

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

C.W.P. No.9474 of 2009
Date of decision: 2.7.2009

Nokia Siemens Networks Pvt. Ltd.

-----Petitioner

Vs.

Union of India and another.

-----Respondents

**CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MRS JUSTICE DAYA CHAUDHARY**

Present:- Mr. Ashok Aggarwal, Sr. Advocate with
Ms. Ritu Bhalla, Advocate &
Mr. Rohit Khanna, Advocate
for the petitioners.

Mr. A.K. Chopra, Sr. Advocate with
Mr. Gurminder Singh, Advocate &
Ms. Shaibya Sood, Advocate
for respondent/caveator.

ORDER:

1. This petition seeks quashing of decision of respondent No.2 Bharat Sanchar Nigam Limited (BSNL), rejecting the petitioner's technical bid in Tender No.CMTS/PB/P&D/PHASEVI/25M/TENDER (PART 2)/2008-09 dated 1.5.2008 communicated vide letter dated 25.5.2009, Annexure P-12 and also for setting aside decision of opening of price bids on 15.5.2009.

2. The BSNL published notice on 1.5.2008, inviting tenders for GSM Phase VI for procurement of 93 Million lines.

The petitioner was also one of the tenderers. A Pre-Bid Conference of all the tenderers was held on 28.6.2008. From 24.1.2009 to 27.5.2009, there was correspondence between the petitioner and respondent No.2 and the petitioner came to know that its technical bids had been rejected. No formal communication was received by the petitioner. Pointing out that only single bidder was left and it will not result into competitive prices, the petitioner sought constitution of an independent Committee to look into the evaluation of the bids. Finding no response, the petitioner filed a writ petition, which came up for hearing on 26.5.2009. However, on 25.5.2009, the petitioner received an e-mail, intimating that the petitioner's bids had been found to be 'substantial non-responsive on techno-commercial grounds'.

3. Respondent No.2 appeared on caveat on 26.5.2009 and following order was passed:-

“The primary contention of the petitioners in the present controversy is, that the claim of the petitioners has been rejected arbitrarily, inasmuch as, the financial bid of the petitioner was not even opened. He also states that no reasons have been furnished to the petitioners informing them the basis of rejection of their bid. The contention of arbitrary action can only be determined after the petitioners are informed of the reasons, on the basis whereof the techno-commercial bid submitted by the petitioners was not accepted. In absence of any reasons there would be

no basis for determining whether or not the action of the respondents was arbitrary.

Respondent No.2 i.e., Bharat Sanchar Nigam Limited is on caveat before us. Mr. Gurminder Singh, learned counsel appearing for respondent No.2 on instructions states, that in the interest of transparency respondent No.2 is ready and willing to disclose the reasons on the basis of which the techno-commercial bid of the petitioners was not accepted. Learned counsel for respondent No.2 in order to demonstrate to this Court that respondent No.2 believes in transparency, unilaterally offers to allow the petitioners to inspect the record pertaining to the notices under reference, upto the point of rejection of the techno-commercial bid of the petitioners.

In view of the aforesaid statement made by the learned counsel for respondent No.2, we are satisfied, that as of now, it would be just and appropriate to dispose of the instant writ petition with a direction to respondent No.2, to furnish the reasons on the basis whereof the techno-commercial bid of the petitioners was declared as not substantively responsive.

In view of the above, the instant writ petition is disposed of with a direction to respondent No.2 to furnish the aforesaid reasons to the petitioners through their counsel Mr. Rohit Khanna on or before 2:00 P.M on 27.5.2009. The petitioners are also permitted the right to inspect the relevant record pertaining to the tender under reference at 2:00 P.M. on 27.5.2009. In case the petitioners desire to approach this Court again, on the same cause of action, after perusing the reasons communicated to it, it shall have liberty to do so."

4. In compliance of the above order, respondent No.2 communicated the reasons vide letter dated 27.5.2009, Annexure P-14. The relevant part of the letter containing reasons is as under:-

Reasons for rejection of Techno-commercial bid of M/s NSN in Part-2 of Phase VI

- (i) In terms of clause 10.2 (i) of Section II of the Bid the bidder is obliged to, inter alia, furnish certificate from its bankers as evidence that he has financial capability to perform the contract. M/s NSN has **not submitted the requisite certificate from its bankers** as evidence that it has the financial capability to perform the contract. In response to clarification sought by BSNL vide its clarification dated 24.01.2009, M/s NSN stated that “the banker certificate is under process of procurement and shall be submitted that as soon as we receive it”. As per clause 31 of section-II of tender document, **the non-compliance to this condition entitles the BSNL to outrightly reject of bid of M/s NSN.**
- (ii) In terms of clause 5.2 of Section-IV of the tender documents, the bidder has to provide necessary certificate from the user to establish the proveness of the product offered by the said bidder. **M/s NSN did not furnish the user certificates** for working for a subscriber base of at least 5 million against the network element “Node-B” and therefore failed to meet the conditions of clause 10.3 of Section-II and

clause 5.1 of section-IV of the tender documents wherein the bidder has to provide documentary evidence regarding the system being offered by him to enable the BSNL to assess the proveness of the system offered. As per clause 31 of section-II of tender document, **the non-compliance to this condition entitles the BSNL to outrightly reject of bid of M/s NSN.**

- (iii) Similarly, M/s NSN had to comply with the aforesaid clauses 10.3 of Section-II, clause 5.1 and clause 5.2 of section-IV. M/s NSN, however, **did not furnish the user certificates for** minimum 40 working installations working at least for a subscriber base of 5 million lines, against the network element “RNC” under clause 5.1 of section-IV. Further, it could not furnish the requisite user certificate RNS interfacing the GERAN of at least two other vendors and IP MPLS, against the network element “RNC” under clause 5.1 of section-IV. As per clause 31 of section-II of tender document, **the non-compliance to this condition entitles the BSNL to outrightly reject of bid of M/s NSN.”**

5. The petitioner pointed out that reasons were non-existent and against the record. The relevant part of the response of the petitioner to the three reasons is as follows:-

- “A. Response to reasons for rejection of our Techno commercial Bid in Part-II of Phase VI
- i. Breach of Clause 10.2(i) of Section 2 of the Tender

- (a) In the letter dated 27.05.2009, it has been contended that we had not submitted the Certificate contemplated under Clause 10.2 (i) of the Tender from our Banker's as evidence that we had the financial capability to perform the contract. It has further been stated that in response to the clarification issued by BSNL on 24.01.2009, we had stated that "The Banker's Certificate is under process of procurement and shall be submitted that (sic) as soon as we receive it."
- (b) We state that your purported reason that we had not submitted the Banker Certificate under Clause 10.2(i) is factually erroneous. In this regard, We state that a Banker Certificate dated 17.02.2009 from the Gurgaon Branch of Standard Chartered Bank was hand-delivered to the office of the Punjab Telecom Circle in Chandigarh on 13.03.2009 along with the response to the second set of clarifications issued by BSNL. Thus, in as much as a Banker Certificate had been furnished to BSNL the ground that no Banker Certificate had been submitted and hence our Techno Commercial Bid is liable to be rejected is wholly wrong and perverse.
- (c) Infact, it is extremely pertinent to point out that the fact that the said Banker Certificate which had been delivered by us on 13.03.2009 was received by the Zonal Office of BSNL at Chandigarh is amply evident by the fact that post 24.02.2009, through any clarification or

otherwise, BSNL has never brought up the issue of absence of Banker Certificate with us. Infact, it is vital to note that on 27.03.2009 BSNL had issued a third set of clarification to us. In the said set of clarifications, BSNL did not inform to us that the Banker Certificate contemplated under clause 10.2 (i) of the Tender had not been received. This fact alone sufficiently proves that the Banker Certificate had infact been received by BSNL and the instant stand taken by BSNL that it has not received the Banker Certificate is only an afterthought and an attempt to create a justification for rejecting our Tenhno-Commercial Bid.

- (d) Furthermore, it is inexplicable why BSNL permitted us to participate in the further tender process from 24.01.2009 till date and did not reject the bid without further evaluation under Clause 31 of Section-II on which strong reliance is being placed by BSNL now, if indeed we had not submitted the Banker Certificate. Infact, without admitting and assuming for the sake of argument that the Banker Certificate delivered by us to BSNL was not received at the zonal office, even then the conspicuous silence maintained by BSNL with respect to the Banker Certificate and BSNL's overt and covert actions in evaluating our Techno-commercial bids through clarifications and presentations constitutes a deemed waiver of BSNL's right under Clause 31 of Section 2 of the Tender to out rightly reject our Techno Commercial Bid on

the ground of non-submission of the Banker Certificate.

- (e) Without prejudice to the forgoing, we state that the fact that your reliance on the fact of non-submission of Banker Certificate by us is completely misplaced is evident from the admitted fact that for the instant tender, the shortlisted bidder i.e. M/s Ericsson India Pvt. Ltd. was neither asked to submit a Banker Certificate nor had the latter submitted one. The same is a fact which is beyond the shadow of doubt and has been confirmed by the BSNL personnel at that the time of inspection of bids on 27.05.2009.

We believe from our personnel that the reason by M/s Ericsson India Pvt. Ltd. was not asked to submit a Banker Certificate was that M/s Ericsson India Pvt. Ltd. had submitted a Banker Certificate for the separate tender i.e. *CMS/PB/P&D/Phase-VI/25M/Tender (Part-I)/2008-09*.

By the same logic and criterion, there can be no justification for rejecting our Techno-Commercial Bid in as much as we had admittedly submitted a Banker Certificate to the Sought Zone for the South Zone Part-2 (3G Services) Tender.

- (f) In this regard, we also state that the purpose and rationale of the Banker Certificate is to demonstrate and set out the financial capability of a bidder to perform a contract. This being the avowed purpose of a Banker Certificate, no bidder including the shortlisted bidder for the instant tender i.e. M/s Ericsson India Pvt. Ltd.

had submitted distinct and different Banker Certificate for the tenders issued by BSNL under Phase VI; infact one Banker Certificate had been submitted by M/s Ericsson India Pvt. Ltd. in all the tenders of Phase VI in which it had bid for. Similarly, we had submitted the same Banker Certificate in all the tenders including the tender in question wherein we had submitted our Techno-Commercial Bid. In that view of the matter, if the Banker Certificate submitted by M/s Ericsson India Pvt. Ltd. for another BSNL Tender i.e. *No.CMS/PB/P&D/Phase-VI/25M/Tender (Part-I)/2008-09* could be regarded as fulfillment of Clause 10.2 in the tender in question there is no valid reason why (even assuming for the sake of argument that BSNL did not receive the Banker Certificate delivered by us on 13.03.2009) the Banker Certificate admittedly submitted by us in BSNL's South Zone Tender cannot be regarded as fulfillment of clause 10.2(i) of the instant Tender.

- (g) In any event, there can hardly be any doubt on our financial capability to perform the Contract in as much we are successfully executing Phase-IV of BSNL's GSM procurement apart from several other multi-million dollar contracts in India. Moreover, the Audited Annual Accounts submitted by us along with our Bid documents and clarifications leave no manner of doubt regarding our financial capability.

ii. Failure to meet condition of Clause 5.2 of Section 4 of the Tender Documents.

- (a) The second purported reason on the basis of which you have rejected our Techno-Commercial Bids is that we have not provided User Certificates for a subscriber base of at least 5 million against the network element "Node-B". We state that the said reason is wholly wrong and incorrect inasmuch as we had furnished User Certificates to you which clearly brought out that the Network Element "Node-B" was working for a subscriber base of 5 million lines.
- (b) In this regard, we state that BSNL has misdirected itself whilst viewing the issue of a User Certificate required under clause 5.2 of Section IV of the Tender. We state that Clause 5.1 is the Eligibility Clause insofar as the issue of proveness of the equipment being offered is concerned. It is this Clause 5.1 which specifies the Network Elements and the deployment required against each Network Element. There is no dispute over the fact that the equipment being offered by a bidder must meet the standards prescribed in Clause 5.1.
- On the other hand, Clause 5.2 is the ancillary clause to Clause 5.1 which provides how the bidder would have to demonstrate/meet the deployment criteria against each Network Element. As per clause 5.2, this would have to be done by way of "necessary certificates" from the user. Since, Clause 5.2 of the Tender or any other Clause of the Tender does not prescribe any format or Proforma for the Certificate mentioned in the said Clause, the

“necessary certificate” submitted by a bidder under Clause 5.2 must be such that it reasonably satisfies BSNL that the deployment required against each Network Element in Clause 5.1 is met. In other words, “necessary certificates” referred in Clause 5.2 are not in the nature of verbatim undertaking of the deployment criteria specified in clause 5.1 but in essence must reflect the compliance of the bidder with the deployment criteria.

Thus, as long as the Certificates under Clause 5.2 lead to a certain and incontrovertible conclusion that the deployment required for Network Element “Node-B” is met, the same shall be valid and germane Certificate under Clause 5.2.

- (c) In the instant case, we had submitted following five user certificates against Network Element “Node B.”.
- (i) Certificate dated May 8, 2006 from Tim Hellas Telecommunications S.A.
- (ii) Certificate dated May 5, 2006 from Chungwa Telecom Company Ltd.
- (iii) Certificate from France Telecom.
- (iv) Certificate dated 14.04.2006 from Vodafone Omnitel.
- (v) Certificate dated May 10, 2006 from Telia Sonera Mobile Network Ltd.

It is submitted that the Certificate from Vodafone mentioned above shows that with 3097 Node B's and 55% market share for us, the Subscribers base for our UTRAN network is

approximately 3.71 million (6.75 million X 55/100). This corresponds to more than 1190 subscribers per Node B. The total number of Node B's (apart from the 3097 Node B's mentioned in Vodafone's Certificate) borne out by the aforementioned Certificates comes to a figure of more than 12000 (15177-3097=12080). Even if a most conservative estimate of 120 subscribers per Node is to be reckoned (which is around 1/10th of the capacity of Node B deployed by us in Vodafone network), our subscriber base against 12,000 Node B's would be 1,440,000 subscribers. Together with the subscriber base of 3.71 million mentioned in Vodafone Certificate, we clearly surpass the tender requirement of 5 million subscribers against Node B. In any event, it is open for BSNL to verify the fulfillment of subscriber base criterion against Node B deployment, in the manner specified by us hereinabove.

- (d) In fact, it is pertinent to point out that the Sub Committee constituted by BSNL comprising of Shri M. Srivastava (DGM-UP East), Sanjay Kumar (DGM-Rajasthan) and Shri S.P. Chiraniya (DGM-Jaipur), which had the responsibility for compliance of various clauses pertaining to eligibility conditions of Part I, Part II, Part III and Part IV of the Tenders had clearly opined that we had met the requirement of a subscriber base of 5 millions lines against Network Element "Node B". This fact came to our knowledge during the inspection of the

records pertaining to the Tenders on 27.05.2009.

- (e) During inspection, we also perused the Report of another Sub Committee comprising of Sh. S.K. Chopra (DGM-J&K), Sh. Ashutosh Jain (DGM-Haryana) and Sh. Arvind Kumar (DGM-Uttaranchal) which had the responsibility for radio access network pertaining to commercial conditions of Part I and Part II. In its Report, the Committee against Network Element "Node B." noted that the condition of having a subscriber base of at least 5 millions had been complied. However, there was a hand written interpolation before the word "complied" and the expression "NOT" had been prefixed before the word "complied". On the next page of this Sub Committee Report, a printed page of the earlier page was inserted which had the expression "not complied" typed out. From this inserted page onwards till the end of the Sub Committee report, all pages had been page numbered by hand (all other pages from the beginning of the Sub Committee report till the page where the new page been inserted had typed page nos.). This interpolation in one page of the Sub Committee Report raises doubts on the report of this Sub Committee in this regard.
- (f) Be that as it may, it is evident and clear that Sub Committee I mentioned above had clearly held us to be compliant with the deployment criteria for Network Element "Node B". However, the CET which is the final body for evaluation of tenders had upset this finding of Sub Committee

I without assigning any reason whatsoever and had summarily held us to be non-compliant with the subscriber base criteria of Network Element "Node B."

- (g) It is also pertinent to mention here that in the second set of clarifications issued by BSNL, a specific query was raised regarding our compliance with the subscriber base criterion of Network Element "Node B." We had responded to this query by pointing out that the Certificates submitted by us in support of our compliance with the deployment criterion of Network Element "Node B." clearly pointed out that the requirement/deployment of subscribed base had been met. The aforesaid response had in fact been first discussed by us with your personnel before submission.

Thereafter pertinently, no further clarifications were asked by BSNL with respect to the Tender in question let alone the deployment criteria of Network Element "Node B". This fact clearly goes to show BSNL was satisfied with the second set of responses submitted by us to BSNL. Our rejection, therefore, on the purported ground of non-submission of requisite user certificates under Clause 5.2 of the Tender is wrongful and erroneous.

iii. Non compliance with Clause 5.1 of Section IV of the Tender Document by not furnishing the User Certificate for Network Element RNC.

- (a) We state that the third reason on which BSNL has sought to reject our Techno-Commercial Bid

is that we had not submitted User Certificates for the Network Element RNC. In this regard, we reiterate the contents of para (ii) hereinabove and state that since, Clause 5.2 of the Tender or any other Clause of the Tender does not prescribe any format or Proforma for the Certificate mentioned in the said Clause, the "necessary certificate" submitted by a bidder under Clause 5.2 must be such that it reasonably satisfies BSNL that the deployment required against Network Element RNC are met.

- (b) In this regard, we state that you overlooked the following facts while considering the user certificates submitted by us and disregarded certain Certificates completely and have thus erroneously reached the conclusion that the Certificates submitted by are deficient:-

40 working installation:- As per the product description of RNC offered by us, each RNC is capable of supporting 1440 cells. Taking the maximum load of 70% stipulated in the Tender for each RNC, it can be deduced that the total number of cells supportable per RNC would be 1008 (1440 X 70/100).

Now coming to the aspect of Node B's, as elaborated in para ii(c), the Certificates submitted by us under Clause 5.2 of the Tender, demonstrated the total number of deployment of Node B's as 15177. As you are well aware, 15177 Node B's translate into 45531 cells (15177X3).

Correlating the number of cells supportable as per RNC (1008) and Node B's capability

(45531), it is evident that the number of working installations would be around 45 (45531/1008), a figure much higher than the requirement under the Clause in question viz. 40 installations.

Subscriber base of 5 million lines:- As pointed out hereinabove, we had adequately demonstrated a subscriber base of 5 Million against Node B. Since Node B's cannot work in isolation and need RNC's for the delivery of Network capacity, it is a natural deduction that the subscriber base of 5 Million against Node B translates into the same subscriber base for RNC as well.

User certificate interfacing the GERAN of at least two vendors and IP MPLS:- Two of the Certificates submitted by us namely Certificate dated 14.04.2006 from Vodafone and Certificate dated 08.05.2006 from Tim Hellas Telecommunication S.A., clearly show the interface with two other vendors. In so far as IP MPLS is concerned, the same is a standard mode of connectivity used by all operators globally and we are no exception.

- (c) It is also relevant to mention here that in the second set of clarifications issued by BSNL specific queries were raised by BSNL against the Network element RNC. We had vide our response to the said set of clarifications, pointed out that the equipment offered by us met the deployment criteria RNC. No further clarifications were thereafter sought by BSNL at any stage regarding the Network Element RNC. Interestingly, the West Zone of BSNL had raised

third set of clarifications on the Network Element RNC (against the very same set of clarifications submitted by us to BSNL in the second round) with respect to the number of working installations of network RNC, which were duly submitted by us to BSNL. In the event, you were not satisfied with our response to the second set of clarifications on the Network Element RNC, nothing prevented you from seeking further clarifications on the same, but not having done so, you are estopped from rejecting our explanation summarily.

- (d) We thus state our rejection on the above reason is again erroneous and incorrect.”

6. Learned counsel for the petitioner points out that reasons given by respondent No.2 for rejecting the technical bid of the petitioner are perverse on the grounds already mentioned by the petitioner in its letter dated 5.6.2009, Annexure P-17.

7. Even though decision taken on technical matters by an expert Committee may not be interfered with by this Court on merits, having regard to the fact that huge amount is involved and even according to respondent No.2, the value of contract to be awarded is Rs.5,000/- crores, it is expected that respondent No.2 must not only act fairly but should also appear to be acting fairly and transparently. Concept of level playing field has been held to be part of rule of law and fairness in **Reliance Energy Ltd. and another v. Maharashtra State Road Development Corpn. Ltd. and others**, (2007) 8 SCC 1.

8. Before we could go into the merits, learned counsel for respondent No.2 fairly states that respondent No.2 stands for transparency and fairness. The decision was taken to reject the technical bid of the petitioner on the recommendation of a Committee of technical experts i.e. Technical Evaluation Committee headed by Chief General Manager, Telecom, U.P. (West) in its report dated 13.4.2009. The said report is said to be the basis of the reasons mentioned in the impugned letter dated 27.5.2009, Annexure P-14. Learned counsel further says that a copy of the said report will be furnished to the petitioner within one week from today. The petitioner will be at liberty to give its comments on the said report to the Committee, which has been constituted to oversee the integrity part between the tenderers and the BSNL. The Committee has been constituted before issuance of Tender Notice by the BSNL itself and comprises of persons who have occupied high posts, including two former Chief Election Commissioners of India. The said Committee has held its meeting, in which the petitioner had participated and next meeting will be held on 26.7.2009. The rejection of techno-commercial bid of the petitioner can be subjected to scrutiny by the said Committee and final decision, thereafter, can be taken by the Chairman-cum-Managing Director. A copy of proceedings of the Committee will be given to the petitioner. The petitioner will be at liberty to give his views on report of the said Committee.

9. Accordingly, in view of statement of learned counsel for the respondent No.2, we direct that rejection of techno-commercial bid will be subject to final decision that may be taken, after scrutiny by the Committee called as 'Independent External Monitoring Committee' by the Chairman-cum-Managing Director of BSNL after considering view point of the petitioner. The Committee will give a copy of its proceedings to the petitioner and the petitioner will be at liberty to give its comments, within three days, to the Chairman-cum-Managing Director of BSNL who may pass order after considering the petitioner's view point.

10. The petition is disposed of accordingly.

(ADARSH KUMAR GOEL)
JUDGE

July 02, 2009
ashwani

(DAYA CHAUDHARY)
JUDGE