

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on : 05.12.2014

W.P.(C) 1233/2014 & CM 2572/2014 & 4641-4642/2014

**M/S TELECOMMUNICATIONS
CONSULTANTS INDIA LTD .**

.... Petitioner

versus

M/S BHARAT SANCHAR NIGAM LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Anil Sapra, Senior Advocate with
Mr P.K.Bansal, Ms Rupali Kapoor,
Mr Akshay Sapra, Mr Mridul Yadav, Advocates.
For the Respondents : Mr Sanjeev Narula & Mr Ajay Kalra, Advocates for
BSNL.

CORAM:

**HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SIDDHARTH MRIDUL**

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. The petitioner is aggrieved by the respondent's letter dated 27.01.2014, whereby the petitioner's bid submitted on 10.01.2014, was returned.
2. On 25.02.2014, when this matter came up for admission, this Court passed the following order:-

“The petitioner (M/s Telecommunications Consultants India Limited) is a wholly owned Government of India company. It had submitted its bid in respect of tender No. CA/CNP/NCN-OFC-T-443/2013 dated 29.07.2013 for laying optical fibre cables for the Indian Navy. One of the conditions was the requirement to submit a Bank Guarantee by way of a bid security for an amount of Rs. 2 Crores. The bid security was required to be kept valid for a period of 210 days from the date of tender opening.

It has so happened in the present case that the tender opening date has been extended by the respondent on five occasions which necessitated the extension of the period of validity of the Bank Guarantee from time to time. The initial bid opening date was 18.09.2013. It was extended to 03.10.2013, then to 24.10.2013, 19.11.2013, 10.12.2013 and, finally, to 10.01.2014. The original Bank Guarantee was issued on 28.09.2013 being Bank Guarantee No. 0007BG00146514. The initial expiry date was 02.05.2014. Thereafter, as and when the bid opening dates were extended the validity period of the Bank Guarantee was extended from time to time.

Ultimately, inasmuch as the final extension of the bid opening date was notified as 10.01.2014, the petitioner obtained an extension of the Bank Guarantee by virtue of a letter dated 09.01.2014 from ICICI Bank which had issued the Bank Guarantee. The amended guarantee extended the expiry date of the Bank Guarantee to 26.08.2014 to be in conformity with the condition that the Bank Guarantee should be valid for 210 days with effect from the date of opening of bids. The said amended Bank Guarantee

was submitted prior to 11.30 a.m. on 10.01.2014 which was the last time and date for submission of bids. The petitioner, however, did not submit the original Bank Guarantee along with the amended Bank Guarantee dated 09.01.2014. However, on the very same day at 16:50 hours the original Bank Guarantee was also furnished to the respondent.

The respondent, by a letter dated 27.01.2014, returned the bid security (the original Bank Guarantee and the amendment to the Bank Guarantee) on the ground that the documents were supposed to be submitted off-line by 11:30 hours on 10.01.2014.

It has been contended by the learned counsel for the petitioner that the petitioner is a wholly owned Government Company. Through inadvertence the original Bank Guarantee had not been submitted along with the last amendment of the Bank Guarantee by 11:30 hours on 10.01.2014. But, the original Bank Guarantee was available and was furnished shortly thereafter at 16:50 hours. According to him, this is only a minor hyper-technical irregularity which ought to be waived by the respondent in terms of clause 21.5 of the bid conditions. These contentions, of course, are controverted by the learned counsel for the respondent.

However, in the circumstances narrated above, in view of the fact that the bid opening dates have been extended by the respondent from time to time and the fact that the petitioner had the Bank Guarantee's validity extended in view of those extensions, we feel that as an interim measure it would be appropriate if the petitioner's Bank

Guarantee is re-submitted by the petitioner to the respondent and that the respondent considers the petitioner's bid for technical evaluation and , if qualified in the technical evaluation, the bid should also be considered for financial evaluation. It is ordered accordingly.

We have issued the above interim direction for processing the petitioner's bid on account of various factors. One of them is that the petitioner, a wholly owned Government Company, does not appear to us, prima facie, to be attempting to steal a march over any of its competitors by altering initial bid conditions like bid amount etc. They have only submitted the original Bank Guarantee late (though on the same date). There is no dispute that the original Bank Guarantee had been obtained by the petitioner much prior to the bid submission date. There is also no dispute that the petitioner had submitted the amended Bank Guarantee prior to 11:30 hours on 10.01.2014. It is only though inadvertence that the original Bank Guarantee had not been furnished along with the amended Bank Guarantee which the petitioner did furnish by 11:30 a.m. on 10.01.2014. Furthermore no malafide can be attributed to the petitioner and prima facie we are of the view that the respondent's conduct in returning the bid security and not waiving this irregularity could be regarded as a hyper-technical interpretation of the bid conditions. It is also important to note that public interest would be served by widening the competition and not by restricting the competition subject to the other bid conditions being complied with. We are of course making it clear that the interim direction would be subject to the final order passed in the writ petition.

The counter affidavit be filed in four weeks and the rejoinder affidavit, if necessary, be filed within two weeks thereafter.

Renotify on 06.05.2014.

Dasti.”

3. This was followed by the order dated 23.07.2014 which was to the following effect:-

“We are informed by the learned counsel for the respondent that the technical bid of the petitioner was opened and evaluated and they were found to be technically qualified. This is, of course, pursuant to the directions given by this Court. The next step is to consider the petitioner’s bid along with the other qualified bidders and financial evaluation done. We make it clear that there is no impediment in continuing with the evaluation process by including the petitioner’s bid. However, as in our previous order we make it clear that these interim directions would be subject to the final order that would be passed in the writ petition. The respondent shall tabulate the price bid but shall not award the contract to any party till further orders of this Court.

Renotify on 22.08.2014.

Dasti.”

4. Ultimately, this Court passed the order dated 18.11.2014, wherein the learned counsel appearing on behalf of the petitioner had stated that the price bids have been opened and that the petitioner was the L-1 bidder, having

made a bid of Rs.666.39 crores. He submitted that there was a vast difference between the L-1 and the L-2 bidder (Aster Private Limited). It was suggested by the learned counsel for the petitioner that the difference was approximately Rs.450 crores. However, the learned counsel for the respondent stated that though the financial bids have been opened, he was not aware of the exact figures and the financial bids were still under the process of evaluation. He had requested for some time. Consequently, the matter was re-notified for today (05.12.2014).

5. The learned counsel for the respondent has handed over a letter dated 03.12.2014, a copy of which is taken on record. That letter is addressed to the learned advocate, in which it has been indicated that the bids of all the bidders have been evaluated and tabulated as under:-

“The Committee for Evaluation of Tender (CET) has submitted its report on evaluation of financial bids of all the four participant bidders including that of petitioner – M/s TCIL.

As per the report, the total evaluated bid values (in Rupees) in respect of all the bidders are tabulated below:

M/s Vindhya Tele Links	M/s. Aster Private Limited	M/s.Sterlite optical Fibre Limited	M/s. TCIL
1021,36,49,884.83	984,24,06,192.74	1084,37,23,861.32	666,39,07,545.51

As per above tabulation, the value of bid of petitioner – M/s TCIL, is L-1 value amongst all the bids submitted in the subject tender.

As per its report, the CET has recommended that the quoted price of M/s. TCIL (L-1 bidder), as given in the report may be considered for approval by the competent authority.”

6. It is evident from the above that the petitioner (TCIL) is the L-1 bidder with a bid of approximately Rs.666.39 crores. The L-2 bidder is Aster Private Limited with a bid of Rs.984.24 crores. The difference between the two bids is Rs.317.85 crores (approximately) which turns out to be almost half of the L-1 bid itself. From the above, it is also evident that the Committee for Evaluation of Tender has recommended that the quoted price of TCIL (L-1 bidder) be considered for approval by the competent authority. However, the letter also notes certain orders passed by this Court and, therefore, the learned counsel has been requested by the respondent to request this Court to give a final order in the present writ petition so that the respondent may proceed further in the tender and award the same.

7. The learned counsel appearing on behalf of Aster Private Limited, who has filed an impleadment application, has also been heard. It is his case

that although the petitioner is the L-1 bidder by a large margin, the said bid cannot be accepted because it did not fulfil the condition of submitting the original bank guarantee on or before 11.30 am on 10.01.2014 which was the closing time for submission of the bid. The learned counsel appearing for Aster Private Limited drew our attention to paragraph 12 of the Notice Inviting Tender (NIT) which deals with bid security and reads as under:-

“12. BID SECURITY

12.1 Pursuant to clause 7, the bidder shall furnish, as part of his bid, a bid security for an amount of **Rs.2,00,00,000.00 (RUPEES TWO CRORES) ONLY.**

12.2 The bid security is required to protect the purchaser against the risk of bidder's conduct, which would warrant the forfeiture of bid security pursuant to para 12.7.

12.3 The bid security shall be in the form of a Bank Guarantee issued by a scheduled bank in favour of the purchaser, valid for a period of **210 days from the date of tender opening.**

12.4 A bid not secured in accordance with para 12.1 & 12.3 shall be rejected by the Purchaser

being non-responsive at the bid opening stage and returned to the bidder unopened.

12.5 The bid security of the unsuccessful bidder will be discharged/returned as promptly as possible and within 60 days of acceptance of tender but not later than 30 days after the expiry of the period of the bid validity prescribed by the purchaser pursuant to clause 13.

12.6 The successful bidder's bid security will be discharged upon the bidder's acceptance of the advance purchase order satisfactorily in accordance with clause 27 and furnishing the performance security.

12.7 The bid security may be forfeited:

(a) If the bidder withdraws his bid during the period of bid validity specified by the bidder in the Bid form or

(b) In the case of successful bidder, if the bidder fails:

(i) To sign the contract in accordance with clause 28

Or

(ii) To furnish performance security in accordance with clause 27.

(c) In both the above cases, i.e. 12.7(a) & (b), the bidder will not be eligible to participate in the tender for same item for one year from the date of issue of APO. The bidder will not approach the court against the decision of BSNL in this regard.

(d) The bidder shall submit an irrevocable undertaking duly signed by it and its partners/OEMs stating that both of them i.e. the bidder and its partners shall be liable for due performance of the contract jointly and severally, failing which both of them shall be liable to be barred from having any business dealing with BSNL for a period of three years.

He submitted that in view of paragraph 12.4, a bid which is not secured in accordance with paragraphs 12.1 & 12.3, was liable to be rejected at the threshold as being non-responsive at the bid opening stage itself and the bid was liable to be returned to the bidder unopened.

8. The learned counsel also referred to paragraph 21 of the NIT which related to preliminary evaluation and the same reads as under:-

“21. PRELIMINARY EVALUATION

21.1 Purchaser shall evaluate the bids to determine whether they are complete, whether any computational errors have been made, whether required sureties have been furnished, whether the

documents have been properly signed and whether the bids are generally in order.

21.2 Arithmetical errors shall be rectified on the following basis. If there is a discrepancy between the unit price and total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected by the purchaser. If there is a discrepancy between words and figures, the amount in words shall prevail. **If the bidder does not accept the correction of the errors, his bid shall be rejected.**

21.3 Prior to the detailed evaluation, pursuant to clause 22, the Purchaser will determine the substantial responsiveness of each bid to the Bid Document. For purposes of these clauses, a substantially responsive bid is one which confirms to all the terms and conditions of the Bid Documents without material deviations. The purchaser's determination of bid's responsiveness shall be based on the contents of the bid itself without recourse to extrinsic evidence.

21.4 A bid, determined as substantially non-responsive will be rejected by the purchaser and shall not subsequent to the bid opening be made responsive by the bidder by correction of the non-conformity.

21.5 The Purchaser may waive any minor infirmity or non-conformity or irregularity in a bid which doesn't constitute a material deviation, provided such

waiver doesn't prejudice or effect the relative ranking of any bidder."

9. The contention of the learned counsel for Aster Private Limited was that the fact that the petitioner had not submitted the original bank guarantee and had only submitted the amended bank guarantee has rendered the bid of the petitioner to be non-responsive in terms of paragraph 12.4 of the NIT and, therefore, in terms of paragraph 21.4, the bid ought to have been rejected.

10. On the other hand, the learned counsel for the petitioner submitted that this is a mere hyper-technical objection as was being raised on behalf of the respondent initially and now by Aster Private Limited. He submitted that paragraph 21.5 itself permitted the respondent to waive any minor infirmity or non-conformity or irregularity in the bid which did not constitute a material deviation, provided that such waiver did not prejudice or effect the relative ranking of any bidder. He submitted that he had approached this Court at the initial stage even before the technical bids and price bids were opened. Therefore, at that point of time, the waiver, that was sought, would not, in any event, prejudice or effect the relative ranking of any bidder. In any event, the learned counsel for the petitioners submitted that the expression used in paragraph 21.3 and 21.4 is "a substantially responsive

bid” and not merely a responsive bid. He further referred to paragraph 21.3 to submit that a substantially responsive bid is one which conforms to all the terms and conditions of the bid documents without material deviations. He submitted that insofar as the bid security was concerned, as outlined in paragraph 12, it was for the specific purpose of paragraph 12.7. This is clear from clause 12.2 which stipulates that the bid security is required to protect the purchaser against the risk of bidder’s conduct which could warrant the forfeiture of bid security pursuant to paragraph 12.7 of the NIT.

11. The said paragraph has already been extracted above as also the detailed circumstances under which a bid security may be forfeited. Sub-paragraph (a) of paragraph 12.7 indicates that the bid security may be forfeited if the bidder withdraws his bids during the period of bid validity specified by the bidder in the bid form. All the other eventualities referred to in (b) and (c) would have arisen only after successful bidder was selected. Insofar as the question of withdrawal of the bid is concerned, it is abundantly clear that the petitioner had no such intention. The fact that it submitted the original bank guarantee on the very same date, though after the closure time of 11.30 am, indicates that the petitioner had no intention to withdraw its bid. The bank guarantee was already available with the petitioner, it is only

through inadvertence that the same had not been submitted along with the amended bank guarantee. Therefore, insofar as the respondent is concerned, the object of securing it against the risk of the bidder's conduct was not, in any way, threatened or imperilled. In our view, insisting on the petitioner's strict compliance, as indicated by the learned counsel for Aster Private Limited, would amount to hyper technicality. In our view, the petitioner's bid was substantially responsive and it was well within the right of the respondent to waive the mere technical irregularity referred to above.

12. We must also note that in a Supreme Court decision in the case of **Poddar Steel Corporation versus Ganesh Engineering Work: AIR 1991 SC 1579**, the Supreme Court had observed as under:-

“6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause No. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are

merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases...”

XXXX

XXXX

XXXX

XXXX

“8. In the present case the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the Tender Committee took the abundant caution by a further verification from the bank. In this situation it is not correct to hold that the Diesel Locomotive Works had no authority to waive the technical literal compliance of clause 6, specially when it was in its interest not to reject the said bid which was the highest. We, therefore, set aside the impugned judgment and dismiss the writ petition of the respondent No. 1 filed before the High Court. The appeal is accordingly allowed with costs throughout.”

In similar vein, we feel that the petitioner’s bid ought to be treated as substantially responsive for the purposes of ensuring and covering the respondent’s risk as contemplated in paragraph 12.2 of the NIT.

13. We may also take note of a Division Bench decision of this Court in the case of **Kapsh Metro JV versus UOI & Anr. 2007 (95) DRJ 668 (DB)**, wherein this Court held as under:-

“5. We are of the view that this entire imbroglio has arisen because of the postponement of the date on which the tenders were to be opened, i.e., from 4th January 2007 to 22nd January 2007 (17 days later) by respondent No. 2. If Clause 2.7 of the tender is examined it is evident that it required that the EMD in the form of a bank guarantee was to be valid for a period of 180 days. On the date the bid was submitted by the petitioner, i.e., 5th January 2007 it was valid for 180 days. Even according to the respondent No. 2 if the date of opening the bid was not postponed the petitioner's bid would have been in order. The amount being a large amount (EMD of Rs. 10,000,000/- (Rupees Ten Million only) or US\$ 25,0000) the technical non compliance is bonafide and the period taken for rectification of the EMD not so unreasonable so as to completely vitiate the petitioner's bid. Consequently, to accept the respondent No. 2's pleas would be tantamount to invalidating the petitioner's bid on a hyper-technical construction on account of a situation brought about only by the postponement of the bid by respondent No. 2 itself. Taking into account the fact that the bids are international it will be wholly unjust to deny the petitioner the opportunity to participate in the tender process, specially since no unfair advantage has been gained by the petitioner in this process. The petitioners are not stealing a march over any of their competitors by altering their bid amount. The petitioners have been conscientious enough by updating the EMD on their own after coming to know of the technical non-compliance. We fail to see how

the Respondent No. 2 can claim that public interest would not be subserved by the participation of the petitioner. Wider competition in such circumstances is always in public interest and therefore, we do not find that there is sufficient reason for Respondent No. 2 to exclude the petitioners' bid for such a minor discrepancy and that too one which was cured on a timely basis suo moto by the petitioner. In our view, since public interest requires a wider participation of bidders to ensure healthy competition, the dictum laid down by the Hon'ble Supreme court in M/s Poddar Steel Corpn.'s case (supra) would be clearly applicable and the enforcement of the validity period of the EMD Clause by the respondent No. 2 by insisting on the literal compliance of the 180 day validity period would not be justified. At the highest, the deficiency was of the 17 days period in the EMD of a 180 validity period and this too was subsequently altered in order to conform to the prescribed requirement. We are of the view that in this case, the time lag of 17 days is a technical irregularity of little significance and is worthy of being waived as per the dictum laid down by the Hon'ble Supreme Court in M/s Poddar Steel's case (supra). Furthermore, the same has been set right and is now fully compliant with the requirements of the tender. In our view, this is an eminently fit case where strict literal compliance would not subserve public interest or indeed the interest of justice. In so far the judgments relied upon by the respondent No. 2 is concerned, we are of the view that they are not applicable in the instant case because Respondent No. 2 is being unreasonable by not even allowing the petitioners bid a fair consideration especially considering that there has been no accrual of unfair advantage to any of the parties. In this view of the matter, the writ petition is allowed and the letter dated 15th February 2007 is quashed and the bid of the petitioner is directed to be

considered in accordance with law by the respondents.”

14. Finally, we also need to take note of the Supreme Court decision in the case of **Air India Ltd. v. Cochin International Airport Ltd.: 2000 (2) SCC 617**, wherein the Supreme Court observed as under:-

“7. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article [226](#) with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.”

15. In this case, we find that there is an overwhelming public interest which is involved inasmuch as, if the contract is awarded to the petitioner, public money to the extent of approximately Rs.370 crores would be saved and this amounts to virtually 50% of the project cost. Furthermore, the petitioner is not a private party and, in the circumstances above, no *mala fides* can be attributed to the petitioner for the unintentional slip that it committed in not submitting the original bank guarantee although it had submitted the amended bank guarantee on time. We have also noted above

that the respondent is a public sector undertaking and its risk was fully covered.

16. In these circumstances, apart from the fact that the lapse was a mere hyper-technical one, the overwhelming public interest involved requires us to interfere and to direct that the contract ought to be awarded, as recommended by the Committee of Evaluation of Tender, as noted in the letter to the advocate dated 03.12.2004, to the petitioner.

The writ petition is allowed to the aforesaid extent.

All pending applications also stand disposed of.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

DECEMBER 05, 2014/‘sn’