

## Mr.Chander Shekhar vs Ministry Of Communications And ... on 2 May, 2013

CENTRAL INFORMATION COMMISSION

Room No. 308, B-Wing, August Kranti Bhawan, Bhikaji Cama Place, New Delhi-

File No.CIC/AD/A/2009/001366

Appellant	Shri Chander Shekhar
Public Authority	BSNL.
Dates of hearing	21st February and 22nd March, 2013
Date of decision	2nd May, 2013

Facts :-

This matter has a chequered history. Vide RTI application dated 2.7.2012, the appellant had sought the following information :-

"I am one of the shareholders of KEC International Limited. KEC International Limited had participated during September'08 in the mega tender floated by BSNL in all the four zones for Planning, Engineering, Supply Installation, Testing & Commissioning of Infrastructure for various lines for cellular mobile expansion and now I understand that the financial bid of the same has been opened in February 2009 and evaluation of all the financial bids is complete.

1. Please arrange to provide me a copy of the complete Report of Evaluation of Tender on the Financial Bids received from various bidders against Part 3 of Tender No. IMPCS/PHASE VI/WZ/CGMT-MH/2008- 09/1 dated 01.05.2009 and opened on 28.02.2009 for West Zone.

2. Please arrange to provide me a copy of the complete Report of Evaluation of Tender on the Financial Bids received from various bidders against Part 3 of Tender No. CTD/IMPCS/TENDER/PHASE VI/2008-09 DATED 01/-5/2009 and opened on 28/02/2009 for North Zone.

3. Please arrange to provide me a copy of the complete Report of Evaluation of Tender on the Financial Bids received from various bidders against Part 3 of Tender No.CTD/IMPCS/TENDER/PHASE VI/2008-09 dated 01/05/2009 and opened on 28.02.2009 for North Zone.

4. Please arrange to provide me a copy of the complete Report of Evaluation of Tender on the Financial Bids received from various bidders against Part 3 of Tender No.TA/Cellone/SZ/2008/01 dated 01.05.2009 and opened on 28.02.2009 for South Zone."

2. The CPIO had refused to disclose any information under section 8(1)(d) of the RTI Act vide letter dated 30.7.2009. On appeal, the first Appellate Authority had upheld the decision of the CPIO vide letter dated 8.9.2009. The second appeal was heard by the Bench of Ms. Annapurna Dixit, Information Commissioner, who set aside the decisions of the CPIO and the Appellate Authority and ordered release of information vide her decision dated 10.11.2009. Paras 08, 09, 10 & 11 of her decision are extracted below :-

"8. The Respondents submitted their reply to the Appeal vide communication dated 04.11.2009 reiterating the order passed by the Appellate Authority to the extent that BSNL had signed a Non Disclosure Agreement (NDA) with all the participating vendors. Hence disclosure of information would result in breach of contract. Furthermore, the contention of the Appellate Authority to the effect that the overall bid value is readout as a practice in the presence of representatives of bidders was simply to ensure authenticity of the bids. Copies of two such Non Disclosure Agreements were placed on record and parts thereof reproduced in the submissions as well. The Respondents took the additional plea at this stage, that the matter is sub judice before the Hon'ble Supreme Court and the Appellant alongwith M/s KEC International Ltd were petitioners in the said litigation; hence the requested information could not be supplied.

9. The Appellant on his part has also submitted a Concise Note of his Arguments rebutting each of the contentions of the Respondent. While explaining the background of the case, the Appellant submitted that the bids were to be evaluated in two stages viz. the techno commercial and the financial part. The financial bid was to be opened in respect of only those parties which qualified techno commercial evaluation of the bids. Despite offering the lowest bid from the East Zone as on 28th Feb 2009, KEC's rating was downgraded during subsequent financial evaluation and the bid of another bidder viz. ACME Ltd., despite being non compliant with the terms of the tender, was evaluated as the lowest. Hence the evaluation process of BSNL was challenged and a Writ Petition to this effect filed in the Calcutta High Court and subsequently the matter reached the Supreme Court. Meanwhile ACME filed a Writ Petition in the Mumbai High Court challenging the technical & financial evaluation of the bids by BSNL and produced before the Mumbai High Court the clandestinely obtained copies of the financial evaluation report and price negotiation report pertaining to the West Zone. Since the source of obtaining the copies of the documents were not made known, it drew stern observation from the Mumbai High Court and the petition was dismissed. However the BSNL did not raise the issue of the Non Disclosure Agreement or Commercial Confidence; nor did it take any action against ACME. Ironically the same documents which had been obtained by ACME surreptitiously had been sought by the Appellant in the form of the RTI application. If the documents were withheld under the garb of the NDA or Commercial confidence from the Appellant, the availability of similar documents with another bidder in another litigation, according to the Appellant, was directly contradictory.

10. It is abundantly clear from the material available on record that the evaluation process being complete, the commercial position of any of the bidders could not be affected, least of all adversely, post the opening and finalization of the tender. Thus the exemption sought under Section 8(1) (d) of the RTI Act 2005 is not maintainable since the information sought by the Appellant is already in public domain after the finalization and completion of the bidding process and evaluation and consequently as discussed hereinabove, cannot pose a threat to the competitive position of any of the bidders, at this stage. In fact it is in larger public interest to disclose such information, as rightly contended by the Appellant, which pertains to an activity undertaken by a Public Authority utilizing public money to the tune of approximately Rs. 40,000 crores for providing services to the public at large. The Non-Disclosure Agreement also is valid only for the Confidentiality Period, which is the period till the bids are opened, as is clearly envisaged in the Agreement itself. It cannot be the case of the Respondent that no information pertaining to such public activity with a huge financial outlay, involving such enormous public exchequer, shall be kept secret. Looking at the issue from a different perspective, the Commission also believes that such a Non-Disclosure Agreement between a Public Authority and any agency, debarring the access to information, thereby disrupting the transparency and accountability of the Public Authority completely, is in direct violation of the very spirit of the RTI Act 2005, and therefore is illegal to that extent, as the RTI Act only allows exemption from disclosure under specific conditions as given under Sections 8(1) and 9. The NDA executed sometime during mid 2008 is illegal per se if it stipulates non disclosure of information even beyond the "Confidentiality Period" i.e. precisely even after the opening of the tender and the finalization of the evaluation process etc. since it is contradictory and conflicts with the provisions of the law I.e the RTI ACT 2005. The public interest in this case any way far outweighs the weak contentions put up by the Respondent to protect the so-called private interests. In so far as the pendency of the Supreme Court case is concerned, firstly it seems like an afterthought on the part of the Respondent, since the ground was not taken earlier. Secondly, since the Supreme Court is not investigating nor sitting at trial over the case, no question of impeding process of investigation arises. The Respondent has simply denied information since the matter is sub judice, whereas there is no such provision of law of denial, under the RTI Act 2005.

11. The Commission is thus of the considered opinion that the information as sought by the Appellant cannot be categorized as exempt since the same is available in public domain after the opening of the bid and finalization of the evaluation process. The Respondent is accordingly directed to furnish the information within 15 days of receipt of this order, under intimation to the Commission."

3. BSNL had filed Writ Petition No. 2946/2010 before the Single Bench of the Delhi High Court against the order of the CIC which was dismissed vide order dated 3.5.2010. The reasons for the dismissal of the Writ Petition, as enumerated in para 06 of the order of the Division Bench in its decision dated 23.3.2012(LPA No.90/2010), are extracted below :-

"6. The learned Single Judge dismissed the writ petition preferred by the appellant impugning the order aforesaid of the CIC observing/holding, (a) that the writ petition filed by KEC International Ltd. impugning the tender process had been finally dismissed by the Supreme Court finding no illegality in the decision making process and declaring the party which was awarded the contract as the lowest bidder - thus the objection to disclosure of information on the ground of the matter being sub judice did not survive; (b) that the plea of the appellant of the confidentiality period as per the Non Disclosure Agreements being in vogue for the reason of the formal contract having not been entered into with the successful bidder was of no avail since the bidding process was complete and the selection of the successful bidder stood finalized;

(c) again for the reason of the bidding process having stood completed, the question of the commercial interest of any of the bidders being adversely affected by the disclosure did not arise; (d) Section 22 of the Act gives effect to the provisions of the Act notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act - consequently the Non-

Disclosure Agreements cannot be used by the appellant to defeat the right to information under the Act; (e) even otherwise the Non Disclosure Agreements cannot be said to extend beyond the confidentiality period defined in the agreement itself as the period between the opening of the tender and the finalization of the bids."

4. BSNL had filed LPA No.900/2010 in this matter before a Division Bench of the Delhi High Court. The Division Bench vide decision dated 23.3.2012 remanded the case to CIC for affording an opportunity of hearing to the parties and deciding the matter afresh.

5. It is a landmark judgment. It would, therefore, be useful to advert to the legal principles expounded by the Division Bench at this stage.

(i) First and foremost, confidentiality or secrecy is the essence of sealed bids. It helps the contract awarding party to have the most competitive and best rates or offer. Every bidder wants to keep his bid secret so that other bidders do not know of his bid and they bid blindly. When a bidder submits his bid, he does so in the expectation that his bid would not be disclosed to the rival.

Secret bids, thus, promote competition and guard against favouritism; fraud and corruption and lead to award of contract, to secure the best of work at the lowest price practicable.

(ii) The secret bids are not confined to the price only . It may cease to be of any value or lose confidentiality once the bids are opened. The bids/tenders today require the bidders to submit in the bids a host of information which may help and be required by the tender calling institution to evaluate the suitability and reliability of the contracting party. The secret bids/tenders are often

divided into technical and financial bids. The technical part of the bids may contain information about the technology and the processes evolved and developed by the bidders which technology and process may not otherwise be in public domain and which the bidders may not want revealed to the competitors. If a bidder were to be disclosed the entire information submitted by another rival bidders, the possibility of unscrupulous businessmen participating in the tender merely for acquiring such information cannot be ruled out. Such disclosure may lead to the competitors undercutting in future bids. It would be pertinent to extract para 11 of the decision in extenso :-

"11. Over the years the secret bids are not confined to the price only, which may cease to be of any value or lose confidentiality once the bids are opened. The bids/tenders today require the bidders to submit in the bids a host of information which may help and be required by the tender calling institution to evaluate the suitability and reliability of the contracting party. The bidders are often required to, in their bids disclose information about themselves, their processes, turnover and other factors which may help the tender calling institution to evaluate the capacity of the bidder to perform the contracted work. The secret bids/tenders are often divided into technical and financial parts. The bidders in the technical part may reveal to the tender calling institution their technology and processes evolved and developed by them and which technology and processes may not otherwise be in public domain and which the bidder may not want revealed to the competitors may lead to the bidder losing the competitive edge in subsequent awards of contracts. If it were to be held that a bidder by virtue of participating in the tender becomes entitled to all particulars in the bids of all the bidders, the possibility of unscrupulous businessmen participating in the tender merely for acquiring such information, cannot be ruled out. Such disclosure may lead to the competitors undercutting in future bids. We may at this stage notice that the Freedom of Information Act prevalent in United States of America as well as the Freedom of Information Act, 2000 in force in United Kingdom, both carve out an exception qua trade secrets and commercial or financial information obtained from a person and which is privileged or confidential. The tests laid down in those jurisdictions also, is of 'if disclosure of information is likely to impair government's ability to obtain necessary information in future or to cause substantial harm to competitive position of person from whom information is obtained. It has been held that unless persons having necessary information are assured that it will remain confidential, they may decline to cooperate with officials and the ability of government to make intelligent well-informed decisions will be impaired. Yet another test of whether the information submitted with the bids is confidential or not is of 'whether such information is generally available for public perusal' and of whether such information 'is customarily made available to the public by the business submitter'. If it is not so customarily made available, it is treated as confidential."

(iii) A balance has to be struck between the principle of promoting honest and open Government by ensuring access to information on the one hand and the principle of confidentiality breach whereof is likely to cause substantial harm to the competitive position of a person from whom information is obtained. Para 13 of the order is extracted below :-

"13. What thus emerges is that a balance has to be struck between the principle of promoting honest and open government by ensuring public access to information created by the government on the one hand and the principle of confidentiality breach whereof is likely to cause substantial harm to competitive position of the person from whom information is obtained and the disclosure impairing the government's ability to obtain necessary information in future on the other hand. Also, what has been discussed above may not apply in a proceeding challenge wherein is to the evaluation process. It will then be up to the Court before which such challenge is made, to decide as to what part of the evaluation process is to be disclosed to the challengers."

(iv) Even though the tender process in this case has been scrapped, the information which is being sought, relates to evaluation of the bids by the appellant BSNL. Even though the period of non-disclosure agreement has expired, yet the court holds the view that the disclosure of third party information would require following the procedure prescribed under section 11(1) of the RTI Act. Para 16 of the order is extracted below :-

"16. What we find in the present case is that the tender process has been scrapped. The information which is being sought relates to the evaluation of the bids by the appellant. Though the Non Disclosure Agreement extended the obligation of confidentiality beyond the date of opening of the tenders also but only for a period of two years from the date of disclosure or to the completion of business purpose whichever is later. The business purpose stands abandoned with the scrapping of the tenders. More than two years have elapsed from the date when the information was submitted. Thus the said agreement now does not come in the way of the appellant disclosing the information. However, we are of the opinion that disclosure of such information which would be part of the evaluation process would still require the third party information procedure under Section 11 of the Act to be followed. As aforesaid, besides the bid price, there may still be information in the bid and which may have been discussed in the evaluation process, of commercial confidence and containing trade secret or intellectual property of the bidders whose bids were evaluated."

6. After making the above significant & meaningful observations, as noted above, Division Bench remanded the case to the Central Information Commission to issue notices to the parties whose bids were evaluated in the evaluation process u/s 11(1) of the Act and to decide the request of appellant Chander Shekhar afresh.

7. This is how this case has come up before this Commission.

8. Keeping in view the legal complexity of the matter, the Chief Information Commissioner constituted a Bench consisting of Shri M.L. Sharma, IC and Shri Basant Seth, IC. The Bench briefly heard the matter on 21.2.2013. Shri Suresh Kumar, Additional GM, BSNL(CPIO) was directed to produce the "Report on Evaluation of Tender on the Financial Bids" received from various bidders

in respect of any one of the Zones on 1.3.2013.

9. When the matter so stood, considering the importance of the matter, the Chief Information Commissioner, constituted a Full Bench comprising of the following to decide this matter :-

- Ms Annapurna Dixit, IC; in chair;
- Shri M.L. Sharma, IC; and
- Shri Basant Seth.

10. As Shri Suresh Kumar, CPIO, sought further time from the Commission for production of documents, the matter could not be heard on 1.3.2013. It was finally heard on 22.3.2013. BSNL was represented by Shri Suresh Kumar, Additional GM(CPIO) and Shri Jitender Agrohi, Additional GM. The appellant was represented by Adv. Surender Bir. The bidders were represented as follows :-

- Shri Pramod Singh for Iconn Tele Ltd.
- Adv. Angad Kochar for GTL Ltd.
- Brig.(Retd.) Sushil Kumar Arora for Aster Tele-Services Pvt. Ltd.

11. As directed by the Delhi High Court, the Commission issued notices to the following parties u/s 11(1) of the RTI Act.

- M/s. Spanco Telesystems & Solutions Ltd;
- M/s. Icomm Tele Ltd;
- M/s. Sujana Towers Ltd;
- M/s. G.T.L. Ltd; &
- M/s. ACME Tele Power Ltd.

12. Brig. Arora appearing for Aster Tele Services Pvt. Ltd. objected to the disclosure of the requested information in writing on the ground that it was proprietary information and if it falls in the hands of competitors, the Company's strategy for new bids would be known to them, thereby causing detriment to the Company. Adv. Pramod Singh appearing for Iconn Tele Services Pvt. Ltd. made oral objection to the disclosure of information. Adv.

Angad Kochar appearing for GTL Ltd. also objected to disclosure of information. The rest of the companies did not respond.

13. Shri Suresh Kumar, CPIO, has filed a written representation dated 19.2.2013 before the Commission in which he has stated that BSNL had floated a tender under the name of "GSM Phase VI" for the installation of 93 million GSM lines in four parts. Several bids were received by BSNL. The bids were evaluated and L-1 and L-2 were selected for Part-III. The price negotiations took place between BSNL and L-1 for Part-III. After negotiations, the rates were recommended by the Negotiating Committee to the competent authority for finalization/approval. However, the competent authority in his wisdom decided to scrap the tender. As a result of this scrapping, no contract came into existence. The bid was never given the shape of a contract and, therefore,

providing any information under the RTI Act does not arise. The representation goes on to say that BSNL had signed a Non-Disclosure Agreement with the participating vendors and for this reason also, requested information cannot be disclosed. According to him, para 18 of the mutual Non-disclosure Agreement casts an obligation of confidentiality even after the expiry or termination of the agreed period of confidentiality.

14. It has been further contended that by virtue of Non-Disclosure Agreement, the BSNL is the recipient of information in a fiduciary capacity and disclosure of information on its part would adversely affect the goodwill of BSNL in the public eye, with the result that there would be lesser participation of vendors in the future tenders thereby reducing competition and harming the financial interests of BSNL.

15. Adv. Surinder Bir appearing for the appellant has also filed a written representation wherein it has been contended that the bid of KEC was the lowest on 28th February, 2009, in the East Zone. However, its rating was down-graded during subsequent financial evaluation and the ACME bid, inspite of being non-compliant in tender terms, was evaluated as the lowest. This led to litigation in the courts. It is his further contention that BSNL has completed the process of financial evaluation of bids for all the Zones and has already rated the bidders in all the Zones and, therefore, information sought by him is not barred from disclosure under section 8(1) of the RTI Act. He has adduced the following grounds in support of his plea for non-applicability of section 8(1)(d) of the RTI Act :-

"That the disclosure after the evaluation was not amounting to a compromise of the competitive position of the bidders as the prices of each line item in the bid of all the bidders were in public domain once price bid was opened.

Most of the items required to be supplied in Part III of the tender are available off the shelf and the market prices are in public domain. Hardly any copy rights and patents in regard of these items are also not an issue as the technology involved in manufacturing is fairly mature and widely used. Consequently hardly any commercial confidence would be involved.

That the subsequent evaluation reports are merely a chronological recording of the procedure adopted to ascertain that the submitted bids are as per tender terms and the committees evaluating the bids have followed the terms specifying the evaluation procedure with due diligence.

That BSNL took a totally divergent stand in another petition filed by Nokia Siemens Network in the Punjab & Haryana High Court against BSNL challenging its techno-commercial evaluation pertaining to Part 2 of the tender in North Zone. BSNL totally ignored the Sec. 8(d) of RTI Act 2005 and NDA and volunteered itself in order to be transparent and fair and offered to share the evaluation report with Siemens Nokia Networks even when the financial evaluation of the bids had not commenced and BSNL was under no obligation to share the evaluation report at this stage, as per



stated stand of CIC.

That BSNL to provide me the evaluation reports does not pass the test that by any stretch of imagination it could have refused the Parliament to supply the reports, if asked. Consequently its reply is at total variance with the proviso to section 8 as well as the Kerala High Court judgment (Canara Bank v. CIS, Delhi, AIR 2007 Ker 225)"

16. It is also his contention that the period for which non-disclosure agreement was signed has since expired and, therefore, BSNL cannot use it as a shield to deny information which otherwise is disclosable.

17. As noted above, in response to the notices issued to them under section 11(1) of the RTI Act, the bidders have not agreed to the disclosure of information. The same stand has been taken by BSNL for the reasons mentioned here-in above. The real question before the Commission, therefore, is whether the information is disclosable to the appellant under the RTI Act.

18. It may be recalled that the CPIO and the AA had refused to disclose information under section 8(1)(d) of the RTI Act. Clause (d) is reproduced below :-

"(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information"

19. A bare reading of the above clause would indicate that any information which relates to 'commercial confidence' or 'trade secrets' or 'intellectual property' can be denied to the information seeker, if said disclosure would harm the competitive position of the third party. However, the competent authority still has the discretion to disclose such information if he is satisfied that disclosure of such information would serve a larger public interest. The question is whether the requested information contains any elements of commercial confidence, trade secrets or intellectual property. As observed by the Delhi High Court in BSNL -Vs- Chandersekhar, information relating to technology can be said to be covered in this category. Similarly, the minute details of the bids submitted by various parties may also said to be broadly covered under this clause. But during the hearing, Adv. Surinder Bir, appearing for the appellant, has clearly stated that he does not want voluminous documents relating to the bids in-question. All that he is interested is in the Report of Evaluation of Tender on the Financial Bids received from various bidders in respect of all the Zones. The relevant documents were produced before us by Shri Suresh Kumar, CPIO, on 22.3.2013 which were perused. In our opinion, the Evaluation Report does not contain any technological information, even though it does contain elements of financial information about the bids. It, thus, appears to us that the Evaluation Report per se does not contain any information which is barred from disclosure under clause (d).

20. On the other hand, the contention of Adv. Surinder Bir that KEC was L-1 in the East Zone but its rating was downgraded in the subsequent Financial Evaluation and ACME became L-1 thereby

casting doubt on the evaluation process, cannot be disregarded. It is important to mention that the tender is valued at Rs. 40,000 crores. The tender has been floated by a prestigious PSU of the Central Government i.e. BSNL. The PSUs are expected to set an example of transparency and open-ness before the people of the country. The appellant is not seeking technological information which is a proprietary item and involves bidders rights under various protective laws such as the Copyright Act, the Patent Act and so on. All that the appellant is requesting for is the Report of Tender Evaluation. Of course, this involves an element of financial information but it has to be noted that the tender has been cancelled under mysterious circumstances. In our opinion, disclosure of limited financial information contained in the Evaluation Report is not going to cause any harm to any of the parties at this belated stage. In fact, transparency in public life warrants that this information is disclosed. The confidentiality clause has become irrelevant due to its expiry. We are, therefore, of the opinion that it would be in the larger public interest to disclose the Report on Tender Evaluation in the Financial Bids. However, it will suffice if the report relating to the East Zone only is disclosed to the appellant where irregularities are alleged to have occurred.

21. This order may be complied with in 04 weeks.

Order reserved and pronounced on 2nd May, 2013.

( Basant Seth )  
Information Commissioner

( M.L. Sharma )  
Information Commissioner

( Annapurna Dixit )  
Information Commissioner

Authenticated true copy. Additional copies of orders shall be supplied against application and payment of the charges, prescribed under the Act, to the CPIO of this Commission.

( K.L. Das ) Deputy Registrar Address of parties :-

1. The CPIO,