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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 19.04.2016

+ **W.P.(C) 2883/2016 & CM No.12081/2016 (stay)**

DRIPLEX WATER ENGINEERING INTERNATIONAL PVT LTD PETITIONER

versus

BHARAT HEAVY ELECTRICALS LTD RESPONDENT

Advocates who appeared in this case:

For the Petitioner : Mr Vikram Nandrajog, Advocate.

For the Respondent : Mr A.K. Roy, Advocate.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No.12082/2016 (exemption)

Exemption is allowed subject to all just exceptions.

W.P.(C) 2883/2016 & CM No.12081/2016 (stay)

1. This writ petition pertains to the notice inviting tender dated 16.07.2015, which was issued by Bharat Heavy Electricals Limited (BHEL), respondent herein. The subject tender pertains to the Condensate Polishing Unit as per technical specifications prescribed therein for 1x800 MW KOTHAGUDAM TPS, Stage – VII, Paloncha, Telangana. The petitioner, amongst others, participated in this

conditional open tender enquiry. The last date for submission of bids was 17.10.2015. The price bids were opened on 29.02.2016. The petitioner's price bid was not opened. Because the petitioner's price bid was not opened and no communication had been received by the petitioner, it addressed a letter dated 11.03.2016 to BHEL requesting BHEL to open the price bid of the petitioner and then decide the fate of the tender.

2. The petitioner had also written a letter dated 10.03.2016 to the customer, namely, Telangana State Power Generation Corporation Limited (TSGENCO).

3. After going through the record and hearing counsel for the parties, it is evident that the price bid of the petitioner was not opened by BHEL because of the communication received by BHEL from TSGENCO dated 29.12.2015. The said communication clearly indicates that the petitioner (Driplex Water Engineering International Private Limited) was not approved. The letter dated 29.12.2015 reads as under:-

“

<i>TELANGANA STATE POWER GENERATION CORPORATION LIMITED (A. Govt of Telangana Stage Undertaking) Vidyut Soudha, Hyderabad – 500082. www.tsgenco.telangana.gov.in Phone: 040 – 23499261 Fax:040-23499263</i>	
<i>From: The Chief Engineer, Thermal Projects Construction, TSGENCO, Vidyut Soudha, Khairatabad, Hyderabad – 500 082 Email ID: cetpcktps800gmail.com</i>	<i>To: M/s Bharat Heavy Electricals Limited, Power Sector – Marketing, BHEL House, Siri Fort, NEW DELHI-110 049, Fax No.011-26493561</i>

Sir,

Sub: TSGENCO – KTPS – VII (1X800MW) – Approval of additional vendor for Condensate Polishing Unit of BHEL/PEM Package – Reg.

*Ref: 1. Lr.No.CEE/111/KTPS-VII (1X800MW)/Vendors/D.No.15/15, Dt.09.04.2015,
2. M/s BHEL Lr.PS-PEM/PG-II/TSGENCO/KOTH/031 Dt.14.12.15.
3. M/s BHEL e-mail dated 23.12.15*

Please refer to your letter (2) cited, where in it was requested for approval of M/s DRIPLEX WATER ENGINEERING INTERNATIONAL PRIVATE LIMITED as additional vendor for Condensate Polishing Unit of BHEL/PEM Package.

In this regard, it is to inform that the vendor M/s DRIPLEX WATER ENGINEERING INTERNATIONAL PRIVATE LIMITED is not approved, as M/s DRIPLEX WATER ENGINEERING LIMITED which has technical tie up M/s DRIPLEX WATER ENGINEERING INTERNATIONAL PRIVATE LIMITED has not fulfilled contractual obligations and performance of the vendor is poor in respect of Condensate Polishing Unit of KTPS Stage-VI (1X500MW) and KTPP Stage-I (1X500MW) Projects.

Yours faithfully,

CHIEF ENGINEER/TPC

Copy to:

- 1. Chief Engineer/O&M/KTPS/Paloncha – 507115, Khammam (Dist.,).*
- 2. SE (Tech.) to Chairman & Managing Director / TSGENCO / Vidyut Soudha / Hyderabad*
- 3. Superintending Engineer/E&M/KTPS-VII/Paloncha – 507115, Khamman (Dist.,).*
- 4. AS to Director (Projects)/TSGENCO/Vidyut Soudha/Hyderabad.*
- 5. Sri Y.A. Srinivas Rao, GM/BHEL-TSGENCO Camp Office /*

Vidyut Soudha, Khairatabad.

6. *M/s BHEL, PEM, HRD & ESI Complex, Plot No.25, Sector 16A, Noida – 201301, U.P.*
7. *M/s. DCPL, Block DG-4, sector II, Salt Lake City, Kolkata-700 091.*
8. *Mr Pradeep Kapoor, GM, DCPL, DCPL, 304, Diamond Block, Rockdale compound, Somajiguda, Hyderabad-500082.”*

4. This letter has to be read in consonance with Clause 18 of the NIT which is as follows:-

“18. Bidder to note that this is a conditional Open Tender enquiry and the price bid (Part-II) opening/RA participation shall be subject to following condition:

A) Approval of bidder by End Customer. Approval shall be taken up by BHEL with customer based on the credentials/reference list. Hence Bidders are requested to submit the following (as part of their credentials) on or before Part-I opening/due date:-

- *Company Profile*
- *Recent Purchase orders copies*
- *Reference list indicating PO details, customer name, PO date, execution date etc.*
- *Performance certificate issued by the clients.*

B) Techno-commercial recommended bidders.”

5. On a plain reading of Clause 18(A), it is evident that the bidders were clearly informed that the price bid (Part-II) opening would be subject to the specific condition of the approval of the bidder by the End Customer (i.e. TSGENCO). It is clearly stipulated in the said clause that the approval was taken up by BHEL with the customer based on the credentials/reference list which was to be submitted by a bidder. There is

no doubt that the petitioner submitted its credentials/reference list. There is also no doubt that BHEL sought approval from TSGENCO. This is clear from the letter dated 29.12.2015, which has reference to BHEL's letter of 14.12.2015 and BHEL's e-mail dated 23.12.2015. It is also clear that when BHEL sought the approval, TSGENCO by the said letter dated 29.12.2015 informed BHEL that the petitioner was not approved. This was the state of affairs as obtaining on 29.02.2016 when the price bids were opened.

6. Subsequently, as already pointed out above, the petitioner addressed letters to TSGENCO on 10.03.2016 and to BHEL on 11.03.2016. In response to the letter of 10.03.2016, TSGENCO by its communication dated 15.03.2016 addressed to BHEL now indicated that the petitioner "is hereby approved" as an additional vendor for Condensate Polishing Unit of BHEL/PEM package pertaining to KTPS, Stage – VII (1X800 MW). The entire letter dated 15.03.2016 reads as under:-

***"TELENGANA STATE POWER GENERATION CORPORATION
LIMITED***

*(B. Govt of Telengana Stage Undertaking)
Vidyut Soudha, Hyderabad – 500082.*

www.tsgenco.telengana.gov.in

Phone: 040 – 23499261

Fax:040-23499263

<i>From:</i> <i>The Chief Engineer,</i> <i>Thermal Projects</i> <i>Construction,</i> <i>TSGENCO, Vidyut Soudha,</i> <i>Khairatabad, Hyderabad –</i> <i>500 082</i> <i>Email ID:</i> <i>cetpcktps800gmail.com</i>	<i>To:</i> <i>M/s Bharat Heavy Electricals</i> <i>Limited,</i> <i>Power Sector – Marketing,</i> <i>BHEL House, Siri Fort,</i> <i>NEW DELHI-110 049,</i> <i>Fax No.011-26493561</i>
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Lr.No.CEE/111/KTPS-VII(1X800MW/Gendors/D.No.495/15
Dt.15.03.2016

Sir,

Sub: TSGENCO – KTPS – VII (1X800MW) – Approval of additional vendor for Condensate Polishing Unit of BHEL/PEM Package – Reg.

Ref: 1. Lr.No.CEE/111/KTPS-VII (1X800MW)/Vendors/D.No.15/15, Dt.09.04.2015,
2. M/s DRIPLEX letter Ref. No.T631/DWE/15-579/1476, Dt.10.03.16.

With reference to the above, it is to inform that M/s DRIPLEX WATER ENGINEERING INTERNATIONAL PRIVATE LIMITED, NEW DELHI is hereby approved as additional vendor for Condensate Polishing Unit of BHEL/PEM Package pertaining to KTPS Stage – VII (1X800MW).

Yours faithfully,

Sd/-
CHIEF ENGINEER/TPC

Copy to:

- 9. Chief Engineer/O&M/KTPS/Paloncha – 507115, Khammam (Dist.,).*
- 10. SE (Tech.) to Chairman & Managing Director/TSGENCO/Vidyut Soudha/ Hyderabad*
- 11. Superintending Engineer/E&M/KTPS-VII/Paloncha – 507115, Khamman (Dist.,).*
- 12. AS to Director (Projects)/TSGENCO/Vidyut Soudha/Hyderabad.*
- 13. Sri Y.A. Srinivas Rao, GM/BHEL-TSGENCO Camp Office/Vidyut Soudha, Khairatabad.*
- 14. M/s BHEL, PEM, HRD & ESI Complex, Plot No.25, Sector 16A, Noida – 201301, U.P.*
- 15. M/s. DCPL, Block DG-4, sector II, Salt Lake City, Kolkata-700 091.*
- 16. Mr M. Raghvendra Rao, GM, DCPL, DCPL, 304, Diamond Block, Rockdale compound, Somajiguda, Hyderabad-500082.”*

7. It is on the strength of this letter dated 15.03.2016 that the learned counsel for the petitioner submitted that it now has the approval of the customer (TSGENCO) and further its price bid should be opened. Particularly, because it was never communicated to the petitioner that TSGENCO had not given its approval earlier. It is stated that in case the petitioner was informed about the rejection communicated by the letter dated 29.12.2015, it could have sought a clarification from TSGENCO there and then and much before the price opening date.

8. Unfortunately, we cannot agree with the submissions made by the learned counsel for the petitioner. The first reason for not agreeing is that the approval of the bidder by the End Customer (i.e. TSGENCO) was to be taken by BHEL with the customer (i.e. TSGENCO) in terms of Clause 18 of the NIT, which we have reproduced above. The bidder was not to communicate directly with the customer. Secondly, the price bid opening was clearly conditional on an approval of the bidder by the Customer. The price bids were opened on 29.02.2016. On that date, the only communication that BHEL had from the Customer (TSGENCO) was the letter dated 29.12.2015, which was, as stated above, a letter communicating the fact that the petitioner was not approved for the project in question. Therefore, BHEL cannot be faulted for not opening the price bid of the petitioner on 29.02.2016 and now that the price bid of the other bidders have been opened, the further communication dated 15.03.2016, which is after the date of the opening of the price bid, cannot be looked into for the purposes of opening the price bid of the petitioner.

9. We may also point out that, as submitted by the learned counsel for

BHEL, the latter was not obliged to communicate the issue of approval or disapproval by the Customer. Once it received the communication from the Customer, all that was required to be gone into was whether on the price bid opening date, the bidder had been approved by the Customer or not.

10. The learned counsel for the petitioner also submitted that one of the reasons for filing this petition was that the petitioner did not know and was not made aware of the manner in which BHEL presented the petitioner's case for approval before the End Customer. This, according to us, is not a requirement stipulated in the tender conditions. The plea taken by the petitioner would amount to an objection being taken to the tender conditions itself and if, at all, such a plea could be raised, the petitioner ought to have done so before participating in the tender.

11. In view of the forgoing discussion, there is no merit in the writ petition. The same is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

APRIL 19, 2016/st