
(1999) 08 DEL CK 0019

In the Delhi High Court

Case No : Civil Writ Petition No. 1769 OF 1998 and C.M. No's. 2947, 7900 and 9238/98

Vinitec Electronics Private Limited

APPELLANT

Vs

The World Bank and Others

RESPONDENT

Date of Decision : 19-08-1999

Acts Referred:

Citation : (2000) 3 AD 355 : (2000) 85 DLT 5 : (2000) 53 DRJ 209

Hon'ble Judges : A.D. Singh, J

Bench : Single Bench

Advocate : Mr. Mukul Rohtagi, Mr. Jatinder Sethi and Mr. Shyam Moorjani, for the Appellant; Mr. Arun Mohan , Mr. Prakash Vasudeva, Mr. Adarsh B. Dial, Ms. Sumati Anand and Mr. Vikramajit Sen, for the Respondent

Judgement

Anil Dev Singh, J.—This is a writ petition whereby the petitioner, Vinitec Electronics Private Limited, seeks quashing of the award of the contract for supply of uninterrupted power supply systems (for short "UPS systems") to the seventh respondent Next Generation Business Power Systems Ltd., (for short "NGBPSL"). The facts giving rise to the petition are as follows :

2. On November 7, 1996 the World Bank gave loan to the Government of India for modernisation of the banking operations in the country. As one of the beneficiaries under the aforesaid project of the World Bank the fourth respondent Syndicate Bank, invited sealed bids vide its tender No. SB:CPPD: WB: ICB: UPS: 05/97 dated June 1, 1997 for supply, installation and commissioning of UPS systems for working of their computers. The date of opening of the bids was fixed as December 4, 1997. The competitors including the petitioner and the seventh respondent submitted their bids. The bid of the petitioner was rejected, while that of the seventh respondent was accepted. As a result thereof the seventh respondent was called upon to make supplies of UPS systems as per the following purchase orders :

3. The petitioner not being satisfied with the award of the contract to the seventh

respondent submitted a complaint to the Operations Adviser, World Bank, on February 4, 1998. Pursuant thereto the World Bank by its letter dated February 9, 1998 sought the comments of the fourth respondent (Syndicate Bank). On receipt of this letter the fourth respondent by its letter dated February 14, 1998 furnished its comments to the World Bank. Thereafter, on March 2, 1998 the Operations Adviser, World Bank, informed the petitioner that its complaint had been looked into but there was no basis for the same. Thereafter, the fourth respondent by its letter dated March 27, 1998 to the petitioner communicated the reasons for not considering the bid submitted by the petitioner. The petitioner feeling aggrieved of the award of the contract in favor of the seventh respondent has filed this writ petition but no relief is being sought in respect of the letter of the fourth respondent dated March 27, 1998.

4. I have heard learned counsel for the parties and have given my earnest consideration to the arguments raised by them. First I will deal with the following submissions of the learned counsel for the petitioner : (1) The fourth respondent appointed the fifth respondent National Centre for Software Technology (for short "the NCST"), for the purpose of evaluating the bids though the fifth respondent did not have the competence to undertake the job as it was dealing with software and not with hardware systems, the latter being the category under which the UPS systems fall. (2) The NCST delegated the function entrusted to it and appointed a consultant Shri Bharat Desai to evaluate the bids which it was not competent to do as the NCST did not have the power to further delegate its function assigned by the fourth respondent to an outsider. (3) Shri Bharat Desai was a good friend of a senior executive of the seventh respondent and has showed a bias in favor of the seventh respondent.

In order to appreciate the submissions of the learned counsel for the petitioner it will be necessary to notice the additional affidavit of Mr. George Arakal, Chief Administrative Officer of the NCST, dated September 22, 1998. The additional affidavit while referring to the origin of the NCST states that it was set up by the Government of India, Department of Electronics. The affidavit further states that apart from its expertise in software, the NCST is equally apt in hardware systems and computer networks. The affidavit also alludes to the fact that the NCST has a hardware division manned by qualified and experienced team of engineers who hold degrees in Electrical/Electronics Engineering and have undergone rigorous training in the relevant field of Hardware Engineering both in India and abroad. The affidavit recounts the achievements of the NCST in the field of consultancy in the areas of specification planning, evaluation, selection and installation of computers, UPS, ATM, MTCR, equipment, hardware systems and computer networks. The affidavit reflects that NCST has in the past provided consultancy to the Indian Oil Corporation, Hindustan Petroleum, Oil and Natural Gas Commission, Oil Coordination Committee, Indian Council for Agricultural Research, Banking Sector including Reserve Bank of India, Stock Exchanges, Ministry of Human Resource Development of the Government of India, Ministry of Environment, Government of India and Government of Maharashtra in the above

said areas. It is also pointed out therein that the NCST has been a consultant for International Institutions such as United Nations Development Programme, Commonwealth Secretariat, London, United Nations University, Netherlands, UNESCO, UNCSTD, etc. The affidavit also specifies in Annexure "A" thereto the names of several other clients to whom NCST has provided consultancy in the field of computer hardware, local area networks, wide area networks, MICR equipments, automated teller machines, UPS systems, etc. The list shows leading institutions numbering thirty-four which have benefited from the consultancy provided by the NCST.

5. The, affidavit also reflects that the technical evaluation of the bids in question was undertaken by a team of senior officers of the NCST. The affidavit highlights the fact that the NCST is manned by qualified and experienced persons including its following employees :_

6. The petitioner has not been able to controvert the achievements, expertise and experience of the NCST in the field of UPS systems, ATM, MICR equipments, hardware systems and computer networks. In the circumstances, Therefore, I do not agree with the learned counsel for the petitioner that the NCST was not competent to evaluate the bids. Therefore, the challenge of the petitioner that the NCST did not have the requisite competence to evaluate the bids fails.

7. The impression of the petitioner that the NCST delegated its functions to evaluate the bids to an individual. Shri Bharat Desai, an outside consultant, is also without any foundation as Shri Bharat Desai is an officer of the NCST. Besides, as is evident from the aforesaid affidavit of the Administrative Officer of the NCST, the technical evaluation of the bids was done by a team of officers of the NCST which did not include Bharat Desai. It is further manifest from the affidavit that the evaluation was done by the said team in their collective wisdom and not by an employee thereof in his individual capacity. The allegation of the petitioner that Shri Bharat Desai was friendly to a senior executive of the seventh respondent has been categorically denied in the affidavit. The petitioner has not been able to substantiate the allegation. In any case Shri Bharat Desai was not a member of the team which made technical evaluation of the bids and Therefore the said challenge of the petitioner is devoid of any force.

8. The circumstances in which the NCST was appointed as the technical consultant for the purpose of advising the fourth respondent in the matter of evaluation of the bids also need to be noticed as some grievance was made with regard to its appointment being an outside agency. At same time the role of the fourth respondent in evaluating the bids is also required to be seen. According to the reply of the fourth respondent filed on May 12, 1998, which is supported by an affidavit of Shri P.K. Saxena, Manager in its head office, the UPS system is a sophisticated electronic equipment and since the fourth respondent did not have in house expertise in evaluating the bids in respect of such a technical and sophisticated equipment, it appointed the NCST as its technical consultant for the purposes of advising it on the evaluation of the bids. It is pointed out that the

NCST on examination of each of the bids submitted a detailed report in respect thereof. An officer of the bank from the Computer Policy Planning Department remained associated throughout with the NCST during the process of technical evaluation of the bids.

9. The reply of the fourth respondent also shows that on receipt of the report from the NCST the matter was placed before the Hardware and Software Evaluation Committee of the bank. The Committee was headed by a General Manager of the bank at Head Office at Manipal and it also included an external technical expert, Prof. S. Rajaram, Head of the Department of Computer Sciences of Manipal Institute of Technology, Manipal. The said committee of the bank considered the bids along with the report of the NCST. The reply further points out that the bid of the petitioner was not found to be responsive, while that of the seventh respondent was found to be substantially responsive.

10. Thus it is clear that the fourth respondent did not commit any illegality in requisitioning the services of the NCST for the purposes of technical evaluation of bids in view of latter's expertise in the field of UPS and hardware systems. This was done without the fourth respondent losing control over the matter of final selection of the bidder for carrying out the work in question. The fact that an officer of the bank remained associated with the NCST till the completion of the process of technical evaluation of the bids and the fact that after the technical evaluation of the bids by the NCST the matter was further examined by the Hardware and Software Evaluation Committee of the Syndicate Bank, is a pointer to the fact that the final say in the matter remained with the fourth respondent and it did not abdicate its power and function in favor of the NCST.

11. I will now examine the further arguments advanced on behalf of the petitioner. Learned senior counsel for the petitioner, submitted that the seventh respondent did not fulfill the eligibility criteria as specified in the tender documents. In this regard the petitioner relied upon qualification criteria laid down in Section VI A of the Invitation for Bids. Construing the criteria the learned senior counsel for the petitioner contended that the seventh respondent submitted its bid as a manufacturer though it did not qualify as a manufacturer of UPS systems. According to the learned counsel, a bidder should not only be a manufacturer or an authorised representative of a manufacturer, but should have on an earlier occasion designed, manufactured, tested and supplied at least 50% of the quantity of the equipment similar to the type specified in the Schedule of Requirements, and its equipment must have been in successful operation for two years as on the date of the opening of the bids. It was pointed out that the seventh respondent was incorporated under the Companies Act, 1956, only on December 28, 1995 and Therefore its equipment could not be said to have been in successful operation for two years as on the date of the opening of the bids. Learned counsel also submitted that though the seventh respondent claims to be a manufacturer, it does not have any manufacturing facility at all and it had not on an earlier occasion designed, manufactured and supplied 50% of the quantity

of the equipment similar to the type specified in the Schedule of Requirements. According to the petitioner, the seventh respondent has been only a distributor of Fiskars Power Systems of Finland and power systems of some other foreign manufacturers in India : actually the seventh respondent has the experience of supplying UPS systems as a distributor only and has no expertise in manufacturing and designing the equipment in question; the seventh respondent merely procures the UPS systems from other sources and passes on to the purchasers; and the seventh respondent has wrongly held out to the fourth respondent that it was a manufacturer of the said systems. Learned counsel for the petitioner also urged that by merely importing CKD kits of UPS systems and assembling them, it does not make the petitioner a manufacturer of UPS systems. It was argued that since the seventh respondent did not fulfill the eligibility criteria, its bid should have been rejected by the fourth respondent.

12. I have considered the aforesaid submissions of the learned counsel for the petitioner. In order to appreciate the submissions of the learned counsel for the petitioner it will be necessary to refer to the eligibility criteria laid down in the "Invitation of Bids". The criteria is laid down in Part VI A of the bid documents. The said qualification criteria is reproduced below to the extent it is relevant :-

"(a) The Bidder should be a manufacturer/authorized representative of a manufacturer who must have designed, manufactured, tested and supplied AT LEAST 50% OF THE QUANTITY OF THE EQUIPMENT(S) SIMILAR TO THE TYPE SPECIFIED IN THE SCHEDULE OF REQUIREMENTS WHICH SHALL BE IN SUCCESSFUL OPERATION FOR AT LEAST 2 YEARS AS ON THE DATE OF BID OPENING. [The Bidder should invariably furnish documentary evidence in support of the above qualification criterion].

xx xx xx"

13. As per the aforesaid criteria the bidder should be a manufacturer or an authorised representative of a manufacture and must have designed, manufactured, tested and supplied at least 50% of the quantity of the equipment similar to the one specified in the "Schedule of Requirements" of the Invitation for Bids, and such similar equipment should be in successful operation for at least two years as on the date of opening of the tenders.

14. At this stage, the stand of the fourth and the seventh respondents that the seventh respondent imports CKD kits of UPS systems and assembles them in India and makes a value addition to the product in accordance with the terms of the Invitation for Bids needs to be noted. In view of this fact situation the first question which requires determination is whether the seventh respondent can be called a manufacturer. In order to arrive at the meaning of the word "manufacturer" as occurring in clause (a) of Section VI A of the Invitation for Bids it would be necessary to refer to clauses 10.2 and 27.1 of Section II of the Invitation for Bids. These clauses reads as follows :_

"10. BID FORM

xx xx xx

10.2 For the purpose of granting a margin of domestic preference pursuant to Clause 27, the Purchaser will classify the bid, when submitted, in one of the three groups, as follows :

10.2.1. Group A : Bids offering goods manufactured in India for which the domestic value added in the manufacturing cost is not less than 20% of the exfactory price;

10.2.2 Group B : Bids offering goods manufactured in India for which the domestic value added in the manufacturing cost is less than 20% of the exfactory price, and for goods of foreign origin already located of foreign origin already located in the Purchaser's country; and

10.2.3. Group C : Bids offering goods of foreign origin to be imported by the Purchaser directly or through the supplier's local agent.

xx xx xx"

"27. DOMESTIC PREFERENCE

27.1. In the comparison of evaluated bids, the Purchaser will grant a margin of preference to goods manufactured in India in accordance with the following procedures, provided the Bidder shall have established to the satisfaction of the Purchaser and the World Bank that the manufacturing cost of such goods includes a domestic value added equal to at least 20% of the exfactory bid price of such goods.

xx xx xx"

15. The aforesaid clauses give a clue to the meaning of the word "manufacturer". It does not rule out the procurement of CKD kits or any part of the UPS system by the bidder. A person would be qualified to bid even when he buys the components of the UPS systems from abroad, assembles them in India and makes a value addition of the Indian components thereto to the extent indicated in the aforesaid clauses as such a person would still be a manufacturer.

16. According to the stand of the fourth respondent as noticed from its reply affidavit, assembly of CKD kits with value addition is considered manufacture by the vendor. I do not see how the stand of the bank and the seventh respondent can be faulted. If the work "manufacturer" was intended to mean a vendor who would be making all the components of the UPS systems itself then there would have been no use of clauses 10 and 27 of Section II of the "Invitation for Bids". It is common knowledge that a manufacture of a mechanical device involves putting of the various components together so that it can be used for the purpose for which it is manufactured. More often than not it is not feasible for a manufacturer to manufacture all the components by itself. Usually manufacturers of products procure different parts from different sources and assemble them for producing mechanical devices. For the purpose of illustration the example of a

motor car would be apposite. Under the bonnet it has an engine, carburetor, battery, distributor, ignition system and various other components. The car manufacturers by and large buy these components from different manufacturers of such parts and assemble them to produce a car. The car manufacturers cannot be expected to manufacture all the components required to produce cars in their factories. They still remain car manufacturers even when they produce cars by utilising the components purchased from the market. Similar is the case with the seventh respondent. It is using CKD kits to produce UPS systems but as long as it makes value additions thereto to the tune of 20% or more on ex factory price, the seventh respondent will fall in the category of a manufacturer. The petitioner has not been able to dislodge the claim of the fourth and seventh respondents that the seventh respondent was making value addition to the UPS systems in accordance with the terms of Invitation for Bids (see reply affidavit of fourth respondent dated May 12, 1998 and para 13 of the reply affidavit of the seventh respondent dated May 12, 1998). In the affidavit of the fourth respondent it has also been categorically stated that its officers along with the consultant visited the factory of the seventh respondent prior to the award of the contract and it was verified on such inspection that the seventh respondent was importing CKD kits. According to the fourth respondent it was established that there was a component of value addition by the seventh respondent to the equipment in question. It has been categorically denied by the fourth respondent that the seventh respondent has no manufacturing facility. In the circumstances, Therefore, the process of assembly by the seventh respondent has been rightly considered as manufacture by the fourth respondent.

17. As regards the submission of the learned counsel that the seventh respondent cannot be said to have designed the UPS systems as it was using CKD kits from other sources, again, the illustration of the car can be considered to test the same. Though the car manufacturers may be using components produced by the various manufacturers, the design of the car can still be theirs. Therefore, it cannot be said that since the seventh respondent purchased CKD kits, it cannot be said to have designed the UPS systems.

18. Insofar as the submission of the learned counsel for the petitioner that the seventh respondent was incorporated only on December 28, 1995 and, Therefore, on December 4, 1997, the date of the opening of the bids, its equipment could not be said to have been in successful operation for at least two years on the date of opening of the bids, the stand of the fourth and the seventh respondents may be seen from their respective reply affidavits. It is claimed that the seventh respondent had been operating business of manufacture and supply of UPS systems since 1993. This claim is made on the ground that in 1996 it had taken over "Business Power Systems" which was one of the divisions of the parent company known as Associated Techno Plastic Pvt. Limited. The division is said to have been transferred by the Associated Techno Plastic Pvt. Limited to the seventh respondent w.e.f. April 1, 1996. The fourth respondent accepted the bid of the seventh respondent on being satisfied that the latter had supplied similar

UPS systems to various parties such as Steel Authority of India Limited, SIDBI, Govt. of Assam, TISCO, IDBI Bank, State Bank of India, LIC and other large companies. It was also demonstrated to the fourth respondent by the seventh respondent that the similar UPS systems purchased by various companies had been in successful operation since more than two years prior to the opening of the bids. The argument of the petitioner that since the seventh respondent was incorporated on December 28, 1995 and the bids were opened on December 4, 1997, Therefore it could not be said to have been in existence two years prior to the opening of the bids, and consequently its equipment could not be said to be in successful operation for at least two years as on the date of the opening of the bid, appears to be plausible on the surface and first blush. It has been pointed out by the fourth and the seventh respondents that the latter had not only taken over the business of the Business Power Systems but it had also taken over the office and staff of the said division. Since the Business Power Systems (BPS) was already in the business of manufacture and supply of UPS systems since 1993, the seventh respondent on taking over of Business Power Systems can be said to have acquired the same expertise and skill which was available with Business Power Systems. It seems to me that the requirement laid down in the Invitation for Bids is for the purpose of ensuring that the party whose bid is accepted has the necessary expertise and skill in the manufacture and supply of UPS systems. What the fourth and seventh respondents in essence claim is that the seventh respondent assimilated the experience and expertise of Business Power Systems. It must be considered as an entity with past experience since 1993 as it had subsumed and absorbed the business of "Business Power Systems", its staff, office and experience in the field. This identification of the seventh respondent with the Business Power Systems cannot be ignored. In the circumstances, claim of the seventh respondent that it had supplied UPS systems in the past and it fulfills the above said condition of two years, it cannot be brushed aside in view of its link with the Business Power Systems.

19. The requirement of two years laid down in the "Invitation for Bids" is not to be construed pedantically but needs to be construed so as to subserve the purpose for which such a condition was laid down. It was argued by the learned counsel for the seventh respondent that it is not necessary that the seventh respondent ought to have been established two years prior to the date of opening of the bids as per the requirement laid down in Section II of the "Invitation for Bids". According to him, clause (a) of Section VI A of the Invitation for Bids merely lays down that the equipment manufactured by a vendor should be similar to the one which is in successful operation for at least two years as on the date of the bid opening. This interpretation of clause (a) of Section VI A is plausible, but it is not necessary to examine the same in detail for arriving at any definite conclusion as the seventh respondent in any event, as already noted, had the advantage of absorbing the business of another enterprise, namely; Business Power Systems with all its experience and expertise gained since the year 1993. This aspect was examined not only by the purchaser

bank but also by the World Bank. The World Bank took into consideration that the seventh respondent had acquired the assets and liabilities of another company in January 1996 which included the full benefit of all pending contracts and engagements and orders in connection with the said business. In this connection it may be recalled that the petitioner had filed a complaint to the Operations Adviser, World Bank, against the award of the contract to the seventh respondent. The World Bank on examining the complaint of the petitioner found the same to be baseless. In this regard its letter to the petitioner dated March 2, 1998 reads as follows :_

"INDIA : Financial Sector Development Project Modernization and Institutional Development Component Loan 3857-INprocurement of UPS from M/s. NGBPS.

Thank you for your letter of February 4, 1998 regarding the above. We have reviewed the cases cited by you and note that out of six bids referred by you, Sl. No. 2 is yet to be decided. Sl. No. 5 was processed for award to M/s. NGBPS as an agent of M/s. Fiskars and Sl. No. 6 was awarded to another bidder.

An examination of the remaining three bids indicates that :

M/s. NGBPS acquired the assets and liabilities of another company in January 1996, which included "the full benefit of all pending contracts engagements and orders in connection with the said business."

Supplies of UPS made by them during 1994-1995 and onwards have value addition in India ranging from 2% to 35%. Taking these supplies with varying percentages of value addition the borrowers have verified and satisfied themselves that the said supplies met with the specified criteria.

We have looked into the matter and have concluded that we have no basis on which to object to the decision taken by the borrower.

We appreciate your interest in the matter and hope that you would continue to participate in the Bank assisted projects."

20. While judicial review of exercise of contractual power of the Government or its bodies can be made by the High Court sitting in the writ jurisdiction, it is only in cases where the Government or its bodies have acted illegally and illogically and their actions smack of mala fides, arbitrariness, unfairness and unreasonableness that the court will interfere. But the impugned order does not suffer from these maladies.

21. It also needs to be noted that the petition raises disputed questions of fact. While the petition avers that the seventh respondent does not fulfill the eligibility criteria inasmuch as it was not a manufacturer and had not manufactured 50% of the quantity of the equipment similar to the type specified in the Schedule of Requirements which was in successful operation for two years as on the date of opening of the bids, the fourth and the seventh respondents have categorically denied the same. The fourth respondent has given certain facts & figures in

support of its assertion regarding eligibility of the seventh respondent (See: pages 273 to 278 of the writ record). While exercising jurisdiction under Article 226 of the Constitution this court will not charter a course which takes it on a fishing and a roving enquiry into the disputed questions of fact.

22. Learned counsel for the petitioner also raised the question that the B.P.S. and seventh respondent were not registered with the excise department at the relevant time as manufacturers. This is a matter for the consideration of excise department which is competent to see whether or not the B.P.S. and the seventh respondent had violated any of the provisions of the Central Excise & Salts Act, 1944 and evaded duty. It is also for the excise department to consider whether or not the seventh respondent is an export oriented unit which does not require registration.

23. Therefore, all the challenges of the petitioner fail and are hereby rejected. It also needs to be noted that the tender of the petitioner was rejected and in this regard a communication was made to the petitioner by the Syndicate Bank by its letter dated March 27, 1998. This letter gives the reasons for not considering the bid of the petitioner. These reasons as given in the letter are as follows :_

"1. We had, vide our letter No. WB0081/459/97 dated 29.12.1997, had asked you to furnish, inter alia, documentary evidence to substantiate successful operation of the UPS systems for at least 2 years. However, the copies of the certificates from your clients that you submitted in reply could not substantiate the requirement.

2. The bid document specified Comprehensive warranty of the UPS systems for a period of 12 months after the UPS are delivered at site, installed, commissioned, successfully tested and accepted. However, the Warranty offered by you for the UPS systems was 12 months from the date of installation.

3. We had, vide our letter No. WB0081/459/97 dated 29.12.1997, asked you to furnish Banker's Certificate. However, you had submitted an unauthenticated and undated copy of a "credit information report" from the banker which is prominently marked "private & confidential". The report does not indicate which branch has issued the report.

4. The following deviations were observed in the technical evaluation of the product offered :

(a). The technical detail form gives make of batteries as "VINITEC make". Our Consultants have opined that these batteries are not standard international quality batteries. The battery life also has not been indicated in the offer. Since the batteries form a significant part of the UPS price, our Consultants have not accepted this.

(b). The model number given in the test certificate for 5 KVA UPS submitted by you was different from the model of the UPS offered by you.

(c). The charger current indicated was too high.

(d). The product literature submitted did not indicate availability of a number of indicators, alarms, metering and protections.

(e). Technical details provided indicate an ideal UPS which offers 100% efficiency.

5. Some of the observations made during the visit of our Consultants to your factory are given below :

(i). The 5 KVA UPS system offered by you for testing was unable to take the load. The system could not be rectified and offered for reinspection on the day of the visit.

(ii). The quality assurance methodology, followed was not satisfactory.

(iii). The UPS offered for inspection did not have cold start feature and the noise level was also too high. The equipments chattered at full load.

(iv). The step load performance of the UPS systems could not be demonstrated.

(v). No facility to measure crucial parameters like Crest Load Factor, Noise, Temperature, Input & Output Power etc. was available. The instruments used are of very old type which are likely to give inaccurate reading."

24. It is significant that the petitioner has not challenged the aforesaid letter which virtually rejects its tender. Therefore, in view of the fact that the petitioner has not challenged the rejection of its bid, it appears to me that in the circumstances, Therefore, the petitioner does not have the locus standi to question the award of the contract to the seventh respondent.

25. In view of the above discussion, the writ petition fails and is hereby dismissed. Consequently, interim order stands vacated.