

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 01.11.2013

+ **W.P. (C) No. 6547/2013 & CM No.14245/2013**

ROHDE AND SCHWARZ GMBH AND CO. KG

....Petitioner

versus

AIRPORT AUTHORITY OF INDIA AND ANR.

....Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Sandeep Sethi, Sr. Advocate
alongwith Mr Sashivansh Bahadur,
Mr Dinesh Mathur, Mr Robin R. David,
Mr R. S. Mathur and Mr Chitranshul Sinha.
For the Respondents : Mr K.K. Rai, Sr. Advocate alongwith
Mr Digvijay Rai.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present petition has been filed by the petitioner praying for quashing the communication dated 06.09.2013 issued by the respondent No.1 rejecting the Pre Qualification Qualifier bid of the petitioner.
2. The petitioner, Rohde & Schwarz GmbH & Co. KG is an independent company specializing in electronics having its headquarter in Muehldorfstrasse 15, 81671 Munich, Germany.
3. The controversy involved in the present petition is whether the petitioner is entitled to claim the experience of its subsidiary as its own for

the purposes of meeting the specified eligibility criteria for participating in the tender for installation, testing and commissioning of Voice Communication System at Delhi and Kolkata Airports.

4. The Executive Director (CNS-Planning), Airport Authority of India (respondent no. 2 herein) issued a Notice inviting tenders on 11.03.2013 being Tender No. (CNS-P)-05/2012-13 (hereinafter referred to as 'NIT') on behalf of the Chairman, Airports Authority of India (AAI) for Supply, Installation, Testing and Commissioning of Voice Communication System at Delhi and Kolkata Airports at an estimated cost of ₹22.21 Crores. The last date for submitting the documents by the bidders was 22.05.2013

5. The NIT specified the criteria for eligibility of bidders. Clause 4.1 of the NIT specified that the bidders should be Original Equipment Manufacturer (OEM) or authorized representatives of the OEM or system integrators. It was further specified that in case of a bid submitted by the authorized representative of an OEM, only the credentials of the bidder i.e. the Authorized Agent would be considered for evaluating whether the eligibility criteria as specified was satisfied. In case of an authorized representative a current authorization from the OEM authorizing the bidder to act as its authorized representative for the tender was required to be submitted. In order to be eligible for the tender, a bidder was also required to have an annualized average financial turnover of at least ₹6.66 Crores or equivalent during the last three financial years as per practice prevailing in the country of the bidder. And, the Balance sheet along with profit and loss account of the bidder for the last three years was required to be submitted as a proof of financial turnover.

6. The NIT also provided for a criteria of past experience and an eligible bidder was required to have the requisite past experience in Supply, Installation, Testing & Commissioning (SITC) of Voice Communication and Control System (VCCS) (TDM or IP Based). Clause 4.3 of the NIT provided for six criteria relating to past experience and the bidder was required to meet at least one of the said six criteria. Clauses 4.1, 4.1.1 and 4.3 of the NIT are relevant and are quoted below:-

“4.1 The bidder should be Original Equipment Manufacturer (OEM) or its authorized representative or System Integrator (SI).

4.1.1 In the case of authorized representative of OEM, credentials (financial turnover & experience as mentioned below) of bidder only will be considered for evaluating eligibility criteria.

XXXX

XXXX

XXXX

XXXX

4.3 Experience:

4.3.1 The bidder should have successfully executed Supply, Installation, Testing and Commissioning (SITC) of Voice Communication and Control system (VCCS) (TDM or IP Based) and meeting any one of the following six criteria during last seven years.

a1. One order of value not less than Rs.17.77 crores for SITC of VCCS (TDM or IP Based) at any Airport.

a2. Two orders each of value not less than Rs.11.11 crores for SITC of VCCS (TDM or IP Based) at Airports.

a3. Three orders each of value not less than Rs.8.88 crores for SITC of VCCS (TDM or IP Based) at Airports.

a4. One order for the SITC of VCCS (IP Based) having not less than 30 number of controller working positions.

a5. Two orders each for the SITC of VCCS (IP Based) having not less than 20 number of Controller working positions.

a6. Three orders each for the SITC of VCCS (IP Based) having not less than 10 number of Controller working positions.

XXXX XXXX XXXX XXXX XXXX”

7. It is contended by the petitioner that all necessary documents as required including those in respect of the eligibility criteria for pre qualification as mentioned in clause 4 of the NIT were submitted by the petitioner on or before 22.05.2013. The documents submitted by the petitioner included a certificate in terms of clause 4.3.2 of NIT certifying that Rohde & Schwarz Topex S.A (hereinafter referred ‘R&S Topex’) a subsidiary of the petitioner had successfully executed the project for Supply, Installation and Commissioning of IP voice communication and control system with more than 32 Controller Working Positions. The project completion date was stated to be 25.08.2008. It is on the basis of the said project executed by R&S Topex that the petitioner claimed to have complied with the experience criteria as specified in clause 4.3.

8. On 11.06.2013, the respondent sought further documents with regard to the petitioner’s shareholding in Rohde & Schwarz Topex S.A a subsidiary of the petitioner incorporated in Romania. In response to the

clarification sought, the petitioner communicated that 51% of the shares in R&S Topex were held by petitioner and the balance were held by employees. The petitioner further clarified that for the purposes of the tender, the petitioner was the OEM however, for meeting the experience criteria, the petitioner was relying on the project executed by R&S Topex. The respondents sought further clarification on 17.06.2013 regarding the make/model of number of IP based VCCS system & its internal architecture being on IP technology (core system), ANSP certificate and the technical literature in support of core system being on IP based technology. In response to that query, the petitioner submitted its clarification on 18.06.2013.

9. R&S Topex issued a letter to respondent no.1 on 10.07.2013 certifying that the petitioner was fully authorized to offer, sell & execute the VCS-4G systems around the globe including the tender. The petitioner also sent a letter on the same date i.e. 10.07.2013 stating that the petitioner and R&S Topex were closely linked in terms of commercial aspects, organization, quality management and product development and act as one entity in the market. It was stated by the petitioner that it held majority shares in R&S Topex and the petitioner had the option to purchase the balance 49% shares which were held by the employees.

10. It is contended by the petitioner that a meeting was held between respondent no.1 and petitioner on 25.07.2013 and the petitioner was directed by the General Manager (Finance) of the respondent no.1 to get the clarification submitted on 10.07.2013 verified by its auditor. The petitioner subsequently sent a letter dated 06.08.2013 seeking confirmation that all the

necessary clarifications which were sought had been provided and in the event further clarity was required the same could be presented to the evaluation committee.

11. In response to the letter dated 06.08.2013 sent by the petitioner the General Manager of respondent no.1 further sought further clarification regarding:-

- “a. Whether Petitioner has sold and installed the equipment at other countries?
- b. If so, on what capacity did the Petitioner sell/install the equipment with reference to R & S Topez S.A.?
- c. Whether completion/performance certificate in the name of the Petitioner was issued by end user?”

12. On 11.08.2013 the petitioner made a request to respondent no.1 to allow them to make clarification to the Tender Evaluation Committee of respondent no.1 but the request was denied. However, subsequently on two dates thereafter that is on 21.08.2013 and 22.08.2013 the Legal & Finance Department of the respondent allowed the petitioner to substantiate their claim of meeting the eligibility criteria.

13. The Pre Qualification Qualifier bid of the petitioner was rejected by respondent on 06.09.2013.

14. We have heard the learned counsel for the parties. It is contended on behalf of the respondent that the petitioner does not qualify the eligibility criteria as specified in clause 4.3 of the NIT. While it is admitted by the petitioner that the petitioner as an incorporated entity does not by itself

have the requisite experience as specified in clause 4.3 of the NIT, however, its subsidiary namely R&S Topex does meet the experience criteria.

15. It is contended that R&S Topex has successfully executed projects for supply, installation, testing and commissioning of IP Voice Communication and Control Systems which have performed satisfactorily after commissioning. R&S Topex is a subsidiary of the petitioner wherein petitioner holds 51% of the total share holding of the company. The balance shares are held by the employees and there is no involvement of any other entity. The petitioner also asserted that it had an exclusive option to purchase the remaining 49% of the share capital. Several directors of the petitioner are members of the supervisory board of R&S Topex and one of the directors of the petitioner is also a director of R&S Topex. According to the petitioner, the petitioner and R&S Topex function as a single entity. It is, thus, contended by the petitioner that the experience of R&S Topex ought to be counted as the experience of the petitioner for the purpose of the past experience criteria specified by the respondent.

16. The petitioner relied upon the decision of the Supreme Court in the case of **New Horizons Limited and Another v. Union of India and Another: (1995) 1 SCC 478** as an authority in support for his contention that the experience of a subsidiary ought to be considered as the experience of the holding company and the respondent must act as a prudent commercial person and pierce the corporate veil for examining whether the petitioner possesses the specified experience or not. The petitioner has also relied upon the decision of the Supreme Court in the case of **State of U.P.**

and Others v. Renusagar Power Co. and Others: (1998) 4 SCC 59 to further the argument that it is obligatory for the respondent to pierce the corporate veil while considering the past experience of the petitioner.

17. The respondent has raised a preliminary objection with respect to the maintainability of the present petition. It is contended that as the petitioner is not a citizen of India, the right under Article 19(1)(g) is not available to the petitioner. Since the present matter relates to a commercial tender, the right under Article 14 of the Constitution of India cannot be read in disjunction with the right under Article 19(1)(g) of the Constitution of India. The Respondent has relied upon **Indo-China Steam Navigation Co. Ltd v. Jasjit Singh, Addl. Collector of Customs: (1964) 6 SCR 594** in support of the contention that the present petition is not maintainable.

18. It is further contended on behalf of the respondent that the experience of R&S Topex cannot be counted as an experience of the petitioner as the two companies are separate legal entities. It is further submitted on behalf of the respondent that the experience certificate of R&S Topex submitted by the petitioner, in order to meet the criteria as specified in Clause 4.3 of the NIT, relates to the supplies made in 2008. Admittedly, at the material time R&S Topex was not a subsidiary of the petitioner. Further the equipment supplied by R&S Topex was manufactured by R&S Topex and thus the experience of R&S Topex is that of a manufacturer. The learned counsel appearing for the respondent pointed out that in the present case the petitioner is claiming to be an Original Equipment Manufacturer (OEM) and is seeking to rely on the

experience of R&S Topex, a company which is no longer manufacturing the equipment.

19. We are unable to accept the contention that the present petition is not maintainable on account of the petitioner not being a citizen of India. The right to equality enshrined in Article 14 of the Constitution of India is not limited to the citizens of this country alone but to any person. Article 14 of the Constitution of India provides that:-

“The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

There is no basis to limit the expression “any person” in Article 14 to only citizens of India. Article 14 is a protection against arbitrariness and discrimination by the State. It is incumbent upon the State to act reasonably and treat all persons without discrimination. In the present case, the tender floated by the respondent is a global tender which extends to persons other than citizens of India. The petitioner would thus have a right to be treated fairly and without discrimination and therefore can maintain a petition alleging arbitrariness and hostile discrimination which violates Article 14 of the Constitution of India. In the case of *Indo-China Steam Navigation Co. Ltd.* (supra) the Supreme Court was considering a case where large quantity of gold bars were found concealed in a vessel owned by the appellant therein and thus the same was liable to be confiscated as per Section 52A of the Sea Customs Act, 1878. It was contended, in that case, that Section 52A of the Sea Customs Act would be violative of Article 14 and the right to acquire and hold property which was guaranteed under

Article 19(1)(f) of the Constitution of India (since deleted by virtue of the 44th Constitution Amendment). The said contention was not entertained as it was held that in order to support the plea under Article 14, the appellant would have to fall back upon the fundamental right guaranteed by Article 19(1)(f), which was not available to the appellant being a foreign company. In the present case, the petitioner is not required to take recourse to fundamental rights under Article 19 of the Constitution of India in order to maintain a petition alleging that disqualification on the ground of eligibility criteria is arbitrary and discriminatory and violative of Article 14 of the Constitution of India.

20. The question that remains for our consideration is whether the experience of supply and installation of equipment by R&S Topex in the year 2008 can be considered as the experience of the petitioner for the purpose of meeting the experience criteria as specified in Clause 4.3 of NIT.

21. In our view, while it is incumbent for the respondent to act reasonably and fairly, the same does not imply that it is necessary for the respondent to ignore the corporate façade of all entities who bid for providing equipment and services to the respondent.

22. In our view the decision of the Supreme Court in the case of *New Horizons (supra)* cannot be interpreted to mean that the corporate veil must be pierced in each case of a commercial tender and it is incumbent upon the authority to ignore the corporate structure altogether. In the case of *New Horizons (supra)* the Supreme Court was considering a case where past

experience was not considered as a condition of eligibility for consideration of the tender but was to be examined at a subsequent stage of tender evaluation. In that case tenders by joint ventures were permissible and in that context the question arose whether the experience of the constituent joint venture partners of a joint venture company should be taken into account for considering the experience and the resources available with the joint venture company. The Supreme Court clearly held that it is not necessary that the experience should be in the name of the tenderer only and it was possible to envisage situations where a bidder may have sufficient experience yet the same may not be in its own name. The relevant extract from the said judgment is quoted below:-

"23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22.4.1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the

requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take

note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22.4.1993. This would required that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22.4.1993 when read with the notice for inviting tenders dated 26.4.1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be

actively involved in the project both out of Singapore and resident in India."

23. Applying the ratio of the aforesaid decision in *New Horizons (supra)* the question which is required to be answered is whether the petitioner has the requisite experience albeit not in its own name and whether the respondent is justified in not considering the experience of R&S Topex as that of the petitioner. It is relevant to note that the petitioner has submitted his bid as an Original Equipment Manufacturer (OEM) and not as an agent of another entity and it stands to reason that in order to qualify, the petitioner must show past experience of installation and supply of equipment as an Original Equipment Manufacturer. Its subsidiary R&S Topex is admittedly not the Original Equipment Manufacturer and thus we are unable to accept that the action of respondent in not accepting the experience of R&S Topex as the experience of the petitioner is in any manner arbitrary or unreasonable.

24. It is also relevant to note that R&S Topex claims to have acquired the experience of supply and installation of equipments as complying with the requirements of Clause 4.3 of NIT in the year 2008 and at the material time R&S Topex was not a subsidiary of the petitioner. It is contended that the petitioner acquired the majority shares of R&S Topex in 2010 and by virtue of the acquisition has also acquired the experience available with the said company. This contention is also liable to be rejected as according to the petitioner R&S Topex ceased to be a manufacturer and it is thus difficult to see as to how its past experience as an Original Equipment Manufacturer can be construed to be an experience of the petitioner.

25. In order to fall within the test as laid down in the case of *New Horizons (supra)* it would be necessary for a bidder to show that it has the relevant experience, however, the same may not be recorded in its name. It is not open for a bidder to claim experience of another entity as its own experience. The instances given by the Supreme Court are cases where the bid is submitted by a partnership firm in which case the entities submitting the bid are essentially the partners and therefore the experience of partners becomes relevant. Joint venture companies formed for a specific purpose are also akin to partnerships although in an incorporated form. In cases of mergers or amalgamations the resources of the companies are pooled although the amalgamating company loses its corporate name and identity which merges with the identity of the amalgamated company. In such cases, in essence, the bidder continues to be an erstwhile company although the experience may not be in the name of the amalgamated company. In all the examples given in the decision of *New Horizon (supra)* the vital test which has to be met is that the bidder must in fact have the requisite experience although for some reason it may not be available in his name. In the present case the bidder is the petitioner and the benefit of experience which is being claimed is that of a completely different entity. Although the petitioner may have acquired a majority stake in that entity, the same does not automatically translate the experience of R&S Topex as that of the petitioner.

26. There is yet another aspect which in this case requires to be highlighted and this aspect is whether the respondent is required to make in-depth investigation into the experience of the petitioner or the same should

be clearly discernable from the material that is provided. In the present case even if it is assumed that on the petitioner acquiring 51% shares of R&S Topex, the said company was reorganised and the relevant resources were acquired by the petitioner, the same cannot be clearly discerned from the material on record and in order to determine whether the petitioner has the requisite experience an investigation into the details of the re-organisation following the acquisition of majority shares of R&S Topex would have to be conducted. In such circumstances, if the respondent authorities does not accept the experience of the petitioner the said decision cannot be faulted as being arbitrary and unreasonable as it would not be obligatory on the authority to conduct an indepth investigation as to the claims of the petitioner if the same are not clearly discernable from the material as furnished.

27. The facts in the case of ***Renusagar*** (*supra*) are also materially different. In the said case a public company had set up its captive power plant under the form of a separate wholly owned subsidiary. The Government also recognized the holding company as having its own source of power generation and took advantage of it for the purposes of imposing power cuts. The day to day affairs of the subsidiary were also conducted by the holding company. It was apparent that the wholly owned subsidiary was in fact functioning as a division of the holding company and the power generated was for the captive consumption of the holding company. It is in this context that the court held that the facts implied acceptance of the power plant as being owned by the holding company and merely because the captive power plant had been set up in a wholly owned subsidiary the

same would not take anything away from the fact that it continued to be a captive power plant of the holding company. The said decision is thus of no assistance to the petitioner.

28. We are unable to accept that the action of the respondent in rejecting the Pre Qualification Qualifier bid of the petitioner is contrary to the NIT or offends Article 14 of the Constitution of India. Accordingly, we dismiss the present petition and the pending application. The parties are left to bear their own costs.

VIBHU BAKHRU, J

BADAR DURREZ AHMED, J

NOVEMBER 01, 2013
RK

