be party aggrieved. The larger public interest far outweighs the interest of a few and, therefore, ought to be dismissed.

51. In support of his submissions, he has referred to and relied upon the following judicial pronouncements:- (i) Silppi Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 *Constructions Contractors v. Union of India*, (2020) 16 SCC 489, particularly paras 6, 7, 11, 13; (ii) *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517, particularly para 22. (IV) Submissions on behalf of Respondent No.11

52. Sri Mukul Rohatgi, learned Senior Advocate, assisted by Sri Pawanjit Singh Bindra, Senior Advocate, appearing for Respondent No.11 made the following submissions-

(i) A party ineligible at the threshold cannot ask the Court to examine the award of a tender.

(ii) The current set of facts at hand is not a case of one party being favoured over a close second, and in this case, the petitioners laying challenge to the tender is wholly unwarranted and untenable in law.

(iii) That the submission on behalf of the petitioners, alleging Respondent No. 11 as having the intent or entering into a Joint venture or Consortium is specious. A Joint Venture or Consortium is formed when there is a prior meeting of minds of the parties to enter into such an agreement and then, subsequently, place a bid. No such activity took place in the present set of facts. Non can, under one roof and entirely on their own supply, all the components of a tender.

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(iv) Developing and sourcing various components, such as textbooks, charts, video material and other educational aid, and then putting it together is what the current respondent is doing. That is an act of expertise, and service is rendered.

(v) That an agreement can be tailor-made when there is mal-intent on the part of the tender issuing authorities, to the detriment of other parties. In the current situation, all the three short-listed bidders are entities of the Government of India. To state that the State of Bihar deliberately tailored the conditions to suit entities of the Government of India is a submission sans any basis.

53. In support of his submissions, he has chiefly referred to and relied upon the following judicial pronouncements:- (i) Tata Cellular (supra), [para 94]; (ii) Michigan Rubbar (India) Limited (supra), [para 23]; (iii) Uflex Limited (supra) [para 42, 47]; (iv) Jagdish Mandal (supra) [Para 21, 22]; (v) Galaxy Transport Agencies, Contractors, Traders, Transporters & Suppliers v. New J. K. Roadways, Fleet Owners and Transport Contractors & Ors., 2020 SCC OnLine SC 1035. [Para 14-16] LAW

54.I. Fundamental Principles Governing Tender/Contractual matters Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

(i) The Constitution Bench (Five-Judge) of Hon'ble the Supreme Court in Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1, accounting for the principles laid down in its earlier decisions, summarized seven principles, to be adhered to, by the State in dealing with matters of the Governmental policy in distribution of natural resources; contractual matters; Tenders; negotiation; etc. "170.1. Firstly, State actions in the contractual field are meant for public good and in public interest and are expected to be fair and just.

170.2. Secondly, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 of the Constitution of India in contractual matters.

170.3. Thirdly, the fact that a dispute falls in the domain of contractual obligation, would make no difference to a challenge raised under Article 14 of the Constitution of India on the ground that the impugned act is arbitrary, unfair and unreasonable.

170.4. Fourthly, every State action must be informed of reason and it follows that an act uninformed by reason is arbitrary.

170.5. Fifthly, where no plausible reason or principle is indicated (or is discernible), and where the impugned action ex facie appears to be arbitrary, the onus shifts on the State to justify its action as fair and reasonable.

170.6. Sixthly, every holder of public office is accountable to the people in whom the sovereignty vests. All powers vested in a public office, even in the field of contract, are meant to be exercised for public good and for promoting public interest.

170.7. And seventhly, Article 14 of the Constitution of India applies also to matters of governmental policy even in contractual matters, and if the policy or any action of the Government fails to satisfy the test of reasonableness, the same would be unconstitutional."

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(ii) While construing the expression 'distribute' in Article 39(b) of the Constitution of India, the Apex Court in Natural Resources Allocation (supra), clarified that alienation of natural resources by way of auction may not always sub- serve common good. In fact, at times, it may run counter, for the word 'distribute' would take in its amplitude and encompasses all manners and methods of distribution conceivable under economic necessities.

(iii) Examining the extent of power of judicial review, in Michigan Rubber (India) Ltd. (supra), the Hon'ble Supreme Court (Two Judge Bench) observed that:-

"Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

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(iv) In National High Speed Rail Corporation Limited v. Montecarlo Limited and another, 2022 SCC Online SC 111, Hon'ble the Supreme Court noted as under:-

"95. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case

where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the concerned Court(s), which ultimately may look to the larger public interest and the national interest involved."

(Emphasis supplied)

(v) In *Montecarlo Ltd. v. NTPC Ltd.*, (2016) 15 SCC 272, the Hon'ble Supreme Court held that:-

"26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third- party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

(Emphasis supplied)

(vi) There is no fundamental right to do trade and business in intoxicant. [Har Shankar and others v. The Dy. Excise and Taxation Commr. And others, (1975) 1 SCC 737]

54. II. The Trust Doctrine

(i) It cannot be disputed that the principle of public trust doctrine is applicable in the State dealing with natural resources. Some Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 of which stands enumerated by the Constitution Bench in Natural Resources Allocation (supra), to be as (a) the property subject to the trust must be used for public purpose; (b) under the Constitution and more specifically Article 39(d), there is no prohibition of alienation of such property; (c) However, while doing so, all constitutional principles must be adhered to; (d) judicial care and due process must be adhered to; (e) The State as a trustee is obliged to hold such natural resources for the benefit of the citizens as also ensure equal distribution to sub-serve common good. [Also Union of India v. Assn. of Unified Telecom Service Providers of India, (2020) 3 SCC 525]

(ii) The public trust doctrine is a specific doctrine with a particular domain and has to be applied carefully." [Natural Resources Allocation (supra) Para- 93]

(iii) Disposal of public property partakes the character of trust and the Government and the public authorities are obliged to make all attempts to obtain the best available market price while doing so. [Rakesh Kumar Goel v. U.P. State Industrial Development Corpn. Ltd., (2010) 8 SCC 263]

54. III State's Power To Sell By Negotiation

(i) Welfare State exists for the largest good of the largest member, dedicated to eradication of poverty, hence obligation to secure the best market price in commercial Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 transaction is necessary. [Ram and Shyam Company v. State of Haryana and others, (1985) 3 SCC 267]

(ii) The amplitude and power of the Government is unrestricted, exclusive in dealing with contractual matters/privileges even by private negotiations. [State of Orissa and others Vs. Harinarayan Jaiswal and others, (1972) 2 SCC 36, para-14].

(iii) But, however, such actions must be legitimate and above board; shorn of "aversion" or "affection" Departure from the rule of public auction should not be by way of "compromise". [Haji T.M. Hassan Rawther v. Kerala Financial Corporation, (1988) 1 SCC 166, Para-14]

(iv) Even in a case of such obligation being discharged by way of a public auction/tender negotiation by the parties can take place. Air India Ltd. v. Cochin International Airport Ltd. and others, (2000) 2 SCC 617, para-7]

(v) Governmental actions must not be such as "it shakes the public confidence". [Nagar Nigam, Meerut v. Al Faheem Meat Exports (P) Ltd. and others, (2006) 13 SCC 382]

(vi) The departure from the ordinary rule of public auction must not be in a way that it gives an appearance of 'bias, jobbery or nepotism'. [Sachidanand Pandey v. State of W.B. Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 (1987) 2 SCC 295; Manohar Lal Sharma v. Principal Secretary and others, (2014) 9 SCC 516]

(vii) Non- floating of tenders and not holding public auction will not be deemed to be a result of the misuse of the executive power in an arbitrary manner. Equally, there has to be some 'rational' and the action should be "not suggestive of discrimination." [Villianur Iyarikkai Padukappu Maiyam v. Union of India & Ors. (2009) 7 SCC 561, Para- 164, 174].

(viii) Reading auction as a constitutional mandate would be distortive of another constitutional principle embodied in Article 39(b). [Natural Resources Allocation (supra) para-113; Bihar State Housing Board and others v. Radha Ballabh Health Care and Research Institute Private Limited, (2019) 10 SCC 483]

54. IV Tender- Its Character; Nature; Rights of the Parties

(i) A tender is an offer, notified for acceptance and submission, unconditionally by the willing parties to its obligations. [Meerut Development Authority (supra), para 26].

(ii) Invitation to a tender is in the realm of a contract. [Natural Resources Allocation (supra); Uttar Pradesh Avas EvamVikas Parishad and others v. Om Prakash Sharma, (2013) 5 SCC 182, para-29] Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

(iii) Mere submission to a tender confers no right upon the party, save and except for its valid consideration in terms thereof. [Harinarayan Jaiswal (supra, para-13; Meerut Development Authority (supra), para 27;]

(iv) Mere deposit of bid amount would also not confer any right upon the tenderer. [Ratnagiri Gas and Power Private Limited v. RDS Projects Limited and others, (2013) 1 SCC 524, Para -28]

(v) Past record of tenderer; quality of goods or services offered would have been bearing on the overall assessment in assigning suitability of the successful bidder. [Raunaq International Ltd. v. I.V.R. Construction Ltd. and others, (1999) 1 SCC 492, Para-16]

(vi) There is no concluded contract till the time the bid is accepted. Also bid be not necessarily accepted, be it even that of the highest bidder. [Air India Ltd. (supra); Trilochan Mishra etc. v. State of Orissa and others, (1971) 3 SCC 153,. Harinarayan Jaiswal (supra); Master Marine Services (P) Ltd v. Metcalfe & Hodgkinson (P) Ltd. and another, (2005) 6 SCC 138, Para-11,]

(vii) No bidder is entitled as a matter of right to insist for further negotiation unless the terms so provide; Bidder has got no Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 right, save and except for a fair treatment in the matter of evaluation of competent bids offered by interested parties. Mere deposit of money in terms of the bid also does not confer any right of the bidder. Tenderer has no right for negotiation after submission of bid. The State has a right to accept or reject even the highest or lowest bid; There exists no obligation on the part of tender issuing authority to accept any of the tenders or even the lowest bidder. Of course such a decision has to be based on the existence of good and sufficient reasons.[State of Jharkhand and others v. CWE-Some Consortium, (2016) 14 SCC 172, para- 13]

(viii) On acceptance of bid, contract between the parties becomes concluded and an agreement binding the parties disentitling them to wriggle out of the same. [Har Shankar (supra)]

(ix) In the absence of power of general relaxation, essential conditions of a tender must be adhered to. However, deviation in relation thereto must be applied uniformly qua all the terms of the tender and the parties entitled for such benefit. [Bakshi Security and Personnel Services Private Limited v. Devkishan Computed Private Limited and others, (2016) 8 SCC 446, para-15] Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

(x) Minor deviation from the explicit term of the tender itself would not be sufficient, in the absence of malafide for the Court to set aside the tender at the behest of an unsuccessful bidder.[Bharat Coking Coal Limited and others v. AMR Dev Prabha and others, (2020) 16 SCC 759, para 47]

(xi) Onus to prove that the tender condition is 'a make believe one is upon the party alleging the same. [Harinarayan Jaiswal (supra), para-13; Union of India and others v. Ashok Kumar and others, (2005) 8 SCC 760 (supra), para 21]

54. V. Economic Policy of a Government:- Scope of Interference

(i) In Villianur Iyarkkai Padukappu Maiyam v.Union of India and Ors. (2009) 7 SCC 561, the Court observed that:

"167. In the matter of policy decision and economic tests the scope of judicial review is very limited. Unless the decision is shown to be contrary to any statutory provision or the Constitution, the Court would not interfere with an economic decision taken by the State. The court cannot examine the relative merits of different economic policies and cannot strike down the same merely on ground that another policy would have been fairer and better.

168. In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 contrary to law or mala

fide, a decision bringing about change cannot per se be interfered with by the court."

(ii) Unique Projects inheres unique procedure. [Villianur Iyarkkai Padukappu Maiyam (supra), para-165]

(iii) In complex economic matters, every decision is necessarily empiric and it is based on experimentation or what one may call 'trial and error method and therefore, its validity cannot be tested o any rigid 'a priori' considerations or on the application of any strait-jacket formula. The Court must while adjudicating the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or 'play in the joints' to the executive. The same is required to be given unless such decision is patently, arbitrary, discriminatory and malafide. [State of M.P. and others v. Nandlal Jaiswal and others, (1986) 4 SCC 566, State of Punjab v. Yogender Sharma Onkar Rai & Co. and others, (1996) 6 SCC 173] Natural Resources Allocation (supra), para- 139, 141, 142; Villianur Iyarkkai Padukappu Maiyam (supra), Air India Ltd. (supra), Manohar Lal Sharma v. Narendra Damodardas Modi and others, (2019) 3 SCC 25; Kuldeep Singh v. Government of N.C.T. of Delhi, (2006) 5 SCC 702, Para-25] Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

(iv) Unless the decision is ex-facie contrary to a Statute or against public policy, Constitutional Court would exercise judicial restraint. [Ramchandra Murarilal Bhattad and others v. State of Maharashtra and others, (2007) 2 SCC 588] [Also 5 M & T Consultants, Secunderabad v. S.Y. Yawab and another, (2003) 8 SCC 100, Para-16, Association of Registration Plates v. Union of India and others, (2005) 1 SCC 679, para 35]

(v) Simply because the tender is going to be benefitted commercially is not a ground to interfere.[5 M & T Consultants, Secunderabad (supra) para 16].

(vi) Unless overwhelming public interest requires it so. Intervention otherwise may lead to vast amounts unbudgeted expenditure. [Master Marine Services (P) Ltd (supra), para 12, Sanjay Kumar Shukla v. Bharat Petroleum Corporation Limited and others, (2014) 3 SCC 493, para 19]

54.VI Scope Of Interference Under Article 226 In Commercial Transactions, Particularly Tender Matters

(i) Action in excess of jurisdiction or error apparent on the face of record resulting in manifest miscarriage of justice is a major ground for interference. [Bishnu Ram Borah and another vs. Parag Saikia and others, AIR 1984 SC 898] Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

(ii) Government is a guardian of the finances of the State and expected to protect the financial interest of the State. [Tata Cellular (supra), para 70]

(iii) The scope of judicial review is not reviewing the decision, but the decision making process itself. Judicial review is not an appeal, and under the garb of such review, it must not be used as an instrumental for abusing the power or usurping the same. The scope of judicial review is confined

to:

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

(b) Irrationality, namely, Wednesbury unreasonableness.

(c) Procedural impropriety.

[Tata Cellular (supra), para 77]

(iv) In the very same decision what is irrational, stands further elaborated in the following terms:-

'By "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness". (Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. [(1948) 1 KB 223 : (1947) 2 All ER 680]) It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at.'

"

(1) It is open to the court to review the decision-

maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld..."

"(2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in R. v. Barnet London Borough Council, ex p Johnson [(1989) 88 LGR 73] the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down."

"83. A modern comprehensive statement about judicial review by Lord Denning is very apposite; it is perhaps worthwhile noting that he stresses the supervisory nature of the jurisdiction:

"Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves embark on a rehearing of the matter. See Healey v. Minister of Health [(1955) 1 QB 221 : (1954) 3 All ER 449 : (1954) 3 WLR 815] . But

nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly. See *H.K. (an infant), Re* [(1967) 2 QB 617, 630 : (1967) 1 All ER 226 : (1967) 2 WLR 692] , and *R. v. Gaming Board for Great Britain, ex p Benaim and Khaida* [(1970) 2 QB 417 : (1970) 2 All ER 528 : (1970) 2 WLR 1009] . The courts will ensure that the body acts in accordance with the law.

If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation. See *Punton v. Ministry of Pensions and National Insurance* [(1963) 1 WLR 186 : (1963) 1 All ER 275] . And if the decision-making body has gone wrong in its interpretation they can set its order aside. See *Ashbridge Investments Ltd. v. Minister of Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Housing and Local Government* [(1965) 1 WLR 1320 : (1965) 3 All ER 371] . (I know of some expressions to the contrary but they are not correct). If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere.

See *Padfield v. Minister of Agriculture, Fisheries and Food* [1968 AC 997 : (1968) 1 All ER 694] . If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding -- so unreasonable that a reasonable person would not have come to it -- then again the courts will interfere. See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [(1948) 1 KB 223 : (1947) 2 All ER 680] If the decision-making body goes outside its powers or misconstrues the extent of its powers, then, too the courts can interfere. See *Anisminic Ltd. v. Foreign Compensation Commission* [(1969) 2 AC 147 : (1969) 1 All ER 208 :

(1969) 2 WLR 163] . And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside.

See *Sydney Municipal Council v. Campbell* [1925 AC 338 : 1924 All ER Rep 930] . In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons -- in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly. See *Padfield case* (as AC pp. 1007, 1061) [1968 AC 997 : (1968) 1 All ER 694] ."

(v) However, in the said decision itself the Court enunciated the following principles as follows:-

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 substituting its own decision, without the necessary expertise which itself may be fallible. (4) The terms of

the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

(vi) These principles stand reiterated in Natural Resources Allocation, (supra), para 103, 107, Raunaq International Ltd.(supra); Air India Ltd.(supra); Master Marine Services (P) Ltd (supra), para-12, Meerut Development Authority (supra), Afcons Infrastructure Limited (supra); and Sudhir Kumar Singh (supra).

54. VII Article 14 - Reasonableness

(i) In Michigan Rubber (India) Ltd. (supra), the Hon'ble Apex Court in para 13 observed as under:

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 "22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in

favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country."

(Emphasis supplied)

(ii) What is reasonableness of an action, in a contractual matter has to be gauged from the attending facts of each case. It further observed that-

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

(iii) There is presumption of requirement of reasonableness being satisfied in a Governmental action and it being in public interest. [Villianur Iyarkkai Padukappu Maiyam (supra), Para-170] Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

(iv) Reasonableness cannot be a mere ipse dixit. [M.P. Oil Extraction v. State of M.P., (1997) 7 SCC 592, Para 41].

(v) Private Interest would not prevail over public interest. There is need to maintain transparency in Governmental contracts.[Nagar Nigam, Meerut (supra), Para 13]

54. VIII Arbitrariness - the anti-thesis of Equality.

What would be an illegal or irrational act of the State or procedural impropriety, requiring judicial interference has been succinctly explained by Lord Diplock in Council of Civil Services Unions v. Minister For Civil Service : (1984) 3 All.E.R (HL);

"Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 by those persons, the judges, by whom the judicial power of the State is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong with our judicial system....

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

(ii) The test to be applied for determining reasonable classification and arbitrariness in the context of Article 14, in relation to contractual obligation, stands considered by Hon'ble the Apex Court in Natural Resources Allocation, (supra), (para 97) Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 "It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be

founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question."

"102. Equality and arbitrariness were thus, declared "sworn enemies" and it was held that an arbitrary act would fall foul of the right to equality. Non-arbitrariness was equated with the rule of law about which Jeffrey Jowell in his seminal article "The Rule of Law Today"

said:

"Rule of law principle primarily applies to the power of implementation. It mainly represents a state of procedural fairness. When the rule of law is ignored by an official it may on occasion be enforced by courts."

"103. As is evident from the above, the expressions "arbitrariness" and "unreasonableness" have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in *Sharma Transport v. Govt. of A.P.* [(2002) 2 SCC 188], this Court has observed thus:

(SCC pp. 203-04, para 25) "25. ... In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary.

The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

"104. Further, even though the "classification"

doctrine was never overruled, it has found less favour with this Court as compared to the "arbitrariness" doctrine. In *Om Kumar v. Union of India* [(2001) 2 SCC 386 : 2001 SCC (L&S) 1039], this Court held thus: (SCC p. 409, para 59) "59. But, in *E.P. Royappa v. State of T.N.* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] Bhagwati, J. laid down another test for purposes of Article 14. It was stated that if the administrative action was 'arbitrary', it could be struck Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 down under Article 14. This principle is now uniformly followed in all courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable."

(emphasis supplied)

54. IX Meaning Of Public Interest In The Context Of Contractual Matter

(i) In Raunaq International Ltd. (supra), the Hon'ble Apex Court defined the elements of public interest, in the context of tender matter, to be:

"10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work

-- thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation."

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(ii) Even if there is defect in the decision making process, in the absence of overwhelming public interest, no interference is warranted.[Air India Ltd. (supra), para-7, Master Marine Services (P) Ltd (supra), para 15, Ramchandra Murarilal Bhattad (supra)]

54. X Mala fides

(i) Unless substantial interest public in nature or the transaction entered into with mala fide intent, the Court would refrain from intervening in a dispute between two private tenderers. [Raunaq International Ltd. (supra), Para-11]

(ii) Allegation of mala fide has to be based on cogent material. [Raunaq International Ltd. (supra) Para-11]

(iii) Mala fides or improper motive must be discernible from the surrounding factors and proving facts preceding the passing of the order. Burden to establish bonafide is "very heavy on the person alleging the same. [Ashok Kumar (supra) Para- 21; Ratnagiri Gas and Power Private Limited (supra), Para 26.2)

(iv) In Ratnagiri Gas and Power (P) Ltd. (supra), the Hon'ble Apex Court observed further:

"26.1. In State of Bihar v. P.P. Sharma [1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192] this Court summed up Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 the law on the subject in the following words: (SCC p. 260, paras 50-51) "50. 'Mala fides'

means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith..., (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.

51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient."

(Emphasis supplied) [Reiterated in JSW Infrastructure Limited and another v. Kakinada Seaports Limited and others, (2017) 4 SCC 170, Para 10]

54. XI Terms Of Tender Are Rarely Subject To Judicial Review.

(i) Terms of the contract are best left to be interpreted by its author even if not acceptable to the Constitutional Court, unless it is a case of mala fide exercise of power; perversity in the understanding or appreciation or in the application of the terms of the tender conditions. [Caretel Infotech Limited (supra)]

(ii) It was held if the express terms are perfectly clear and free from ambiguity, there is no chance to be made between different possible meanings; the clear terms must be applied even if it would consider otherwise it to be more suitable. Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 [Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board, (1973) WLR 601 (HL)]. It further observed, "it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which though tacit, formed part of the contract which the parties made for themselves."

54. XII Legitimate Expectation Gives Ways To Larger Public Interest

(i) The doctrine of legitimate expectation gets assimilated in the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Of course such an expectation is contextual to the attending facts and the decision touching such legitimate expectation is to be seen not from the vantage point of private party but larger public interest. A bona fide decision of a public authority satisfying the constitutional mandate would withstand judicial scrutiny and outweigh the private interest. [Food Corporation of India v. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71 at page 76, para 8]

(ii) The doctrine of "legitimate expectation" operates in the domain of public law and only in an appropriate case, Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 constitutes a substantive and enforceable right .[M.P. Oil Extraction (supra), para 44]

(iii) Doctrine of legitimate expectation is source of procedural or substantive right. [Kuldeep Singh (supra), para 25]

54. XIII PERSON AGGRIEVED

(i) The Hon'ble Apex Court(Four Judge Bench) in Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed, (1976) 1 SCC 671, elaborately discussed the issue of locus standi in the context of a person aggrieved; There must be infringement of some legal right or prejudice to their right inhering in them; Elaborately further, in the context of writ of certiorari, the Court categorized it to be (i) person aggrieved; (ii) stranger and (iii) busybody or meddlesome interloper.

54. XIV Public Law Remedy vis-à-vis Contractual Disputes

(i) When, in relation to a contractual dispute with a public law element party chooses public law remedy (writ petition) instead of private law remedy (suit etc.), adjudication of a contractual right is restricted only to the extent of review of Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 administrative action. [Rishi Kiran Logistics (P) Ltd. (supra), Para 29]

54. XV Balance of convenience always plays a major role in moulding the reliefs.

(i) Mere disqualification by way of tender condition itself would not tantamount the condition being tailor made to non-suit a party. Also selection of a competent party by way of an open tender procedure cannot be said to be an act of creating monopoly. [Association of Registration Plates (supra)]

(ii) In order to award a contract to a particular party, a reverse engineering process is evolved to achieve that objective by making the tender conditions such that only one party may fit the bill. Such an endeavour has been categorised as "Decision Oriented Systematic Analysis" (for short "DOSA"). [Uflex Ltd. (supra), Para 5]

(iii) The decision in Nabha Power Limited (NPL) (supra), essentially deals with principles for interpreting commercial contract, whereas the question in the present case pertains not to that, but instead to determining the justiciability of the terms of the tender.

"49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 rule which is the basis of The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] test of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties. The development of law saw the "five condition test"

for an implied condition to be read into the contract including the "business efficacy" test. It also sought to incorporate "the Officious Bystander Test"

[Shirlaw v. Southern Foundries (1926) Ltd. [Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in B.P. Refinery (Westernport)

Proprietary Ltd. v. Shire of Hastings [B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta- principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and Attorney General of Belize v. Belize Telecom Ltd. [Attorney General of Belize v. Belize Telecom Ltd., (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

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55. We have elaborately discussed the significant features and the object to be achieved by undertaking such an essential and mammoth task of empowering our future generation. Imparting quality education to a child is imperative to national growth and realizing rights under the broad ambit of Article 21, read alongside the ideals enshrined in Part IV of the Constitution. The steps taken by the Government to implement this Scheme, which will foster a better informed future generation, are in furtherance of these goals. We need not repeat already stated, more specifically, in para 9, 10, 15, 22 & 37 of our opinion.

56. Considering the uniqueness of the project and the constitutional mandate of providing education to more than one crore children studying in different schools (66269) in Bihar, aged 6 to 9 years, the State Government in terms of the Central Government Policy, initiated the process for implementation by giving a nomenclature "Mission AADHAR." The National Education Policy, 2020 empowered and enabled State Government to constitute a Steering Committee as previously mentioned, for providing guidance, review, and real-time monitoring for the Scheme's implementation, ensuring effective feedback. In this backdrop, the Government of Bihar notified the Steering Committee to be headed by the senior Officer, namely Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Additional Chief Secretary, Department of Education, Government of Bihar. Initially, Steering Committee did contemplate associating all the stakeholders for implementing the project through the Bihar Education Project Council (BEPC). A decision, sound as it may be, at the relevant point in time was to have the project implemented through the State and its instrumentality, such as SCERT, an organization, tasked with preparing a curriculum and syllabi; for implementing the educational policy and BSTPC which generally carries out the printing work. The BEPC was to coordinate such activity. The record reveals that the project was to be implemented within a time-bound period with the special focus and endeavour of at least initiating the same within the current financial year, i.e. 2021-22.

57. It emanates from the record that various stakeholders within the State of Bihar held a series of meetings. Pursuant to the decision taken by the Central Government, in June 2021, for implementing the project across all the States in India, the Government of Bihar, having received such communication, on July 6, 2021 (Page 248), vide an order, decided to implement the project by giving a nomenclature.

"Aadhar Mission" to realize the goal of 'Foundational Literacy and Numeracy (FL&N) under NEP, 2020 in a time-bound Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 manner. As noticed earlier, the stakeholders met between July 2021 and October 2021, with one such last review meeting held under the Chairmanship of Additional Chief Secretary, Education Department, Government of Bihar on November 9, 2021. In furtherance of discussions of this meeting, a letter dated 12 November 2021 (Page 601) was issued to all stakeholders for convening a discussion workshop, on 16.11.2021, upon the directions of the Additional Chief Secretary for the execution of the FL&N Mission. Considering the urgency, uniqueness and complexity of the project to be implemented, a decision was taken, though not by the Steering Committee, but by all the relevant stakeholders, to have the project implemented through a centralized process. In this light, a meeting of all the crucial stakeholders, including Director, Primary Education, Department of Education, State Project Director, BEPC and SCERT, Government of Bihar, was convened. On December 2, 2021 (Page 290/1437), a five-member Committee stood constituted to finalize the tender document/RFP terms. Significantly, both SCERT and BEPC were part of the said Committee.

58. However, having got a whiff of the project being implemented through a centralized process, petitioner no.1 (Bihar Offset Printers Association) met the concerned Minister and raised Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 objections and issues against such action. Most of the petitioners relentlessly pursued the matter at a different level and with other bodies. However, considering the project's uniqueness, the authorities could not find themselves in agreement with their request of splitting the contract into two parts/components/compartments, i.e. printing textbooks by the State Body and providing the other component through the process of tender.

59. Resultantly on December 23, 2021 notice inviting tender was published.

60. It would be only observed that out of five petitioners, three of them, namely M/s Puja Printech Pvt. Ltd (Petitioner No.

2), M/s Patna Offset Press (Petitioner No.3) and New Ratan Priya (Petitioner No.4) were not only present and participated in the pre-bid meeting when the terms of the tender, including the request for relaxation of the eligibility criteria, were discussed and decision taken thereupon. Noticeably, the successful bidder was not even present. On the suggestions made during such a meeting, the authority modified certain conditions of the RFP and resultantly issued a corrigendum dated 11 January 2022.

61. Despite participating in such a process, petitioners directly/indirectly opened up another independent channel to get Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 the eligibility conditions of tender modified. On this issue, Petitioner No. 1 pursued the matter with the BSTBC, who in turn wrote to BEPC requesting for reconsideration and other requests were made by Petitioner no. 3 and 4, namely M/s Patna Offset Press and New Ratan Priya to BEPC. One factor in such persuasion was the adjoining State of Jharkhand's decision to split the contract into two parts. However, such an endeavour could not fructify with the decision taken at the level of Additional Chief Secretary, Department of Education, Government of Bihar. Such request stood turned down.

62. In our considered view, these facts alone are sufficient to dismiss the petition, more so, being disqualified and given the law enunciated in Association of Registration Plates (supra). However, we proceed to deal with all the issues argued before us.

63. On January 21, 2022, a Committee of eight members was constituted to evaluate the material to be submitted by the bidders (Page-515). The Evaluation Committee met on January 28, 2022, submitting the sample evaluation report the same day. As a follow-up step, the Technical Evaluation Committee met and submitted its report on January 29, 2022. These reports of the Evaluation Committee and the Technical Evaluation Committee, Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 already extracted in the earlier part of our opinion (para 30 & 31 supra), were considered. A final decision was taken thereupon by the Purchase Committee, which, undisputedly, is the highest Committee to review and make a final call. This was done on February 1, 2022, itself (Para 33 supra).

64. Significantly, only 3 out of 20 bidders could qualify the eligibility criteria. And incidentally, in the instant case, all three of them are Public Sector Undertakings.

65. With the technical and financial bids evaluation, private respondent no.11, also the lowest in the financial offer, was declared the most suitable to implement the project (Report reproduced in para 33 supra). The policy was based not only on the commercial bid but also on the technical know-how, expertise, past experience in implementing works of similar nature. The said respondent has undertaken works of similar nature- for 1500 Schools in Uttar Pradesh, 1110 in NCT Delhi, 591 in Odisha, 500 schools in Uttarakhand. Equally, they have undertaken the execution of 40 assignments relating to education, spread over a period of one decade.

66. A submission that the amendment/modification of the Request for Proposal was to be placed before the Five Member Committee who initially prepared the same would not in any way Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 vitiate the process for the simple reason that a modification clause was stipulated in the Request for Proposal, not to be settled by the authors. And, it is not the petitioners' case that such modification was carried out by an authority not competent to do so. Some of the petitioners participated in the pre-bid meeting, as has come on record. The competent authority approved the decision to modify the terms. The same was made after recommendations of the bidders were either accepted or rejected. The decision, complete in all respects, was put on the public domain by uploading to the official website. Hence, at all times, there has been due consideration, deliberation and application of mind, with the whole process being

transparent.

67. The Committee may have a prepared draft of the RFP, but the competent authority who finally issued the same is also authorized to modify the terms.

68. The Bihar Educational Project Council is an instrumentality of the parent Department, i.e. Education Department, Government of Bihar. One of the objectives and purposes of establishing such a Council is to execute a centrally sponsored scheme under the Samagra Shiksha Abhiyan. The Council is headed by a senior-level IAS Officer, who in the instant case is respondent no.8, namely the State Project Director, BEPC. Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 It is no doubt true that initially, the Government had constituted and notified a Steering Committee, but as it appears from the record, the said Committee never met, save and except on a solitary occasion on September 16, 2021, for charting out the course of FL& N programme.

69. BEPC exhibited urgency in the implementation of the Scheme. In its right earnestness, ensuring benefits reach out to more than one crore children, as also more than 14 lakh teachers of Bihar. After engaging and consulting essential stakeholders, it undertook the task with due approval of the competent authority, the Additional Chief Secretary, Education Department, Government of Bihar, who took a conscious decision. And a letter dated 17 August 2021 (page 251) was issued by Member Secretary, State Steering Committee, to the State Project Director, BEPC asking him to take steps to lay down a road map of implementation (Page 218-19). It is not that respondent no.8, namely the State Project Director, Bihar Education Project Council, of his own suddenly took that stand. It was deliberated and thought out action engaging all the necessary stakeholders which action was taken with the approval of the Additional Chief Secretary, Government of Bihar.

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70. A submission that the tender condition was tailor- made either to oust the petitioners or to favour a third party, more so, the successful bidder, is not only fallacious but preposterous, more so, in the absence of any tangible material to support the same. Successful bidder had not even participated in the pre-bid meet. It cannot be said that the respondent's action is mala fide in law, as has been held in P.P. Sharma (supra), is not born from the record. The Officer had no animus against any one of the petitioners/ manufacturers/ businessmen in Bihar. There was no past dealing with them that reflected such conduct. The Officer also does not have a repute from service record of doubtful integrity or taking rash decisions. The State chose the best team to implement the project considering the uniqueness and magnitude, which exercise is entirely within their decision making power. The fact that the petitioners were allowed to represent and that their relentless efforts to persuade and bring about reconsideration were met with objective consideration, only reflect the absence of malice or biasness. In fact, their endeavour seeking reconsideration by prompting an instrumentality of the State, i.e. BSTPC, to urge such reconsideration was also not deemed to be out of line and was accorded due regard.

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71. Equally, the respondents have not exhibited any act of rashness or compromised with any public interest. In fact, paramount consideration both in the decision-making process and the decision, overwhelmingly, exhibits public interest. Correct preparation and selection of material composite in nature, both for the children and teachers; timely distribution and training; obtaining feedback, is itself a humongous task, best to be handled by a single agency, considering prompt and timely implementation of the Scheme in achieving its noble object. We need not repeat what we have already observed in our earlier part of the opinions (Paras 9, 10, 15, 22, 32 supra). The tender condition is not a "make believe", an act of "Jobbery" contrary to any Statute, warranting interdiction by the Court in reviewing the decision making process.

72. It is a settled principle of law that terms of the tender being contractual in nature are best left to be determined by the parties, unless, of course, such terms are arbitrary, capricious and fall within the exceptions carved out by the Courts within the constitutional framework over a period of time, more so in Natural Resources Allocation, (supra), Tata Cellular (supra), Michigan Rubber (India) Ltd. (supra).

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73. The monetary value as published in RFP was '0', which was amended at a particular time to Rs.250 Crore; the essential condition of the annual turnover of a bidder is stipulated to be Rs.300 crore. Hence, the eligibility criterion is contended to be irrational. The submission needs to be repelled on two counts-

(a) eligibility criteria is determined based on the estimated cost by the Government of India and (b) on a conjoint reading of the documents, i.e. cost of the project as estimated by the Government of India and the CVC guidelines. We may only note that the tender document itself disclaims the prices as initially being published '0' to be amended at an appropriate point in time.

74. The submission that based on the CVC guidelines, the qualification criteria of minimum financial turn over for the last three years ought to have been Rs.75 Crore (30% of the project estimated of Rs.250 Crore) instead of Rs.300 Crore, also merits rejection for the simple reason that the CVC guidelines only prescribe the minimum requirement with no higher limit. In any event, the condition of Rs.300 Crore is fixed by the author of the document considering the uniqueness of the project and is based on the objective satisfaction, in which we see no error. Decision in Nabha Power Limited (NPL)(supra) is evidently clear and aptly applicable. We may only add that CVC guidelines also speak of Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 accounting for the soundness of the agency along with its expertise, depending upon the nature and scope of the work.

75. In the instant case, the stipulation of minimum turnover was a formula laid down by the CVC in its guidelines. Private Respondent No.11 has explained the same in its pleadings. Initially, it was the case of the petitioners that the tender condition was in violation of such guidelines. However, it was subsequently argued that the guidelines do not apply to the work in question for it to apply only to the construction of bridges and highways. Be that as it may, on record, there is nothing to suggest that the conditions stipulated are violative of the CVC guidelines.

76. Eligibility criteria of minimum experience of the nature of work sought to be executed were laid down after due deliberation. The parties having knowledge and experience with annual average turnover from an educational assignment in ICT were also included. The amendment was incorporated by the Committee headed by the State Project Director, as is evident from the minutes of the meeting dated 6 January 2022, communicated vide letter dated 10 January 2022 (Annexure-9, Page 187) (Para 43 supra).

77. The petitioners have contended that SCERT must prepare the study material and other supplementary study aid Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 because it has to be done in local language and context. Such contention does not have any weight because the FL&N Scheme itself prescribes three languages, namely Hindi, English and Urdu wherever applicable. Even if this argument was to be acceded to, the preparation of said material by the successful bidder would not dilute the quality of education in any manner as it has considerable experience working in different areas of the country as reflected by the affidavits filed by them, which fact cannot be disputed.

78. The petitioners have contended that contrary to the nature of work sought to be achieved through this tender, which is primarily the printing of material, the experience category includes IT/ICT items that are irrelevant. It is further contended, supplementing the argument that the tender is tailor-made to suit the successful bidder and oust the petitioners that the definition of an 'educational assignment' has been altered. As already discussed, this tender is in pursuance of the goals set out centrally by the NIPUN Bharat scheme and the AADHAR Mission on the State Level. The components of the FL&N programme are pretty straightforward and speak for themselves as to not be limited to merely printing. The record reflects that the study material which is to make up this Scheme has to be developed through third parties over and above that being developed by SCERT (Minutes Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 of meeting dated 16.11.2021). It includes charts, video lectures, and other aspects, both for students and teachers, as already reproduced supra (Paras 9, 10, 15, 22, 37 of our opinion). Therefore, it is an unfounded contention that including IT/ICT related work in the definition of 'educational assignment' has been done to tailor-make the tender for the successful bidder. The decision taken is a policy matter and has been done to achieve the more significant public interest of education of children, keeping in mind the uniqueness as it involves not only education but also teacher training and monitoring to ensure that the material prepared translates into actual impact on the child studying the same.

79. With emphasis, it is argued that the work efficiently could have been executed through the BSTPC. We may only notice that the petitioners' attempt to approach the Government through the said Corporation was also deliberated upon and considered appropriately. Significantly, BSTPC did not pursue the matter any further, and they are not the party aggrieved before us. The decision in not getting the textbooks printed through the said Corporation was an objective consideration keeping in mind that -

(a) their track record which led to the passing of several orders by this Court prompting the Government to ensure timely printing of Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 books [Page-438]; (b) the Central Government, in the past granting one-time approval for release of

the fund concerning the project undertaken in the year 2018 [Page-505]; and (c) the complexity, uniqueness, magnitude of the project to be implemented. It has come on record that the BSTPC also outsources its printing work to various private entrepreneurs. It is not that it itself prints the books. It has been getting the material printed from private sources in the past. Against this backdrop, petitioners cannot be allowed to piggy ride on the shoulders of BSTPC, when in fact, they are pursuing their cause.

80. The contention that even such modification was done to oust the petitioners and benefit a particular class of tenderers is also unfounded on facts and law. Such terms were made after consultation and due deliberation. Essentially, petitioners wanted relaxation regarding the eligibility condition, i.e. (a) minimum annual average turnover of Rupees three hundred crores; (b) past experience successfully undertaken a certain number of educational assignments of a particular value for a particular period. The decision taken bona fide is in the public interest considering the complexity and enormity of the project. We may only reiterate that there were only three bidders who could qualify, and all of them were Public Sector Undertakings. Hence, there is Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 no question of the officers exhibiting any bias in their favour. All actions are legitimate; aboveboard; shorn of aversion or affection; without any compromise or in violation of principles enunciated in Natural Resources Allocation (supra); Tata Cellular (supra); Michigan Rubber (India) Ltd. (supra); and Haji T.M. Hassan Rawther (supra).

81. Given the attending facts and circumstances and the principles enunciated in Natural Resources Allocation (supra), a submission that petitioners' right to participate under Articles 19 and 301 stands infringed is legally untenable. Regarding the latter, one has to scrutinize or ascertain whether the impugned legislative or executive act operates to restrict or barricade trade, commerce or intercourse directly and immediately as distinct from creating some indirect or inconsequential impediment that may be regarded as remote. [State of Bihar v. Harihar Prasad Debuka, (1989) 2 SCC 192] Equally, no case has been effectively made for violations of Article 14 and 21. The record does not reveal the petitioners to have established any right warranting interference by this Court.

82. Is it really? As is so alleged by the petitioners that, with the award of the tender, public exchequer would lose a sum of Rs.100 Crore? In our considered view, there is no tangible Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 material on record to establish such fact, except a simple averment made by the petitioner that the printing work can be done at a much lesser cost, i.e. Rs.125 crore. Well, this is best to be left to the experts, having exclusive domain over the issue. Pricing in the instant case is to be viewed differently than what the Government would fetch in selling the material resources of the State. The work's complexity and composition is a factor that even the Central Government has worked out, as is evident from the estimates made for budgetary allocation of funds to the State of Bihar (Para 15 of our opinion). The contention also needs to be negated because the programme for educating the children under FL&N Mission is not mere distribution of reading material but material prepared by experts to enhance the children's intelligence quotient. It is a composite programme where content prepared by the experts is not only to be printed but also teachers trained and educated to ensure that the material designed is effectively delivered and utilized. The endeavour does not shake the public confidence in any manner, nor does it compromise any public interest.

83. We may observe that the material approved by the Sample Approval Committee was shown to us in Court. We are satisfied with the content and the quality. And no material was Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 ever placed by the petitioners before any Authority. An endeavour was made to get the material prepared by SCERT, a body constituted to prepare the contents, further to be printed by BSTPC for distribution to the children in the schools of Bihar. But then a conscious decision was taken to get the work done through a centralized process, perhaps given the complexity and uniqueness of the project, but certainly on account of time constraints. It is not that the material prepared by them is being copied or replicated for the project in question. Also, their track record cannot be ignored. Lack of efficiency exhibited by these agencies resulted in (a) the Government changing its policy by directly remitting the money for the purchase of books into the children's Bank account and the Central Government approving it only for a specific period (Page-504,505); (b) judicial interdiction mandating early completion of the task undertaken for publishing and distributing reading material to the children studying in Bihar (Page-438).

84. The NIT has been issued in furtherance of NEP, framed to recognize, identify, and foster each student's unique capabilities by sensitising teachers and parents to promote each student's holistic development in academic and non-academic spheres. Under the said policy, the highest priority has been Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 accorded to achieve FL&N of all students by Grade-3. [counter affidavit of respondent no.11 at page 1133-34]

85. In an affidavit filed before this Court by Respondent-8, the project with its intent is described as under

(Page 488):-

"Teaching Learning Materials for implementation of Innovative Pedagogies is an activity under which different FLN materials related to innovative pedagogies are required to be implemented. Under this activity, services for creation and development of content along with procurement and supply of FLN materials, development of audio video training module and conduction of training for teachers are required with innovative pedagogies... That different items under the activity are inter-related, integrated and are supplementary & complementary to each other. Purpose of the activity is to create, develop & prepare teaching & learning materials of high quality with new ideas, new concepts rather than to depend on traditional methods of teaching so that school children can study with better understanding of the subjects."

86. What weighed the authority in executing the project through a single process was the time factor, and the fact that budgetary allocation would lapse should the programme not be executed during the current financial year 2021-22. Though on the lapse of budget, there is a discordant note between the Central Government and the State Government as is born out from the pleadings. According to the State Government, the budgetary allocation was to lapse on March 31, 2022, which, as is evident from the affidavit filed by the Central Government, it to be not so Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 (Page-1624). Be that as it may, this itself cannot be a reason

to vitiate the entire process, for we do not find arbitrariness, illegality, unreasonable or any hastiness exhibited by the Authorities in the decision-making process. Solely on this ground, the tender process cannot be said to be either malicious or detrimental to the public interest; to the contrary, the public interest lies in early and quick implementation of the FL&N Mission with the distribution of the material to the children for their benefit.

87. A submission that students would have been better off with the continuation of direct benefit scheme formulated by the State of Bihar is fallacious on two counts- (a) policy decision to such effect was taken, with the prior approval of the State Government only on account of delay attributable to the instrumentalities of the State. (b) It was a onetime measure as approved by the Ministry of Human Resources Department, Government of Bihar vide communication dated 9 March 2018, and ex post facto approval granted in 2018-19 and 2019-20.

88. Under the Micro, Small and Medium Enterprises Development Act, 2006, whether petitioners had any vested right or a legitimate expectation to the award of work in question? In our considered view, the answer necessarily has to be in the Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 negative. The Act was indeed enacted to facilitate the promotion and development and enhance the competitiveness of micro, small and medium enterprises within the State, the object being to give impetus to industrial growth and activity. It stipulates the classification of enterprises and measurement for promotion, development, and enhancement of competitiveness amongst such classified enterprises. As stipulated in Chapter V, the only right that accrues in favour of such enterprises is recovering the amount for the supply of goods and rendering service. It does not bestow any confirmed or vested right of allocation of work from the State/its instrumentality. Hence to contend that the Government's endeavour in procuring material through a centralized source violates the said Act, is legally untenable. Equally, it cannot be said to have infringed any right of legitimate expectation, more so in the light of decision rendered in Kamdhenu Cattle Feed Industries (supra) and M.P. Oil Extraction (supra).

89. To contend that the award of work is against the Rule 131O, 131U, 131 ZH of Bihar Finance (Amendment) Rules, 2005 is also, in our considered view, untenable in law. According to the State, the Rules are applicable only for the procurement of goods and not services. In support, they seek reliance on a decision rendered on 21.05.2021 by a learned Single Judge of this Court in Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 CWJC No.7289 of 2020 titled as Bihar Offset Printer Association v. State of Bihar & Ors. (page- 639). The said decision undoubtedly has not attained finality. As such we prefer to deal with the issue from a different angle.

90. Rule 131O prescribes the minimum amount of bid security to be fixed in awarding a commercial contract in nature. The said Rules specify the bid security to be between two per cent to five per cent of the estimated value of the goods to be procured. The expression between two per cent to five per cent of the estimated value of the goods to be procured used is "ordinarily". As such, it does not provide a minimum ceiling beyond which the bid amount cannot be stipulated. Rules 131U and Rule 131ZI enable the Department to hire external professionals consultancy firms for a specific job and monitor. The said Rules are essentially executive orders that ordinarily should be followed when charging the Government exchequer, suitably supplanted or modified by other rules or instructions.

Their application is to be in a way that anything contained within them is not repugnant to subject or context.

91. Insofar as the particular rules to which the petitioners refer, relaxation in price (price preference-Rule 131B) is to be given to units located and registered in Bihar as also they would Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 not be liable to pay earnest money. This would only apply had they been eligible at the threshold to execute the tender.

92. On the point of non-advertisement in the Indian Trade Journal (Rule 131H), while using the word 'should', the same section also mentions that the document is uploaded on the Website of the Department. This condition has been satisfied. The non-advertisement in the journal has not, in any way, caused prejudice to the petitioners.

93. On performance security (Rule 131P), continuing with the Scheme of directory language, the word used for securing such amount is 'should', therefore, leaving open the possibility for the Department to decide otherwise, needless to say, on grounds free of any mal-intent.

94. The primary purpose and object of obtaining bid security were to prevent bidders from withdrawing their bids before the bid validity period or signing the agreement.

95. To amplify the issue, it is argued that the Standard Policy of the Government of Bihar in awarding the project to an instrumentality of the State is a comparatively reduced profit margin of 9-12%. Further, the instrumentality of the State, i.e. BSTPC, could execute the work at a much lower price; hence public money should not be allowed to be wasted. The contention Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 only merits rejection for as we have noticed the project of its own kind is required not only material distribution but also its preparation by experts, monitoring continuously over a minimum period of time.

96. Bifurcation for procurement of different materials, i.e. school kits, student kits and teachers' education material, as is so suggested by the petitioners, would only defeat the object and purpose of the Mission, for FL&N material has to be uniform for all the students and the schools and material of such a nature and/or quality cannot be said to be readily available in the market.

97. Attacking the process in finalising the tender, our attention is invited to the procedure adopted by the relevant Committees. Emphasizing, it is argued that (a) it lacks objectivity;

(b) it ignored minimum pre-requisite and, more specifically that of past experience; (c) it did not account for non-submission of necessary documents indicating fulfilment of eligibility criteria, more specifically ISO certificate and (d) the marks were jacked up to ensure compliance of the minimum requirement of three bids to be successful, for failure thereof would have resulted into the entire process falling through.

98. On all counts, we do not find favour with such submissions because having three minimum successful bidders is Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 contained in the

general information of the tender document [Page-1664, 1667]. In any case, relaxation thereof has caused no prejudice to anyone, and neither is that a case pleaded before us. For, all are treated uniformly, and condition of a minimum of three bids is not that of a Statute; Rule; or Regulation. It's purely in the realm of a contract. In our considered view, even if there were only one party fulfilling all essential conditions, it would not make the process of tender fall through. As stipulated, the evaluation was done by three separate committees. The sample evaluation committee did the first marking. [Page-518] (Para 30 supra). The next, by the Technical Evaluation Committee, was regarding the material to be supplied and the technical feasibility of the parties [Page-521] (Para 31 supra). The final evaluation by the Purchase Evaluation Committee [Page-526] (Para 33 supra). The Technical Evaluation Committee found the three parties to be compliant with the terms of the Essential Conditions and, as such, awarded marks. Noticeably, on the issue of ISO certificate, the Committee, for the reasons prescribed in their report, while awarding 10 out of 20 marks, left the final decision to be taken by the Purchase Committee. It is not that the bidders did not fulfil the requirement of ISO certificate. It is only that one of the parties (ITI) had an upgraded version of the same certification which led to the Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 enhancement of award in marks concerning that. It was well within the domain of the Purchase Committee, being the superior and final authority, to evaluate the technical competence of the prospective bidder as is evident from clause 27.3 of the bid document, reproduced supra [Page-71] (Para 41 supra). Even on the other component, the Purchase Committee was competent to make a decision, did so, and awarded marks. The entire evaluation process is compliant with settled principles of law and contractual obligation.

99. In attacking the decision of declaring private respondent no.11 as a successful bidder, it is argued that it has violated the essential condition of the tender since it has formed a consortium in the execution of the work. Our attention is invited to the fact that a back to back tender for execution of the terms of the tender in question, was issued by the successful bidder (Page-

780). Also that such action was taken simultaneously during the finalization of the instant bidding process. It is not; however, the pleaded or argued case of the petitioners that the decision-making process was with a pre-determined mind of awarding the contract to the successful bidder, evidenced by the fact that the eventual successful bidder was not even present in the pre-bid meeting only after which did the terms of tender crystallize.

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100. Special conditions of the bid do prohibit forming of a joint venture/consortium. It is, however, not an essential condition that the material to be supplied is to be printed, manufactured of its own by the tenderer. It does not prohibit the procurement of such material from the open market, be it by whatever means/mode. So outsourcing, even by sub-contracting, is not akin to having a joint venture/consortium. The object and purpose of prohibiting a consortium/joint venture were to make a single person responsible and accountable for the execution of the work. In its wisdom, the Government decided to deal with one entity and held that entity responsible and accountable for executing the work. In commercial parlance, Consortium means, As per Merriam Webster 1: an agreement, combination, or group (as of companies) formed to undertake an enterprise beyond the

resources of any one member. 1 As per the European University Institute's Guidebook for Tenderers.

"A joint venture (JV) is an entity formed between two or more parties to undertake economic activity together. Both parties agree to create a new entity by contributing equity, and then share in the revenues, expenses and control of the enterprise.

A consortium is an association of two or more individuals, companies or organizations with the objective of participating in a common activity or pooling their resources to achieve a common goal.

Available at <https://www.merriam-webster.com/dictionary/consortium->

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Within the Consortium, each participant retains separate legal status and the Consortium's control over each participant is generally limited to activities involving the joint endeavour, particularly the division of profit;.2

101. Hon'ble the Supreme Court considered the meaning of the term 'Joint Venture in New Horizons Ltd vs. Union of India [1995 (1) SCC 478], which was reproduced in Faqir Chand Gulati v. Uppal Agencies (P) Ltd., (2008) 10 SCC 345 Pages 349-351 Drawing from various scholarly sources, it was held as under-

"21. This Court had occasion to consider the nature of "joint-

venture" in New Horizons Ltd. v. Union of India [(1995) 1 SCC 478] . This Court held : (SCC pp. 493-94, para 24) "24. The expression 'joint venture' is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject- matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839.) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23)."

(Emphasis Supplied) "22. ... A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit What is a joint venture or a consortium? Available a t

<https://www.eui.eu/About/ProcurementattheEUI/FAQs/What-is-a-joint-venture-or-a-consortium>
Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 is jointly sought without any actual

partnership or corporate designation."

(Emphasis Supplied) "23. ... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are : (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over, and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement."

(Emphasis Supplied)

102. In Ashok Leyland Limited versus Himachal Pradesh Road Transport Corporation and another. CWP No.601 of 2017, Date of Decision : August 30, 2017, the Division Bench of the Hon'ble High Court Of Himachal Pradesh, Shimla, of which one of us, Sanjay Karol, ACJ (as he then was) was a member, had occasion to consider the term, 'Consortium' and held as under:-

"68. The purpose of accepting the Consortium Bidding is that in modern commercial tenders where varied fields of expertise are required, a single party may or may not possess all the requisite qualifications and therefore, Consortium Bidding is permitted. In that, the members of the Consortium may collectively bring with them, their varied expertise into the tender bid. Whenever Consortium Bidding is done, it is necessary, at least for any one of the constituents of the Consortium, to satisfy each of the tender qualifications. The term "Consortium" literally means a combination of several companies, banks, etc. for a common purpose. In the case of a Bidding Consortium, the Lead Developer/Lead Consortium Member shall be that Consortium Member vested with the prime responsibility of developing the project. The Lead Consortium Member shall necessarily make the maximum Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 entity contribution in the project among the consortium members. As long as the norms are clear and properly understood by the decision-maker and the bidders satisfy the requirements, then, there is no difficulty in accepting Consortium Bidding.

(Emphasis Supplied)

103. We agree with the submissions made by Sri Mukul Rohatgi, learned Senior Advocate, that for the existence of a joint venture/Consortium, there must be prior meetings of the mind to enter into such an agreement and, after that, place a bid. In the present case, the tender issued by respondent no.11 is in pursuance of the tender in question being awarded to it, and so the persons to whom the said respondent will outsource a particular component of the works had no meeting of the mind and therefore, cannot be said to be a part of a consortium or joint venture.

104. In this backdrop, the endeavour made by private respondent no.11 cannot be said to be an act of fraud, nor is there an obligation upon the said respondent to disclose the rates so quoted by the parties in the bid invited by them. Their bids may be like back to back contracts, but it does not in

any manner contravene the essential conditions or make a third party directly answerable to the State Government, thereby defeating the purpose of a single tender.

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105. We are also not in agreement that the Stores Purchase Preference Policy 2002 (Page- 1002) stands violated, for there is nothing in the said policy that would prohibit the Government from undertaking the exercise considering the uniqueness of the project, more so, when it is partially a centrally sponsored and funded.

106. We do not agree with the submissions made on behalf of the State that the petitioners have no locus to initiate the present proceedings, more so, in view of the law laid down in *Jasbhai Motibhai Desai* (supra).

CONCLUSIONS

107. In light of the preceding detailed discussions, the issues are answered as under:-

(i) Whether the process adopted or decision made of procuring educational material through a centralized process and short-listing the lowest tenderer is so arbitrary and irrational that the Court can say: the decision is such that no responsible authority acting reasonably and following relevant law could have reached?

(ii) Whether by undertaking such a process public interest is affected?

(iii) Whether the acts of Additional Chief Secretary, Department of Education, Govt. of Bihar, as also the Director, Primary Education, Govt. of Bihar-cum-

Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Nodal Officer, FLN, in finalizing the policy for implementing the Foundational Literacy and Numeracy (FL&N) scheme by calling a tender can be said to be illegal?

108. The decision to invite a tender was taken in the course of realization of the plan of action deliberated by the State Steering Committee and after that by the State Project Director, BEPC and other necessary stakeholders. The paramount principle that emerges from the discussion is that although Government must be given freedom of contract, its decision must be tested to be free from arbitrariness or mala fides. [*Tata Cellular* (supra) and *Natural Resources Allocation* (supra)]. It has been held that the Court must not enter into weighing the wisdom of a particular public policy and as held in *Premium Granites v. State of T.N.* (1994) 2 SCC 691; *Directorate of Education and others v. Educomp Datamatics Ltd. and other* (2004) 4 SCC 19, this decision rests with the executive authorities. Therefore, so long as the decisions taken were met with necessary approval, which is the Additional Chief Secretary, Department of Education, Government of Bihar, it is not open to the Court to decide whether this approach was correct or not.

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109. The petitioners challenged the process by which the authorities decided to short-list respondent no.11 as a successful bidder. In arriving at such a decision, a complete absence of arbitrariness and irrationality is essential, with the paramount consideration being public interest. It is the considered opinion of this Court that the process adopted, i.e. a separate committee for the formation of the tender, after a decision taken at the appropriate level of Additional Chief Secretary, Education Department, Government of Bihar, along with the necessary conditions stipulated as per the importance of the project and the goals intended to be fulfilled, followed by three-stage evaluation process on objective consideration, satisfies such requirement. We need not repeat, already opined earlier. The issues are, therefore, answered accordingly.

(iv) Are the conditions laid down in the Request for Proposal (RFP) tailor-made to either oust the petitioners or favour others? If so, can such an action be said to be mala fide?

110. As discussed above, a tailor-made condition is one that is explicitly made to suit one party or person. As also discussed, it the copious amounts of documents that form the records of this case, no material, save and except for bald assertions, is placed in furtherance of this claim. Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022

111. We may only borrow from what Hon'ble the Apex Court has said in Association of Registration Plates (supra):-

"42. There is no material on record to infer any mala fide design on the part of the tendering authority to favour parties having foreign collaborations and to keep out of the fray indigenous manufacturers... The terms of the notice inviting tenders were formulated after joint deliberations of Central and State authorities and the available manufacturers in the field. The terms of the tender prescribing quantum of turnover of its business and business in plates with fixation of long-term period of the contract are said to have been incorporated to ensure uninterrupted supply of plates to a large number of existing vehicles within a period of two years and new vehicles for a long period in the coming years. It is easy to allege but difficult to accept that terms of the notices inviting tenders which were fixed after joint deliberations between State authorities and intending tenderers were so tailored as to benefit only a certain identified manufacturers having foreign collaboration. Merely because a few manufacturers like the petitioners do not qualify to submit the tender, being not in a position to satisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory.

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been

argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

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112. The Hon'ble Apex Court in P.P Sharma (supra) defined 'mala fide' and described it as an action wanting of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. It is also stated that a mere assertion is not sufficient for mala fide to be made out.

113. In Michigan Rubber (India) Ltd. (supra), one of the principles emerged that 'certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work'. This statement, therefore, justifies the conditions of having an annual turnover of Rs.300 crores, and the same cannot be purported to have been made to oust the petitioners.

114. As discussed above, the competent authority had no reason to favour the successful bidder or any of the two other Public Sector Undertakings for this project, and therefore it is the considered view of this Court that this issue has to be answered in the negative.

(v) Can the terms and conditions mentioned in the tender be deemed manifestly unreasonable and arbitrary?

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115. The Constitution Bench of Hon'ble the Apex Court in Natural Resources Allocation (supra) stated that irrespective of a dispute being in the nature of a contractual obligation, Article 14 would apply if the action is arbitrary unfair or unreasonable. Further, in Michigan Rubber (India) Ltd. (supra), it has been held that fixation of tender value is entirely within the purview of the executive, and in formulating tender condition, greater latitude is to be conceded to the authorities. Considering the larger public interest involved, i.e. high quality education to children, fulfillment of sustainable development goals and the uniqueness of the project, the conditions in the tender cannot be said to be unreasonable or arbitrary. The tender issuing authority has been held to be the best judge of the terms stipulated therein [Monarch Infrastructure (P) Ltd. Commr. Ulhasnagar Municipal Corpon. (2000) 5 SCC 287] And, in any event, the interest of a few, i.e. Bihar based printers, would give way to the more significant public interest stipulated above, negating the contention of the actions being violative of Article

14.

(vi) Whether procurement of educational materials, such as textbooks etc., to be developed and published under Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 this tender can be termed

as procurement of goods or services under the Bihar Finance (Amendment) Rules, 2005?

116. On application of these rules to the current lis, we need not reiterate what is held in paras 89 to 94 of the opinion. Even so, the word used within the said Rules is broadly. This indicates that strict compliance is not a necessity. Even if the petitioners' argument was accepted by this Court, Hon'ble the Supreme Court in Jagdish Mandal (supra) has stated that the technicalities of the law cannot come in the way of larger public interest and in the present case, larger public interest lies clearly in favour of the State action being upheld as it concerns a one of a kind, unique programme being implemented for better and more purposeful growth of the young generation.

(vii) Whether successful bidders failed to fulfil the essential terms and conditions of the tender?

117. The basic pre-qualification criteria in Section III of the Tender Document mentions six heads that a potential bidder must qualify under to be considered further. The first is that it should be an Indian Company; in this case, the successful bidder is a Government Sector Undertaking. The second is the financial turnover clause already established to be on an average Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 Rs.300 crore and above from educational assignment. Third should be a profitable entity. Fourth it should not have been blacklisted for any malpractices by any Government or Institution. Fifth, it should have completed an assignment as per the conditions mentioned in this clause and should have valid ISO certification. No averments made on behalf of the petitioners cast sufficient doubts on the eligibility of respondent no.11 for the Court to reverse the selection for the award of tender in its favour. Additionally, it has been argued on behalf of respondent no.11 that its eligibility is not open to judicial review in the absence of mala fide, arbitrariness, or unreasonableness, which are absent as already stands. Therefore, this contention of the petitioners is rejected, and this issue is answered accordingly.

(viii) Whether Respondent's actions of short-listing the tenderer can be said to be an act of malice and favouritism, thereby vitiating such process in the direction of award of the tender?

118. The principles laid down by Hon'ble the Apex Court in Sachidanand Pandey (supra) , that nothing should be done which gives the impression of favouritism or nepotism is held good by the fact that the short-listing of the tenderer, has been done after the requirements and submissions of all bidders Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 have been suitably evaluated by three committees. As held in Tata Cellular (supra), the decision to accept a tender is reached by negotiations on various levels and is more often than not made by experts. It is also settled that the Court only reviews how the decision is taken and does not sit to correct such a decision, except when the principles of Wednesbury reasonableness are violated. Therefore, having already tested the award of tender against the sacrosanct principles of Article 14, we find no reason to accept this contention of the petitioners. Further, as elaborated in Issue no.(i), neither the records nor the submissions made by the learned counsel lend themselves to the allegations of favouritism or malice.

(ix) Whether the act of Respondent No.11, namely Telecommunications Consultants India Ltd. (TCIL) simultaneously in issuing a tender for procuring components of the tender in question can be

termed a consortium/joint venture in the commercial parlance?

119. As discussed in the detail, a consortium or joint venture essentially includes the coming together and meeting of the mind of two parties who then jointly enter into an agreement or a contract to bring the conditions of a tender to fruition. Such Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022 essential requirement is, as is evident from the record, missing. Outsourcing components of a tender post the same being awarded cannot be said to be a consortium and, therefore, this contention does not weigh with the consideration of this Court.

120. The questions raised and corresponding issues framed are answered in the terms above.

121. Before parting with this judgment, we must note the local sentiments surrounding the issuance of this tender. As noted above, the Court's jurisdiction so far as contractual matters are concerned is minimal and therefore, in the absence of grave irregularities, upholding State action is the path to be adopted. However, the Court emphasizes the importance of local industry growth and prosperity. As a welfare state, the Executive must realise that larger public interest also lies in the economic development at the local level. As far as practicable, therefore, efforts should be made to facilitate holistic growth, including economic, industrial growth, educational and social prosperity in line with other sustainable development goals.

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122. In view of the aforesaid discussion, the writ petition is dismissed. Interim order stands vacated. All interlocutory applications stand disposed of. No Costs.

(Sanjay Karol, CJ)

S. Kumar, J. I agree.

(S. Kumar, J.)

Sunil/P.K.P./Amrendra

AFR/NAFR

CAV DATE

Uploading Date

Transmission Date

AFR

25.02.2022

25.03.2022