

## Techno Compact Builders (M/S) Vs North East Frontier Railway and Others

**Court:** Gauhati High Court

**Date of Decision:** March 21, 2013

**Acts Referred:** Constitution of India, 1950 " Article 226

**Citation:** AIR 2013 Guw 137 : (2013) 2 GLT 829

**Hon'ble Judges:** Biplab Kumar Sharma, J

**Bench:** Single Bench

**Advocate:** S.S. Dey, Mr. M. Nath and Mr. A.K. Sarkar, SC, Railways, for the Appellant; U. Dutta and Mr. B. Baruah, for the Respondent

**Final Decision:** Dismissed

### Judgement

Biplab Kumar Sharma, J.

Both the Writ petitions by and between the same parties pertaining to the impugned tender processes have been

heard together and are being disposed of by this common judgment and order. The petitioner which is a duly constituted registered proprietorship

firm having its office at Guwahati and represented by sole proprietor has filed the first Writ Petition being WP(C)No. 346/2013 challenging the

order of acceptance issued in favour of the respondent No. 4 in connection with the ""work for Supply, installation and commissioning of SDH

Add/Drop MUX(STM-1/STM-4)"" and other associated equipments for OFC communication in various section including provision of OFC(24

fibre) and 6 Quad cable involving trenching, laying, jointing and their termination in section Golakgangj-Bilasipara (New Line) under NMX-JPZ

project of APDJ Divn. of N.F. Railway"" in pursuance of tender processes convened vide Tender No. DY. CSTE/Con/NJP/2012/03/GKJ-

Bilasipara/OFC-SYS pertaining to Tender Notice No. S&T/CON/2012/03.

2. In the second Writ petition being WP(C) No. 356/2013 the challenge made is to set aside and quash the letter of acceptance issued in favour of

respondent No. 4 in connection with the work for ""Supply, installation and commissioning of SDH Add/Drop MUX(STM-1/STM-4) and other

associated equipments for OFC communication in various section including provision of OFC(24 fibre) and 6 Quad cable involving trenching,

laying, jointing and their termination in section Golakgangj-Bilasipara (New Line) under NMJ-JPZ project of APDJ Divn. Of N.F. Railway"" in

pursuance of tender processes convened vide Tender No. DY. CSTE/Con/NJP/2012/03/GKJ- Bilasipara/OFC-SYS pertaining to Tender

Notice No. S&T/CON/2012/03.

3. In both the writ petitions, further prayer made is to direct the respondents 1, 2 & 3 to reconsider the bid of the petitioner in respect of both the

contracts. Facts involved and the issues raised in both the Writ petitions being more or less the same, the learned counsel for the parties argued

their respective cases in reference to the first Writ petition being WP(C) No. 346/2013.

4. Mr. S.S. Dey, learned counsel appearing for the petitioners referring to the qualifying/eligibility criteria both under the technical eligibility criteria

and financial eligibility criteria submitted that the respondent No. 4 in whose favour the letter of acceptance has been issued being not

qualified/eligible ought not to have been considered. He submitted that as per the requirements of the said qualifying/eligibility criteria, respondent

No. 4 having not done the work stipulated under technical eligibility criteria and the work in reference to which its bid has been accepted, being in

the joint venture, the same could not have been considered by the tender committee. Referring to the minutes of the tender committee he also

submitted that there is total non-application of mind towards accepting the tender submitted by the respondent No. 4.

5. Mr. A.K. Sarkar, learned Standing Counsel, Railways referring to the various tender conditions submitted, that the petitioner having not fulfilled

the eligibility criteria, the tender committee could not consider his bid, but on the other hand, the respondent No. 4 having fulfilled the required

criteria, the work has been entrusted to the said respondent in acceptance of its tender.

6. Mr. U. Dutta, learned counsel appearing for the respondent No. 4 submitted that if the plea of the petitioner is to be accepted, compromise will

have to be made with the tender conditions. Referring to the pleas on which the writ petitions are structured and the counter thereof in the affidavits

in opposition filed by the respondent No. 4 and also the official respondents, he submitted that the particular exercise carried out by the tender

committee cannot be interfered with in exercise of writ jurisdiction. He submitted that the petitioner having not fulfilled the eligibility criteria, the

tender committee was not in a position to consider its tender, but on the other hand, the respondent No. 4 having fulfilled all the requisite criteria,

the letter of acceptance has been issued to it in acceptance of the tender submitted by it.

7. The qualifying/eligibility criteria under clause 12.0 of the tender documents read as follows:-

QUALIFYING/ELIGIBILITY CRITERIA:

All the tendere(s) irrespective of their being known to this organisation or not, must submit related supporting documents in respect of the

following:

#### 12.1. Technical Eligibility Criteria

i) The tender(s) should have completed at least one similar single work for a minimum value of 35% of advertised tender value work.

ii) Similar nature of works physically completed within the qualified period i.e., the last three financial years and current financial year (even though

the work might have commenced before the qualifying period) should only be considered in evaluating the eligibility criteria.

iii) The total value of similar nature of work completed during the qualifying period and not the payments received within qualifying period alone

should be considered.

iv) In the case of composite works involving combination of different works, even separate completed works of required value should be

considered while evaluating the eligibility criteria.

v) Similar nature work means: "Telecom Works of Trenching and laying including splicing, termination with supply of STM/PDMUX equipment

and/or associated telecom equipment for: OFC and Quad cable".

Note:

If the tenderer is not OEY of STM/DMUX equipment, then MOU (Notarised with OEM for technical support in installation commissioning, post

commissioning maintenance problem, failures and supply of its spares to be submitted

vi) Certificate from private individuals/firms for whom such works are executed/being executed shall not be considered.

#### 12.2 Financial Eligibility Criteria:

Total contract amount received by the during the last years (i.e., current year and three previous financial years) should be total minimum of 150%

of advertised tender value of work, supported by

a) Authenticated payment record of N.F. Railway or any other Govt. Department of PSUs etc. or

b) Audited Financial Statement certified by Chartered Accountant.

#### 12.3 Joint Venture will be permitted in this tender.

8. As per the clause 2.2 of the tender document, the value of contract covers a total of 05(5) number of stations viz. Golakgang, Gouripur,

Alamgang, Bogribari and Bilasipara in APDJ Division of N.F. railway which comprises the following.

Schedules

Schedule- A - Supply of OFC equipment

Schedule- B - Execution of OFC equipment

Schedule- C - Supply of other telecom materials

Schedule- D - Execution of outdoor telecom work.

9. Under clause 20.0 of the tender documents, the Railways reserve the right to hold negotiations with L-1 tenderer, who should be the lowest,

valid, eligible and technically acceptable tenderer could also been considered for award of the contract directly if the rates were not unreasonably

high.

10. Under chapter III of the tender documents providing for special conditions of tender and contract, clause 123 reads as follows:-

The signalling and Telecomm, Materials for which RDSO approved firms exist should be procured from Part-I approved firms only. In case for

any materials for which there is no Part-I approved firm, it can be procured form Part-II approved firm. No materials are to be procured from

firms which are banned by Railway Board/RDSO.

11. The grounds on which the challenge to the acceptance of the tender submitted by the respondent No. 4 has been formulated are available in

paragraph 9 of the Writ petition which is quoted below:-

That your Petitioner states subsequent to the opening of the tenders, the petitioner detected that the following prima facie glaring defects in the

Tender Documents of the Respondent No. 4:-

(a) contrary to the requirements of the Clause 12.1(i) of Qualifying/Eligibility criteria, the Respondent No. 4 had neither completed any similar

single work for the minimum value of 35% of the advertised Tender Value of the Work individually in last 3 years.

(b) The Respondent No. 4 also could not show any document of receipt of payment amounting to total minimum of 150% of Tender Value of the

work individually for last 3 financial years.

(c) The Respondent No. 4 also did not comply with the requirements of TDS Certificates, audited Balance Sheets as well as attested Certificates

from employer/clients as required under various clauses of the Tender Document for verification.

It may be stated herein that as per Clause 12.3 SECTION-I (Chapter-II) having debarred from Joint Ventures, it essentially signifies that individual

entitles have to submit tenders also fulfilling all the qualifying/eligibility criteria set out under the entire Clause-12 on the basis of their

individual/personal qualification and not their qualification based on any past joint Venture project.

12. According to the petitioner, the respondent No. 4, has not fulfilled the qualifying/eligibility criteria on the basis of their individual personal

qualification, although they might have fulfilled the same on the basis of joint venture project which is barred in the present tender. On the other

hand it is the stand of the respondents that the petitioner has emphasised on ""individual/personal qualification"" of its own without there being any

such requirements in the tender document.

13. According to the petitioner, the respondent No. 4 is disqualified in terms of the above quoted clause 12, having not fulfilled the eligibility criteria

of an individual tenderer and its individual eligibility criteria being sought to be fulfilled by means of its past association for execution of work under

joint venture. The Railways in its affidavit while dealing with the eligibility criteria of the petitioner has stated thus:

That in regard to the statements made in Para 6 of the writ petition, it is stated that the petitioner did not fulfil the requirements of Para 12.3 of

Chapter-II (special conditions of Tender). The clause 12.3 of Chapter-II reads thus:- the clause 12.3 of chapter-III reads:-

The Signalling and Telecom. Materials for which RDSO approved firms should be procured from Part-I approved firms only. In case for any

materials for which there is no Part-I approved, it can be procured from Part-II approved firm. No materials are to be procured from firms which

are banned by Railway Board/RDSO. At the relevant point of time when the tender was invited by the respondent no.3, it was the Research

Designs and Standards Organisation, (Ministry of Railway), Lucknow QS-M7. 1-3, July 2012 Approved List of Firms for Manufacture and

Supply of Electrical Signalling and Telecommunication Items was in force. The said approved list was valid from 01.07.2012 to 31.12.2012, there

are only two firms under the Part-I approved list and these are-M/s. Punjab Communications Limited, Chandigarh and M/s. Webfil Limited of

Kolkata. Again, there are two firms under the Part-II approved list and these are:- M/s Commтел Networks Pvt Ltd of Mumbai, and M/s Coral

Telecom Limited of Noida. In the present tender, the petitioner has quoted PDMUX from M/s. Coral Telecom Limited of Part-II RDSO

approved firm and so, it is not as per requirement of tender condition as mentioned in Para 12.3 of Section-I, Chapter-III (Special Conditions of

Tender & Contract).

The Section-II of the tender contains the Technical Specifications. The Chapter- VII of the Section-II contains inter-alia the Scope of work and in

bold letters it is stated therein-"" Since this work is incremental work to existing OFS system, full compatibility and conformity should be maintained

with existing associate OFC, MUX and Control Equipment"". (Page No. 116 of the writ petition). As such, it is crystal clear that the work is an

incremental work to existing OFC system and in the existing control board/OFC link SDH of M/s Tejas, PDMUX of M/s Punjab Communication

are installed. Hence, technically the offer of the petitioner is not considered responsive and not conforms all the specifications without any material

deviation. Furthermore, the offer of the petitioner is non-economic in the sense of spare management. Because, some additional inventory, i.e. new

kind of cars and modules will be required for maintenance of the OFC link. Hence the offer of the petitioner is technically not a suitable offer.

Instead, the respondent no. 4 as submitted MOU (Notarised) with OEM (Original Equipment Manufacturer) M/s Punjab Communication Ltd. In

support of PDMUX and a MOU (Notarised) a with OEM Tejas Network India Limited, Bangalore in support of SDH ADD/DROP MUX

14. Although the petitioner has emphasised on the purported requirement on ""individual/personal qualification"" but nowhere, under clause 12

(qualifying/eligibility criteria) it is provided that the tenders) has/have to complete" individually in similar single work for the minimum value of 30%

of the advertised tender value of work. As stated in the counter-affidavit filed by the respondent railways, the petitioner along with the tender

documents submitted unaudited figure for financial year 2010-2011 and further put one approximate amount from 1st April 2011 to 31.07.2011.

On the other hand, the respondent No. 4 has submitted definite figures showing receipt of 150% of the advertised tender value of work during the

prescribed period. The same is also supported by an audit financial statement certified by the Charter Accountant for the financial year 2010-2011

and also the record of payment issued by Railway officials and the same were properly verified and found to be correct and genuine.

15. Although the petitioner has put much emphasise on the term ""joint venture"", but as per clause 12.3 of the tender document, it is only the

participation of joint venture which is not permitted/debarred in the tender as it is not the major tender. Coupled with this, as per annexure 1 of the

Railway Board"s circular letter dated 02.09.2008, value of a completed work done by a tender in an earlier partnership firm or a Joint Venture

firm shall be reckoned only to the extent of the concerned tenderers share in that partnership firm/Joint Venture firm for the purpose of satisfying

compliance of the above mentioned technical eligibility criteria in the tender under consideration.

16. Clause 16.2 of the said circular is related to the financial eligibility criteria. The NOTE under heading financial eligibility criteria reads thus:-

Contractual payment received by a Member in an earlier JV firm shall be reckoned only to the extent of the concerned member"s share in that JV

firm or the purpose of satisfying compliance of the above mentioned financial eligibility criteria in the tender under consideration.

17. It is for the above reason that the tender committee found respondent No. 4 as financially qualified even though its qualification may be based

on past joint venture project in which the said respondent has a major stack.

18. Tenders were finalised in compliance of the terms and conditions laid down in the tender documents of the concerned tender notice and also in

compliance of Railways Boards Policy on the said matter ""appointment of works contractor and finalisation of tenders"", In this connection the

respondent railways have referred to the Railway Board's letter dated 22.01.2001 in which the term L-1 has been defined as the lowest, valid,

logical and technically acceptable tenderer. In the instant case, the respondent No. 4 has been issued with the LOA on 12.01.2013 as it was found

that the offer made by the said respondent satisfied the technical and financial requirements. The offer made by the said respondent was regarded

as the valid L-1 lowest offer.

19. In paragraph 10 of the counter-affidavit filed by the respondent railways, it has been stated that if the tender of the petitioner was to be

accepted, then in such events,

(I) there would be a failure in saving the system integrity of entire installation as the nature of the work is incremental in nature;

(II) there would be material deviation in the integrity of entire installation as the protocol will not match;

(III) the authority will have to incur more cost as additional inventory i.e. new kind of cards and modules will be required for maintenance of the

OFC link;

(IV) there would be wastage of public money and it will dent the state largesse;

(V) there will be wilful violation of the Approved List of Firms for Manufacture and Supply of Electrical Signalling and Telecommunication items

prepared by the Research Designs and Standards Organisation, (Ministry of Railway), Lucknow vide QS-M-7. 1-3/July 2012, which was in force

at the relevant time frame;

20. It is to be noted that as per the minutes of the tender committee, the offer made by the respondent No. 4 was found to be technically sound

and viable and in conformity with the approved list prepared by ""Research Designs and Standards Organisations"" (RDSO), Ministry of Railways,

Lucknow QS-M-7. 1-3, July 2012, Approved List of Firms for Manufacturer and Supply of electrical signalling telecommunication items, which

was in force at the relevant time. As against the annexure 8 RDSO approved list of January 2011, annexed to the reply affidavit filed by the

petitioner, the respondent No. 4 in his affidavit has referred to the approved list of July 2012 which was applicable at the time of invitation and

opening the present tenders. The said RDSO approved list is for the period from 01.07.2012 to 1.12.2012. The nature of work is incremental and

thus the incremental telecom work in the aforementioned five stations is also required to be executed in conformity with the other station of which

Golakganj and Bilasipara is a small part as stated in the counter-affidavit filed by the respondent No. 4 which in its proprietorship business

enterprise has MOU with different firms which are approved as per the part (I) of RDSO approved list and it has offered PINCOM-MUX and

SDH equipment of Messer's TEJAS in its tender. Thus, it cannot be said that the offer made by the respondent No. 4 is not in consonance with

the existing installation set up Per contra, the Writ petitioner has no MOU with M/s PUNCOM and it has MOU only with M/s WEBFIL limited as

reflected in the minutes of the tender committee. The petitioner has quoted MUX of M/s Corel Telecom Limited which is in Part II of the approved

list of RDSO.

21. As regards the emphasis on the clause in the tender document, "I joint venture is not permitted in this tender" it is clear that the same leads to

only one meaning which is participation of any joint venture company/business firm is not permitted in the tender process. As reflected in the tender

document itself, tenders have been invited from the established firms and manufacturers or their authorised agents for supply and execution. The

tender documents have nowhere put any restriction that the participant in the tender process has to be qualified financially on his individual basis.

22. It was argued on behalf of the petitioner, that it being joint L-1 along with the respondent No. 4 should have been invited for negotiation.

Suffice is to say that mere similarity in the financial bid of the petitioner did not entitle it to be considered unless it was found technically competent

to be offered with the work. Admittedly, the petitioner has no MOU standing with M/s Punjab Communication Limited of Mohali, Chandigarh

shortly known as PUNCUM.

23. Pursuant to the, letter of acceptance issued to the respondent No. 4, the said respondent has already executed guarantee bond towards

performance of the contract on 17.01.2013 (value of guarantee rupees 21,47,808/-). The work in question is also required to be executed with

180 days from the date of LOA.

24. The tender committee constituted by experts in its meeting held on 03.12.2012 having deliberated upon the matter in details (page:-19-31 of

Annexure-2-counter-affidavit of Railways), this Court exercising its power of Judicial Review under Article 226 of the constitution of India cannot



interfere with the said findings lightly. The committee in consideration the eligibility, both technical and financial upon evaluating the bids has

commented thus:-

Techno Compact Builder, Guwahati (offer No. 4/4): the tenderer Techno Compact Builder, Guwahati (Offer No. 4/4) has submitted the following

MOU (Notarised) with OEM

A. M/S CORAL TELECOM LIMITED. Noida in support of PDMUX

B. TEJAS Network India Limited, Bangalore in support of SDH ADD/DROP MUX (SN-125 to 130). The MOU (Notarised) has been legally

vetted with some observations by LO/Con at (SN- 372, Para 1 & 2). TC is of the opinion observation is minor & will be compelled by the

tenderer if the tenderer if the tenderer will become eligible L-I

C. Observation of TC member for MOU of M/S CORAL TELECOM LIMITED, Noida in support of PDMUX

It is mentioned in Section-I Chapter-III (Special Condition of Tender & Contract) Para 12.3 that the signalling & Telecom materials for which

RDSO approved firm exist should be procured from Part-I approved firm only. In case for any materials for which there is no Part-I approved

firm, it can be procured from Part-II approved firm. No materials are to be procured from firms which are banned by Railways Board/RDSO.

Techno Contact Builder has quoted PDMUX from M/s Coral of Part II RDSO approved firm which is not as per the requirement of tender

condition mentioned as in Section-I Chapter-III (Special Condition of Tender & Contract) para 12.3.

Thus, TC is of the opinion that their offer is incomplete & does not satisfy the requirement as mentioned in Section-I Chapter-III (Special

Condition of Tender & Contract) para 12.3.

#### 12.0 OBSERVATIONS BY TENDER COMMITTEE:

Under Technical Eligibility, criteria, it is stipulated that ""If the tenderer is not OEM of STM/DMUX equipment, then MOU (Notarised) with OEM

for technical support in installation commissioning, post commissioning maintenance problems, failures and supply of its spares to be submitted"". It

is seen that MOU has been submitted by all the tenderer for the period of the validity of the contract.

13.0 With the discussion vide para 3 to para 11, TC found that

13.01 Offer (3/4) of Rama Telecom Pvt. Ltd. Rejected vide NIT Clauses B & TD Clause 8.0 (b), as firm has not deposited requisite amount

toward Tender Cost as discussed in item No. 3.3

13.02 Offer (1/4) of East India Enterprise, Guwahati does not satisfying the Technical Eligibility Criteria of NIT Clause 1 & TD Clauses 12.1 (i).

Hence, East India Enterprise, Guwahati officer is not considered.

13.03 Offer of Techno Compact Builder, Guwahati (Offer 4/4) has not satisfy the tender document condition as mentioned in Section-I Chapter-

III ( Special Conditions of Tender & Contract) para 12.3 respectively. Hence, treated incomplete as discussed in para 11.4 & considered not to

discussed further.

13.04 In view of the above, TC considers the offer of Global Communications, Siliguri (Offer No. 2/4) is technically & financially suitable and

eligible L-1 in terms of eligibility criteria & satisfy the tender document condition laid down for the present tender.

17.0 Discussion of the lowest offer:-

Out of the 4 (four) Tender, the lowest eligible offer L-1 is received form Global Communication, Siliguri at a total cost of Rs. 4,40,4,040/-which is

(+) 9.2% above from the Railways estimated cost of Rs. 4,03,39,610/- of the work. So tender committee has decided to negotiate on the offer of

Global Communication Siliguri to explore the possibility of reduction of rate.

## 18.0 RECOMMENDATIONS

In view of the above deliberations, Tender Committee has recommended to hold 1 (one) round of negotiation with L-1 tendered, Global

Communication, Siliguri (2/4), (i) to negotiate for quoted rate Schedule B, Schedule C & Schedule D & (ii) To withdraw special request, although

it has no financial implication.

25. The tender committee being expert body consisting of technical persons having undergone the particular exercise with all its expertise and on

the basis of the said exercise having arrived at the particular conclusion, this Court exercising its Writ jurisdiction cannot sit on appeal over such

expertise none and that too in absence of any malafide exercise of powers the members of a said committee. There is also no allegations of

violation of any statutory rules.

26. For all the aforesaid reasons, I do not find any merit in the writ petitions and accordingly they are dismissed, leaving the parties to bear their

own costs. The interim order operating in this proceedings stand vacated.