IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4952 of 2023

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M/s Montecarlo Projects Limited a Company incorporated Under the Provision of Companies Act, 2013 and having its Registered Office at Mantecarlo House, Sindhu Bhavan Road, Ahmedabad-380, 058, through its Authorized Signatory, Mr. Sujeet Kumar, aged about 35 years (M), Son of Ajit Chandra Mishra, Residing at 74, Mishriganja, PO Lalbagh, PS-University PS District-Darbhanga.

... ... Petitioner/s

Versus

1. North Bihar Power Distribution Company Limited a Company incorporated Under the Provisions of the Companies Act, 1956, having its registered Office at Urja Bhavan, 4th Floor, Bailey Road, Patna through its Managing Director.
2. REC Limited a Government of India Enterprise, having its registered Office at Core-4, SCOPE Complex, 7, LOdhi Road, New Delhi through its Managing Director.
3. The Managing Director, North Bihar Power Distribution Company Limited, a Company incorporated Under the Provisions of the Companies Act, 1956, having its registered Office at Urja Bhawan 4th Floor, Bailey Road, Patna.
4. The Managing Director REC Limited, a Government of India Enterprise, having its registered Office at Core-4, SCOPE Complex, 7, Lodhi Road, New Delhi.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Adv.
		Mr. Mrigank Mauli, Sr. Adv.
		Mr. Pranjal Buch, Advocate
		Mr. Brisketu Sharan Pandey, Advocate
		Mr. Abhishek Kumar, Advocate
For the Respondent/s(UOI):		Mr. Radhika Raman, CGC
		Mr. Ram Tujabh singh AC to ASG
		Mr. Devansh Shankar Singh, Advocate

For the Respondent no.1&3 Mr. Umesh Prasad Singh, Sr. Advocate
Mr. Kumar Tiwari, Advocate
Mr. Vaibhawa Veer Shankar, Advocate
Mr. Sameer Sawarn, Advocate

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

Date : 20-04-2023

In the instant petition, petitioner has prayed for the following relief(s):-

"(i) For issuing writ of certiorari or any other writs (s), order (s) setting aside impugned e-mail disqualifying the Petitioner at the Technical Stage without any reason or justifiable ground more particularly when the Petitioner qualifies and meets with all the technical criteria as provided in the Notice Inviting Tender No. 4/PR/NBPDCL/2023 (hereinafter referred to as the "NIT") and the Request for Proposal (hereinafter referred to as the "RFP"), issued by the Respondent No. 1 and the bid submitted by the Petitioner is rejected by the Respondent No. 1

(ii) For issuing appropriate writ (s), order (s) and or direction declaring the action of the Respondent No. 1 of disqualifying the Petitioner from the Bidding Process in relation to the Notice Inviting Tender No. 4/PR/NBPDCL/2023 dated 11.01.2023 issued by the Respondent No. 1 for the "Appointment of Advance Metering Infrastructure Service Providers (AMISPs) including design of Advance Metering Infrastructure (AMI) system with supply, installation and commissioning with FMS of 112 Lakh Smart Prepaid Meter, system meters including DT Meters with corresponding energy accounting in specified area of North Bihar Power Distribution Company Limited (NBPDCL)& South Bihar Power Distribution Company Limited (SBPDCL) under DBFOOT model (HYBRID Model, CAPEX Plus

OPEX) as being arbitrary, illegal and unjust;

(iii) For issuing a writ, order or direction to the Respondent No. I to consider the Bid submitted by the Petitioner dated 13.02.2023 in relation to the Notice Inviting Tender No. 4/PR/NBPDCL/2023 dated 11.01.2023 issued by the Respondent No. 1 for the "Appointment of Advance Metering Infrastructure Service Providers (AMISPs) including design of Advance Metering Infrastructure (AMI) system with supply, installation and commissioning with FMS of 112 Lakh Smart Prepaid Meter, system meters including DT Meters with corresponding energy accounting in specified area of North Bihar Power Distribution Company Limited (NBPDCL) & South Bihar Power Distribution Company Limited (SBPDCL) under DBFOOT model (HYBRID Model, CAPEX Plus OPEX",

(iv) For issuing writ of mandamus directing the Respondent No. 1 not to proceed further in relation to the Notice Inviting Tender No. 4/PR/NBPDCL/2023 dated 11.01.2023 issued by the Respondent No. 1 for the "Appointment of Advance Metering Infrastructure Service Providers (AMISPs) including design of Advance Metering Infrastructure (AMI) system with supply, installation and commissioning with FMS of 112 Lakh Smart Prepaid Meter, system meters including DT Meters with corresponding energy accounting in specified area of North Bihar Power Distribution Company Limited (NBPDCL) & South Bihar Power Distribution Company Limited (SBPDCL) under DBFOOT model (HYBRID Model, CAPEX Plus OPEX)".

(v) For granting ex-parte interim and ad-interim reliefs in terms of prayers above;

(vi) For such other and further reliefs as this Hon'ble Court may deem fit in the facts and circumstances of the present case."

2. Petitioner is one of the bidders in respect of Notice

Inviting Tender (NIT) No. 4/PR/NBPDCL/2023. Respondent North Bihar Power Distribution Company Limited (for short NBPDCL) a Government of Bihar undertaking invited Request for Proposal (in short RFP) for appointment of Advance Metering Infrastructure Service Providers (in short AMISPs) including design of Advance Metering Infrastructure (AMI) system with supply, installation and commissioning with FMS of 112 lakhs Smart Prepaid Meter, system meters including DT Meters with corresponding energy accounting in area specified by the DISCOMs under DBFOOT model (HYBRID Model, CAPEX plus OPEX).

3. The petitioner's bid was held to be ineligible on the score that petitioner did not fulfill the technical and financial requirement of qualification in particular technical requirement at 8.1 to that effect a communication was forwarded through mail vide Annexure-P/1 on 28.03.2023. Further, on 31.03.2023 a communication has been addressed to the petitioner vide Annexure-P/10 in which it is stated that petitioner is not fulfilling Clause- 8.3(e).

4. Learned counsel for the petitioner submitted that the petitioner is fully eligible, the concerned respondent has not given proper interpretation to the extent whether petitioner is

eligible or not with reference to Clause-8.1 read with Clause-8.3 of Section 2 of RFP. It is submitted that once the petitioner fulfills Clause- 8.1 read with Clause-8.3 (a), (b), (c) and (d). Question of further fulfilling 8.3(e) (i), (ii), (iii) and (iv) is not warranted. In support of such contention he relied on definition of infrastructure sector, namely, (qq) " Infrastructure Sector" shall mean such sectors notified by Department of Economic Affairs in its Gazette Notification no. 13/1/2017-INF dated 26th April 2021 and as amended from time to time. Consequently, he has pointed out the notification issued by the Ministry of Finance dated 26th April, 2021 to the extent that which are the infrastructure sector which has been undertaken which are not only relating to electrical which includes roads and bridges, Ports, Shipyards, Inland Waterways, Airport etc. In support of aforementioned contention that he need not fulfill Clause-8.3(e) (i), (ii), (iii) and (iv) he relied on communication of REC Limited vide Annexure-P/5 dated 03.02.2023. Similarly, guidelines issued by REC vide Annexure-P/12 and yet another communication of the Executive Director, REC dated 22.10.2021 (Annexure-P/14). The overall contention is that petitioner need not fulfill eligibility criteria stated in Clause-8.3 (e) (i), (ii), (iii) and (iv). Further, it is submitted that petitioner do fulfill criteria 8.3 (e) (i), (ii), (iii) and (iv). In this regard he is relying on Annexure-P/16. Therefore, the impugned action of the respondent in rejecting the petitioner's bid is not in order and it is liable to be set aside.

5. *Per contra*, learned counsel for the respondent resisted the aforesaid contentions of the petitioner and submitted that petitioner does not fulfill the criteria or eligibility in terms of Clause-8.3 (e) (i), (ii), (iii) and (iv). The petitioner's counsel has not appreciated the fact that the petitioner did not fulfill the conditions stipulated in Clause-8.3 (e) (i), (ii), (iii) and (iv) with reference to Annexure-P/16 and very vaguely submitted that the petitioner fulfilled all criteria. Learned counsel for the respondents submitted that in terms of Annexure-P/16, the petitioner do fulfill the eligibility criteria narrated in Clause-8.3 (e) read with (i), (ii), (iii) and (iv).

6. Heard the learned counsels for the respective parties.

7. Core issue involved in the present *lis* is whether petitioner fulfills the requisite criteria mentioned in Clause- 8.1 read with 8.3 or not? It is necessary to reproduce Clause-8.1 and 8.3. which are as under:-

"8.1 The technical and financial requirements of qualification are as follows:

S. No.	**Requirements**	**Supporting Documents**
	Technical Requirements	

1.	Sole/ Lead Bidder must have either: (a) paid for, or received payments for, construction of Eligible Project(s); Or (b) paid for development of Eligible project(s) in the Infrastructure sector in the last 7 (seven) Financial Years with aggregate project value of not less than INR 1788 Crore.	a) References along with requisite) contract /Purchase Order (PO) Work Order (WO). The references should indicate client name, scope of work, Project start date (as per the format prescribed in Form 13 given in Section 4),
2.	Sole/ Lead Bidder/ any other Consortium Member must have experience of integration of head-end system with MDM on standard interfaces and data exchange models for at least 20,000 consumers/ end points(cumulatively) in an Indian/ Global Utility (power/ water/natural gas/ telecom), completed in the last 7 (seven)years which are in operation for at least 1 (one) year. Or Sole/ Lead Bidder/ any other Consortium Member should have installed, integrated, tested and commissioned control center hardware (or on cloud) and application software for at least 50,000 endpoints (cumulatively) in an Indian/ Global Utility (power/ water natural gas telecom). completed in last 7 (seven) years which are in operation for at least 1(one) year.	In case Non-Disclosure agreement (NDA) is signed with the client, Bidder shall provide an undertaking for the NDA and shall also provide a client certification as proof of experience along with Client Name Email Address/ Contact no/ designation etc. b) Documentary evidence ol completion of the Project or completion of Go-live status (ie. Go-live certificate, UAT testing certificate etc) of the respective project as per the definition of Go Live/ UAT specified therein or other documentary evidence indicating completion (e.g., proof of payment received proof of asset capitalized in books of accounts (as applicable) and client certificate for supply of material or similar proofs) along with contact details of the client: c) Any other documentation for implementation performance/ operation
3	The Sole/ Lead Bidder should have a valid pre- qualification and technical empanelment certificate for the required communication technology, issued by REC and approved by the committee constituted vide the letter issued by the Ministry of Power F.No. 14/02/2021-UR&SI-Il-Part(1)-(E-258136)dt. 10th January 2022, at the time of bid submission	Valid Empanelment certificate of the sole/lead bidder for the proposed solution, issued by REC/ committee constituted thereby
4.	**Financial Requirements** The Bidder shall have positive net worth for each of the last three financial years. The Net worth of the Bidder should be at least Rs 1073 Crore in any of the last three Financial Years Or Bidder shall have a minimum ACI of Rs 1073 Crore at the close of the preceding financial year [Net Worth means sum total of the paid up capital and free reserves (excluding	Audited Annual financial Statement with audited report and vetted to accounts, Balance Sheet and P&L Account for the respective Financial Years and CA certificate as per the formant prescribed in Form 12 given in Section 4.

	reserves created out of revaluation) reduced by aggregate value of accumulated losses (including debit balance in profit and loss account for current year) and intangible asseys.]. [ACI means minimum investible funds (i.e.. immediately available funds for investment and callable capital) subject to the limits of investment in a single investee entity (in the relevant jurisdiction for a Foreign Investment Fund, or the maximum permissible investment limit for an AIF) (as per the SEBI (AIF) Regulations, 2012, as may be amended from time to time), as applicable] Please note: a. Incase a Bidder and/(or) it's Parent(s)/ Affiliate(s) has issued any fresh equity capital during the current financial year, the same shall be permitted to be added to the Bidder's Net Worth subject to the statutory auditor of the Bidder certifying to this effect. b. In case a Bidder and/(or) it's parent(s)/ Affiliate(s). being a SEBI registered AIF or Foreign Investment Fund, has received any fresh capital commitment available for the immediate deployment during the current financial year, the same shall be permitted to be added to the Bidder's ACI subject to the statutory auditor of the Bidder certifying to this effect.	

8.3 For the purposes of satisfaction of Technical Requirement, the following shall apply:
a) Eligible Projects, as referred in Technical Requirement, shall mean works contracts for developing asset/ facility in India or abroad which involve building/ installing, and commissioning /go-live such asset/ facility but shall not include any assignment where the scope is limited to only (i) supply of goods or (ii) supply of manpower.
b) Projects that have achieved completion/ or have achieved commissioning/ go-live as identified in the Project document(s) at least 7 (seven) Days prior to the Bid Submission Deadline shall be considered.
c) The Technically Evaluated Entity must have either executed itself/ paid for such projects or must own at least 26% of the shareholding in the

company that has executed the project(s) up to the date of commissioning of such project.
d) For the purpose of clause, 8.1 above, infrastructure sector is defined under Definitions in Section 3. In reference to this, Energy efficiency projects in Electricity distribution sector shall also be considered.
e) <u>For the purpose of clause, 8.1 & 8.2 (A) to (E) above, the Eligible Project(s) in the:</u>
(i) <u>Power sector shall mean projects relating to generation or transmission or distribution of electricity</u>:
(ii) <u>Water sector shall mean projects relating to water treatment including desalination or water supply (rural or urban) or wastewater/sewerage or drainage or water pipelines:</u>
(iii) <u>Natural gas sector shall mean projects relating to natural gas transmission or distribution: and</u>
(iv) <u>Telecom sector shall mean projects relating to infrastructure cabling or communication systems for setting up Wide Area Network (WAN) or Local Area Network (LAN) or Internet Services of VOIP solutions, etc."</u>

Underline Supplied

8. Learned counsel for the petitioner has not pointed out how the petitioner fulfills each of the item at Clause- 8.3 (e) (i), (ii), (iii) and (iv). Merely stating that list of documents have been enclosed vide Annexure-P/16 does not suffice he has to pin point each of the items read with the relevant document. Therefore, one has to draw inference that the petitioner does not fulfill the criteria mentioned at Clause-8.3 (e) (i), (ii), (iii) and (iv). Further Clause 8.1 and 8.3 (d) and (e) cannot be read in isolation so as to say that the petitioner has fulfilled the criteria under 8.1. There is no option for the purpose of taking the

eligibility criteria of the each of the bidder. In other words, if a bidder fulfills Clause-8.1 he need not fulfill Clause-8.3(e) in fact clause-8.3 (e) reads as under:-

> *"e) For the purpose of clause, 8.1 & 8.2 (A) to (E) above, the Eligible Project(s) in the:*
> *(i) Power sector shall mean projects relating to generation or transmission or distribution of electricity:*
> *(ii) Water sector shall mean projects relating to water treatment including desalination or water supply (rural or urban) or wastewater/sewerage or drainage or water pipelines:*
> *(iii) Natural gas sector shall mean projects relating to natural gas transmission or distribution: and*
> *(iv) Telecom sector shall mean projects relating to infrastructure cabling or communication systems for setting up Wide Area Network (WAN) or Local Area Network (LAN) or Internet Services of VOIP solutions, etc."*

9. For the purpose of Clause 8.1 and 8.2 (a) to (e), above the eligible projects in (i) to (iv). At this stage, it is necessary to take note of the word used eligible project in Clause-8.1. Under 8.1 there is no expansion of what is meant by eligible projects, therefore, the eligible projects were required to be taken note of Clause 8.3(e) read with (i) to (iv). In order to overcome the hurdle of eligibility, learned counsel for the petitioner relied upon certain communication of REC Limited read with guidelines cited (supra) but the same has no assistance to him. The scope of the present litigation is only with reference to NIT read with the conditions stipulated for the purpose of qualification requirements under para 8, 8.1 and 8.3 of Section 2 of RFP.

10. In view of these facts and circumstances, the petitioner has not made a prima facie case so as to interfere with the impugned action of the respondents.

11. In the light of Apex Court decision in the case of ***Kalabharati Advertising Vs. Hemanth Vimal Nath Narichania***, reported in ***(2010) 9 SCC 437***, clearly held that once the petition is disposed of it is deemed that whatever the interim order or direction given by such Courts merges with the final order. In other words, interim order/direction would not be existing in the eye of law. Hence, interim order in the present case stands vacated.

12. Accordingly, the present petition stands dismissed.

13. Pending Interlocutory Applications, if any, stands disposed of.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

Balmukund/
DKS/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	25.04.2023
Transmission Date	NA