IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.2113 of 2016

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1. M/s Balaji Enterprises (An ISO 9001/2008 certified Firm Affiliated with Bihar Industries Association) through its Proprietor, Shadab Anwar son of S.M. Alimuddin having office at Babu Bazar, Ara, Police Station Ara Sadar, District - Ara, Bhojpur.

.... Petitioner/s

Versus

1. The South Bihar Power Distribution Company Ltd. through its Managing Director, Vidyut Bhawan, Bailey Road, Patna.
2. The Chief Engineer (Store & Purchase), South Bihar Power Distribution Company Ltd. Vidyut Bhawan, Bailey Road, Patna.
3. The Electrical Superintending Engineer, South Bihar Power Distribution Company Ltd. Vidyut Bhawan, Bailey Road, Patna.
4. Accountant General, Birchand Patel Path, R - Block, Patna.
5. Accountant General (Auditor), Patna, Bihar, Birchand Patel Path, R - Block, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Sanjeet Kumar, Advocate
For Accountant General	:	Mr. Madhuresh Prasad, Advocate
For the SBPDCL	:	Mr. Vinay Kirti Singh, Sr. Advocate.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 28-03-2017

Heard learned counsel for the petitioner and learned counsel for the South Bihar Power Distribution Company as well as Accountant General.

In the present writ petition, petitioner is challenging letter no.1631 dated 30.11.2015 issued by the Electrical Superintending Engineer (S & P) having informed that on account of audit objection raised by the Accountant General (Auditor), Patna, Bihar the payment against purchase order no.86 to the tune of Rs. 1.19 Crores has been retained.

From the records it appears that the Power Holding Company had issued three NITs vide NIT nos. 1, 2 and 3 in all NITs the petitioner was L-I tenderer was selected for supply of conductors of different nature. In purchase order no.40 dated 3.9.2012 petitioner was to supply 3500 KM of ACSR Rabbit Conductor as per IS 398 (Part -2) 1996, the landed rate was Rs.30,671.98, total value of order was to Rs.10,73,51,930.00. Against NIT no.2 purchase order no.36 dated 20.7.2012 was issued in favour of petitioner for supply of ISI marked 4000 Kms ACSR Weasel Conductor as per IS 398 (Part-2) 1996, landed rate was Rs.17,498.95, total value of supply was Rs.6,99,95,800.00 and third NIT vide purchase order no.29 dated 26.6.2012 was issued for supply of ISI marked 1000 Kms ACSR “DOG” conductor as per IS 198 (Part-2) 1996, landed rate of Rs.59,456.93, total value of order was Rs.5,94,56,930.00. In all the three agreements Clause 36 provides, 30% additional tenderer item will have to be supplied as arepeat order as per the old rate. It is better to quote Clause 36 of the agreement:

“36.Extension order:- In the event of an order being placed on the tenderer the tenderer will have to supply additional 30% of the ordered quantity on the same terms and conditions, if the extension order is placed by the Board within twelve months from the date of acceptance/placement of the order."

In terms of that agreement if demand is made within twelve months to supply 30% additional the tenderer is bound to supply the same at old rate. Instead of applying that Clause of the agreement a fresh tender was issue vide NIT no.354 on 31.8.2013 for supply of ACSR Weasel conductors, estimated cost of purchase order was Rs.22.44 Crores. Petitioner being L-I contractor was selected, new price was fixed for supply of Weasel Conductor. After supply the petitioner placed his bill for payment.

But in the meantime, audit was conducted by the office Accountant General, Bihar, Patna for Comptroller General and Auditor General. Auditor raised objection that in stead of applying Clause 36 of the Bid document the authority of the Power Holding Company with the connivance of petitioner Company floated fresh tender granted purchase order at a higher new rate which led to extra payment of Rs. 1.19 Crores was under process, is completely illegal and not permissible in law as office of the Power Holding Company should have insisted the petitioner Company to supply conductor up to 30% within twelve months as per old rate, not at the new rate which has been quoted.

Accountant General, Bihar , Patna has also filed a counter affidavit where it has been mentioned that report of Accountant General has been submitted before the Governor of Bihar for laying before the State legislature as per provision of Article 151 of the Constitution of India. Audit report of the CAG has been placed for examination by the Public Accounts Committee, a Parliamentary Committee, constituted by the State legislature in accordance with the provisions of the Rules of procedure and conduct of business of the legislative Assembly which is still pending for recommendation. No final decision has been taken till date, he further submits that in terms of the original agreement Clause 36 provides repeat order up-to 30% at old rate but purposely the Power Holding Company has taken step for fresh purchase at new rate while first, second and third agreement was in operation if there was need of conductor, demand should have been placed from the present petitioner. It emerges from the counter affidavit, that when petitioner did not respond to the demand placed upon the petitioner on that account the Power Holding Company has issued a fresh tender for supply of weasel conductor. When objection has been raised by CAG payment has not been made to the petitioner Company. It will be relevant to quote paragraph 10, 11 and 12 of the counter affidavit:

"10. That thereafter such draft paragraphs and the replies of the State Govt. are considered by the office of the CAG and are included in the audit report to be submitted before the Governor of Bihar for laying before the State legislature in accordance with the provisions of Article 151 of the Constitution of India after approval by the CAG.

11. That the said audit paragraphs from such audit report of the CAG are examined by the Public Accounts Committee, a Parliamentary Committee, constituted by the State Legislative in accordance with the provisions of the Rules of procedure and conduct of business of the legislative Assembly.

12. That pursuant to the aforesaid examination, if any corrective, remedial or regularisation action on any objection raised by this Office is to be taken by the Executive only, if it remains unsettled."

But the affidavit of the Power Holding Company does not disclose the action taken by Power Holding Company, when petitioner Company failed to respond to the demand for supply of conductor, instead of inviting fresh tender Power Holding

Company should have taken action to ensure supply of conductor at the old rate whereas the letter of Chief Engineer has recommended that the objection of Accountant General, Patna, Bihar be ignored.

Learned counsel for the petitioner submits that earlier tender and subsequent tender has no connection to each other the claim of the petitioner cannot be adjusted against the second supply order as both agreements are distinct and different. The petitioner has brought to the notice of this Court t hat Chief Engineer and other Accounts Officers has submitted its report where it has been mentioned that objection raised by the CAG should be accepted meaning thereby that should be ignored. It is peculiar how this Officer can give such an opinion instead of ignoring objection Clause 36 of the contract should have been enforced which prescribes 30% repeat order.

As the matter is pending before the Public Accountant Committee for consideration this Court should refrain from passing order in favour of the petitioner as objection raised by the Accountant General cannot be brush aside lightly as it relates revenue loss of Rs. 1.19 Crores.

This Court does not find any merit in this writ petition. It is accordingly dismissed. It is expected that Committee will take final decision in the matter within a reasonable time. However, petitioner will be at liberty to bring the facts to the knowledge of the Committee. The petitioner, if so advised, may take action as per law.

(Shivaji Pandey, J)

Vinay/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	17.4.2017
Transmission Date	NA