IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Case No. : CM No.5125-CWP of 2020,
CM No.5648-CWP of 2020,
CM No.5641-CWP of 2020,
CM No.5665-CWP of 2020
in/and CWP No.6680 of 2020

Date of Decision : 08.07.2020

ABC Renewable Energy Private Limited and others .... Petitioners

vs.

NHPC Limited and another .... Respondents

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY.
HON'BLE MRS. JUSTICE MEENAKSHI I. MEHTA.

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Present : Mr. Akshay Bhan, Senior Advocate
with Mr. Sushant Kareer, Advocate
for the petitioners.

Mr. Chetan Mittal, Senior Advocate
with Mr. Aman Arora, Advocate
and Mr. Udit Garg, Advocate
for respondent No.1.

Mr. Arun Gosain, Senior Panel Counsel,
for respondent No.2.

Mr. Sanjay Sen, Senior Advocate
with Mr. Sakya Chaudhari, Advocate
and Mr. Sumeet Goel, Advocate
for applicant in **CM No.5125-CWP of 2020**.

Mr. Puneet Bali, Senior Advocate
with Mr. Vijay Pal, Advocate
for applicant(s) in **CM Nos.5648, 5641 & 5665-CWP of 2020**.

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MEENAKSHI I. MEHTA, J. :

By way of the instant writ petition, the petitioners have prayed for the issuance of a writ in the nature of certiorari quashing the decision dated 06.03.2020 (Annexure P-1) as taken by respondent No.1 NHPC Limited, (hereinafter referred to as "NHPC") whereby the bid, submitted by petitioner No.1 for developing 400 MW of grid-connected Solar Photo Voltaic Power Project, has been rejected as being "non-responsive". A further prayer has been made for issuance of a writ in the nature of mandamus directing NHPC to consider the afore-said bid of petitioner No.1 as being "responsive". An alternate relief has also been sought to quash the bid-process initiated by NHPC and to return the bank guarantee furnished by petitioner No.1 towards Earnest Money Deposit and also to reimburse it (petitioner No.1) for an amount of Rs.28,98,571.42 as incurred by it in preparing and submitting the bid and participating in the bidding process.

2. Bereft of unnecessary details, the averments, as set-forth by the petitioners in the petition in hand, are that petitioner No.1 is a Company duly registered under the Companies Act, 2013 (for short "the Act of 2013"), having its registered office at Hyderabad and has been formed with the objective of developing and setting up renewable power projects across the country. It is a subsidiary of BIF-III FVCI Holdings India 1 Pvt. Ltd. (for short "BIF-III") which holds 51% stake in it. BIF-III is promoted by Brookfield Asset Management Inc., a global infrastructure, real estate,

renewable and private equity investor. Petitioner No.1 is also a group Company of Axis Energy Ventures India Pvt. Ltd. (for short "Axis") which holds the remaining 49% stake in it. Axis had been established in the year 2010 with the objective of becoming a major renewable energy developer in the country and has developed renewable energy projects in India having total capacity of 1024 MW with additional projects of 774.9 MW in the advanced stages of development. Moreover, Axis has also entered into a Memorandum of Understanding (MoU) with the Government of Andhra Pradesh for the development of solar power projects of 5000 MW and also wind power projects of 5000 MW capacity. Petitioners No.2, i.e. Axis Wind Farms (Anantpur) Pvt. Ltd. and No.3, Axis Wind Farms (Rayalseema) Pvt. Ltd., are the Companies registered under the provisions of the Companies Act, 1956 (for short "the Act of 1956") having their registered offices at Hyderabad. Both these petitioners are the "affiliates" of petitioner No.1 under the provisions of Request for Selection (RFS) as these are owned and controlled by the same Company namely BIF-III. These "affiliate" petitioners own, operate and maintain two wind power projects of 105 MW capacity each in Andhra Pradesh.

3. The petitioners have, further, averred that NHPC is an enterprise of the Government of India and is mandated to plan, promote and organize an integrated and efficient development of power in all aspects through conventional and non-conventional sources in the country and

abroad. In order to procure and supply solar power to the state distribution companies (discoms) across the country for supply to the consumers and to enable the discoms to meet their renewable power purchase obligations in a cost-effective manner and to encourage the solar power generation in the country, NHPC issued the RFS on 06.01.2020 inviting bids for setting up grid-connected Solar Photo Voltaic Power Projects of minimum project capacity of 50 MW and maximum capacity of 600 MW at multiple locations in the country on a build, own and operate basis. The aggregate capacity of the solar projects selected through the RFS is 2000 MW. As per the RFS, the solar power produced by the selected bidders from their respective projects would be purchased by the NHPC under the Power Purchase Agreements with a term of 25 years for sale to various discoms in the country. The said RFS set out detailed instructions for the bidders for submission of bids as well as the technical and financial eligibility criteria and also contemplated for short-listing the bidders through a single-stage Two Envelope e-bidding process with Envelope No.1 containing the technical bid and Envelope No.2 having the financial bid. The technical bid related to the documents pertaining to the qualification requirements as specified in Clause 3.8 and the financial bid was supposed to contain the first round tariff bid. The financial bids of only those bidders were to be opened who fulfilled the eligibility criteria as contained in Clause 3.8 of the RFS. The short-listed bidders were eligible to participate in an e-reverse auction where they could quote any value lower than their first quoted tariff and the lowest quoting bidder was to be allotted its qualified capacity of project(s) at the last quoted tariff and this process was to continue till the offered capacity of the project was fully allotted.

4. It has also been averred by the petitioners that petitioner No.1, while complying with the provisions of RFS, participated in the bid process by submitting its bid for setting up solar power project of a cumulative capacity of 400 MW. The technical bids, as submitted by all the bidders, were opened on 04.02.2020 and vide letter dated 10.02.2020, NHPC sought certain clarifications and documents from petitioner No.1 and on the very next day, i.e. 11.02.2020, petitioner No.1 submitted reply to the said letter along-with the requisite documents. Thereafter, the impugned decision dated 06.03.2020 was conveyed to petitioner No.1, through e-mail, regarding its bid having been rejected for being "non-responsive" as it did not meet the qualificational requirements set out in RFS. However, no reasons for the said rejection were advanced in the above-said decision. On being contacted by the representatives of petitioner No.1 in this regard, the representatives of NHPC verbally informed them that the said bid had been considered as "non-responsive" because petitioner No.1's reliance on petitioners No.2 and 3 as its "affiliates" had not been accepted by the NHPC, whereas both these petitioners fell within the term "affiliate", as defined in RFS as all the three petitioners are under the common control of

BIF-III by virtue of its direct and indirect ownership of more than 50% of the voting shares in each of these three companies. Petitioner No.1 is a subsidiary of BIF-III and petitioners No.2 and 3 are, directly or indirectly, wholly owned subsidiaries of BIF-III. Moreover, 50% of the Directors of petitioner No.1 and both the remaining petitioners are common. Format 6.6, as required to be submitted for meeting the financial criteria as set-forth in RFS, requires a bidder to list its “affiliates” contributing to its financial capability and to indicate the relationship between such “affiliates” and the bidder could rely upon the financial capability of its “affiliate” for meeting the financial criteria. Hence, the impugned order qua rejection of the bid, submitted by petitioner No.1, is illegal and arbitrary.

5. The NHPC, in its written reply, has contested the claim of the petitioners, inter-alia, on the grounds of maintainability as well as its being an abuse of the process of law and has, rather, asserted that all nine bids, as detailed in para 5 of the preliminary submissions, had been received on Central Public Procurement (CPP) Portal online till the last date fixed for this purpose, i.e. 31.01.2020 and these bids were opened online on 04.02.2020. The Technical Evaluation Committee (TEC) evaluated the techno-commercial bids of all the said bidders and found the bids submitted by eight bidders, named in para 5.2(II), as the responsive, while considering the bid of M/s AMP Energy Green Pvt. Ltd. as “non-responsive”. However, the Finance Division of NHPC, on examining the report of TEC, observed

that the bid submitted by petitioner No.1 was "non-responsive" because the bidder neither controlled its "affiliates" nor was controlled by them (its "affiliates"). The afore-mentioned view of Finance Division was, then, referred to the Law Division of NHPC and after examining the matter, the Law Division also reiterated the view taken by the Finance Division. Then, the price-bids of the remaining responsive bidders were opened online through CPP Portal on 06.03.2020 by a duly constituted Tender Opening Committee. Thereafter, TEC recommended for e-Reverse auction amongst the bidders (excluding H1), as specified in para 5.7. The rejection of the bid of petitioner No.1 by NHPC is strictly in accordance with law as well as the terms and conditions of RFS/NIC and the manner of evaluating the bids has been fair and transparent and this petition deserves dismissal.

6. It is worthwhile to mention here that while issuing the notice of motion on 12.03.2020, the earlier Bench allowed the petitioner to participate in the reverse auction slated for the next day, without prejudice to the rights and contentions of the respondents and any other bidder and without any equities accruing in its (petitioner's) favour and the result of the reverse auction was ordered to be kept in a sealed cover with the further direction that the same be produced before the Court on the next date of hearing.

7. However, since the entire dispute between the parties in the petition in hand revolves around the point of the "responsiveness" of the bid

submitted by petitioner No.1, therefore, we deem it appropriate to dwell upon their respective contentions/ arguments on this point and do not feel the necessity to open the e-result of the reverse auction, as stated to have been submitted with e-password protection, in compliance of the afore-said order.

8. We have heard learned counsel for both the parties in the present petition and have also gone through the file thoroughly.

9. Mr. Akshay Bhan, learned senior counsel for the petitioners, contended that petitioner No.1 submitted its bid for the said project, well in time and also satisfactorily tendered the clarifications as well as all the requisite documents, as sought by NHPC in respect of its bid but vide the impugned decision/order (Annexure P-1), NHPC illegally and arbitrarily rejected its bid as being "non-responsive" without disclosing any reason for the same and it was only after petitioner No.1 made a request to NHPC on 07.03.2020 vide Annexure P-12 to re-look at the entire documents and mete a fair treatment to it, when the NHPC intimated petitioner No.1 that its bid was considered as "non-responsive" because it (petitioner No.1) neither controlled petitioners No.2 and 3 nor was controlled by them.

10. He further pointed out that in the RFS, term "affiliate" had been defined in Section 2 as *"a Company that directly or indirectly controls or is controlled by or is under common control with, a Company developing a project....... and control means ownership, directly or indirectly, of more*

than 50% voting shares of such Company" and drew our attention to the Certificate issued by the Company Secretary (available at page 247 in the paper-book) and the Chart (as annexed therewith at page 248), wherein it has been certified that petitioners No.2 and 3, along with petitioner No.1, were qualified to be "affiliates" having common control through BIF-III holding more than 50% share holding in these "affiliates" directly or indirectly and he contended that thus, petitioners No.2 and 3, along-with petitioner No.1, squarely fell within the definition of "affiliates" because of their being under the common control of BIF-III and hence, the impugned decision, being erroneous and illegal, deserved to be quashed.

11. However, Mr. Chetan Mittal, learned senior counsel for NHPC, argued that the bid submitted by petitioner No.1 while relying upon the financial capability of petitioners No.2 and 3 to mete out the eligibility criteria, as envisaged under RFS, was rightly held to be "non-responsive" as neither petitioner No.1 controlled nor was controlled by petitioners No.2 and 3 and therefore, they could not be held to be the "affiliates" of petitioner No.1 and in this case, the children, instead of the parent Company, have joined hands to submit the said bid which is not permissible under the RFS.

12. For the purpose of adjudicating the entire above-referred controversy/dispute between the parties in this petition, it would be expedient as well as necessary to look into the definition of "affiliate" as provided in Section 2 of the RFS which is as under :-

> "***"Affiliate"*** *shall mean a Company, that directly or indirectly, controls, or is controlled by, or is under common control with, a Company developing a Project or a Member in a Consortium developing the Project and control means ownership, directly or indirectly, of more than 50% (fifty percent) of the voting shares of such company or right to appoint majority Directors.*

From this definition, it emerges that for being qualified as "affiliate", the Company must fulfil either of the three following conditions :-

(i) It controls the Bidder Company, or

(ii) is controlled by the Bidder Company, or

(iii) is under common control with the Bidder Company.

13. Clause 3.8.2 of RFS pertains to the financial eligibility criteria for the bidders and at Page No.333 of the paper-book, it has been specifically mentioned that the bidder may seek qualification on the basis of the financial capability of its parent and/or its affiliate(s) for the purpose of meeting the qualification requirements as per (i) and (ii). Both these clauses pertain to the "net-worth" and "liquidity" conditions respectively, as required to be fulfilled by the bidders. Petitioner No.1, admittedly, relied upon the financial capabilities of petitioners No.2 and 3 for fulfilling the above-said financial criteria by claiming them (petitioners No.2 and 3) to be

its "affiliates".

14. As is explicit from the bare reading of Annexure P-15, i.e. the copy of the letter dated 12.03.2020, sent by NHPC to petitioner No.1 in reference to its (petitioner No.1's) letter dated 07.03.2020, i.e. Annexure P-12, the bid of petitioner No.1 has been held to be "non-responsive" on the ground that petitioner No.1 neither controls nor is controlled by the afore-named petitioners No.2 and 3 and as such, these petitioners did not fall within the definition of "affiliates". In the written-reply as filed by NHPC, it has been categorically mentioned that the Finance Division of NHPC, after examining the report of TEC, observed as under :-

> *"M/s ABC Renewable Energy Private Ltd. has been proposed to be qualified on the basis of Net Worth and Turnover of its affiliates M/s Axis Wind Farms (Anantpur) Pvt. Ltd. and M/s Axis Wind Farms (Rayalseema) Pvt. Ltd. However, as per definition of "Affiliates" provided in the bid conditions and flow chart, it is clearly established that the Bidder neither controls its affiliates nor is controlled by its affiliates. Accordingly, Finance is of the view that M/s ABC Renewable Energy Private Ltd. does not qualify in terms of the bid conditions and hence its bid may be treated as non-responsive."*

In para 5.4 therein, it has been asserted that the Law Division of NHPC, after examining the case, opined as under :-

> *"As per share holding pattern issued by RPR & Associates, it appears that relationship of M/s Axis Wind Farms (Anantpur) Pvt. Ltd. and M/s Axis Wind Farms (Rayalseema) Pvt. Ltd. does not fall within the definition of "Affiliates" as provided in the Bid condition. In view of above, this division agrees with the views of Finance Division."*

15. From the above discussed opinions of the Finance Division as well as the Law Division of NHPC, it is crystal clear that they have considered the bid of petitioner No.1 as "non-responsive" on the ground that neither it controls nor is controlled by its "affiliates", i.e. petitioners No.2 and 3 but however, **they have not whispered even a single word regarding the above-discussed third limb of the afore-mentioned definition of "affiliate", as set forth in Section 2 of the RFS, i.e. *"Affiliate" means "a Company, that is under common control with a Company developing a Project......."***

16. As pointed out earlier, the Certificate of the Company Secretary regarding the composition and share-holding of all the three petitioners and the Certified Chart, showing the relationship between these petitioners, are available in the paper-book at Pages No.247 and 248 respectively. In the said Certificate, it has been specifically certified that BIF-III holds 51% shares and Axis holds the remaining 49% shares in petitioner No.1 and in petitioner No.2, BIF-III holds 100% shares. As mentioned in the afore-referred definition of "affiliate", control means ownership, directly or

indirectly, of more than 50% of the voting shares of an "affiliate" Company. It being so, it is crystal clear that BIF-III holds more than 50% shares in petitioners No.1 and 2. So far as petitioner No.3 is concerned, as per the said Certificate, petitioner No.2 holds 100% shares in it, meaning thereby that factually, BIF-III holds 100% shares in petitioner No.3 Company also. The afore-explained share holding of BIF-III in all the three petitioner Companies clarifies that these Companies are under the "control" of BIF-III, which further shows that petitioners No.2 and 3 are under common control with petitioner No.1, which has submitted the bid for developing the above-said project. Resultantly, it has to be held that petitioners No.2 and 3 are eligible to be termed as the "affiliates" of petitioner No.1 and the impugned decision of NHPC holding the bid of petitioner No.1 to be "non-responsive" on the score of petitioners No.2 and 3 not qualifying to be the "affiliates" of petitioner No.1, in terms of its definition as provided in RFS, is erroneous, illegal and arbitrary.

17. **Before parting with this judgment, we must clarify that we are not oblivious of the settled proposition of law that the Courts are not supposed to sit in appellate jurisdiction or as Reviewing Authorities over the decisions taken by the Government or any undertaking of the Government in context of commercial transactions with other parties but it has also been consistently held in a catena of judgments that the Court can look into the legality, fairness and transparency aspects of**

such transactions and in view of the foregoing discussion culminating in the opinion of this Court regarding the impugned decision of the NHPC being illegal, erroneous and arbitrary, we deem it appropriate to look into the bid-process for the afore-mentioned project to the extent of impugned decision regarding the "non-responsiveness" of the bid, as tendered by petitioner No.1.

18. As a sequel to the facts and circumstances, as discussed in the preceding paragraphs, the present petition is hereby allowed to the effect that the impugned decision of NHPC qua rejection of the bid of petitioner No.1, while holding it to be "non-responsive" with the observation that neither it is controlled by its "affiliates", i.e. petitioners No.2 and 3 nor it controls them, is hereby quashed and NHPC is directed to consider the said bid of petitioner No.1 in accordance with the relevant rules as well as the terms and conditions, as laid down in the said RFS.

CM No.5125-CWP of 2020 :

Keeping in view the fact that the entire dispute/controversy in the present writ petition pertains to rejection of the bid of petitioner No.1 by respondent No.1 NHPC, we are of the considered opinion that for the purpose of effective and substantive adjudication of this dispute between the parties, the applicant is not a necessary party to this petition. Hence, this application is hereby dismissed.

CM Nos.5648, 5641 & 5665-CWP of 2020 :

Since we have not passed any order for quashing the bid process, therefore, these applications stand disposed of as having become infructuous.

(DAYA CHAUDHARY)
JUDGE

(MEENAKSHI I. MEHTA)
JUDGE

08.07.2020
monika

Whether speaking/reasoned ?	*Yes/No.*
Whether reportable ?	*Yes/No.*