

(2005) 07 DEL CK 0014

In the Delhi High Court

Case No : Writ Petition (C) 19715 of 2004

MIC Eelctronic Limited

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-07-2005

Acts Referred:

Citation : (2005) 2 CTLJ 243 : (2005) 123 DLT 698 : (2005) 83 DRJ 9

Hon'ble Judges : T.S. Thakur, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : L. Nageshwar Rao, G. Ramakrishna Prasad and Mohd. Wasay Khan, for the Appellant; Sukumar Patt Joshi, for Respondent No. 1-3, Ashish Dholakia, for Respondent No. 4, Rakesh Tikur, and Sanat Kumar, for Respondent No.7, for the Respondent

Judgement

Badar Durrez Ahmed, J.—The present writ petition pertains to the notice inviting tender (NIT) issued by the Bharat Sanchar Nigam Limited (BSNL), the Respondent No.2 herein on 15.7.2004. The Tender No. was MM/SW/072004/000277 and by virtue of the said NIT sealed tenders were invited for supply of MSC BASED WLL-CDMA EQUIPMENTS with EMBG (Ernest Money Bank Guarantee) for the packages as given below:-

1. WLL CDMA 2000 IX (PACKAGE-1): 10.5 LAKH LINES Rs.2,00,000,00/- 2. WLL CDMA 2000 IX INTEGRATED FWTs (PACKAGE-II): 10.5LAKHS Rs.2,00,000,00-

The petitioner also submitted its bids. However, when the bids were opened on 14.10.2004, the petitioner's representative was asked to take back the bids submitted by it in original on the ground that the bids submitted by the petitioner did not satisfy the eligibility criteria for submission of bid security of requisite value i.e. Rs. 2 crores.

2. The petitioner is aggrieved by this and has approached this Court, inter alia, for the issuance of a writ, direction or order in the nature of mandamus declaring the action of the respondent No.2 (BSNL) in rejecting the bids of the petitioner

as unconstitutional, arbitrary and illegal. The petitioner has also prayed for the issuance of a writ, direction or order to the Respondents directing them to accept the bids of the petitioner and process the same by duly considering it along with the rest of the bidders who were found to be responsive and not to discriminate against the petitioner in the matter of supply of the equipments to the respondent No.2 (BSNL).

3. It may be pointed out that the petitioner had earlier approached the High Court of Judicature at Hyderabad on 24.10.2004 by virtue of the writ petition No. 19577/2004 which was dismissed by the said High Court on the ground of lack of territorial jurisdiction by an order dated 8.11.2004. A writ appeal filed before a Division Bench of that High Court was also dismissed on 22.11.2004. It is, thereafter, in December 2004, that the present writ petition for the aforesaid reliefs was filed.

4. In the meanwhile, the bids of the responsive bidders were proceeded and three successful bidders were identified being L-1, L-2 and L-3. The orders were placed on the said three successful bidders in the following proportion:-

"L-140%

L-2 30%

L-3.30%"

Initially, these successful bidders were not made parties in the present writ petition. However, subsequently, by an impleadment application being C.M. No. 524/2005, they were sought to be added as Respondents and they were so added as directed by this Court by its order dated 17.1.2005. This Court, on 17.1.2005, had passed an interim order directing that till the next date, the respondents were not to receive any supplies from the successful bidders. This was modified by an order dated 21.2.2005 whereby the respondent BSNL was granted liberty to allocate the said supplies to the extent of 60% of the total quantity sought to be purchased under the said tender. This modification, was however, not to be construed as an expression of any opinion on the merits of the petition. It now transpires, as per the statement of the counsel for BSNL, that out of the successful bidders, up to 5th July, 2005, L-1 has supplied 2,01,451 units and L-2 and L-3 have supplied 13,250 and 15,000 units respectively. The counsel for these successful bidders submitted that although the 60% permitted by this Court has not been fully supplied, they have already placed orders and have made full arrangement for the supply of the same.

5. After this resume of the background facts, we now come to the crux of the matter. The entire case of the petitioner depends upon the construction that is to be placed on Clause 12.1(i) of the Instructions to Bidders which reads as under:-

"12.BID SECURITY

12. (i) Pursuant to clause 7, the bidder shall furnish, as part of his bid, a bid

(iv) Slab D without limit."

It was also contended that the fixation of the monetary limit of a small scale unit was done by taking into account 50% of the average net sales turnover for the last three years. It was submitted that up to Rs. 50,00,000/- the exemption was given in terms or the amount specified for each slab. However, where the monetary limit of a small scale unit was beyond 50,00,000/- the exemption from payment of bid security was limited to Rs. 50,00,000/-. To controvert these arguments, Mr Rao, who appeared for the petitioner, submitted straightway that this slab system had been done away with. He further submitted that earlier, the petitioner had been issued a Permanent Enlistment Certificate by the National Small Scale Industries Corporation Limited on 19.7.2002 which was valid for two years and in that certificate the monetary limit in respect of the petitioner was - "without limit". He submitted that this certificate had been superseded by the certificate issued on 12.5.2004 referred to above wherein a monetary limit of Rs. 7.03 crores has been prescribed insofar as the petitioner is concerned. He submitted that had the new certificate not been issued then, possibly, it was open to the respondents to contend that the exemption from payment of bid security in the case of the petitioner would be limited to Rs. 50,00,000/- for each package. But, according to him, that situation does not arise in view of the fact that the new Permanent Inlistment Certificate prescribed a specific monetary limit of Rs. 7.03 crores and secondly, the policy of slab system has been done away with. He placed reliance on an Inter Office Memorandum issued by the General Manager (Finance). N.S.I.C. Limited on 24.6.2003, a copy whereof has been placed at page 656 of the paper book. The subject of the said Inter Office Memorandum reads as under:-

"Revision in Procedure for Fixation of Monetary Limit."

Paragraph 2 of the said Inter Office Memorandum being relevant, is reproduced hereinbelow:-

"2.The revised delegation of powers viz.a.viz the `monetary limits" to be granted to SSI units while issuing registration certificate required a reexamination of the procedure for fixation of monetary limits. This has since been reviewed and the following has been approved by the Competent Authority:

The slab system has been dispensed with, and

The practice of fixing a `without limit" has been stopped and

The limits shall be fixed on the basis of the figure calculated on the basis of the formula/calculation procedure prescribed. (The figure so calculated, wherever required, to be rounded off to the next higher lac of rupees)."

This clearly discloses that the slab system has been dispensed with and the practice of fixing a "without limit" has been stopped.

7. We have considered all these aspects and it appears to us that the contentions

of Mr Rao are correct. First of all, upon a plain reading of Clause 12.1(i) it appears that there are two categories of small scale industries " those which have a prescribed monetary limit and those for which no limit has been prescribed. The former category of small scale industries are covered in the first part of the clause and are entitled to exemption up to the limit prescribed. The latter category of industries fall under the second part and exemption to them is limited to the extent of Rs. 50,00,000/-. The petitioner falls in the first category as the limit of Rs. 7.03 crores is clearly prescribed by the certificate dated 12.5.2004. Secondly, it appears when BSNL issued the NIT, the officers concerned were oblivious of the shift in policy with regard to the doing away that of the slab system by NSIC. It is only because of this that the purported anomalous situation has arisen. Although, we see no anomaly.

8. We now come to the difficult part, i.e., what relief can be granted to the petitioner? As stated above, we are in agreement with the contention of the petitioner that its bids ought not to have been returned and ought to have been processed with the other responsive bidders. The unfortunate part is that bid was returned and taken back by the representative of the petitioner. Nobody knows what the bid was. It is also not clear from the averments in the petition as to what it was. And, there is no statement in the petition as to whether the bids of the petitioner were higher or lower than those of the successful bidders. We had toyed with the suggestion of Mr Rao that 60% of the supplies as permitted by the interim order of this Court need not be disturbed but the petitioner may be considered for the balance 40% of supplies. But, on what basis is the petitioner is to be considered? There is no bid by the petitioner and we have no way of knowing what was the bid made by the petitioner at that stage. Where would the petitioner figure in the list? Would it become L-1 or would it be L-7 or L-8 or something else? We have no way of knowing. And, price is not also the only criteria for the awarding of a contract. There are various considerations which enter into the contemplation of the person who places the order. Some of the considerations are indicated in paragraph 9 of the Supreme Court decision in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, which reads as under:-

"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be: (1) The price at which the other side is willing to do the work; (2) Whether the goods or services offered are of the requisite specifications; (3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important; (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; (5) past experience of the tenderer, and whether he has successfully completed similar work earlier; (6)

time which will be taken to deliver the goods or services; and often (7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there would be, in a given case, an element of public law or public interest involved even in such a commercial transaction."

So, we cannot say with any degree of certainty as to whether even if the petitioner's bid had been taken to be responsive, the petitioner would have been a successful bidder. In this view of the matter, it would be difficult for us to direct that the petitioner be awarded any part of the contract for supply of the items under the present tender. In the course of arguments we were informed that BSNL is coming out with further tenders in respect of the said items. It would be open to the petitioner to participate in such tender in accordance with the terms of the tender. It is unfortunate that in these writ proceedings, although we are of the view that the petitioner was wrongly held to be non-responsive bidder, we cannot grant any relief to the petitioner for the reasons indicated above. This, however, does not foreclose the petitioner's rights to seek an appropriate civil remedy.

9. The writ petition is, accordingly, disposed of with no order as to costs.