

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 11.08 2010

% Date of decision: 16.08.2010

+ **WP (C) No. 10380 / 2009**

BRAHLER ICS INDIA PVT. LTD. & ANR.PETITIONERS

Through : Mr. Jos Chiramal, Ms. Kailash Golani,
Mr. Ramesh Kumar and
Mr. Hari Om Kumar, Advocates

- V E R S U S -

UNION OF INDIA & ORS. RESPONDENTS

Through : Mr. A.S. Chandhiok, ASG with
Mr. Jatan Singh and Ms. Shweta Kakkad,
Advocates for R – 1 to R – 4.
Mr. Kalyan S. Vadlamani,
Advocate for R – 5 / BOSCH.
None for R – 6.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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|----|---|----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

SANJAY KISHAN KAUL, J.

1. The petitioners are the manufacturer and authorised dealer respectively of 'Brahler ICS' and 'DIS' brands of

digital audio-conferencing systems. The same product is manufactured and sold through authorised dealers being respondents No. 5 and 6 respectively in respect of the brand 'Bosch'. The petitioners claim that they are world-renowned in their product, which has been installed in different UN Organizations as also at both the Houses of Parliament, Prime Minister's House, Vigyan Bhawan, various State Legislatures, etc.

2. The Central Public Works Department (for short, 'CPWD') floated a tender in March, 2009 short-listing the aforesaid three brands for participating in the tender for supply, installation, commissioning and after-sales service of digital audio-conferencing system in Lok Sabha replacing the existing system installed about 18 years' back by petitioner No. 1. One of the clauses of the tender document, i.e., clause 2.2(a) provided that the manufacturer ought to have office set-up and service centre in India for seven years, while clause 2.2(c) provided that the manufacturer ought to have annual financial turnover in India / export to India of minimum Rs.12.8 crores during the last three consecutive financial years ending 31.03.2008. These tender conditions were objected to by petitioner No. 2 vide letter dated 23.03.2009. The petitioners also submitted their respective bids along with earnest money deposit (EMD). There was no participation at that stage by respondent No.

5 or its authorised dealer. The bid was cancelled as none of the bidders met the qualifying requirements of the tender and a revised tender document was issued on 20.05.2009. The same clauses were once again incorporated though with diluted requirements and read as under :-

“2.2 The manufacturer, whose system is proposed to be used for this work:-

- a) Must have their permanent office set up and service center in India since 01-04-2007 and the satisfactory proof of the same to the satisfaction of the competent authority of the department must be enclosed along with PQ application failing which their tender application shall not be considered. The address, telephone number and fax number of both, i.e., office and service center, must be clearly mentioned.

... ..

- (c) Must have average annual financial turnover in India / export to India of minimum Rs.320 Lacs during the last three consecutive financial years ending 31st March, 2008. This should be duly audited and certified by a registered chartered accountant or submit proof of custom duty or such other documents for the export of average Rs.320 Lacs during last three years to India. Year in which no turnover is shown would also be considered for working out the average.

(emphasis supplied)

3. Petitioner No. 1 once again protested, but submitted fresh tender and the same was the position of petitioner No. 2. The bids of the petitioners were rejected vide the impugned letters dated 07.07.2009 and it is the case of the petitioners that the apparent reason for the same is the

non-compliance of clauses 2.2(a) and 2.2(c) of the tender document.

4. The petitioners allege that the conditions in the tender document have been tailor-made to suit and create the exclusive monopoly for Bosch, which is making inferior quality products in China and the rates quoted by Bosch are considerably higher to those quoted by the petitioners. The petitioners have, thus, laid a challenge to these clauses of the impugned tender document and the letter dated 07.07.2009 by filing the present writ petition under Article 226 of the Constitution of India (for short, 'the Constitution').

5. The respondents have opposed the writ petition. Respondent No. 1 / Union of India (UOI) in the counter affidavit have pointed out the specialised nature of job, which had to be carried out requiring that the system should be based on the latest and state-of-the-art technology. There are stated to be three leading / premier manufacturers of the digital sound system, namely, M/s. DIS, M/s. Brahler ICS and M/s. Bosch (formerly known as Phillips Ltd.). These firms are based in Denmark, Germany and Germany respectively. It is the case of respondent No. 1 / UOI that when the previous sound system was installed, the manufacturer office set-up was not available in India and difficulties were faced in removal of defects and maintenance including taking up the matter with the

manufacturers. It was, thus, found appropriate to specifically stipulate for a permanent office in India for removal of defects and maintenance and for a minimum turnover in India to ensure that the products of the company are being supplied within the country. Respondent No. 1 / UOI has further explained that the prescribed procedure for preparation of eligibility criteria for specialised work is set out in the CPWD Works Manual, 2007, Amendment Circular No. DGW/MAN/160, DGW/MAN/172A and Para No. 5(a) of the CVC Circular No. 12-02-1-CTE-6, which read as under :-

“(i) Experience of having successfully completed works during last seven years ending last day of the month previous to the one in which applications are invited. Three similar works each of value not less than 40% of the estimated cost put to tender; or two similar works each of value not less than 60% of the estimated cost; or one similar work of value not less than 80% of the estimated cost, all amounts rounded off to a convenient figure.

Apart from the criteria of work experience, NIT approving authority may lay other suitable conditions depending upon the nature of work.

- (ii) ‘Similar Work’ shall be spelt out clearly in NIT.
- (iii) System of two / three envelope may be followed for call of tenders. In such a case, the technical bids shall be approved by NIT approving authority and the financial bids by the authority as per delegations of powers for approval of tenders.
- (iv) The average annual financial turnover should be at least 30% of the estimated cost during the immediate last three consecutive financial years.

Keeping in view the past experience of the department as mentioned in Para 7 above, suitable conditions of permanent office set-up and service centre of the manufacturer along with Indian turnover were inevitable to safeguard the Government interest.”

It has, thus, been explained that the eligibility criteria of the work has been made as per the procedure prescribed hereinabove.

6. The rationale for inclusion of clauses 2.2(a), 2.2(b) and 2.2(c) have also been explained. It has been stated that the manufacturer must have the permanent office set-up and service centre in India, but requirement for the same has been scaled down from last seven years to two years in the second tender. The objective is to ensure adequate service support / service back-up of the manufacturer for proper maintenance and functioning of such sophisticated and specialised systems. The necessity was felt to bind the manufacturer(s) by Indian law in case they back out of their commitments. The annual financial turnover requirement as per clause 2.2(c) was diluted from Rs.12.8 crores to Rs.3.8 crores in the second tender, which is actually half the tender amount of goods to be supplied.
7. The cancellation of the first tender has been explained as out of six tenders sold, only two bids were received in three envelope system from petitioner No. 1 and petitioner No. 2, but neither of the two qualified the eligibility criteria and, thus, the tender was rejected and called afresh. Some parameters were diluted to facilitate greater

participation. Thus, in the second tender, which is under challenge, five firms submitted their technical and financial bids, but only two firms were found eligible for opening of technical and financial bids.

8. It is noticed in our Order dated 11.01.2010 while admitting the writ petition that the sole plea advanced by learned counsel for the petitioners is that the tender conditions impugned by him tend to create monopoly in favour of respondent No. 5, which is contrary to CVC guidelines and CPWD Works Manual. Such a monopoly is sought to be created, as per the contention of learned counsel for the petitioners, on the basis of the said clauses 2.2(a) and 2.2(c) whereby the requirement of local service centre of a dealer has not been found enough and the manufacturer is required to have a local office apart from the requirement of minimum annual financial turnover. It was the submission of learned counsel for the petitioners that the job being a specialised job and only three makes being listed at a pre-qualification stage, the requirement of turnover was irrelevant.

9. We fail to see any reason in the aforesaid argument. The rationale for including these two clauses has already been given in the counter affidavit. It can hardly be said that the requirement of the presence of the manufacturer in the country with the minimum annual financial turnover is irrational or so absurd as to shock the conscience of the

Court and / or for the Court to interfere under Article 226 of the Constitution of India. It is not a one-time supply for product, but requires continuous maintenance. Thus, the supplies made can be serviced if there is a local presence of the manufacturer because the principal liability would remain of the manufacturer. If the dealer disappears from the scene, then respondent No. 1 / UOI may be left high and dry and they had stated that in the past they had such an experience. Similarly, the requirement of a minimum turnover in the country is equally important and the amount specified of annual financial turnover is only half the value of the goods to be supplied. It is not irrationally high.

10. Learned counsel for the petitioners sought to contend that CVC guidelines contained in its Office Memorandum dated 17.12.2002 dealing with prequalification criteria (PQ) has been breached. The relevant portion of the said Office Memorandum is as under :-

“OFFICE MEMORANDUM

Subject :- *Prequalification criteria (PQ).*

The Commission has received complaints, regarding discriminatory prequalification criteria incorporated in the tender documents by various Deptts./Organizations. It has also been observed during intensive examination of various works/contracts by CTEO that the prequalification criteria is either not clearly specified or made very stringent/very lax to restrict/facilitate the entry of bidders.

2. The prequalification criteria is a yardstick to allow or disallow the firms to participate in the

bids. A vaguely defined PQ criteria results in stalling the process of finalizing the contract or award of the contract in a non-transparent manner. It has been noticed that organizations, at times pick up the PQ criteria from some similar work executed in the past, without appropriately amending the different parameters according to the requirements of the present work. Very often it is seen that only contractors known to the officials of the organization and to the Architects are placed on the select list. This system gives considerable scope for malpractices, favouritism and corruption. It is, therefore, necessary to fix in advance the minimum qualification, experience and number of similar works of a minimum magnitude satisfactorily executed in terms of quality and period of execution.

3. Some of the common irregularities/lapses observed in this regard as highlighted as under:-

i) For a work with an estimated cost of Rs.15 crores to be completed in two years, the criteria for average turnover in the last 5 years was kept as Rs.15 crores although the amount of work to be executed in one year was only Rs.7.5 crores. The above resulted in prequalification of a single firm.

... ..

iv) In a work for supply and installation of A.C. Plant, retendering was resorted to with diluted prequalification criteria without adequate justification, to favour selection of a particular firm.

... ..

4. The above list is illustrative and not exhaustive. While framing the prequalification criteria, the end purpose of doing so should be kept in view. The purpose of any selection procedure is to attract the participation of reputed and capable firms with proper track records. The PQ conditions should be exhaustive, yet specific. The factors that may be kept in view while framing the PQ Criteria includes the scope and nature of work, experience of firms in the same field and financial soundness of firms.

... ..”

11. If the aforesaid Office Memorandum is examined carefully, we find that the submission of learned counsel for the petitioners is without any basis. The illustrations given in respect of annual financial turnover show that the very high turnover requirement as compared to the estimated cost is what is sought to be discouraged. This is factually not so in the present case where the minimum turnover is only 50% of the value of the goods to be supplied. The requirement of average annual financial turnover is itself envisaged.

12. Learned ASG has rightly pointed out that petitioner No. 1 in its letter dated 26.05.2009 while representing for reconsideration of eligibility criteria for work had set out the reason for seeking relaxation in tender conditions on the ground of tough conditions of currency Euro with the result that it could not compete with other competitors. The relevant portion of the said letter is extracted as under:-

“A tender was called on 28.03.2009 for opening on 09.04.2009 for the above work and we participated in it. We were meeting all the condition (about a dozen of them) except the turnover condition of the firm in India. For which we had explained clearly that due to tough condition of currency Euro in the world market for past few years, we could not compete with our competitors who were offering their product from Chinese Market and Thai Market. Products by M/s. Bosch are of Chinese origin and of M/s. DIS are of Thai origin and due to our equipment of being of German origin we could not match the prices for competition therefore are not able to meet your requirement of turnover in Indian Market. We have a very sound financial standing of the parent

company which owns this company in India and had submitted the financial figures in our bid earlier also.”

(emphasis supplied)

13. Learned ASG has also invited our attention to the financial status of respondent No. 5 to contend that though respondent No. 5 did not participate in the first tender, it actually met the financial requirements of that tender.
14. It has, thus, been rightly contended that petitioner No. 1 itself accepted that it was having a tough period where it was finding it difficult to compete with its competitors. The objective of a second tender on the first tender failing was served by better participation and though respondent No. 5 had not participated in the first tender, it met the financial requirements for that tender. Learned ASG also invited our attention to Appendix 20 with reference to para 16.12.1 dealing with guidelines for fixing eligibility criteria for two / three envelope systems, which stipulates that the average annual financial turnover should be 50% of the estimated costs during the immediate last three consecutive financial years.
15. In sum and substance, we find that learned ASG has rightly contended that the inclusion of the two clauses, i.e., clauses 2.2(a) and 2.2(c), as noticed hereinabove, is based on the requirements of respondent No. 1 / UOI for the contract in question and there is nothing so arbitrary, illegal or onerous in the terms, which would shock the conscience of the Court or make the Court interfere under

Article 226 of the Constitution. In fact, we find these clauses not unreasonable.

16. No doubt, the net result of the tenders twice floated is that on the first occasion, there was no bid qualified; while on the second occasion, only Bosch has qualified. We put a specific query to learned counsel for the petitioners to point out to us any CVC guidelines in terms whereof even if the terms and conditions of the contract are not unreasonable, a single bid would require something more to be done. Learned counsel for the petitioners is unable to do so. The fact that Bosch has emerged as the only successful party is a consequence of participation in the tender whose conditions have been found by us not to be unreasonable. It is apparent that the petitioners wanted the contract once again. We do feel that it is the endeavour of the petitioners to seek deletion of clauses which do not suit them or which disqualifies them. The petitioners want a tender tailor-made for their requirement and want the intervention of the Court to re-draft the tender to suit them. This is hardly permissible in law.

17. In the end, we may note that we had put the learned counsels to notice at the beginning of the hearing that the losing party would have to bear the actual costs. We had asked the counsels for the parties to file memo(s) of fee and costs, which have been so filed. The memo of respondents No. 1 to 4 shows a professional fee amount of

Rs.1,92,500/- as certified by the counsel and of respondent No. 5 of Rs.1,65,000/- for counsel on record apart from certain miscellaneous expenses, service tax and senior counsel's fee of Rs.7,64,500/-. No senior counsel assisted us in the matter at the stage of final hearing. We, thus, quantify the costs at Rs.1,65,00/- for respondent No. 5.

18. The writ petition is, thus, accordingly dismissed with costs quantified at Rs.1,92,500/- for respondents No. 1 to 4 and Rs.1,65,000/- for respondent No. 5 to be borne by the petitioners and paid within 15 days.

SANJAY KISHAN KAUL, J.

August 16, 2010
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VALMIKI J. MEHTA, J.