

**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

Dated this the 23<sup>rd</sup> day of July, 2008

BEFORE

**THE HON'BLE MR. JUSTICE N KUMAR**

Writ Petition No. 3381 of 2008 (GM-TEN)

**BETWEEN:**

M/s NSoft(India) Services Pvt. Ltd.,  
No.91/ 1, 1<sup>st</sup> Floor  
Ramakrishna Square  
Bull Temple Road  
Bangalore - 560 019  
Represented by its  
Managing Director  
Sri Naagarej Subramanya ... Petitioner

(By Sri H N Sashidhara, Advocate for  
M/s Keavy & Co., Advocates)

**AND:**

1 M/s BESCO Ltd.,  
Bangalore Electricity Supply  
Company Limited  
Corporate Office  
K R Circle  
Bangalore  
Represented by its  
Managing Director  
Sri Chandre Gowda

2 M/s Zygox Infotech (P) Ltd.,  
No.8, 1<sup>st</sup> cross, 1<sup>st</sup> Floor  
Opp to Water Tank  
II Stage, Indiranagar  
Bangalore - 560038  
Represented by its  
Managing Director  
Sri Ravi Shanker

3 Additional Chief Secretary  
and Principal Secretary  
Department of Energy to the  
Government of Karnataka  
Vikasa Soudha  
Bangalore

... Respondents

(By Sri N Krishnananda Gupta, Advocate for R1;  
Sri B. Veerappa AGA for R3;  
Smt. Shobha Bhavikatti, Advocate for R2)

This Writ Petition is filed under Articles 226 and 227 of the Constitution of India, praying to quash the orders relating to Annexure-A, B, C, D dated 29-9-2007 vide BCP-207 in respect of LOT No.1 to 4 passes by respondent-1 also order dated 30-11-2007 as per Annexure-G along with the order dated 8-2-2008 passed by the Additional Chief Secretary, Department of Energy, Government of Karnataka/R3 in EN3 EEB 2008 as per Annexure-W.

This Writ Petition coming on for preliminary hearing this day, the Court made the following:

C O R D E R

The petitioner has challenged in this Writ Petition two contracts awarded to the second respondent and sought for quashing of the same. The first contract is in respect of spot billing and collection in BESCOM Sub-Divisions. Second contract refers to maintenance of billing software.

2. The first respondent floated a tender inviting bids for Total Revenue Management of Billing and Collection of BESCOM Sub-Divisions in respect of 4 lots. The common qualifying requirements were stipulated for all the Lots. The

petitioner was one such bidder and so also the second respondent. Petitioner's bid was not accepted whereas the second respondent's bid was accepted. The grievance of the petitioner is that the second respondent did not possess the requisite qualification, namely three years experience of providing similar services in any electricity supply utility in India. The second respondent contended that they do possess the three years qualification. The first respondent has not categorically stated in the statement of objections that the second respondent do possess the requisite qualification of three years experience. But, they rely on the observations of the appellate authority who has held that the second respondent has three years experience. Therefore, they contend that the petitioner's contention is baseless.

3. The petitioner preferred a statutory appeal against the order passed by the tender accepting authority under Section 16 of the *Karnataka Transparency in Public Procurements Act, 1999* for short hereinafter referred to as 'the Act'. The Appellate Authority after considering the rival contentions, at paragraph 4 of the order, dealt with the matter and held, according to R-1 the requirement as stated in the bid document, is only work of similar nature. Since there is no

specific definition in the tender document on what constitutes work of similar nature, the decision of the tender inviting authority in determining this was accepted and accordingly it dismissed the appeal. Aggrieved by the said orders the petitioner is before this Court.

4. Learned counsel for the petitioner assailing the aforesaid findings contended that the crucial date for computing three years experience is 19.11.2006 the date of the tender notification. The material on record discloses that for the first time the second respondent supplied spot billing machines only on 3.12.2004. If the period is computed from the said date, as on 19.11.2006, the second respondent did not have the prescribed qualification. Therefore, the findings recorded by the procurement entity as well as the Appellate Authority is on the face of it illegal and therefore, is liable to be quashed.

5. Per contra, the learned counsel appearing for the first respondent contended that, it is on 5.5.2003 as per Annexure-R13 the second respondent was awarded the previous contract and the period so computed from the said date, makes it clear that the second respondent had the three

years experience and, therefore, there is no substance in the contention of the petitioner. Learned counsel for the second respondent reiterated the aforesaid stand.

6. Annexure-H is the modified notice inviting tenders issued by the first respondent which is the subject matter of this Writ Petition. In the notification the first respondent invited tender through e-tendering from the eligible bidders for spot billing and collection in BESCOM subdivisions of the lots mentioned therein for a period of three years and renewable for a further period of two years on annual basis, subject to the discretion of BESCOM and mutually agreed terms and conditions. The circles to which the said tender related to was Bangalore Rural, Tumkur, Davanagere and Kolar. Clause 7.0 deals with the requirement of the procuring entity. It reads as under:

***Requirements:***

*The operational requirements:*

- (i) *The billing application software, the operating system, the database and the interface and the application software, for the spot billing machines will be provided by BESCOM.*



- v) The SP should provide the necessary hardware as follows:

Hardware/place	Sub-division	Section	Cash Counter (Local/remote)
Desktop PCs	4 Nos	2 Nos	1 no each
136 col Dot matrix printer	1 no	1 no.	Nil
80 col Dot matrix printer	Nil	Nil	1 no each
Laser printer	1 no	Nil	Nil
Bar Code Scanner	Nil	Nil	1 no each
ONLINE UPS	1x5KVA-4hrs	1x2KVA-2hrs	1x2KVA-2hrs each
LAN	Appr nodes	Appr nodes	Nil

(The specification as per Annexure-1) (appr-appropriate nodes)

**"Qualifying requirements: (Common for all the LOTE)**

- a. The Bidder shall be in the business of providing "similar service" for the last three years in any electricity supply Utility in India and have their own software development team for the last three years.
- b. The minimum turnover of the bidder in similar nature of job should be Rs.5 Crores per annum (Three years annual audited accounts should be produced along with the bid document).

- c. The bidder should have minimum 25 technically qualified persons (BE Computer or MCA Experienced in database applications) as well as knowledge on handling the oracle database application on Unix/Linux platform, in the pay roll of the company/firm for the last three years (Documents will be verified by the BESCOM IT staff.)
- d. The bidder should have minimum 10 technical persons in their payroll for the last three years to handle computer hardware problems like computer systems, printers etc.,

(underlining by me)

7. A reading of the aforesaid provision makes it clear that the bidder has to supply spot billing machines at the customers premises. He is also expected to supply stationary for both spot billing machines as well as for office purposes to meet the day to day activities in each sub-divisions. The bidder also has to supply desk top PCs, 136 column dot matrix printer, 80 column dot matrix printer, laser printer, barcode scanner, Online UPS and LAN. In substance it is a tender for supply of goods. ✓



8. For supply of the aforesaid goods the qualification prescribed for the bidder is that the bidder shall be in the "business of providing similar service" for the last three years in any electricity supply utility in India and have their own software development team for the last three years. The words "similar service" is referable to the goods to be supplied under clause 7.0 requirements, for a period of three years. In fact in the context the word similar is not only inappropriate but also misleading. The correct description would have been "Goods".

9. Earlier the second respondent was awarded a contract for maintenance of the systems and data base at 52 Sub-Divisions and also to establish a data warehouse at corporate office to maintain the customer accounts on 5/7-5-2003. This contract was for a period of two years. The respondents rely on Annexure-R13 to show the three years experience which refers to this contract for service. A reading of Annexure-R13 shows that the first respondent requested the second respondent to take up the work of providing DBA Support upgradation of BNC Software and database, at qualified L1 rate as envisaged in the project immediately. Further, reliance was placed on Annexure-R14 dated 22.9.2003 where it is stated with reference to the work entrusted to the second respondent, the

work of tuning and maintenance of the billing and collection software at 52 subdivision of BESCOM to a total cost of Rs.43,20,000/- is awarded to the second respondent-firm on mutually agreed terms and conditions to be entered into separately. There is no mention about supply of spot billing machines in the said tender. On the contrary it was a contract of service. The contract is for providing DBA Support Upgradation of BNC Software and Database and further includes the work of tuning and maintenance of building and collection software. Therefore, the earlier contract was not at all a contract for supply of goods and no spot billing machines were supplied under the said contract whereas the present contract is for supply of spot billing machines and other goods as aforesaid, which they call it as "BUSINESS OF PROVIDING SIMILAR SERVICE". It is obvious that these words are used in the tender with ulterior motive to help the second respondent and to award the contract to him. It is predetermined and tailor made.

10. After the aforesaid contract was awarded to the second respondent, for the first time under a separate contract No.309/2003-04 dated 3.12.2004, the second respondent has supplied 500 numbers of hand held spot billing instrument

with printer for electricity bills including all necessary software, interface software, etc., Therefore, the second respondent's experience in supplying spot billing machines to the first respondent is to be computed from 3.12.2004. So calculated, as on 19.11.2006 the second respondent did not have the three years experience as required under the terms of the bid document. In fact the earlier contract was purely for maintenance of hardware and software which were supplied by the first respondent. Therefore, the decision of the procurement entity that the second respondent do possess three years qualification in supplying spot billing machines to the first respondent for a period of three years is *ex facie* illegal and contrary to the material on record. Unfortunately, the Appellate Authority has not applied its mind to these material particulars and simply carried away by the expression used "similar business" without properly finding out what is the nature of tender and the work expected of the second respondent under the tender in question and what was the experience the second respondent acquired under the earlier tenders. Therefore, the order of the Appellate Authority is illegal. Thus, the second respondent did not possess the three years experience in supplying spot billing machines and other hardware items which is the subject matter of the tender

in question. Accordingly, the award of contract to the second respondent in preference to the petitioner who appears to have all the requisite qualification is a clear case of preferring a bidder who does not satisfy the qualification prescribed by the procuring entity. Therefore, the award of the contract to the second respondent is illegal and is liable to be quashed, and accordingly it is quashed.

11. The second contract pertains to maintenance of billing software awarded to the second respondent as per Annexure-G. The work of maintenance of billing software in Kolar, Tumkur, Davanagere and Bangalore Rural Circle at the rate of 65 paise per installation per month for the successfully generated bills during the month exclusive of applicable taxes was awarded to the second respondent. The contract was for a period of three years from the date of implementation and extendable for 2 more years on mutually agreed terms and conditions. It is not in dispute that before awarding this contract to the second respondent, the first respondent did not float any tender. It was awarded to the second respondent under clause (b) of Section 4 of the Act. The petitioner has alleged in the Writ Petition that the said award of contract is

contrary to the provisions of the Act and, therefore, liable to be quashed.

12. It is not in dispute that the petitioner was not a bidder for the said contract as no tender was floated by the first respondent. The award of contract is challenged for the first time in this Writ Petition. Therefore, it was contended on behalf of the respondents that, when the petitioner was not a rival claimant, he is estopped from challenging the contract that too belatedly before this Court.

13. When the first respondent did not invite tenders, the question of petitioner submitting his bid would not arise. It is true in the tender floated in 2005 the petitioner was not an applicant. That cannot be held against him while awarding contract for the year 2007. As he was not aware of the award of present contract to the second respondent, he has challenged the same immediately after coming to know of the same. That explains the delay. Therefore, this Writ Petition filed challenging the award of contract to the second respondent without calling for tender and in contravention of Section 4 of the Act is maintainable.

14. Even on merits it was contended that the first respondent had floated a tender inviting bids for DBA and centralized consumer data base -cum-consumer care centre in the year 2002. The last date for sale of bidding document was 17.10.2002 and the last date for receipt of bids was 31.10.2002. In pursuance of the said notification five applications were received and the petitioner was not one among such applicant. On consideration of the comparative merits of those five applicants, the bid submitted by the second respondent was accepted as it was more competitive. The said contract was for a period of two years as is clear from Annexure-R13 dated 5/7.5.2003. It is after expiry of the two years period the impugned contract has been awarded to the second respondent as per Annexure-G, under clause (b) of Section 4 of the Act as the aforesaid service is available only from a single source and there are no reasonable alternatives or substitutes exist. If the first respondent has complied with the provisions of Section 4(b) of the Act and has awarded the contract to the second respondent, the petitioner cannot have any grievance whatsoever. Therefore, it is to be examined whether Section 4(b) of the Act has been complied with while awarding the contract to the second respondent.

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15. The records of the first respondent is made available to the Court. It discloses on 3.11.2006 a meeting was held to discuss regarding the implementation of the billing software and to have a uniform billing system across BESCOM and to examine whether as per the Act the BILLNET software can be deployed across BESCOM and its maintenance can be given to the second respondent. The relevant proceedings are reproduced hereunder:-

*"BANGALORE ELECTRICITY SUPPLY COMPANY  
Corporate Office, K.R. Circle, Bangalore - 560 001*

**PREAMBLE:**

*BILLNET software utilized for Billing of BESCOM in EMAS is developed and maintained by M/s. Zygox Infotech Ltd., Bangalore. In the meeting held on 03-11-2006 under the chairmanship of CMD, BESCOM to discuss regarding the implementation of the billing software and to have a uniform billing system across BESCOM it was asked to examine whether as per KTPP act the BILLNET software can be deployed across BESCOM and its maintenance can be given to M/s.Zygox Infotech Ltd., Hence, a committee was constituted to examine whether the BILLNET software developed for BESCOM with the assistance of M/s Zygox Infotech Ltd., can be treated as single source and the maintenance of this software can be given through a direct award*







16. A reading of the aforesaid proceedings make it clear that the first respondent was conscious of the fact that if any service or goods have to be procured, they have to follow the Act and an exception is carved out under Section 4 and before the said exception could be availed of, it is necessary for them to constitute a committee under the said section. Therefore, a committee consisting of four members was constituted to examine whether the BILLNET software developed for BESCOM with the assistance of the second respondent could be treated as a single source and the maintenance of this software can be given through a direct order. The committee examined the terms of reference. It held four sittings. The points discussed during these sittings are referred. But, in the end they are fair enough to observe that, "we the members of this committee come to a unanimous conclusion that as none of us are experts in the software domain, this matter should be referred to Prof. Sadagopan, Director, IIT, Bangalore, for his opinion".

17. From this it is clear that the committee constituted under Section 4 was not a committee of experts. It was a committee of four officials who were not experts. Therefore, the said committee cannot be construed as a committee of experts

constituted under Section 4(b) of the Act. It was not a committee of experts under the said provision.

18. The said committee addressed a letter to Professor Sadagopan which reads as under :-

**"BANGALORE ELECTRICITY SUPPLY COMPANY  
LIMITED**

*(Wholly owned Government of Karnataka Undertaking)*

No. GM(E)/BCS/SPA/-19972-73    Office of the General  
Encl: One Bunch                    Manager (Elec)  
C.O&M, South Circle  
K.R. Circle, Bangalore  
Dated: 27-12-2006

Prof. S. Sadagopan                    4 Jan 2007  
Director  
International Institute of Information  
Technology  
26/C, Opp. Infosys (Gate-1)  
Electronic City  
Bangalore - 560 100

*By Regd. Post*

Sir,

*Sub: Awarding Maintenance Contract of the  
Billing Software Implemented in BESCOM*

*Ref: Our discussion with your kindself on  
16-12-2006, at IIT, Bangalore.*

*Adverting your kind attention to the above  
subject and as discussed with your kindself, we wish to  
bring the following points:*

*BESCOM has implemented a Billing Software,  
which was initially developed by TCS and then  
awarded to M/s Zygox for maintenance during 2003,  
which is running successfully in Bangalore city. Now,  
BESCOM intends to expand the same software to entire  
BESCOM area.*

NOT A RECORDED COPY OF MAINTENANCE CONTRACT OF BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED

In this regard we need your expert opinion on the following:

- i) Can BESCOM directly award this maintenance contract to M/s Zygox or should call for a tender.
- ii) We are using SCOUNIX V7.1.3. as our operating system with Oracle 8.1. as the database and VB.net as front end for this billing software. We need your opinion on continuing using this version of this software.

Further, if any clarifications are required please feel free to contact the undersigned.

Yours faithfully,

Sd/-  
General Manager, (Elect.)  
Bangalore South Circle, BESCOM  
& Convener of the Committee"

19. A reading of the aforesaid letter makes it clear that instead of asking the expert whether the aforesaid services are available elsewhere or it is available only from a single source or the second respondent has exclusive rights in respect of the aforesaid goods or service, they were requesting the expert to tell them whether they can directly award the maintenance contract to the second respondent or should they call for a tender. In reply to the said letter Professor Sadagopan has replied as under :-

"INTERNATIONAL INSTITUTE OF INFORMATION  
TECHNOLOGY BANGALORE

Prof. S. Sadagopan  
Director



*Novell or Microsoft Windows (taking into account application portability).*

*Thanking you  
With regards  
Sd/-  
S. Sadagopan*

*Cc: Mr. Anil D'Souza  
Asst. G.M. - IT & MISD  
BESCOM  
Bangalore\**

20. A reading of the letter makes it clear that it is an opinion of an expert. But, it does not disclose that the services rendered is available from a single source only or that the second respondent has exclusive right in respect of the services and no reasonable alternative or substitutes exist. Therefore, he has not certified that the services are available from a single source. The said opinion is of no assistance, and if the authority has acted on such opinion it is highly illegal. However, it is thereafter, on the basis of the said opinion the contract was awarded to the second respondent.

21. It is in this background we have to see what are the requirements to be satisfied under Section 4 of the Act before a contract could be awarded without calling for tender. The Act was enacted by the Karnataka State Legislature to provide for ensuring transparency in public procurement of goods and

services by streamlining the procedure in inviting, processing and acceptance of tenders by Procurement Entities, and for matters related thereto. "Procurement Entity" has been defined under the said Act to mean, any Government Department, a State Government Undertaking, Local Authority or Board, Body or Corporation established by or under any law and owned or controlled by the Government, and any other body or authority owned or controlled by the Government and as may be specified by it. Chapter II deals with regulation or procurement. Section 5 provides that, on and from the date of commencement of the Act no procurement entity shall procure goods or services except by inviting tenders for supply. Section 6 contemplates that no tender shall be invited, processed or accepted by a procurement entity after the commencement of the Act except in accordance with the procedure laid down in the Act or the Rules made thereunder. Act provides for publication of tender bulletins, tender bulletin officers, tender inviting authority and tender accepting authority, tender scrutiny committee, opening of tenders, duties of tender inviting authority, how a tender is to be accepted, how a tender is to be rejected and a statutory appeal to a person aggrieved in the aforesaid tender process.

22. Therefore, after coming into force of the Act, inviting tenders for procuring the goods and services is the rule and the said procurement should be in accordance with the procedure prescribed under the Act. However, the Act makes two exceptions. Firstly, as contemplated under Section 3 the provisions of the Act are not made applicable to the projects funded by international financial agencies or projects covered under international agreements. The second exception, with which we are concerned, is found in Section 4 which reads as under :-

*4. Exceptions to applicability.- The provisions of Chapter II shall not apply to Procurement of goods and services,-*

*(a) During the period of natural calamity or emergency declared by the Government;*

*(b) Where the goods or services are available from a single source or where a particular supplier or contractor has exclusive rights in respect of the goods or services or construction work and no reasonable alternatives or substitutes exist.*

*Provided that for the purpose of this clause there shall be a committee of three experts consisting of one technical representative of the procuring entity one technical representative of the*



*Government organization dealing with similar procurement and one representative from a reputed Academic Or Research Institution or Non-Commercial Institution having expertise in such line to examine and declare that the goods or services are available from a single source.\**

23. Therefore, it is clear, during the period of natural calamity or emergency declared by the Government for procuring goods or services it is not necessary to follow the procedure prescribed under the Act. The second exception is clause (b). That is, where the goods or services are available from a single source or where a particular supplier or contractor has exclusive rights in respect of the goods or services or construction work and no reasonable alternatives or substitutes exist. Then it is not necessary to follow the procedure prescribed under the Act. There is no obligation to procure such services and goods by inviting tenders. But, before this provision could be invoked, there should be a finding by a competent authority that the goods or services are available only from a single source or a particular supplier or a contractor who has exclusive rights in respect of the goods or services. For that purpose the statute provides for constitution

of a committee of three experts consisting of the following persons:-

- (1) one technical representative of the procuring entity
- (2) one technical representative of the Government organisation dealing with similar procurement
- (3) one representative from a reputed Academic or Research Institution or Non-Commercial Institution having expertise in such line to examine and declare that the goods or services are available from a single source.

24. The said experts have to be drawn from three different sources as mentioned in the provision. The significance of the same is, that two of them are not under the control of the procurement entity. That is how the public interest is protected and transparency is achieved, even in exceptional cases. Therefore, all the aforesaid persons, i.e. technical persons, must be experts in the field. It is the committee consisting of these three experts alone which on consideration of the goods and services which are placed before it, can declare that the goods or services are available from a single source. It is after such certification by the committee of experts in the field, the procurement entity could place orders

for supply of service and goods from such single source. Therefore, the Legislature has taken pains to meticulously provide in the Act itself for the constitution of the committee of experts and for their decision before the regular procedure is dispensed with. As Section 4 is an exception to the general rule, the said provision has to be strictly construed.

25. It is in this background when we look into the facts of this case, the first respondent committed the first error in not appointing experts in the field as committee members. The committee constituted was not of experts. They were unable to take a decision. The said committee committed an error in referring the matter to a Professor, an expert in the field for which they had no power under the Act. It is the procurement entity which has to constitute a three member expert committee to consider the services rendered by the second respondent and then to find out whether he is the only person who has got exclusive control of the said service. That has not been done. After the matter was referred to Professor Sadagopan obviously he was not aware of the provisions of this Act. He has not certified that the petitioner is the only source from which this service could be procured. The recommendation made by him is very general in nature. It

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the tendency of the first respondent, an Instrumentality of the State, to continue to indulge in manipulations and distributing the public largesse is quite evident in this case. When the whole machinery of an instrumentality of the State is directed towards preferring a particular individual or a company in preference to other persons who are similarly placed and the anxiety shown by the statutory authority in awarding contract, in utter violation of the provisions of the Act clearly demonstrates that the authorities are acting in violation of the rule of law. In fact the way tender is worded also gives an impression that from the inception they have kept in mind the interest of the second respondent and not the authority. When these facts are brought to the notice of this Court, this Court cannot be a silent spectator. It is not a mere issue of a writ to quash an illegal action. A duty is cast on the Court to see in future such illegalities do not occur. Therefore, it is very much necessary for this Court to quash these contracts in particular the second contract which is granted in utter violation of the provisions of the Act. As the petitioner has succeeded in showing the illegality he is entitled to succeed and is entitled to get both the contracts quashed.

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28. However, merely because the contract awarded to the second respondent is quashed at the instance of the petitioner, the petitioner is not entitled to the award of contracts straightaway. Before the petitioner could be said to be entitled to the contract, he should satisfy the tender accepting authority that he possess the requisite qualification. That is an exercise to be done by the tender accepting authority and not by this Court. Therefore, I pass the following order:-

- (a) *Writ Petition is allowed.*
- (b) *Annexures-A, B, C and D as well as Annexure-G are hereby quashed. The order of the Appellate Authority at Annexure-W is also quashed.*
- (c) *The first respondent is directed to consider the tender of the petitioner in respect of the contract at Annexure-"H" in accordance with law and pass appropriate orders.*
- (d) *In respect of the contract Annexure "G", the first respondent is directed to follow the procedure prescribed under the Act in awarding the contract*
- (e) *No costs.*

Sd/-  
Judge

ckd/ujk