

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.11552 of 2016

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Allied Engineering Works Pvt Ltd.- Vrindavan Construction (JV) having its local place of business at 204, 2nd Floor, Narayan Plaza, Exhibition Road, Patna through its authorized representative Sri Rajiv Dokania, S/o Narayan Prasad Dokania resident of 101, Sri Ram Palace, Station Road, Patna - 800001.

.... Petitioner

Versus

1. The State of Bihar through the Department of Energy, Urja Bhawan, Daroga Prasad Rai Path, Patna through its Principal Secretary.
2. The North Bihar Power Distribution Co. Ltd., having its office at 3rd Floor, Vidyut Bhawan, Bailey Road, Patna through its Managing Director.
3. The Managing Director, North Bihar Power Distribution Co. Ltd., having its office at 3rd Floor, Vidyut Bhawan, Bailey Road, Patna
4. The Director Projects, North Bihar Power Distribution Co. Ltd., having its office at 3rd Floor, Vidyut Bhawan, Bailey Road, Patna
5. The Chief Engineer, Department of Projects (II), North Bihar Power Distribution Co. Ltd., having its office at 3rd Floor, Vidyut Bhawan, Bailey Road, Patna
6. The Chief Engineer, Department of Projects (I), North Bihar Power Distribution Co. Ltd., having its office at 3rd Floor, Vidyut Bhawan, Bailey Road, Patna
7. The Chief Engineer, Department of Store and Purchase, North Bihar Power Distribution Co. Ltd., having its office at 3rd Floor, Vidyut Bhawan, Bailey Road, Patna
8. The Deputy General Manager (Finance and Accounts), North Bihar Power Distribution Co. Ltd., having its office at 3rd Floor, Vidyut Bhawan, Bailey Road, Patna
9. M/s. Sri Gopikrishna Infrastructure Pvt. Ltd., Plot No. 30/B, Vengal Rao Nagar Colony, Hyderabad- 500038.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Gautam Kejriwal with M/S P.C.Agrawal, Aishwarya Riti, Advocates

For the State : Mr. Upendra Pratap Singh, AC to S.C. 4

For North Bihar Power Distribution Company : Mr. Anand Kr. Ojha, Addl. Standing Counsel

For Respondent No.9 : Mr. Anand Kishore Choudhary, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

ORAL JUDGMENT

Date: 21-09-2016

Heard learned counsel for the petitioner and learned
counsels for the North Bihar Power Distribution Company and for the



State.

2. The petitioner seeks quashing of the decision sent by e-mail message dated 21.6.2016 of the respondent Company by which the technical bid of the petitioner has been rejected and also for quashing the letter dated 20.6.2016 by which the financial bid of respondent No.9 has been sought to be opened inspite of being the single bidder which is contrary to the recent amendment in the Bihar Finance Rules and for consequential direction.

3. The petitioner is a joint venture company incorporated in the State of Haryana and a sole partnership firm having its local place of business at Patna. Pursuant to the NIT dated 1.3.2016 issued by the respondent North Bihar Power Distribution Company Limited for the composite work of Supply & Erection work of 4 (Four) Nos. 1x5 MVA 33/11 KV PSS along with associated 33 KV and 11 KV Line on turnkey basis under State Plan Scheme in Supaul and Madhepura districts of North Bihar the petitioner had submitted its tender papers. The last date for opening of the technical bid was 21.4.2016. There were four bidders, including the petitioner.

4. It is the stand of the respondent Power Distribution Company that a large number of queries were made from the petitioner thereafter and ultimately by e-mail message dated 21.6.2016 the petitioner was informed that its technical bid has been



rejected for the reason that it was not meeting primary eligibility requirement as per Clause 1.1.15. It was also stated therein that it had not submitted the documents as per terms and conditions of RFP Clauses 4.7, 4.15(vii) and 4.15(viii). Thereafter the technical bid of other bidders was also rejected and ultimately the financial bid of respondent No.9 was opened and he was declared as successful bidder at a rate being 8.5% higher than the estimated rate.

5. Clauses 1.1.15, 4.7, 4.15, 4.15(vii) and 4.15(viii) are quoted below :-

“Clause 1.1.15 – Only firms/companies, Government Owned or Private registered and incorporated in India as per Company Act are permitted to bid. Firms/companies not registered and incorporated in India are not permitted to bid.

Clause 4.7 – LA (Liquid Asset) of bidder/tenderer (single or Joint Venture) should be 10% (ten percent) of estimated value of project.

The tenderer should furnish certificates, guaranteed by their bankers regarding the credit limit allowed to them and also banker's assessment of their solvency not earlier than three months from the date of tender.

In case of bidder being a holding company, MAAT and LA/Credit facility shall be that of holding company only i.e. excluding MAAT and LA/Credit



Facility of its subsidiaries. However, in case of bidder being a subsidiary company, MAAT and LA/Credit Facility shall be that of subsidiary company only, i.e. excluding MAAT and LA/Credit Facility of its holding company.

Clause 4.15 – The tenderers shall include the following information and documents with their tenders in the Performa enclosed.

Copies of original documents defining the constitution or legal status, place of registration and principal place of business.

vii. Statement of safety policy and safety statistics for the last five years.

viii. Copy of QA certification and associated documentation.”

6. It is submitted by learned counsel for the petitioner that under Clause 1.1.15 it is merely provided, inter alia, that firms which are registered are permitted to bid. It is submitted that ‘firm’ has been taken by the respondents to mean that it refers only to a partnership firm, whereas Vrindaban Construction being a part of joint venture is a sole proprietorship firm. It is urged that the issue of registration of such sole proprietorship firm is not provided by any provision of law and thus any such requirement of registration per se as a proprietorship firm does not arise and the provisions contained in Clause 1.1.15 cannot be applied for such non-registration and can



only apply to a partnership firm which is not registered.

7. The stand of learned counsel for the Power Distribution Company, on the other hand, is that emphasis on the word 'incorporated' and 'registration' in Clause 1.1.15 read with other provisions of the NIT, including the provision with regard to joint venture firm makes it clear that at all times it is the word 'firm' that has been used and coupled with the registration it can only be made as a reference to a partnership and not to sole proprietorship or an individual. Learned counsel relies upon the definition of the word 'firm' under the Indian Partnership Act in support of his submission. He also relies upon other Clauses, like Clause 4.0, 4.9 and 4.15 to support his stand that the NIT as a whole has to be understood excluding a sole proprietorship from participating in the tender process. It is urged by learned counsel that there is good reason for excluding the sole proprietorship concerned from the tender process as it was a large tender of Rs.9.52 crores, as the firm can sue or to be sued in its name and its liability is unlimited.

8. In reply, learned counsel for the petitioner has sought to place before this Court the provisions of Clauses 37.1 and 37.2 of the NIT as also Clause 57 of the definition clause relying on which he submits that bidding process was definitely open to a joint venture between the company and a sole proprietorship firm. Clause 37 along



with sub-clauses 37.1 and 37.2 is quoted below :-

“37.0 DEATH, BANKRUPTCY, ETC

37.1 If the contractor shall die or dissolve or commit any act of Bankruptcy or being a Corporation to be wound up except for reconstruction purposes or carry on its business under a receiver, the executors, successors or other representatives in law of the state of the contractor or any such receiver, liquidator, or any person in whom the contract may become vested, shall forthwith give notice thereof in writing to the purchaser and shall for one month, during which he shall take all responsible steps to prevent stoppage of the work, have the option of carrying out the contract subject to his or their providing the value of works for the time being remaining unexecuted, provided however that nothing above said shall be deemed to relieve the contractor or his successors of his or their obligations under any circumstances. In the event of stoppage of the works, the period of the option under this clause shall be fourteen (14) days only. Provided that, should the above option be not exercised, the contract may be terminated by the Purchaser by notice in writing to the contractor, and the same power and provisions reserved to the purchaser in clause “Negligence” in the event of taking the work out of the contractor’s hands shall immediately become operative.

37.2 If the contractor is an individual or a



proprietary concern and the individual or the proprietor dies and if the contractor is a partnership concern and one of the partners dies then unless the Owner is satisfied that the legal representatives of the individual Contractor or the proprietor of the property concern and in case of partnership the surviving partners are capable of carrying out and completing the contract, the Owner shall be entitled to cancel the contract as to its in completed part without being in anyway liable to payment of any compensation to the estate of deceased Contractor and/or to the serving partners of the contractor's firm on account of the cancellation of the Contract. The decision of the owner that the legal representatives of the deceased Contractor or serving partners of the contractor's firm cannot carry out and complete the contract shall be final, and binding on the parties. In the event of such cancellation the Owner shall not hold the estate of the deceased contractor and/or the serving partners of the estate of the deceased contractor and/or the surviving partners of the contractor's firm liable to damages for not completing the contract."

He also relies upon the "**Definition of Terms**" which is given in Clause 57 of the NIT in the following terms :-

"57.0 DEFINITION OF TERMS

In constructing these General Conditions and



the annexed Specifications the following words shall have the meaning herein assigned to them unless there is something in the subject inconsistent with such construct:

The Contractor, tenderer shall mean person, or a company firm or an incorporated company whose tender has been accepted by the Purchaser and shall include his/its heirs, executors, representatives and assignee. The “Company/Purchaser/Owner/Employer”

shall mean the NBPDCCL whose Registered Office is situated at Vidyut Bhawan, J.L.Nehru Marg, Patna-800021, Bihar, India and shall include its successor in office and permitted assigns.”

9. From a perusal of the various clauses of the NIT, as quoted above, and others also, this Court finds that whatever may be the intention of the respondent Power Distribution Company that does not appear to be borne out on a conjoint reading of different clauses of the NIT. It is true that there is emphasis of registration of the firm in Clause 1.1.15 but the term used therein is firms/companies which cannot be held to exclusively mean partnership firm as the same refers only to the firms/companies and even a sole proprietorship concern is referred to as a firm. Such general connotation of the term ‘firm’ is also borne out by the meaning of the word ‘firm’ as given in **Black’s**



Law Dictionary (Eighth Edition), which is as follows :-

“**firm**, n. **1.** The title under which one or more persons conduct business jointly. **2.** The association by which persons are united for business purposes. • Traditionally, this term has referred to a partnership, as opposed to a company. But today it frequently refers to a company”

10. It is evident from the aforesaid definition of the ‘firm’, that legally a firm can consist of one person conducting the business under that title instead of in his individual name.

11. The fact that partnership alone is not treated to be a firm under the NIT is to be found in Clause 37 relating to death, bankruptcy, etc. where it is specifically provided that ‘if a contractor shall die’. Clause 57 of the NIT provides that contractor, tenderer shall mean person, or a company firm or an incorporated company whose tender has been accepted by the purchaser and shall include his/its heirs, executors, representatives and assignee. This is coupled with the provision of clause 37 related to death, etc. which specifically provides for the situation when the contractor shall die and is further emphasized in clause 37.2 stating that if a contractor is an individual or a proprietary concern and the individual or the proprietor dies then the owner shall be entitled to cancel the contract,



etc.

12. While there appears to be some likelihood in the submission of learned counsel for the Power Distribution Company that the provisions of the NIT are not happily worded and appear to be a cut and paste job involved in framing of the NIT, but in case any such error in the provisions of the NIT the benefit has to go to the person who has applied pursuant to the NIT. The provision defining the contractor/tenderer, as also the provision regarding contingency on death of contractor based on proprietorship, would enure to the benefit of the contractor and it is evident that in a tender process the owner issuing the tender, specially when it is State under Article 12 of the Constitution, is bound by all the provisions and liable for the same and it is not open to the tendering authority to take a view which may not be borne out from the language of the notice inviting tender whatever may have been the intention otherwise.

13. This Court also does not find any substance in the submission of learned counsel for the Power Distribution Company that the contract is of such a huge amount that an individual contractor would not have the capacity for the liability that may be involved. There is nothing big about a partnership firm which has to give the credit insolvency certificate and it is quite likely that an individual would be more solvent and the individual constituting proprietorship



firm has also unlimited liability like a partner of a partnership firm and thus it cannot be said that there is any additional benefit which is involved in excluding sole proprietorship and permitting only a partnership for the purpose. In any view of the matter, the contract is not so high valued and it is to be presumed that no one would be excluded unless expressly provided. Moreover, the terms of the NIT have to be considered and not the intention of the authorities. So far as the emphasis on the question of registration is concerned, it is evident that if the law does not permit an act to be performed it cannot be insisted upon by any person. Since a sole proprietorship firm is not required to be registered as per the provisions of any act, then the mere fact that there is insistence for the same in Clause 1.1.15 will not exclude a proprietorship firm, that too, in a case of joint venture as in the present matter.

14. Learned counsel for the Power Distribution Company also refers to the provisions under Clause 64 of the NIT which provides that if any tenderer finds discrepancies or omissions in the specifications and documents or is in doubt as to the true meaning of any part, he shall at once request in writing for an interpretation/clarification. The said clause cannot be used against the petitioner as it is the authority issuing the NIT which has to ensure that the terms and conditions are in keeping with its intention, and if



the terms and conditions have not been recorded properly then the benefit of the same would have to be given to the tenderer who has taken pains and made expenses for participating in the tender process.

15. Learned counsel for the Power Distribution Company has also sought to rely upon the decision of the Supreme Court in the case of Directorate of Education and others vs. Educomp Datamatics Ltd. and others : (2004) 4 SCC 19, relying upon paragraphs 9 and 10 of the said decision, which are quoted herein below :

“9. It is well settled now the courts can scrutinize the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India. After examining the entire case-law the following principles have been deduced: (SCC pp. 687-88, para 94)

“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 substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation of 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 facets 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.”

10. In Air India Ltd. v. Cochin International



Airport Ltd. this Court observed: (SCC p. 623, para 7)

“The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.””

16. The said decision does not at all support the stand of the respondents, rather the observation made in Air India Ltd. case (supra) enures to the benefit of the contractor to the extent that the



State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. The norms having been laid down in the NIT being such that a sole proprietorship firm would be led to believe that it can participate therein, it is not open to the respondents to turn around and say that the intention was to include only a partnership firm, etc.

17. Another ground for disqualification of the petitioner was Clause 4.7. It is submitted that the petitioner had submitted earlier a bank certificate but upon enquiry being made a further certificate has been issued by the Dena Bank on 18.4.2016 stating that credit facility has been made available to the petitioner to the extent of Rs.1 crore which was also submitted, whereas the Bank refused to issue a solvency certificate stating that it cannot be granted by the Bank. It is submitted that the very fact that a huge cash credit facility has been provided by the Bank would sufficiently meet the solvency requirement so far as the said provision is concerned.

18. So far as the requirement under Clause 4.15(vii) is concerned, it is submitted that nothing was specific as to the norms and manner and in response to the query by the respondents the same was also submitted. With regard to QA certification under Clause 4.15 (viii) it is submitted that partnership certification of the joint venture



partner M/s. Allied Engineering Private Limited had been submitted.

19. Another issue regarding the petitioner not being A-Class Electrical Licence holder has been raised for which it is stated on affidavit by the respondent State that no A-Class certificate is being issued by the State Government. Thus, there cannot be any insistence upon A-Class Electrical Licence and further that was not a ground for rejection.

20. In my view, the reason for disqualification as mentioned is essentially not meeting the requirement as per Clause 1.1.15. The other appear to be subsidiary and ancillary conditions not going to the root of the matter and do not appear to have been applied to the petitioner. So far as requirements under Clause 1.1.15 is concerned, the manner in which NIT has been floated the petitioner ought to have been treated as qualified and his technical bid could not have been rejected.

21. It is pointed out at this stage by learned counsel for the respondent Power Distribution Company that another bidder has been disqualified on the same ground. It shall be open to the respondent concerned to consider financial bid of the said tenderer also if the rejection is on the same ground.

22. In the light of the aforesaid discussions, the writ application is allowed and the impugned decision of the authorities



conveyed by e-mail message dated 21.6.2016 is quashed and it is directed that financial bid of the petitioner shall be opened and final result of the tender shall abide by the same.

(Ramesh Kumar Datta, J)

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AFR/NAFR	
CAV DATE	
Uploading Date	12.01.2017
Transmission Date	

