IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7755 of 2020

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Dhanlaxmi Electricals Pvt. Ltd., A company incorporated under the Indian Companies Act, 2013, Having its registered office situated at 905, 9th Floor, Concorde Building, Plot No. 66, Sector- 11, Navi Mumbai, Pin Code-400614, through its Executive Director, Mushtaque Ahmed, male, aged about 41 years, son of Mr Taiyab Hussain, resident of B101, Venus Heritage, Plot 39, Sector- 50, Nerul, PS- NRI, Dist- Navi Mumbai (India).

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Energy, Government of Bihar, Patna.
2. The Chairman, South Bihar Power Distribution Company Limited, Vidyut Bhawan, Bailey Road, Patna.
3. The South Bihar Power Distribution Company Limited, through its Managing Director, Vidyut Bhawan, Bailey Road, Patna.
4. The Managing Director, South Bihar Power Distribution Company Limited, Vidyut Bhawan, Bailey Road, Patna.
5. The Chief Engineer, Planning and Engineering, South Bihar Power Distribution Company Limited, Vidyut Bhawan, Bailey Road, Patna.
6. M/s Zeniya Electech Private Limited Bhiwadi with JV M/s MMJ Contruction, Ghaziabad.

... ... Respondent/s

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Appearance :

For the Petitioner	:	Mr. P.K. Shahi, Senior Advocate
		Mr. Saket Tiwary, Advocate
		Mr. Saket Gupta, Advocate
For the Respondents	:	Mr. Lalit Kishore, Senior Advocate
		Mr. Anand Kumar Ojha, Advocate
For Res. No.6	:	Mr. Mrigank Mauli, Advocate
For the State	:	Mr. Vinay Kirti Singh, Senior advocate

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

ORAL ORDER

11 13-11-2020 The petitioner in this writ petition seeks following reliefs:

(i) In the nature of certiorari to quash Letter No.283, dated 28.08.2020, by which the respondents, South Bihar Power Distribution Company Limited has declared the petitioner to be

L3 despite making a bid of the lowest amount and earlier being declared as L1 (Annexure-1).

(ii) In the nature of mandamus directing the respondent, South Bihar Power Distribution Company Limited to award the work as mentioned in NIT No.16/PR/SBPDCL/2020 to the petitioner.

(iii) During pendency of this application, stay the operation of Letter No.283, dated 28.08.2020 and NIT No.16/PR/SBPDCL/2020, issued by the South Bihar Power Distribution Company Limited.

(iv) For any other relief which the petitioner is entitled in the facts and circumstances of the case.

The petitioner by filing I.A. No.1 of 2020 seeks further reliefs:

(v) To set aside the Board Resolution dated 02.09.2020 made by the board of the South Bihar Power Distribution Company Limited by which the work of construction of four number 2X10 MVA, 33/11 KV GIS PSS with associated 33 KV & 11 KV lines and all associated works in PESU area of Patna District against tender being 16/PR/SBPDCL/2020 has been allotted to M/s Zeniya Electech Private Limited, Bhiwadi in joint venture with M/s MMJ

Construction, Ghaziabad, respondent no.6.

(vi) To set aside the offer letter bearing No. SB/PLG/GIS PSS/03/2016, dated 07.09.2020, issued by the respondent, South Bihar Power Distribution Company Limited by which letter of award has been issued to M/s Zeniya Electech Private Limited, Bhiwadi in joint venture with M/s MMJ Construction, Ghaziabad.

(vii) For direction to set aside the contract entered into by the respondent, South Bihar Power Distribution Company Limited and M/s Zeniya Electech Private Limited, Bhiwadi in joint venture with M/s MMJ Construction, Ghaziabad for execution of the subject work.

2. The brief facts sans unnecessary details but relevant for disposal of this case is that South Bihar Power Distribution Company Limited issued a notice inviting tender being 16/PR/SBPDCL/2020 by which tender was sought from intending bidders for turnkey contract for construction of four number 2X10 MVA, 33/11 KV GIS PSS with associated 33 KV & 11 KV lines and all associated works in PESU area of Patna District (Annexure-2). The tender was to be held by two bid system, which was techno-commercial and financial. 20 persons including the petitioner and the respondent no.6 participated in

the tender bid. 19 persons were found technically qualified and thereafter the price bid was opened. Estimated cost of the work was Rs.30,62,00,000/-. The opening of price bid on the basis of quoted amount with GST and loss is done and a list was prepared showing that the petitioner Dhanlaxmi Electrical Pvt. Ltd., Navi Mumbai is L1 but the work was not allotted to the petitioner. When the petitioner enquired about completion of formalities to be followed after declaration of the petitioner as L1, the petitioner, as claimed, came to know that the authorities in order to favour some entity were trying to find some lacuna or irregularity in the bidding of the petitioner and efforts were made to disqualify the petitioner on one pretext or the other. The petitioner wrote a letter on 21st of August, 2020 that the petitioner learnt that South Bihar Power Distribution Company Limited was trying to make an issue that the petitioner has not mentioned in the price bids the capitalized loss and, as such, the petitioner intentionally kept the financial bid low. The petitioner undertakes by writing letter that he would complete the entire work as per technical specification in the same rate, which was quoted in the bid (Annexure-4), but the respondent, South Bihar Power Distribution Company Limited by letter dated 28th of August, 2020 declared the petitioner as L3 and held that the petitioner would not be considered for award of work.

3. Mr. P.K. Shahi, the learned Senior Counsel for the petitioner submits that in letter dated 28th of August, 2020 (Annexure-1), the respondent, South Bihar Power Distribution Company Limited stated that though the petitioner had disclosed losses of power transformer in techno-commercial bid but in the financial bid, the petitioner quoted the losses at zero and has not apportioned that loss and thus, the petitioner has lowered the financial bid in a fraudulent manner. It is further stated that the letter further speaks that there is a discrepancy in the price bid with regard to the applicable GST and even on that count the financial bid of the petitioner was fit to be rejected. It is submitted that the South Bihar Power Distribution Company Limited on its own whims and fancies has assumed certain amount of losses in the price bid offered by the petitioner and thereafter declared the petitioner as L3 instead of L1. The action of the respondents is arbitrary and unreasonable. No show cause was given to the petitioner before adding any price to the financial bid offered by the petitioner on account of capitalized loss and GST. The respondent should have asked explanation before adding any amount to the financial bid of the petitioner and making the financial bid of the petitioner as L3 instead of

L1. It is further submitted that in view of Clause 2.9 of the declaration of instruction to bidders, it would appear that the petitioner gave declaration that the prices for items left blank in the schedules will be deemed to have been included in other items. The total for each schedule and the total of grand summary shall be deemed to be the total price for executing the facilities and sections thereof in complete accordance with the contract, whether or not each item(s) has/have been priced. It is submitted that on the basis of instructions/directions of instructions to bidders, the respondents should have considered the case of the petitioner without adding any price to the financial bids offered by the petitioner, therefore, the letter dated 28.08.2020 (Annexure-1) declaring the financial bid of the petitioner as L3 instead of L1 is illegal and thereafter the subsequent actions of the respondents to enter into agreement with respondent no.6 are not sustainable and fit to be set aside. The respondents offered the same work at Rs.5 Crore more price than offered by the petitioner and the amount shall be spent from the exchequer of the Government and, therefore, the actions of the respondents are arbitrary, mala fide, intransparent and not sustainable.

4. Mr. Lalit Kishore, the learned Senior Counsel ably

assisted by Mr. Anand Kumar Ojha, the learned counsel for the South Bihar Power Distribution Company Limited has submitted that the successful bidder having qualified as L-1, is not made party and the award of work has already been made on submission of bank guarantee agreement and the agreement arrived between the parties has not been challenged in this writ petition, therefore, the writ petition is not maintainable. However, the petitioner has already amended his prayer and also impleaded the successful bidder, who is described as L-1 as respondent no.6. Mr. Lalit Kishore, the learned Senior Counsel further submits that it is a case of wrong calculation of guaranteed losses in the price part of the Notice Inviting Tender (NIT) contrary to the losses submitted in the techno commercial part of the bid by the petitioner in the NIT which makes the bid liable for rejection. The petitioner deliberately mentioned Guaranteed Loss for power transformer in price bid as zero and made calculation of capitalized losses on this basis. Although the document submitted by the petitioner for Techno Commercial evaluation, the Guaranteed Loss was already quoted/declared by the bidder and right course of action was to calculate the capitalized cost in the financial bid on the basis of guaranteed loss. The price quoted by the petitioner in the price part and the capitalization cost on the basis of declaration/submission of losses of transformer in the bid of techno commercial part taken together is the final cost for evaluation of the price part of the bid amongst the bidder. The Guaranteed Loss declaration made by the firm in its techno commercial bid is essential component in the evaluation of price part of the bid. Due to higher technical losses (Iron loss (fixed) loss) and copper loss (variable loss) for the transformer quoted by the bidder in its techno commercial part the corresponding capitalization losses in the price part would have been calculated on this basis, but the petitioner has wrongly calculated the capitalization cost of the transformer on the basis of zero technical losses and claims himself before the court to be L-1 bidder. Calculation of capitalization cost of the transformer on the basis of zero technical losses is even otherwise not technically feasible. The price quoted in the price bid on the basis of zero technical losses leading to overall less cost as appearing in the price part is just to create an impression that despite the cost being lowest the petitioner is being declined for the award. It is submitted that on the contrary the bidder whose price bid for evaluation includes the capitalization cost of the transformer being calculated on the basis of guaranteed losses as declared/submitted by them in their techno commercial part of their bid has been considered. The price bid for evaluation of the bidder was also calculated by including the capitalization cost of the transformer arrived on the basis of guaranteed losses as declared/submitted by the firm in its techno commercial part of the bid. After evaluation of the corrected price part of the bid, the L-1 bidder was awarded the work and the petitioner is actually L-3 bidder in this NIT. The learned Senior Counsel for the respondents company submits that the Hon'ble Supreme Court in various decisions commended great caution and restraint in contract matter specially involving technical issues. The terms of tender requiring for example declaration of Guaranteed Loss is not open to judicial scrutiny as lying in the realm of contract. The tender terms and the processing both are made by experts and interference in such matter at this stage may be adverse to the public interest. It is further submitted that the bidder submitted their papers after publication of NIT No.16/PR/SBPDCL/2020 for construction of 4 nos. 2x10 MVA 33/11 KV GIS PSS along with associated 33 KV and 11 KV lines on turnkey basis in PESU area of Patna. The techno commercial part of NIT was opended on 24.06.2020 as per schedule provided under NIT. Total 20 bidders participated in which the petitioner M/s Dhanlaxmi Electricals Pvt. Ltd., Mumbai was also one of them. After evaluation of Techno-commercial part, some clarifications were sought from bidders as provided under NIT. During Techno-Commercial examination of the Bids, one bidder M/s Shiva Corporation (India) Ltd., Jaipur in JV with M/s Kashmiri Lal Construction Pvt. Ltd., Uttrakhand was found non-responsive. Total 19 numbers of bidders qualified for opening of their price part. It is further submitted that one of the important points in Techno-commercial part is requirement of guaranteed technical losses of Power Transformer. All the 20 bidders including M/s Dhanlaxmi Electricals Pvt. Ltd., Mumbai submitted the power transformer guaranteed losses in their techno commercial bid. Price parts of all 19 bidders were opened and upon evaluation of the price part it was found that price part of M/s Dhanlaxmi Electricals Pvt. Ltd., Mumbai was incorrect in respect to calculation sheet of capitalization cost for guaranteed loss as well as GST calculation. The petitioner has mentioned zero against Guaranteed Loss in price part whereas in techno-commercial bid it has submitted Power Transformer Guaranteed loss as No Load loss 07 KW and Copper Loss 50 KW in Techno Commercial part of bid document. It is further submitted that power transformer guaranteed losses which have been mentioned as zero by M/s Dhanlaxmi Electricals Pvt. Ltd., Mumbai implied that the power transformer supplied by this agency will be having zero technical losses, i.e., it will operate at 100% efficiency which is not technically feasible. It would be surprising that the petitioner has mentioned zero as guaranteed technical losses for power transformer in the price bid. It has already quoted power transformer guaranteed loss as No Load loss 07 KW and Copper Loss 50 KW in techno commercial part of the bid document makes it liable for rejection of bid due to deviation in price part with commercial and technical specification as per RFP/Bid clause 27.2. It is further submitted that the bid papers of the petitioner, M/s Dhanlaxmi Electricals Pvt. Ltd., Mumbai was liable for rejection/disqualification on account of non-mentioning of guaranteed loss but in order to maintain objectivity and transparency of highest order capitalization cost against guaranteed losses was calculated as submitted by M/s Dhanlaxmi Electricals Pvt. Ltd., Mumbai and arithmetic error of GST was also corrected. After calculation, the cost of evaluation of M/s Dhanlaxmi Electricals Pvt. Ltd., Mumbai comes to Rs.32,26,55,544.13/- which clarifies the position of the petitioner company amongst the bidders and on such the price quotation of the petitioner was described as L-3 and not L-1.

5. It is submitted that during the process of finalization of NIT for award of work to L-1 bidder, M/s Zeniya Electech Pvt. Ltd., Bhiwadi in joint venture with MMJ Construction, Ghaziabad, M/s Dhanlaxmi Electricals Pvt. Ltd., Mumbai, the petitioner has given written representation on 21.08.2020 and offered that it is ready to give undertaking pertaining to losses (I) No load iron losses 6 KW and (II) full load copper losses 47 KW having lower guaranteed technical losses than submitted by it in techno-commercial part without any increase in its total quoted amount for supply as assurance, F & I and erection portion which tentamounts to change in price bid. Change in price bid is not allowed under a transparent bidding procedure. Even as CVC guidelines, it is not permissible. After obtaining legal opinion on the recommendation of Special Purchase Committee, Board of Directors in its meeting dated 28.08.2020 accorded approval for award of work to L-1 bidder, M/s Zeniya Electech Pvt. Ltd., Bhiwadi in joint venture with MMJ Construction, Ghaziabad. Accordingly, letter of award vide letter no.284 and 285, dated 07.09.2020 was issued to L-1, respondent no.6. Thus, it would

appear that the entire contention of the petitioner on its self claim without referring to its own attempt to negotiate on becoming L-3 stands demolished by a restructure price part prepared by the power company. It is further submitted that the petitioner attempted to indulge in post bidding negotiation which is strictly prohibited by the CVC. It appears to be a tactical device on the part of the petitioner to quote zero in the price bid avoiding the guaranteed declaration already made by it in Techno Commercial Part in order to show the less price. Mr. Lalit Kishore, the learned Senior Counsel appearing on behalf of South Bihar Power Distribution Company Limited placed reliance on catena of judgements, such as, Tata Cellular v. Union of India, (1994) 6 SCC 651, Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492 and submits that the fundamental principles of judicial review in the contract matter is set out and, therefore, the petitioner has not made out a point for interference.

6. Mr. Mrigank Mauli, the learned counsel appearing on behalf of respondent no.6 has submitted that the petitioner has wrongly placed reliance on Clause 2.9 of the Invitation for Bid and the same does not support the contention of the petitioner-company. The company has power to make decision

if there is discrepancy in the bidding documents of the participants. It is further submitted that Clause 2.9 is not meant and would not benefit the petitioner on account of non-mentioning of price of any items to be supplied. The bidders are bound by the terms and instructions to bidders and the petitioner has violated the terms of instructions to bidders and admitted in para 14 of the writ petition that he did not mention the capitalization losses of transformer but the petitioner made an attempt to make changes after opening of the bid, therefore, the company has rightly added the capitalization loss of transformer in the price bid offered by the petitioner and thereafter the price bid of the petitioner comes to L-3.

7. On the basis of the submissions, I find that one and only question arises for consideration in this case is whether the respondent, South Bihar Power Distribution Company Limited has rightly after adding the capitalization loss of transformer to the price bid offered by the petitioner classified the price bid of the petitioner as L-3 and whether the company respondents have rightly on the basis of evaluation of price bid classified respondent no.6 as L-1 and entered into agreement with respondent no.6 for execution of the work mentioned in the NIT?

8. For proper appreciation of the submissions and the facts submitted on behalf of the parties, it is necessary to reproduce Clause 24 sub clause h(i) which reads as follows:

"Capitalization of losses and evaluation of bids: The guaranteed values of no load loss and load loss shall be mentioned by the bidder while submitting technical bid. The guaranteed losses given by bidder shall be examined at the time of technical scrutiny of the package."

9. From perusal of Clause 25 and Clause 27, it is apparent that both the Clauses deal with opening of price schedules and evaluation of price bids. Clause 27 prescribes the manner and the procedure for evaluation of price bids.

10. The petitioner along with 20 others submitted their technical as well as price bids in pursuance of NIT No.16/PR/SBPDCL/2020 for construction of four number 2x10 MVA, 33/11 KV GIS PSS. The technical commercial bids were opened and out of 20 bidders, technical commercial bids of 19 bidders were found in order. The petitioner as per requirement of Clause 24 (i) h(i) mentions the capitalization losses and guaranteed values of no load loss and load loss. On opening of the price bid the petitioner was found L-1 but when evaluation of price bid was made, it was found that the petitioner has not

mentioned the capitalization losses and the guaranteed values of no load loss and load loss. Some arithmetic miscalculation in the head of GST was also found in the price bid offered by the petitioner for the works mentioned in the NIT but after evaluation in accordance with the procedure as contained in Clause 27 of Instructions to Bidders, it was found that the petitioner did not mention the capitalization loss, i.e., the guaranteed values of no load loss and load loss of the transformer. Capitalization losses of transformer are to be mentioned as the same directly relates with quality and technical make of the transformer but the petitioner instead of mentioning the aforesaid loss on account of no load loss and load loss, the petitioner in price bid mentioned the loss as zero which is impossible as after installation/erection of transformer no load loss is calculated on the basis of consumption of energy by the transformer in case of non-transmission of electric energy from the transformer and load loss at particular degree of centigrade is calculated if the electric energy supplied through the transformer and the technical make of the transformer depends upon the less amount of consumption of energy on no load loss and load loss. It has direct bearing with the price of the transformer but the petitioner showed zero loss on both count in his price bids, therefore, the authority, who evaluated the price bids, added the capitalization of the guaranteed losses of the power transformers which are mentioned in techno commercial bid of the petitioner and added the same to the price bid offered by the petitioner. Thereafter the price offered by the petitioner comes to L-3 and entered into agreement with respondent no.6 whose price bids was classified as L-1.

11. The contention of Mr. P.K. Shahi, the learned Senior Counsel for the petitioner that the petitioner offered undertaking at the time of bid and from perusal of Clause 2.7 and 2.9, it would appear that if the price schedule does not generally give full description of the supply to be made and work to be performed in each item, the bidder shall be deemed to have read the technical specification and other bidding documents to ascertain the full scope of work included in each item. While filing in the rates and prices, the bidders also agreed that the entered rate and prices shall be deemed to include the full scope as aforesaid including the over head and profits. By inserting 2.9 of the undertaking, the petitioner undertook that the prices of items left blank in the schedule will be deemed to have been included in other items. Total for each schedule and the total of grand summary shall be deemed to be the total price

of executing the facilities but on bare perusal of the undertakings, this Court finds that the undertaking is with regard to non-mentioning of the price of any items supplied for construction of the work. So far as non-mentioning of non-capitalization of loss; guaranteed loss on account of no load loss and load loss is not covered under this clause. If the petitioner fails to mention the capitalization of loss on account of no load loss and load loss of the transformers on a prescribed standard, the price bid of the petitioner is liable to be cancelled on this ground as non-mentioning of capitalization of loss of the power if the petitioner quoted the price of transformer, the concerned price is liable to be rejected as mentioning of no load and load losses of power transformer is essential and directly related to the quality of transformer, therefore, I find that the authority has rightly added the capitalization of the guaranteed losses of the power transformer in the price bid offered by the petitioner and after adding the capitalization of the guaranteed losses of the power transformer as offered by the petitioner in technical and commercial bids, the price bids offered by the petitioner comes to L-3 and, therefore, the respondents have rightly rejected the bids of the petitioner and I find no reason to interfere in the order rejecting the bid of the petitioner.

12. Having considered the facts aforesaid, I do not find any merit in this writ petition and the same is dismissed.

(Prabhat Kumar Jha, J)

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