

(2001) 06 DEL CK 0028

In the Delhi High Court

Case No : Letters Patent Appeal No. 264 of 2001

M/s. Alcatel India Limited

APPELLANT

Vs

Mahanagar Telephone Nigam Limited and another

RESPONDENT

Date of Decision : 01-06-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2001) 59 DRJ 393

Hon'ble Judges : Om Prakash Dwivedi, J;A.D. Singh, J

Bench : Division Bench

Advocate : Dr. A.M. Singhvi and Mr. Rakesh Gosain, Adv Mr. Jayant Bhushan, for the Appellant;

Judgement

Anil Dev Singh, J.—This is an appeal directed against the order of the learned single Judge dated 11th May, 2001 IN civil Writ Petition No.1440/2001. The facts giving rise to the appeal are as follows:-

The Mahanagar Telephone Nigam Limited, (for short the "MTNL") in order to expand its "Managed Leased Line Data Network (MLDN) in Delhi and Bombay units, issued a notice inviting tenders (for short "NIT)" on 19th June, 2000.

2. Pursuant to the NIT, the appellant on 31st July, 2000 submitted its tender and also deposited the bid security. Certain other parties also submitted their tenders. The Tender Evaluation Committee shortlisted the appellant and two others, namely, ITI and HTL. on 8th September, 2000, a letter of intent (LOI) was issued to the appellant. Thereafter the appellant on 12th September, 2000 communicated its acceptance to supply the requisite equipment to the M.T.N.L. on the next day, viz., 13.9.2000, the appellant furnished the requisite bank guarantee for due performance of the work to the respondent-MTNL, but the latter did not issue the Purchase Order. Thereupon, not having received the purchase order, the appellant filed a writ petition seeking the following reliefs:-

"a) a writ, order or direction in the nature of mandamus or any other appropriate

write, order or direction, directing the respondent no.1 herein to immediately issue the necessary Purchase Order, on the face of the concluded contract between the parties herein:

b) a writ, order or direction in the nature of mandamus or any other writ, order or direction, directing the respondent no.1 to honour and comply with the requirements as embodied in the Notice Inviting Tender dated 19.6.2000, its annexures and all other documents executed by the parties herein."

3. Before the learned Single Judge a statement was made by the learned Additional Solicitor General that the respondent had decided to scrap the tender in question and it will issue a "new tender notification", if need be. In view of the statement of the learned Additional Solicitor General, the learned single Judge dismissed the writ petition on the ground of the same having been rendered infructuous. The appellant being aggrieved of the order passed by the learned single Judge has filed the instant appeal.

4. Dr. A.M. Singhvi, learned Senior Counsel for the appellant, submitted that the LOI was placed on the appellant after the Tender Evaluation Committee had approved the tender of the appellant. According to him, neither the Telecom Engineering Centre (for short "the TEC") nor the Board Committee which examined the matter subsequently recommended scrapping of the tender. He argued that the tender has been scrapped on extraneous considerations. In this context he pointed out that after the LOI of the appellant was accepted the matter was reopened on receipt of a letter from a Member of Parliament.

5. We have given our earnest consideration to the submissions of the learned senior counsel. We have also gone through the file produced by the M.T.N.L. regarding the MLDN Equipment Procurement Case. We find that after the report of the Tender Evaluation Committee the tender of the appellant was re-examined by the TEC. The TEC in its report pointed out certain deficiencies in the appellant's bid. Subsequent to the report of the TEC, a Board Committee was constituted by the Chairman of the first respondent to examine the tender of the appellant. The committee after a detailed review concluded that the bid was not fully compliant in respect of certain items of technical requirement.

6. In the circumstances, Therefore, we cannot find fault with the action of the first respondent in scrapping the tender. The purchaser cannot be compelled to purchase an article from a supplier especially when the purchaser finds that the article is not suitable for its requirements. In this view of the matter the impugned action of the first respondent cannot be faulted on the ground of arbitrariness, illegality and illogicity.

7. Dr. Singhvi contended that a concluded contract had come into existence on 13th September, 2000 by and between the appellant and the MTNL inasmuch as the appellant on 12th September, 2000 communicated its acceptance to supply the equipment after it had received the letter of intent, and on 13th September, 2000 furnished the performance guarantee to the MTNL. According to him, issue

of a purchase order was merely a ministerial act and non issue of the same did not affect the existence of the concluded contract between the parties. It was also submitted that even after entering into the field of contract the remedy under Article 226 of the Constitution is available to the appellant against the respondents, since the MTNL acted arbitrarily in scrapping the tender.

8. On the other hand, it was submitted by the learned Additional Solicitor General, who appeared for the first respondent-MTNL, that no contract came into existence by and between the appellant and his client, and the latter was justified in scrapping the tender.

9. In rejoinder, Dr. Singhvi reiterated that once the appellant furnished the performance security and unconditionally accepted the LOI, it was incumbent upon the first respondent to issue the purchase order in favor of the appellant.

10. In this regard the learned senior counsel relied upon clauses 34.1, 34.2 and 34.3 of the Instructions to Bidders :-

"34. NOTIFICATION OF AWARD (ISSUE OF LETTER OF INTENT) 34.1 Prior to the expiry of the period of bid validity, the purchaser will notify the successful bidders in writing through a Letter of Intent/Advance Purchase Order by Registered letter or FAX which will be confirmed in writing by Registered letter.

34.2 Upon the successful bidder's furnishing the Performance security pursuant to Clause 4 of General Conditions - Section III and unconditional/unequivocal acceptance of the LOI/APO, the purchase order shall be issued. The purchaser, will promptly notify each unsuccessful bidder and will discharge the bid security, pursuant to clause 15.5.

34.3 The notification of award as per Clause 34.2 above will constitute the formation of the contract."

11. It appears to us that the issuance of the LOI to a bidder merely indicates the intention of the purchaser to place purchase order on the bidder. We are supported in this view by clause 2(e) of the Instructions to Bidders which reads as follows :-

" "Letter of Intent (LOI)" means letter indicating the intention of the purchaser to place Purchase Order on the bidder."

12. It is significant to note that as per clause 26.6 of the Instructions to Bidders, a bid which is not substantially responsive is required to be rejected by the purchaser. Clause 26.6 reads as follows :-

26.6 A bid determined as not substantially responsive will be rejected by the purchaser and may not subsequently be made responsive by the Bidder by correction of the non-conformity."

13. From the above it clearly follows that a bid once submitted will not be made responsive by carrying out corrections at a later stage. As already noted, the bid

of the appellant on examination by the TEC and the Board Committee was found to be suffering from certain deficiencies. This being so, the MTNL was free not to award the contract to the appellant. According to clause 31 of the Instructions to Bidders the purchaser will award the contract to a successful bidder whose bid has been determined to be substantially responsive and is technically and commercially acceptable. It appears to us that before the award of the contract the purchaser may decline to place a purchase order on a party in whose favor LOI is issued.

14. As per clause 35.1 of the Instructions to Bidders, it is only after the issue of the purchase order by the purchaser on the bidder that a binding contract come into existence between them. Clause 35.1 states as follows:-

"35. SIGNING OF THE CONTRACT :

35.1 The issue of purchase order on the receipt of unconditional acceptance of LOI along with the performance security will constitute the award of the contract on the bidder."

15. After the issue of the purchase order on the supplier/bidder a formal agreement between the MTNL and the successful bidder is required to be executed in terms of clause 2(g) of the Instructions to Bidders. Till such time a purchase order is placed on the bidder the contract does not come into existence. According to clause 2(i) of the Instructions to Bidders, the contract comes into existence from the "Contract Date", Which means the date on which the contract comes into effect in accordance with clause No. 35 of the Instructions to Bidders. Besides, unless the purchase order is issued the price payable to the bidder cannot be fixed. According to clause 2(h) of the Instructions to Bidders, the contract price means the price payable to the supplier under the purchase order for the complete fulfillment and proper performance of its contractual obligations to the satisfaction of the M.T.N.L. Merely issuance of the letter of intent and acceptance thereof by the bidder along with furnishing of the performance security, does not amount to creation of a contract between the parties. By that stage even the contract price and the contract date is not fixed. LOI only signifies the intention of the purchaser. We are unable to accept the submission of the learned senior counsel for the appellant that furnishing of the performance security and acceptance of the LOI issued by the first respondent constituted a contract between the parties and the first respondent was obliged to place the purchase order on the appellant. Since no binding contract came into existence between the parties, there was nothing to prevent the first respondent from scrapping the tender. The court sitting in writ jurisdiction cannot issue a mandamus to a purchaser to place a purchase order on a particular seller, or to command the former to enter into a contract with the latter.

16. In view of the aforesaid discussion, we do not find any merit in the appeal. Accordingly, the same is dismissed.