

(2009) 08 AP CK 0014

In the Andhra Pradesh High Court

Case No : Writ Petition No. 10670 of 2009

Nokia Siemens Networks Private Limited and Another

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 24-08-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 5 ALT 377 : (2009) 3 APLJ 367

Hon'ble Judges : G. Rohini, J

Bench : Single Bench

Advocate : N. Sridhar Reddy, for the Appellant; Govt. Pleader for Higher Education, for the Respondent

Final Decision : Dismissed

Judgement

G. Rohini, J.—The 2nd respondent - Bharat Sanchar Nigam Limited (hereinafter referred to as "BSNL") - issued tender notice dated 1.5.2008 inviting sealed tenders on two stage bidding system in four parts from the eligible bidders for planning, engineering, supply, installation, testing and commissioning of GSM/ UMTS based cellular mobile and supply, installation, testing & commissioning of infrastructure for network of capacity for twenty five million lines to be rolled out in three phases in the licensed service areas of BSNL in South Zone. Similar tender notices were issued in North Zone, West Zone and East Zone.

2. The tender is divided into four parts. Part-1 covers planning, engineering, supply, installation, testing and commissioning of GSM based cellular network, Part-2 covers the planning, engineering of 3G network and MBMS, Part-3 covers supply, installation, testing and commissioning of infrastructure and associated items for radio sites and Part-4 covers the OSS / BSS. Eligible bidders can participate in one or more of the parts independently subject to fulfillment of the eligibility criteria specified for each part.

3. The present writ petition is concerned with the bid of the 1st petitioner in

respect of part-2 of the tender relating to 4.5 million 3G lines in South Zone covering Andhra Pradesh, Karnataka, Kerala and Tamil Nadu Telecom Circles and Chennai Telecom District.

4. Admittedly the tenders were invited in two bid system i.e., (1) Techno Commercial and (2) Financial. The last date of selling the tender document as extended was 13.6.2008 and the last date for submission of the queries by the bidders was 16.6.2008. A pre-bid conference was held on 27.6.2008 and the consolidated response to the queries raised by the bidders was issued on 24.7.2008. The last date for submission of the bids was 10.09.2008.

5. The petitioner No. 1 submitted its bid on 10.09.2008 for part-2 in South Zone. Two other bidders namely the 3rd respondent herein and M/s. Z.T.E. India Private Limited also submitted their bids for Part-2 in South Zone.

6. This writ petition is filed initially with a prayer to declare the action of the BSNL in rejecting the 1st petitioner's technical bid by letter dated 23.5.2009 on the ground that it had not been found substantially responsive on techno-commercial grounds as arbitrary and illegal and to set aside the same. Subsequently, having regard to the stand taken by the BSNL before this Court on 28.05.2009 that the price bid of the 3rd respondent was accepted on 27.5.2009 and that the BSNL was in the process of finalizing the tender in favour of the 3rd respondent, the petitioners got the prayer in the writ petition amended seeking a further declaration that the decision of the BSNL to select the 3rd respondent is illegal and to set aside the same.

7. The case of the petitioners as pleaded in the affidavit filed in support of the writ petition:

8. The petitioner No. 1 is a company duly incorporated under the Companies Act, 1956, and the petitioner No. 2 is a Director of the petitioner No. 1. It is claimed that the 1st petitioner is a leading vendor of telecommunication equipment to almost all network operators in India and since the inception of BSNL it has been an active supplier of telecom equipment to the BSNL. It is also stated that in the phase-IV GSM procurement of the BSNL the 1st petitioner had supplied network capacity of 6 million, 8 million switching lines for fixed network and 2 million broad band lines to the BSNL.

9. In response to the tender notice dated 1.5.2008, issued by the BSNL, the petitioner No. 1 submitted its bid for Part-2 in South Zone on 10.09.2008. While the bids were pending consideration for technical selection, the BSNL by letter dated 21.1.2009 sought various clarifications from the 1st petitioner with regard to its bid. The 1st petitioner by letter dated 13.02.2009 furnished the clarifications sought by the BSNL. Thereafter, by letter dated 26.02.2009 the BSNL invited all the bidders, including the petitioner No. 1, to a meeting at Ghaziabad between 3.3.2009 and 5.3.2009 for discussions on the clarifications sought by the bidders with regard to the tender documents. Accordingly, the meeting took place at Ghaziabad and certain queries that had been put by the

BSNL were answered by the 1st petitioner by its letter dated 10.03.2009. As no further clarifications were sought by the BSNL, the petitioner was under an impression that its bid was qualified techno-commercially. However, on 11.05.2009 it was published in various newspapers that the 1st petitioner's bid was technically disqualified and that the 3rd respondent herein and another bidder were short-listed for the next stage of bidding i.e., evaluation of price bids. Though the 1st petitioner's representatives met the Chairman and Managing Director of the BSNL and sought a clarification as to whether its techno-commercial bid had been rejected, there was no concrete response. On 13.05.2009 the 1st petitioner addressed a letter to the 1st respondent - Secretary of Telecommunications - requesting to constitute an independent committee for reconsideration of the matter since short-listing a single bidder would not result in competitive prices. Again on 15.05.2009 separate letters were addressed by the 1st petitioner to the Secretary, Competition Commission, and Central Vigilance Commission, the Office of the Prime Minister of India and Cabinet Secretary. While so, from the newspaper reports dated 16.05.2009 the petitioners came to know that the price bids of the short-listed bidders for the North, South and East Zones were opened on 15.05.2009 at 7.00 pm. On 20.05.2009 the newspapers carried reports that the Communications Ministry was worried that the networks and hardware vendors of suspect origins like Huawei could install backdoor entries, remote login facilities and also design Trojan horses and may not reveal it when they sell the equipment to BSNL. Though the representatives of the petitioners met the officials of respondents 1 & 2, there was no intimation as to the responsiveness of the techno-commercial bid of the 1st petitioner. In the circumstances, the petitioners filed W.P.(C). No. 9182 of 2009 before the High Court of Delhi. However, by order dated 22.5.2009, the said writ petition was dismissed as withdrawn with liberty to approach the Court of appropriate jurisdiction.

10. Thereafter, a letter dated 23.05.2009 was received by the 1st petitioner on e-mail from the DGM (RP), BSNL Mobile Services, Hyderabad, intimating that its technical bid had not been found substantively responsive on techno-commercial grounds and requesting the 1st petitioner to collect the bid security and the unopened financial bid.

11. Aggrieved by the same, the present writ petition is filed contending that the entire decision making process adopted by the BSNL is vitiated by arbitrariness and unreasonableness. It is also contended that the extremely hasty manner in which the technical bids were considered and the price bids were opened casts serious doubts on the transparency and integrity of the tender process. It is also contended that the rejection of the technical bid of the petitioner without assigning any reasons is arbitrary and in violation of principles of natural justice. It is further contended that considering the price bid of the 3rd respondent which is a Chinese company and finalizing the tender in its favour ignoring the apprehensions expressed by the 1st respondent with regard to the National security is arbitrary and illegal. While pointing out that the 3rd respondent was

disqualified from the tenders issued by the BSNL in the West, East and North Zones having regard to the apprehensions of threats to National security expressed by the security agencies of the country, it is contended by the petitioner that the action of the BSNL in short-listing the 3rd respondent in the South Zone despite the said disqualification of the 3rd respondent is totally unjustified and against the public policy.

12. Counter-affidavit dated 2.6.2009 filed by BSNL:

In the counter-affidavit, dated 2.6.2009, filed on behalf of BSNL, it is stated that in response to the impugned tender notice three bidders i.e., the 1st petitioner, the 3rd respondent and M/s. ZTE India Private Limited submitted their bids for Part-2. Subsequent to the opening of the techno-commercial bids, the Tender Opening Committee (TOC) recommended for techno-commercial evaluation of all the three bids as they were found to be generally in order in terms of bid security, number of copies, bid form and etc. Thereafter the bids were handed over to the Committee for Evaluation of the Tender (CET) constituted for evaluation of the bids. A presentation from the bidders was conducted in Hyderabad on 10th and 11th November, 2008. Subsequently, clarifications were asked from all the bidders on 21.01.2009 followed by a meeting at Ghaziabad on 3-5th March, 2009. Thereafter, the CET finalized its report on the techno-commercial evaluation and the same was submitted to the competent authority. So far as the bid of the petitioner No. 1 is concerned, it is stated that the 1st petitioner failed to comply with the tender requirements as per Clause 4.3 of Section I of the Tender Conditions as it had filed a self-certified document on the provenness of its equipment. Filing of a self-certified document being in violation of the Tender Conditions prescribed under Clause 4.3 of Section I, Clauses 10.1 & 10.3 of Section II and Clauses 5.1 & 5.2 of Section IV, the Techno-Commercial Bid of the 1st petitioner was found to be substantively non- responsive under Clauses 26 & 31 of Section II.

13. Since the Techno-Commercial bid of the 3rd respondent was the only one found substantially responsive, the financial bid of the 3rd respondent alone was opened on 15.05.2009. Thereafter by letter dated 23.05.2009 the other bidders, whose techno-commercial bids were found to be substantially non- responsive, were requested to collect their unopened financial bids in terms of Clause 21.6 of Section II.

14. It is further explained that the Committee for Evaluation of Tender (CET) recommended to open the financial bid of the 3rd respondent only as their techno-commercial bids alone were substantially responsive. The recommendation was accepted by the competent authority (2nd respondent) on 22.4.2009 itself. However, the opening of the financial bid was kept pending for want of clearance from the Department of Telecommunications. Immediately on receipt of the clearance from the Department of Telecommunications, the financial bids of the 3rd respondent were opened on 15.05.2009, well within the office working hours.

15. It is also explained that the 1st petitioner was afforded two chances vide letters dated 21.01.2009 and on 04.03.2009 through the meeting at Ghaziabad to identify the requisite document in the bid. However, the 1st petitioner could not avail the opportunity afforded and did not identify the User Certificates for RNC in its original bid to substantiate the provenness as it has not filed any such documents originally. In the absence of any User Certificates the bid of the petitioners submitted along with a mere self- certificate, which is expressly prohibited by Clause 4.3 of Section I, remained invalid. It is also stated that the vital deficiency in the petitioner's techno-commercial bid was always known to the petitioners not only at the time of submission of the bid but also at the later stages of the clarifications and evaluation.

16. It is also contended that there is no express clause in the tender that requires any intimation to the bidders regarding their rejection of the bid and as per Clause 21.6 of Section II the unopened financial bids of the bidders, whose technical and commercial bids have been found substantively non- responsive, shall be returned to the respective bidders unopened. Accordingly the intimation was given to the 1st petitioner by letter dated 23.5.2009. So far as the National security is concerned, it is stated that the 2nd respondent had proceeded with consideration of the tenders of various bidders only after obtaining an absolute clearance from the Department of Telecommunications. Both the Union of India and BSNL had taken into consideration the security of the Nation as of paramount importance and there is no basis for the apprehension that the security interests of the country are at stake.

17. Reply affidavit filed on behalf of the petitioners dated 9.6.2009:

While contending that non-supply of reasons in the letter of rejection dated 23.05.2009 cannot be supplanted in the counter-affidavit, it is claimed that even the reasons stated in the counter-affidavit are irrelevant and immaterial and cannot render the bid of the 1st petitioner substantially non- responsive. It is further alleged that the statements in para 3(b) and 3(f) of the counter-affidavit with regard to the user certificates submitted by the 1st petitioner to establish the provenness of the Radio Network Controller (RNC) were self-contradictory and the alleged shortcoming of the bid of the 1st petitioner was not clear. Since the BSNL never raised any queries with regard to the clarifications and documents submitted by the petitioner on 11.03.2009, there could be no reason to suspect that the BSNL was in any manner dissatisfied with the documents and explanation submitted by the petitioners. The reason now stated in the counter-affidavit is apparently an after- thought to justify the ouster of the petitioner. At any rate, if only the BSNL had complied with the principles of natural justice and called upon the petitioners to explain the true and correct position, the same would have been clarified by the petitioners. Though as per Clause 5.2 of Section IV necessary certificates from the user shall be submitted by the bidder to establish the provenness of the product offered, either Clause 5.2 or any other clause of the Tender does not prescribe any format or proforma for the certificate

mentioned in the said clause. Therefore, the "necessary certificate" required under Clause 5.2 must be such that it reasonably satisfies the BSNL that the deployment required against each network element in Clause 5.1 is met.

18. While claiming that for the purpose of the provenness of the Network element - Node B, under Clause 5.1 of Section IV of the tender the certificates supplied by the petitioner were found to be adequate and satisfactory even though the same were not original, it is contended that the BSNL cannot take a contradictory stand insofar as the Network element - RNC is concerned. It is also contended that it is illogical and impossible for an original certificate to be submitted as part of each bid in each zone and the BSNL had been accepting photo copies of the certificates insofar as the deployment criterion against Node B and VGW & SS is concerned. As a matter of fact, the BSNL had never insisted on the submission of the original certificates from the bidders and even though the petitioner had not submitted the original certificates in the North Zone tender, the BSNL did not raise any objection. It is further contended that the assurance given by the BSNL in its counter- affidavit that it had obtained an absolute clearance from Department of Telecommunications and that they have taken into consideration the security of the Nation as of paramount is irrelevant as Department of Telecommunications is not a security agency of the Central Government. The Ministry of Defence and Home being the Ministries responsible for the external and internal security of the country, the mere clearance by the Department of Telecommunications is not sufficient and the omission to take approval from the Ministries of Defence and Home is fatal to the process adopted by the BSNL.

19. Rejoinder Affidavit and Reply Affidavit:

In reply to the above Reply Affidavit of the petitioners, dated 9.6.2009 the BSNL filed a Rejoinder Affidavit dated 15.6.2009 and in response to the said rejoinder affidavit, the writ petitioners filed another Reply affidavit dated 22.6.2009. Both the parties have not sought leave of this Court for filing the said additional pleadings. At any rate, the said Rejoinder Affidavit dated 9.6.2009 and Reply Affidavit dated 22.6.2009 being in the nature of written arguments without covering any additional factual aspects, instead of burdening this judgment by extracting the said additional pleadings, I propose to consider the respective contentions of the parties in the said additional pleadings, to the extent they are relevant, at appropriate stage. Counter-affidavit filed on behalf of the 1st respondent (Union of India):

The Ministry of Home Affairs, in October, 2008, raised security concern over the participation of foreign companies, especially by the companies operating from or controlled by China in the tender in question floated by the BSNL. A committee was constituted to examine the above said issue after identifying the specific concerns stemming from participation of foreign companies in BSNL tender. The Committee submitted its report on 4.5.2009. The report was examined in the Department of Telecommunications and security guidelines/circular was issued

on 14.5.2009 to BSNL. In addition to other security related observations, it was especially intimated to BSNL in the above said security guideline that resources should not be procured from Chinese vendors for deployment in sensitive regions. The sensitive regions are defined as States having international border with China, Bangladesh, Myanmar and Pakistan. Nothing special was intimated in the above said security guidelines regarding non- selection of the 3rd respondent who was the selective bidder for South Zone. It is further stated the letter of the petitioner No. 1 dated 13.05.2009 was received in the Department of Telecommunications and accordingly comments of BSNL were sought on the said letter. BSNL being a Central Public Sector Enterprises working under the administrative control of Department of Telecommunications, it is fully empowered to take decisions on minute basis in respect of tenders floated by them and Department of Telecommunications cannot interfere in day-to-day functioning of the Central Public Sector Enterprises.

20. The 3rd respondent in whose favour the tender is finalized did not choose to file any counter-affidavit.

21. I have heard the learned Counsel for both the parties in detail. As could be seen from the pleadings narrated above, the present writ petition pertains only to the bids received for Part-2 of the Tender relating to 4.5 million 3G lines in South Zone. It is also clear that out of the three bids received, the techno-commercial bid of the petitioner No. 1 was rejected by the BSNL on the ground that it failed to demonstrate the provenness of the product (RNC element) offered by it by producing the necessary certificates from the user as required in Clause 5.2 of Section IV read with Clause 4.3 of Section I of Tender Conditions. Thus the techno-commercial bid of the petitioner No. 1 was found to be substantially non-responsive.

22. The techno-commercial bid of another bidder by name M/s. ZTE India Private Limited was also rejected on the ground that it was substantially non-responsive and the third respondent's techno-commercial bid alone was found to be substantially responsive. Consequently, the 3rd respondent alone remained in the fray and its price bid was opened on 15.5.2009 and it was decided by the BSNL to finalize the tender in its favour. The said action of the BSNL is assailed in this writ petition.

23. The contentions raised on behalf of the petitioners may be summed up as under:

(1) The rejection of techno-commercial bid of the 1st petitioner is arbitrary and illegal since the alleged failure of the 1st petitioner to establish its provenness of the product (RNC element) offered by it is factually incorrect and without any basis.

(2) The rejection of the 1st petitioner's bid without any intimation assigning reasons for such rejection is arbitrary and in violation of the principles of natural justice.

(3) The action of the BSNL in opening the price bids on 15.5.2009 without even informing the petitioners that their techno-commercial bid had been rejected is arbitrary and illegal.

(4) Even the subsequent order of rejection dated 23.5.2009 is only an after-thought to non-suit the petitioners and scuttle any enquiry into the arbitrary rejection of the 1st petitioner's technical bid.

(5) At any rate non-supply of reasons in the rejection letter dated 23.5.2009 amounts to arbitrary exercise of power vitiating the entire tender process and the same cannot be condoned by supply of reasons in the counter-affidavit in this writ petition.

(6) The action of the BSNL in short-listing the 3rd respondent alone and in deciding to finalize the tender in its favour is palpably wrong and without application of mind to the apprehensions of threats to the National security expressed by security agencies of the country.

(7) The entire decision making process adopted by the BSNL is vitiated on account of the unholy haste in which the BSNL had finalized the tender in favour of the 3rd respondent within a short period of the rejection of the 1st petitioner's technical bid.

(8) The conduct of the BSNL in opening the price bids in an extremely hasty and predetermined manner casts doubts on the transparency and integrity of the tender process.

(9) The decision making process is also vitiated inasmuch as the price bids were opened on 15.5.2009 at a time when the Model Code of Conduct due to the National Elections was in force. This unholy haste is demonstrative of the bad faith and legal malice on the part of the BSNL and invalidates the impugned action.

(10) Rejection of technical bids of all bidders except the 3rd respondent has led to a monopolistic situation which is against the spirit of healthy competition and fair opportunity to all bidders to participate in tender process and against public interest.

24. The contentions urged on behalf of the 2nd respondent/BSNL:

(The same were adopted by the respondents 1 & 3)

(1) The 1st petitioner who failed to submit any user certificates to establish the provenness of RNC equipment offered by it is an unqualified bidder and therefore the interference by this Court under Article 226 is unwarranted.

(2) The writ petitioner who has never raised any protest or objection against the mode of proof insisted upon in the Tender is estopped from contending at this stage that the conditions are impossible of compliance.

(3) The condition with regard to submission of certificate from the user was

uniformly insisted from all the bidders and nobody else pleaded that the said condition had caused prejudice.

(4) The said condition has a nexus to the object sought to be achieved and therefore cannot be held to be unreasonable.

(5) The letter dated 23.05.2009 cannot be held to be bad for want of reasons since it is only a letter of intimation to the petitioner to collect its unopened price bid but not a rejection letter.

(6) The allegations of unholy haste in finalization of tender and mala fides alleged are false and misleading. The entire evaluation process was very transparent and was done by properly constituted committees.

(7) BSNL being a fully owned Central Government Public Sector Enterprise is fully conscious of the security of the country and the financial bid of the 3rd respondent was opened only after receiving the requisite clearance from the Department of Telecommunications which is the administrative ministry of BSNL.

(8) The BSNL had given a very fair opportunity to all the bidders and there is no violation of principles of natural justice.

25. In the light of the rival contentions noticed above, the following points arise for consideration in this writ petition. Points for consideration:

(1) Whether the rejection of techno-commercial bid of the 1st petitioner is arbitrary and illegal?

(2) Whether the decision making process adopted by the BSNL in finalizing the tender in favour of the 3rd respondent is vitiated on the grounds of arbitrariness, unreasonableness or mala fides warranting interference under Article 226 of the Constitution of India?

POINT No. 1:

At the outset, it is necessary to refer to some of the relevant clauses of the Tender in question. (Section I of Tender)

4.2 Eligibility Criteria for part-2 4.2.1 The bidder eligible as per clause-3 above shall fulfill the following criteria related to establishment and experience for participation in Part-2:

(i) The bidder or its collaborator/parent company shall have supplied, installed and commissioned a minimum of 2000 Node-Bs of UTRAN. The complete details of 2000 Node-Bs with address and date of commercial launch is to be included in the bid. This Node-Bs should be working in minimum two UMTS networks of different countries.

(ii) The bidder or its collaborator/parent company should have at least two 3GPP Release-4 or higher version UMTS core network of total capacity of at least 5 million subscribers in two countries. These networks should have been

commercially operational for at least six months as on the date of bid opening. The bidder or their collaborators should have successfully completed IOT test of their core network/UTRAN with all the network elements of various vendors existing in the BSNL network and other established suppliers of network elements called for in this tender.

4.3 The bidder shall submit references of experiences in 2G and 3G, as called for above, in the form of an original certificate with company seal from the network operator signed by the senior official of the company (including name, designation, telephone number, fax numbers and e-mail id of the signatory and that of the company) of all such existing networks in operation. References shall be considered valid provided that the networks mentioned thereof exist and are in operation for the period as mentioned above. References shall also mention performance of network equipment supplied and installed. BSNL reserves the right to verify such references by visiting directly or through Indian consulate or through any other means for which necessary arrangements are to be made by the bidder. However, the cost of TA/DA shall be borne by BSNL. Only user certificates shall be considered valid and no self certification from either the bidder or their collaborators shall be accepted.

Section IV of Tender (Special Conditions)

5. Provenness of the equipment being offered

5.1 The equipment being offered shall have adequate deployment and proven performance. The deployment required for the respective equipments to be considered for this tender is as below:

No. Network Element Deployment required 1. Node-B

- (i) Minimum 2000 working installations.
- (ii) Working for at least for a subscriber base of 5 million lines.
- (iii) Working at least in 2 countries.

2. RNC

- (i) Minimum 40 working installations.
- (ii) Working for at least for a subscriber base of 5 million lines.
- (iii) Interfacing with GERAN of at least two other vendors and IP MPLS.

(iv) Working at least in 2 countries. 3. VGW&SS

- (i) At least 10 working installations.
- (ii) Serving a subscriber base of at least 10 million.

5.2 Necessary certificate from the user as specified in Section-I Clause 4.3 shall be submitted by the bidder as part of the Technical and Commercial bid to establish the provenness of the product offered.

26. As could be seen, Clause 4.2 of Section I of Tender deals in detail with the eligibility of the bidders. The criteria relating to establishment and experience have been clearly specified in Clause 4.2.1. Clause 4.3 further provides that the bidder shall submit references of experience in the form of an original certificate with company seal from the network operator signed by the Senior Official of the Company of all such existing networks in operation. Section IV of the Tender provides for Special Conditions of Contract which shall supplement the provisions contained in Sections I, II and III of the Tender and shall prevail over the said provisions if there is a conflict.

27. Clause 5 of Section IV deals with provenness of the equipment being offered by the bidder. Clause 5.1 has specified the deployment required for each Network element i.e., Node B, RNC and VGW&SS contained in the equipment offered by the bidders.

28. Clause 5.2 further provides that the necessary certificates from the user as specified in Clause 4.3 of Section I shall be submitted by the bidder as part of the technical and commercial bid to establish the provenness of the product offered.

29. Clause 5.2 of Section IV read with Clause 4.3 of Section I makes it clear that so as to establish the provenness of the product offered by them, the bidders should produce the certificates from the concerned users which shall be original certificates as specified under Clause 4.3 of Section I. The ground on which the techno-commercial bid of the petitioner No. 1 was held to be non-responsive was that the 1st petitioner failed to submit the certificates from the user in the form of original certificates so far as network element of RNC is concerned to establish the provenness of the product offered by it. It is alleged that instead of original certificates from user relating to network element of RNC, the 1st petitioner had resorted to self- certification which is impermissible under Clause 4.3 of Section I. Along with its bid, the petitioner No. 1 had submitted the following five user certificates and admittedly the said certificates did not include a separate certificate for RNC element.

(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.

30. The BSNL by its letter dated 21.01.2009 while intimating certain queries, called upon the 1st petitioner to indicate the relevant document to substantiate the experience for RNC element. The queries relating to the documents submitted by the petitioner may be extracted as under:

3.3 Please indicate the relevant documents to substantiate the experience

regarding the 3G installed subscriber base as well as the installed base of the VGW as per the requirements of the Tender. Also please indicate the relevant document to substantiate the experience for RNC.

31. The petitioner gave a reply dated 13.02.2009 as under with regard to the above said query.

(i) Please refer to experience certificates for 3G installed base enclosed in our bid. The same are enclosed herewith at enclosure No. 3.

(ii) Based on our 3G NodeB installed base as reflected in experience certificates submitted in our bid, we have provided a self certificate for qualification against tender RNC requirement. This was necessitated as our customers do not provide a separate RNC certificate but an overall UTRAN/WCDMA one. The same is enclosed herewith of Enclosure No. 3

(iii) For installed base of VGW, please refer to enclosure No. 3.

32. Thus it is clear that the 1st petitioner along with its bid had only produced a self-certificate for qualification against RNC element. It is also not in dispute that the certificate with regard to RNC element which was enclosed to its reply dated 13.2.2009 was again the self-certificate dated 3.9.2008 which was already filed along with its bid on 10.9.2008. Thereafter, the issue was again discussed in the meeting at Ghaziabad on 04.03.2009 and in response to the queries raised by the BSNL, the petitioners addressed letter dated 10.03.2009 stating as under :
"Dear Sir,

33. Enclosed please find herewith response to our second round of queries for GSM Phase VI GSM SZ tender No: TA/Cellone/SZ/2008/01 dated 01/05/2008 subsequent to our presentation is 4th March at ALTTC, Ghaziabad."

34. Along with the above letter, the petitioners had only enclosed a table with regard to its performance of elements of Node B and RNC and no user certificates were furnished.

35. As a matter of fact, the petitioners did not dispute the fact that so far as the element of RNC is concerned, it did not submit any separate certificate from the concerned users. However, it is contended that in the absence of any format or proforma being prescribed in the Tender conditions for the user certificate, the necessary certificate required under Clause 5.2 can be a certificate which reasonably satisfies the BSNL that the deployment required against each network element in Clause 5.1 is met. It is contended that it is sufficient if such certificate reflects the compliance of the bidder with the deployment criteria and as long as the certificate is sufficient to establish that the required deployment is met, the same shall be a valid and germane certificate under Clause 5.2.

36. It is further contended that as per the product description of Node Bs and RNC offered by the 1st petitioner and reflected from the certificate submitted by the petitioner No. 1 with regard to Node Bs it can be deduced that the number of

working installations of RNC would be around 45 which is much higher than the required 40 installations. It is also contended that since the 1st petitioner had demonstrated a subscriber base of 5 million against Node B by producing the user certificates and since Node Bs cannot work in isolation and need RNCs for the delivery of network capacity, the subscriber base of 5 million against Node B automatically demonstrates the subscriber base for RNC as well.

37. It would be appropriate to extract the relevant portion from the reply affidavit of the petitioners dated 9.6.2009 with regard to its aforesaid contentions as under:

Para 6.11 In this regard the petitioners state that the respondent No. 2 has overlooked the following facts while considering the user certificates submitted by the petitioner No. 1 and disregarded certain certificates completely and have thus erroneously reached the conclusion that the certificates submitted by the petitioner No. 1 are deficient:

40 working installations: As per the product description of RNC offered by the petitioner No. 1, 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 ($1440 \times 70/100$)

38. Now coming to the aspect of Node Bs, the Certificates submitted by the petitioner No. 1 under Clause 5.2 of the Tender, demonstrated the total number of deployment of Node Bs as 15177 (which Certificates the respondent No. 2 has accepted and there is no quarrel on the number of Node-B's specified therein). It is a well known technical fact that 15177 Node Bs translate into 45531 cells (15177×3).

39. Correlating the number of cells supportable as per RNC (1008) and Node Bs 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.

40. Subscriber base of 5 million lines: The petitioner No. 1 had demonstrated a subscriber base of 5 Million against Node B. This has also been accepted by the Respondent No. 2.

41. Since Node Bs cannot work in isolation and need RNC's for the delivery of Network capacity, it is natural deduction that the subscriber base of 5 million against Node B translates into the same subscriber base for RNC as well. The petitioner thus automatically demonstrated its deployment against the aforesaid criterion.

42. User Certificate interfacing with GERAN of at least two vendors and IP MPLS:

Two of the Certificates submitted by the petitioner No. 1 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 the petitioner is no exception thereto.

Para 6.12 It is thus sufficiently evident that the Certificates supplied by the petitioner established the provenness of the RNC equipment in accordance with the Tender requirements.

43. The above contention has not been accepted by the BSNL. In Para 9 of the Rejoinder affidavit filed on behalf of the BSNL dated 15.6.2009 it is stated as under:

The averment of the petitioner at para 6.11 of the Reply affidavit that ... "since Node Bs 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" is not tenable as the interface between Node B and RNC is an open one and not proprietary. This means that the Node B of one company/make can be connected to the RNC of any other company/make (as the interface is defined on the open 3GPP standards) and it is for this reason that a separate eligibility for RNC is explicitly given in the tender. In the absence of clear mentioning of the RNC in the provenness certificates by the users, it is difficult to establish that the same make RNCs have been utilized towards realization of the stated subscriber capacity.

44. The learned Counsel for the writ petitioners, while explaining in detail the definitions of Node B, Radio Network Controller (RNC) and Universal Terrestrial Radio Access Network (UTRAN) and their respective architecture and functions, submitted that the UTRAN Network includes both Node B and RNC element and therefore the certificates supplied by the 1st petitioner from its user which confirmed that the 1st petitioner had supplied a UTRAN network means that the 1st petitioner had supplied both RNC and Node B manufactured by it to the user.

45. The learned Counsel for the petitioners vehemently contended that the rejection of the 1st petitioner's techno-commercial bid on a flimsy ground that it had failed to produce the user certificates to establish the provenness of RNC element was on a wholly erroneous understanding. It is also contended that as the certificates already produced by the 1st petitioner clearly demonstrated that it is the 1st petitioner who had provided such a 3G network including the number of elements that were utilized towards attaining such a subscriber capacity, it is untenable to assume that the components are from the manufacturers other than the 1st petitioner. At any rate, according to the petitioners, the non-submission of the original certificates cannot be termed as a material deviation so as to entitle the BSNL to reject the petitioner's techno-commercial bid as not substantially responsive.

46. These are all highly technical aspects which cannot be enquired into and decided by this Court in exercise of writ jurisdiction. Since this Court does not

have the expertise to record a finding as to the sufficiency or otherwise of the certificates produced by the petitioner and moreover since the power of Judicial Review is not an appeal from the decision, this Court will not substitute its decision for that of the BSNL.

47. It is also relevant to note that the 1st petitioner had admittedly failed to submit the original certificates from the user with regard to RNC element as required under Clause 5.1 and Clause 5.2 of Section IV read with Clause 4.3 of Section I of the Tender. May be that, according to the petitioners, the documents already furnished by it are sufficient to satisfy the provenness of the RNC element in the equipment offered by it. However as held in *M/s. G. J. Fernandez Vs. State of Karnataka and others*, it is for the Tender Inviting Authority to decide the sufficiency or otherwise of the documents submitted by the bidders. When the Tender Inviting Authority found that the documents were not sufficient, this Court will not sit in appeal over the decision of the Tender Inviting Authority and substitute its opinion.

48. On a combined reading of Clauses 5.1 and 5.2 of Section IV and Clause 4.3 of Section I of the Tender it seems clear to this Court that submission of the certificates as specified in Clause 5.2 of Section IV read with Clause 4.3 of Section I is mandatory to establish the required deployment of each network element in the equipment offered by the bidders. It is also clear from the said Clauses that the equipment being offered by a bidder has to meet the standards prescribed in Clause 5.1 of Section IV and provenness of the equipment offered has to be established only in the method specified in Clause 5.2 read with Clause 4.3 of Section I of the Tender. As held in *Ram Gajadhar Nishad v. State of U.P.*, (1990) 2 SCC 486, a tenderer can legitimately be excluded from consideration if he fails to comply with such mandatory condition.

49. Hence the contention of the petitioners that the documents already submitted by it are sufficient to establish provenness of its product cannot be accepted as a valid ground to upset the decision of BSNL. It is also not for this Court to determine whether the decision taken by the BSNL is fair since this Court is only concerned with the manner in which the decision has been taken.

50. The further contention of the learned Counsel for the petitioners that the BSNL could have sought a clarification whether the certificates filed by the 1st petitioner meant it was the manufacturer of both RNC and Node B or it could have checked with various operators whose certificates had been submitted by the 1st petitioner instead of straightaway rejecting its techno-commercial bid is also untenable. As could be noticed from the material placed before this Court, various meetings were held and there was also exchange of letters with particular reference to the provenness of the RNC element in the equipment offered by the 1st petitioner. The petitioners sought to justify the production of self-certifications with regard to RNC element on the very same reasons that are urged in this writ petition. However the explanation was not to the satisfaction of the BSNL and ultimately the technical bid of the 1st petitioner was declared as

non-responsive. There is also no reason to assume that the BSNL had incorrectly understood the Tender Conditions. It is also relevant to note that the impugned decision was reached by the BSNL after series of discussions with the petitioners and after evaluation by experts. No case could be made out to show that the said decision was actuated by mala fides.

51. In the circumstances, the BSNL cannot be found fault with in holding that the first petitioner's techno-commercial bid is substantially non-responsive and its decision is neither erroneous nor illegal.

POINT No. 2:

52. The action of the BSNL in finalizing the tender in favour of the 3rd respondent has been assailed before this Court firstly on the ground that the decision making process adopted by the

53. BSNL was vitiated on account of unholy haste in which the tender was finalized in favour of the 3rd respondent.

54. The said allegation is sought to be substantiated on the ground that the financial bid of the 3rd respondent was opened within a short period of the rejection of the 1st petitioner's technical bid and that too at a time when the Model Code of Conduct due to the National Elections was in force.

55. It is alleged by the petitioners that the price bids were opened late in the evening of 15th May, 2009 after the office hours and on the eve of the National election results at a time when the model Code of Conduct during elections was in force. It is also alleged that after receiving the clarification from the 1st petitioner to the queries raised at the meeting in Ghaziabad on 04.3.2009 the BSNL kept quiet and without informing the petitioners that the 1st petitioner's technical bid was found non-responsive, the price bid of the 3rd respondent was opened on 15.5.2009 at around 7.00 pm. According to the petitioners, the above said circumstances manifested unholy haste casting doubts on the transparency and integrity of the tender process.

56. At the outset, it is to be noted that there is no express clause in the Tender which requires any intimation to the bidders, whose technical bid was found to be non-responsive. As per Clause 21.6 of Section II the only requirement is that the financial bids of those bidders whose technical bids are determined as substantially non-responsive shall be returned unopened. The said Clause is extracted hereunder:

21.6 The financial bids of only those technical and commercial bids that are determined as substantively responsive shall be opened. The financial bids of those technical and commercial bids that are determined as substantively non-responsive shall be returned to the respective bidders unopened.

57. In the light of the above provision, the action of the BSNL in not informing the 1st petitioner that its technical bid was found to be non-responsive soon after

the decision of the Tender Evaluation Committee, was neither unusual nor contrary to Tender Conditions.

58. In the counter-affidavit dated 2.6.2009 filed on behalf of the BSNL, it is explained that the Committee for Evaluation of Tender (CET) recommended to open the financial bid of the 3rd respondent only as their techno-commercial bids alone were substantially responsive and the said recommendation was accepted by the competent authority on 22.4.2009 itself. However, the opening of the financial bid was kept pending for want of clearance from the Department of Telecommunications. Immediately on receipt of the said clearance, the financial bids of the 3rd respondent were opened on 15.5.2009. The allegation that the financial bids were opened at about 7.00 pm after the working hours has been denied and it is asserted that the bids were opened well within the office working hours at about 15.15 hours.

59. Thus it is clear that the financial bids were opened after more than three (3) weeks from the date of acceptance of the recommendations of the Tender Evaluation Committee and the allegation that the BSNL had opened the financial bids in an extremely hasty and predetermined manner is unfounded and unwarranted.

60. So far as the Model Code of Conduct issued by the Election Commissioner of India is concerned, it is explained in the counter-affidavit dated 2.6.2009 that the same did not bar the evaluation nor consideration of the evaluation reports by the competent authority. It is also stated that the Election Commissioner's Code had expired by 15.5.2009 and the 3rd respondent's bid was accepted by the competent authority on 27.5.2009 and thus the finalization of the tender was only on 27.5.2009 after the expiry of the Election Model Code of Conduct. The letter dated 5.3.2009 received from the Election Commissioner of India with regard to enforcement of Model Code of Conduct has been placed before this Court. The relevant clause with regard to finalization of tenders reads as under:

Tenders other than Global tenders that are already floated may be evaluated but not finalized without prior approval of the Commission. If they are already floated they shall not be floated without prior approval of the Commission.

61. Since the tender was finalized on 27.5.2009 after the expiry of the Election Model Code of Conduct, the same cannot be held to be contrary to law.

62. Hence the alleged unholy haste on the part of the BSNL in finalizing the tender is without any basis and the contention that the tender process is not transparent is untenable.

63. Next, it is contended on behalf of the petitioners that the action of the BSNL in opening the price bid of the 3rd respondent without informing that the techno-commercial bid of the 1st petitioner had been rejected and particularly non-supply of reasons in the Rejection letter dated 23.5.2009 amounts to arbitrary exercise of power vitiating the entire tender process. It is also

contended that the rejection letter dated 23.05.2009 which was absolutely without any reasons is liable to be set aside on that ground alone. In support of the said contention, the learned Counsel for the petitioners relied upon a decision of the Supreme Court in *Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.*, . It is further contended by the learned Counsel for the petitioners that the reasons subsequently stated in the counter-affidavit to justify the rejection of the techno-commercial bid of the petitioner cannot be taken into consideration in view of the settled law that the reasons cannot be supplanted in the counter- affidavit.

64. There can be no dispute about the well-settled principle of law that the validity of the order made by a statutory functionary must be judged by the reasons mentioned at the time of the order and such reasons cannot be supplemented or introduced in the affidavit or pleadings filed subsequently. However, the letter dated 23.5.2009, by no stretch of imagination can be construed as an administrative order. It is only a communication to the 1st petitioner that its bid was found substantially non-responsive on the techno-commercial grounds and requesting it to collect the bid security and the unopened financial bid.

65. The said communication to the 1st petitioner, who was an unqualified bidder, was given in terms of Clause 21.6 of Section II of the Tender and there is no other provision under the Tender which requires a specific intimation to the unqualified bidder either soon after its disqualification or prior to the opening of the price bids of Qualified bidders. As provided under Clause 21.6 of the Section II of the Tender, the only requirement is that the unopened financial bid shall be returned to the unqualified bidder. In the absence of any other provision, the action of BSNL in sending the letter dated 23.05.2009 to the 1st petitioner after opening the price bids cannot be held to be illegal and no motives can be attributed to BSNL on the ground of the alleged delay in giving the intimation to the 1st petitioner about its disqualification.

66. It is true that Clause 26 of Section II of the Tender reserves the purchaser's right to accept any bid and to reject any or all bids without assigning any reasons whatsoever. In my considered opinion, the said clause which provides for rejection of the bid is not at all involved in the present case. This is a simple case where the 1st petitioner's techno-commercial bid was found to be substantially non-responsive by the Tender Evaluation Committee and therefore after eliminating the 1st petitioner from consideration of its financial bid, it was called upon to collect its unopened financial bid. In *Dinesh Engineering Corporation's* case (3 supra) the Supreme Court was dealing with a case where the bid of the petitioner therein was rejected invoking a clause which was identical to Clause 26 of Section II whereunder the purchaser's right to accept or reject any or all bids without assigning any reasons was reserved. In the said context, it was held that the said power of the Railways (Tender Inviting Authority) was not disputed provided the same was exercised within the realm of the object for which the

said clause was incorporated. It was also held that the said clause did not give any arbitrary power to the Railways to reject the bid offered by a party merely because it had that power and that it was a power which could be exercised on the existence of certain conditions which in the opinion of the Railways were not in the interest of the Railways to accept the offer.

67. As expressed above, the BSNL has not invoked Clause 26 of Section II and it is not a case of rejection of 1st petitioner's bid. Hence, the action of the BSNL on the ground that no reasons were assigned in the letter dated 23.5.2009 cannot be held to be arbitrary, illegal or violative of principles of natural justice and the contention that the decision making process of the BSNL was vitiated on account of arbitrariness is untenable.

68. It is further contended by the learned Counsel for the petitioners that the action of the BSNL in short-listing the 3rd respondent, who is a foreign bidder, and in finalizing the tender in its favour ignoring the National security concern expressed by the Ministry of Home Affairs is against the public interest and therefore on that ground also the decision making process is vitiated. It is true that the 3rd respondent is a foreign bidder. However, the counter- affidavit filed on behalf of the 1st respondent shows that the issue relating to participation of foreign companies especially the companies operating from or controlled by China in the tender in question floated by BSNL attracted the attention of the Ministry of Home Affairs in October, 2008 and pursuant to the security concern raised by the Ministry of Home Affairs, the Department of Telecommunications had constituted a Committee to examine the said issue. It is stated in the counter-affidavit that in terms of the Committee's report dated 4.5.2009 the Department of Telecommunications issued a Circular dated 14.5.2009 to the BSNL informing that resources should not be procured from Chinese vendor's for deployment in sensitive regions i.e., States having international boarder with China, Bangladesh, Myanmar and Pakistan. It is stated by the BSNL that as per the said guidelines/circular there is no prohibition for selection of the 3rd respondent so far as South Zone is concerned since it does not fall under the sensitive regions specified in the Circular dated 14.5.2009. From the above counter-affidavit, it is clear that the Department of Telecommunications has already applied its mind to the security concern raised by the Ministry of Home Affairs and appropriate decision has been taken. Nothing could be placed before this Court by the petitioners to show that such a decision taken by the Department of Telecommunications requires further approval from the Ministry of Defence or Ministry of Home nor the said Ministries are made parties to this writ petition. In the circumstances, the finalization of the tender in favour of the 3rd respondent cannot be set at naught merely on the basis of the apprehensions expressed by the petitioners. Conclusion:

69. The law is well-settled that even in matters in which the Government bodies exercise their contractual powers, the principle of judicial review cannot be denied. However as held by the Supreme Court in a catena of decisions, in such

matters judicial review is intended to prevent arbitrariness or favouritism and it must be exercised in larger public interest. It has also been held by the Courts that in matters of judicial review the basic test is to see whether there is any infirmity in the decision making process and not in the decision itself. It has also been made clear by the Courts that the right to choose cannot be considered to be an arbitrary power except where the said power is exercised for any collateral purpose. It is also a well-settled principle of law that since the power of judicial review is not an appeal from the decision, the Court cannot substitute its decision for that of the decision maker. The interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by mala fides. [vide (1) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, ; (2) Tata Cellular Vs. Union of India, ; (3) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, ; (4) Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, ; and (5) Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others,].

70. Having regard to the reasons stated while deciding Points 1 & 2 and in the light of the settled principles of law noticed above, this Court is of the opinion that the BSNL had neither exceeded its powers in finalizing the tender in favour of the 3rd respondent nor committed an error of law. It cannot also be held that the BSNL reached a decision which no reasonable person would have reached. The alleged unholy hastiness in finalisation of Tender in favour of the 3rd respondent and the allegation that the 1st petitioner was deliberately kept in dark as to its disqualification to defeat its rights and scuttle any enquiry into the rejection of its bid are unfounded and seem to be mere assumptions of the 1st petitioner who is an unqualified bidder. As such they do not constitute legal malice or bad faith so as to vitiate the decision making process of the BSNL.

71. As observed in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, the award of a contract, whether it is only a private party or by a public body or the State, is essentially a commercial transaction and one of the considerations which is of paramount importance in arriving at a decision is whether the goods or services offered are of the requisite specifications. Such consideration is essential to decide whether the person tendering has the ability to deliver the goods or services of the requisite standard and quality.

72. In the instant case, the requirement under Clause 5.2 of Section IV read with Clause 4.3 of Section I of the Tender with regard to production of certificate of experience in the form of original certificate from the user in respect of all the 3 network elements specified in Clause 5.1 of Section IV was uniformly insisted from all the bidders and the first petitioner had participated without raising any objection with regard to the mode of proof prescribed in the Tender.

73. It is not disputed before this Court that the 3rd respondent, who was the successful bidder, had satisfied the said requirement as well as all other conditions prescribed under the eligibility criteria. It is not a case where any

relaxation is granted in favour of the 3rd respondent. Hence, the allegation of bias or favouritism is unfounded. No other specific allegation of any collateral motive in awarding the contract in favour of the 3rd respondent has been made by the petitioner. Admittedly, the writ petitioner is an unqualified bidder. As held in RAUNAQ INTERNATIONAL LTD'S case, no judicial relief can be granted at the instance of such a party, who failed to fulfill the requisite eligibility criteria.

74. For the aforesaid reasons, the impugned action of the BSNL cannot be held to be arbitrary or illegal and the interference by this Court is not warranted on any ground whatsoever.

75. The Writ Petition is accordingly dismissed. No costs.