

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 18.05.2018

+ **W.P.(C) 3140/2018, C.M. APPL.12502-12504/2018 & 17514/2018**

STERLITE TECHNOLOGIES LIMITED

..... Petitioner

Through: Sh. C.S. Vaidianathan, Sr. Advocate with
Sh. Ajoy Roy, Ms. Smarika Singh, Sh. Tanuj
Bhushan, Ms. Nandita Chauhan and Ms. Ahana,
Advocates.

Versus

BHARAT SANCHAR NIGAM LIMITED

..... Respondents

Through : Sh. Dinesh Agnani, Sr. Advocate with
Ms. Leena Tuteja and Sh. Ishaan Chawla,
Advocates, for Respondent No.1.

Sh. Balbir Singh, Sr. Advocate with Sh. Amol
Sinha and Sh. Rahul Kochar, Advocates, for
Respondent No.2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The narrow controversy that needs to be settled in this writ petition is whether the respondent (hereafter referred to as “BSNL”) was justified in invoking Clause 9.2 of Section IV Part B of the tender invited by it on 29.12.2017 (hereafter called “the NIT”). That condition results in the price bid loading of any given bidder “*to the extent of the difference in quantity of the item to meet the full requirement of the SOR on a pro-rata basis for the purpose of evaluation and ordering.*”

2. The facts are that BSNL issued the NIT further to its Bharat Net Phase-II Project for the States of Assam, Madhya Pradesh, Rajasthan, Uttar Pradesh, West Bengal and Sikkim. These six states were further divided into six clusters. The bids were for the selection of Project Implementing Agency to carry out survey, supply, installation, end-to-end integration, testing and commissioning of network for connecting Gram Panchayats on turnkey basis. It is not disputed that the petitioner had bid for three clusters – MP-1, MP-3 and MP-4 when it furnished its tender on 15.02.2018. It claims to have been declared as L-1 in respect of MP-1 and MP-4 clusters. The latter four clusters were at the stage of price negotiations. Concededly, the present proceedings relate to its bid for MP-1 cluster.

3. The petitioner contends that it quoted 100% of the requisite quantities in the NIT. It further relies upon the pre-bid clarifications to the tender issued by the BSNL on 29.01.2018 to state that with respect to the relevant part of the bid, all the prescribed quantities had in fact been quoted and accounted for. It complains that BSNL's decision, therefore, to load its price bid, for under-quoting some quantities is entirely unjustified and unfair. It is submitted that this action by the respondent is contrary to the terms of the tender and, therefore, utterly arbitrary.

4. It is argued on behalf of the petitioner by the learned senior counsel – Sh. C.S. Vaidyanathan that the BSNL had in fact confirmed on 20.02.2018 that its technical bid was techno-commercially responsive. This meant that the bid was found complete and correct in all technical parameters. It is only thereafter that the BSNL went ahead with the petitioner's financial bid on satisfying itself as to the fulfillment of tender conditions that it was the lowest bidder and identified as L-1. In the circumstances, the BSNL could not have resiled and decided in an utter *volte-face* that the price loading condition, i.e. clause 9.2 was applicable. The BSNL's decision is also attacked as opaque and contrary to transparency norms. That apart, the petitioner attacks it on the ground that it was never given a fair

opportunity or chance to state whether in fact the tender conditions with respect to quoting of items had been fulfilled.

5. Sh. Vaidyanathan, learned senior counsel strongly relied upon the clarifications given by BSNL on 29.01.2018 and took the Court through them to say that the required quantities had in fact been factored in the petitioner's bid. The relevant part of the technical specification contained in the tender description, spelling out the specific quantity relates to redundant line cards for OLT chassis and allied accessories. The specifications for MP-1 Circle (MP) involved in the present case, *inter alia*, are reproduced below:

CLUSTER-MP 1 Circle – Madhya Pradesh

SOR-GPON-Material

<u>Schedule of Requirement (SoR)</u>				
S. No.	ITEM Description as per Technical Specification	Quantity		
<i>Supply of Material (As per technical specification given in Annexure A, B & C)</i>				
1	OLT Chassis and allied accessory including 19" standard rack/ETSI rack, 24 U size with 1+1 power module etc. and the installation materials equipped with the line cards in n+1 redundancy mode.	54		
1.1	GPON Ports (Without redundant line cards) (Consignee wise distribution of Ports will be decided by BSNL).	1038		
1.2	Redundant Line Cards (Spare 10% of ports at 1.1)	26		
1.3	Additional OLT GPON Line Cards	0		
	Control/switch/uplink card each:			
1.4	With 4 No. Optical GE (1000 Base LX) interface ports	4	108	
	With 2 No.FE/GE (10/100/10000 Base T) Electrical interface Ports	0		
1.5	Control/Switch/uplink card each with two (2) 10 GE Uplink ports		3	
1.6	DCDB along with Power Cable and earthing cables at each OLT site.		54	
XXX	XXX	XXXX	XXXX	XXXX

6. The petitioner argues that upon becoming aware, it immediately informed BSNL through a series of representations that the redundant line cards fitted by it were in conformity with the quantity indicated. These representations are dated 05.03.2018, 12.03.2018, 19.03.2018 and 21.03.2018 respectively. It is highlighted by learned counsel that the BSNL failed to appreciate that in terms of its clarification no.337 issued on 29.01.2018 as part of pre-bid clarification, the quantity of redundant cards in all SORs and price schedules were clarified as equal to the number of chassis at S. No.1. The petitioner, therefore, quoted 54 redundant line cards at S. No.1 and quoted 26 redundant line cards at S. No.1.2. The reliance placed by the pre-bid clarification, to the extent it is relevant in the present case is hereby extracted as follows:

<i>Queries on BSNL Tender No. TE No.CA/MMT/NOFN/Selection of PIA/T-610/2017 dated 29-12-2017</i>					
<i>S. No.</i>	<i>Section No./Page No.</i>	<i>Clause No.</i>	<i>Clause Description</i>	<i>Clarification sought</i>	<i>BSNL Clarifications</i>
335	Section-3 Part-C	1.4 & 1.5	Control/Switch/Uplink card each: With 4 no. Optical GE (1000 Base LX) interface ports-4 and Control/Switch/Uplink card each with two (2) 10 GE Uplink ports	In the SoR two type of controller asked at Sr. No.1.4 & 1.5 as below with Sr. No.1.4 stating One Controller Card having 1x4G interface and Sr. No.1.5 stating controller having 2x10G interface. We do understand that OLT location would be equipped with	As per tender. The quantity of item under serial number 1.4 (control/switch/uplink with 4 numbers of GE port in each card) shall be made twice of quantity of item at serial number 1 of Table C, (i.e. chassis) in each Package. The quantity of item under serial number 1.5 (Control/Switch/Uplink with 2 numbers of 10GE port in each card) shall be made

				either 2 modules of controller card with 1x4G interface or two modules of controller with 2x10G interface. Our understanding is augmented by the following two clauses: “Technical specification of OLT in annexure-1” at page-413, here clause 6.3.1 says there should be two termination cards in redundancy/load sharing configuration. At page 419 clause 23.9(i)-OLT must support network side cards with 1G ports or 10G ports. Kindly confirm if our understanding is correct.	twice of quantity of item at serial number 1 of Table C (i.e. chassis) in each Package. However ordering of GE card or 10GE card shall be done as per requirement.
XX X		Xxx	Xxxx	Xxxx	Xxxx
337	Section-	1.2	Redundant Line	Our	Supply of redundant

	3 Part-C		Cards (Spare 10% of ports at 1.1) understanding according to requirement Sr. No.1 of the SoR “equipped with the line cards in N+1 redundancy mode” bidder has to provision one additional 8 port GPON card at each OLT location. In addition to these redundant cards at Sr. No.1, is Sr. No.1.2 asking for additional redundant cards. Kindly confirm.	line card is to be made as per requirement of price schedule item no.1.2 of Table C of respective package. This item is the redundant line card which is mentioned as redundant i.e. N+1 of item at serial number 1. Item at serial number 1.1 & 1.2 are part of material mentioned at serial number 1 of Table C. The quantity/number of redundant cards in all SoR and price schedule shall be equal to number of chassis at serial number 1.
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7. The BSNL submits that its decision was correct and justified to invoke the price loading Clause 9.2. Explaining the clarification issued on 29.01.2018, it states that each bidder had the provision of one additional 8 port GPON card at each OLT location and that in terms of the redundant cards in S. No.6.1, additional redundant cards at S. No.1.2 was sought. It is submitted that the query and clarification at S. Nos. 335 and 337 were identical and the BSNL had adopted a consistent approach in this regard. During the hearing, BSNL also produced the techno-commercial evaluation report prepared on 08.03.2016 by its four member committee. The Committee had stated as follows:

“Bharat Sanchar Nigam Limited

(A Govt. of India Enterprise)

Subject: Techno-Commercial Evaluation Report in respect of Tender No.CA/MMT/NOFN/Selection of PIA/T-61/2017 dated

29.12.2017 submitted on 20.2.2018 and additional report with reference to UO No.11-2/6/2017/Bharatnet-II/Turnkey dated 8.3.2018.

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It is mentioned in U.O. that the bidders have entered quantity differently in item no.1.2 of Table C in price schedule.

Clarification issued on 29.1.2018 mentions at Sr. No.337 "Supply of redundant line card is to be made as per requirement of price schedule item no.1.2 of Table C of respective package. This item is the redundant line card which is mentioned as redundant i.e. N+1 of item at sr. no.1. Item at sr. No.1.1 and 1.2 are part of material mentioned at serial no.1 of Table C. The quantity/number of redundant cards in all SOR and price schedule shall be equal to number of chassis at serial number 1.

As per clarification at sr. no.337 the number of redundant line card at sr. no.1.2 of price schedule was to be quoted equal to number of chassis at sr. number 1. If some bidders have quoted less number of redundant cards at sr. number 1.2 same may be loaded by CET as per clause no.9 of Section IV Part B of tender conditions and pre bid clarification at sr. no.337 issued on 29.01.2018. On perusal of bids in different packages it is ascertained that 11 bidders (in 36 bids) have quoted as per the clarifications issued by BSNL about the number of cards.

Sd/-
S.K. Nain
Member

Sd/-
Prem Chand
Member

Sd/-
K.N. Sanyal
Member

Sd/-
MukeshMandal
Member"

- a. From the above discussion, it is evident that the limited controversy is whether the petitioner's bid could be loaded for its quotation of quantities short of what is elicited in the tender documents. It is not in dispute that the relevant conditions in this case are clauses 5 and 6, especially clauses 5.1 to 5.3 In terms of these, the bidders can seek clarification. Under clause 5.2, a clarification was issued by BSNL that it "shall form an integral part of bid documents and it may amount to amendment of relevant clauses of the bid document". The clarification sought in respect of S. No.1.2 of SOR, i.e. the technical specification, was that the

quantity of the items, i.e. the line cards in N+1 redundancy mode, each bidder had to provision one additional 8 port GOPN card at each OLT location. The clarification given was that the redundant line card supplied was to be made in requirement of price schedule item no.1.2 of table C of the respective package. This is the redundant line card which is mentioned as redundant, i.e. N+1 of the Item at S. No.1. S. nos.1.1 and 1.2 are part of:

“Clarification No.337

“Supply of redundant line card is to be made as per requirement of price schedule item no.1.2 of Table C of respective package. This item is the redundant line card which is mentioned as redundant, i.e. N+1 of item at serial number 1. Item at serial number 1.1 & 1.2 are part of material mentioned at serial number 1 of Table C. The quantity/number of redundant cards in all SOR and price schedule shall be equal to number of chassis at serial number 1.”

8. The petitioner’s contention is that since it was deemed technically compliant and eligible, it had to be given the price bid by it and the tender had to be treated as L-1. Here, the Court is of the opinion that the techno-commercial responsiveness implies that the bidder’s offer for tender can be opened. The terms of evaluation are to be based upon terms and conditions of the tender. It is at this stage that clause 9.2, i.e. price loading condition becomes relevant. That condition reads as follows:

“9.2 Cases in which the bidder has quoted for less quantity for any of the items than that indicated in the SOR of the tender documents, then the price bid shall be loaded to the extent of the difference in quantity of the item to meet the full requirement of the SOR on a pro-rata basis for the purpose of evaluation and ordering” [Emphasis supplied].”

9. The BSNL had produced the tender evaluation process as well as a copy of the price bid of the petitioner’s bid. A comparison of the bid, i.e. the petitioner’s bid and that of its competitor shows that in respect of the relevant item, i.e. OLT chassis, the total quantity bid was 54 and that in respect of Item No.1.2, i.e. the

redundant card, the petitioner had submitted a bid for 26 items. In stark contrast, the competitors' bid indicated its understanding that the quantities that had to be necessarily incorporated as part of the essential supplies were 64 under S. no.1 and 54 under S. no.1.2. BSNL has evidently taken into account the clarification of 29.01.2018 which states that the item redundant line card would be S. no.1, 1.1 and 1.2 and has mentioned as part of material mentioned at S. no.1 of table. C. The crucial terms are that the quantity or the number of redundant cards in all SORs and price schedule shall be equal to the chassis at s. no.1. This obviously meant that the number of chassis is part of the OLT channels, i.e. 54. The petitioner's bid does not conform to these specifications.

10. It has been repeatedly held that tender prescription or tender conditions, its incorporation or application are left to the primary judgment of the executive authority or the public agency which publishes bids eliciting eligible bidders (Refer *Central Coal Fields Ltd. v. SLL – SML (Joint Venture) &Ors.* (2016) 8 SCC 622 and *Consortium of Titagarh Firema Adler Spa v. Nagpur Metro Rail Corporation Ltd.* (2017) 7 SCC 846 and *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.* (2016) 16 SCC 818). In the present case, terms of tender condition at paras 5.2 and 5.3 and the clarification issued on 29.01.2018 were incorporated in the tender condition itself. The bidders, therefore, were required to comply and furnish appropriate bids incorporating the prescribed quantities. No doubt, on 29.01.2018, the petitioner's bid was found to be technically eligible. That, however, did not confer any vested or indefeasible right upon it to say that if there was any shortage in the quantities, the other part of the tender conditions could not be insisted upon by BSNL. In this Court's opinion, the BSNL contends correctly that the price evaluation stage occurs later and that the question of price or cost loading had to be dealt with subsequently. This Court is satisfied that in the overall circumstances of the case, the BSNL neither unfairly considered the terms nor acted in an arbitrary manner in deciding to resort to

holding that some bidders had quoted less number of Redundant cards at Sl. no.1.2 and that their tenders could be loaded by CET in terms of clause 9.2.

11. For the foregoing reasons, there is no merit in the petition. It is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

MAY 18, 2018

