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

\+ W.P.(C) 8975/2018 & CM No.34626-27/2018

M/S SHIVALIK HYDRO PVT. LTD. AND ANR...... Petitioners

Through: Mr. Praveen Chaturvedi, Addya Mishra and Ms. Jyoti Chaturvedi, Advocates.

versus

BHARAT HEAVY ELECTRICALS LTD ...... Respondent

Through: Mr. Atul Shanker Mathur, Mr. Prabal Mehrotra, Ms. P. Singh and Ms. Deepabali Datta, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **28.08.2018**

VIBHU BAKHRU, J

1. The petitioners have filed the present petition, *inter alia*, impugning the Suspension Order dated 20.02.2018 (hereafter 'the impugned order') issued by the respondent (hereafter 'BHEL'), whereby BHEL has suspended

business dealings with petitioner no.1 (hereafter 'SHPL') for a period of three years.

Factual Background

2. On 01.06.2012, BHEL issued a Notice Inviting Tender (NIT) for the work of "*Dismantling, Renovation, Erection, Testing, Commissioning and Handing over Operating Unit Plant to OPHC Unit no. 1 to 6 with Civil Architectural, Mechanical, Electrical, Control & Instrumentation works for 6x60 MW Balimela HEP, Odisha*" (hereafter 'the works').

3. Pursuant to the aforesaid notice, SHPL participated in the process of bidding for the contract.

4. On 27.05.2017, SHPL was technically qualified and submitted its bid for execution of the works, quoting a sum of ₹16,95,00,000/-. It is stated that a reverse auction was conducted on 10.08.2017 and SHPL finally quoted a sum of ₹16,89,00,000/-, which was declared to be the lowest. Thereafter, on 10.08.2017, SHPL submitted a confirmation letter.

5. Thereafter, BHEL sent an email dated 11.08.2017 enclosing therewith a derived rate schedule based on the price quoted by SHPL in the reverse auction conducted on 10.08.2017 and called upon SHPL to confirm the same. Since BHEL did not receive response to its email, it sent a reminder on 16.08.2017 requesting SHPL to expedite the submission of the price break up. This was followed by another email dated 17.08.2017.

6. SHPL responded to the aforesaid email by letter dated 19.08.2017, contents of which read as under:

> "Sir,
>
> Refer to above said NIT, we like to inform you that after receiving your detailed BOQ. We observe that we did not consider the value of civil work which affects out price. Due to civil portion overall rates not meet our workable estimate. Civil work cost is nine Crore which we did not consider in our quoted prices."

7. BHEL responded to the aforesaid letter by letter dated 23.08.2017 drawing the attention of the petitioners to Clause 17 of the Business Rules which expressly provided that bids once made by the bidder could not be cancelled or withdrawn and the bidder would be bound to execute the works as mentioned above at the quoted prices. The said Rules also provide that in the event, a bidder withdraws its bid, BHEL would take action as per the extant guidelines for suspension of business dealings which were placed on the BHEL's website.

8. On 24.08.2017, SHPL reiterated its stand that it was unable to take up work for which it was bid. The said letter dated 24.08.2017 reads as under:

> "Sir,
>
> With above reference, further we like to inform you that due to some clerical mistake our quoted price is not meet with our estimate. So we cannot take up this work."

9. Since SHPL had withdrawn its bid and had declared to execute the contract, BHEL issued the impugned order suspending business dealings with SHPL for a period of three years.

10. The learned counsel appearing for the petitioners had assailed the impugned order, essentially, on two fronts. First, he stated that the action taken by BHEL is harsh and burdensome and disproportionate. He has referred to the earlier decision of this Court in ***Avinash Em Projects Private Limited v. Gail (India) Limited: W.P.(C) No.2041/2014, decided on 06.02.2015,*** in support of his contention. Second, he submitted that the General Instruction to Tenderers provides for a mechanism for resolving such an issue. He referred to Clause 1.4.1(v) of the General Instruction to Tenderers and submitted that in case of omission of quoting any rate, the notional rates could have been supplied by BHEL.

11. The learned counsel for the petitioners also relied on the decision of the Supreme Court in ***Kulja Industries Limited v. Chief Gen. Manager, W.T. Proj. BSNL & Ors.: (2014) 14 SCC 731***, where the Supreme Court had laid down certain guidelines while imposing punishment of blacklisting any person.

12. It is also contended on behalf of the petitioners that SHPL had inadvertently not filled in the value of civil construction and not taken the said value in the calculation of its bid.

Reasons & Conclusion

13. There is no dispute that SHPL had participated in the bidding process and submitted a consolidated bid of ₹16,95,00,000/-. SHPL had thereafter participated in the reverse auction and had quoted a value of ₹16,89,00,000/-. Concededly, the said quote was a consolidated quotation for the works included within the scope of the works; there was no separate

quote for civil works. Thus, the contention that SHPL had not filled in the value of civil works is unsustainable.

14. The above contention is also unmerited as after submission of the bid, SHPL had participated in the reverse auction. And, thereafter, SHPL had submitted a confirmation letter dated 10.08.2017, confirming as under:

> "...we confirm that we have quoted
>
> Rs.168900000.00 (in value) & Sixteen Crore Eighty Nine Lacs only) (in words)
>
> For item(s) covered under TENDER NO.BHEL/NR/SCT/BALIMELA/HTG & OTHER (CIVIL)/1066
>
> Taxes shall be as per Revised Tax& Duties clause in GST Regime.
>
> Thanking you and look forward to the valuable order from BHEL."

15. The rate schedule annexed with the aforesaid letter is set out below:

Rate schedule

I.NO.	Description of Works	Lump sum Price ("A") in Rupees (in Figures and word)
1.	Lumpsum price (A) for the total work as per Tender Specification for "DISMANTLING, ERECTION, TESTING, COMMISSIONING, HANDING OVER AND MATERIAL	168900000.00 (Rs Sixteen Core Eighty Nine Lacs only)

	HANDLING WORK OF ENTIRE WORK OF 6x60 MW BALIMELA HEP, Distt MALKANGIRI, ODISHA."	
NOTE:- The rates of different items for the entire scope shall be worked out & awarded as per Annexure '1'.		

16. It is apparent from the facts of the present petition that SHPL has, in fact, withdrawn its bid after the tender had been opened and SHPL had been declared as L1 (the tenderer offering the lowest price). SHPL's offer was lower by about ₹4 Crore from the next lowest offer.

17. In terms of the NIT, the earnest money deposit made by the petitioner would be liable to be forfeited in such a case. Further, BHEL has also placed guidelines in the public domain, which expressly provide that in the event, a supplier withdraws or varies its offer in any manner within a validity period, BHEL would not deal with the said supplier for a period of three years. Clauses 1 and 1.2 of the Guidelines for Suspension of Business Dealings with Suppliers/Contractors are relevant and are set out below:

> **1.0 suspension of business dealing with Suppliers**
>
> The following category of suspensions have been provided in these guidelines depending upon the gravity of the omission or commission by the Supplier.
>
> a. Hold within the unit for specific item(s)/material category(ies)/type of work(s) for one year.
>
> b. Hold within the unit for all item(s)/material category(ies)/type of work(s) for two years
>
> c. Banning across BHEL for all items/material category(ies)/type of work(s) for three years.

*   *   *   *   *

> **1.2 Banning across BHEL shall be imposed in following cases, if**
>
> 1.2.1
>
> i) After price bid opening but before placement of order, Supplier withdraws his offer or varies it in any manner within the validity period."

18. In view of the above, there can be no dispute that the action of BHEL is in accordance with its guidelines. The reliance placed by the petitioners on the decision of the Supreme Court in ***Kulja Industries*** (*supra)* is misplaced, as the said case also related to a matter where there are no guidelines available for blacklisting the contractor and the Supreme Court had observed that each organization should issue specific guidelines. In the present case, BHEL has framed specific guidelines clearly indicating the measures that would be taken in case where a supplier withdraws or various its bid.

19. This Court is also not persuaded to accept that the decision of BHEL is also harsh or disproportionate. The decision in the case of ***Avinash Em Projects Private Limited v. Gail (India) Limited*** (*supra*) is also wholly inapplicable in the facts of this case. In that case, the petitioner was blacklisted for a period of ten years and this court found that certain other offending acts, which were of similar or higher gravity, attracted a lesser penalty. In the present case, the period of black listing is three years and there is no reason to find the same to be disproportionate. SHPL was well aware of the consequences of withdrawing its bid. The correspondences

between the parties also indicate that BHEL warned SHPL of consequences that would follow in the event SHPL decided to withdraw its bid. SHPL having withdrawn its bid after being fully aware of the consequences cannot now complain that the action taken by BHEL is unwarranted or disproportionate.

20. On 11.09.2017, BHEL had also issued a show cause notice to SHPL. SHPL responded to the same by the letter dated 26.09.2017 and personal hearing was afforded to SHPL.

21. It is also relevant to mention that in ***Patel Engineering v. Union of India***: ***(2012) 11 SCC 257***, the Supreme Court had held that there is an inherent power of every organization to not to deal with certain person. Thus, in the present case, BHEL is well within its right to take a decision not to deal with the supplier who has after submitting its tender, withdrawn its offer.

22. The next question to be examined is whether the General Instruction to Tenderers provides for recourse to a special mechanism to address a similar situation. Clause 1.4 of the General Instruction to Tenderers (which is relied upon by the petitioners) reads as under:

> "**1.4 PRICE DISCREPANCY**:
>
> 1.4.1 Conventional (Manual) Price Bid opening: In the case of price bid opening without resorting to Reverse Auction, if there are differences between the rates given by the tenderer in words and figures or in amount worked out by him, the following

procedure for evaluation and award shall be followed:

i) When there is a difference between the rates in figures and in words, the rates which corresponds to the amounts worked out by the contractor, shall be taken as correct

ii) When the amount of an item is not worked out by the contractor or it does not correspond with the rate written either in figure or in words, then the rate quoted by the contractor in words shall be taken as correct

iii) When the rate quoted by the contractor in figures and words tallies but the amount is not worked out correctly, the rate quoted by the contractor shall be taken as correct and not the amount.

iv) In case of lumpsum price, if there is any difference between the amount in figures and in words, the amount quoted by the bidder in words shall be taken as correct,

v) In case of omission in quoting any rate for one or .more items, the evaluation shall be done considering the highest quoted rate obtained against the respective items by other tenderers for the subject tender. If the tenderer becomes L-1, the notional rates for the omission items shall be the lowest rates quoted for the respective items by the other tenderers against the respective omission items for the subject job and the 'Total quoted price (loaded for omissions)' shall be arrived at. However the overall price remaining the same as quoted

> originally, the rates for all the items in the 'Total quoted price (loaded for omissions)' shall be reduced item wise in proportion to the ratio of 'Original' total price and the 'Total quoted price (loaded for omissions)",
>
> vi) The 'Final Total Amount' shall be arrived at after considering the amounts worked out in line with 'i' to 'v' above."

23. It is at once clear that the reliance placed by the petitioners on Clause 1.4.1 of the General Instruction to Tenderers is misplaced, essentially, for two reasons. First of all, Clause 1.4.1 of the General Instruction to Tenderers does not entitle the bidder to alter lump sum price quoted by it. Secondly, Clause 1.4.1 of the General Instruction to Tenderers is only applicable to bid opening without resorting to reverse auction. In this case, it is not disputed that the bids were finalized by way of reverse auction and, therefore, Clause 1.4.1 of the General Instruction to Tenderers is wholly inapplicable in the present case.

24. In view of the above, the present petition is unmerited and is, accordingly, dismissed. All the pending applications are disposed of.

VIBHU BAKHRU, J

AUGUST 28, 2018
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