

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 9TH DAY OF JULY 2015/18TH ASHADHA, 1937

WP(C).No. 17882 of 2015 (I)

PETITIONER(S) :

**CHERIAN VARKEY CONSTRUCTION COMPANY (PVT)LTD.,
ENGINEERS & CONTRACTORS, VTH FLOOR , ALFA PLAZA,
K.P.VALLON ROAD, KADAVANTHRA, KOCHIN- 682 020,
REPRESENTED BY ITS DIRECTOR GEORGE VARKEY.**

**BY ADVS.SRI.SANTHOSH MATHEW
SRI.SATHISH NINAN
SRI.ARUN THOMAS
SRI.JENNIS STEPHEN**

RESPONDENT(S) :

- 1. STATE OF KERALA,
REPRESENTED BY SECRETARY TO GOVERNMENT,
PUBLIC WORKS DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM- 695 001.**
- 2. THE CHIEF ENGINEER,
PUBLIC WORKS DEPARTMENT, ROADS & BRIDGES,
PUBLIC WORKS DEPARTMENT, THIRUVANANTHAPURAM- 33.**
- 3. THE SUPERINTENDING ENGINEER,
PUBLIC WORKS DEPARTMENT , ROADS & BRIDGES,
SOUTH CIRCLE, THIRUVANANTHAPURAM- 33.**
- 4. SEGURO INKEL CONSORTIUM LLP,
EDAPPALLY TOLL JUNCTION, EDAPPALLY P.O., KOCHI- 682 024.**
- 5. KERALA STATE CONSTRUCTION CORPORATION,
30/1521A, PONNURUNNI, VYTILA, ERNAKULAM, KOCHI- 682 019,
REPRESENTED BY ITS MANAGING DIRECTOR.**

**R1 TO R3 BY ADV. SRI.K.A.JALEEL, ADDL. ADVOCATE GENERAL
R4 BY SRI.K.JAYAKUMAR (SENIOR ADVOCATE)
ADVS. SRI.N.AJITH**

SRI.P.M.NEELAKANDAN

R5 BY ADV. SRI.M.V.THAMBAN, S.C.

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 09-07-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS :

- EXT.P1: TRUE COPY OF THE NOTICE INVITING TENDER ISSUED BY THE 2ND AND THIRD RESPONDENTS.**
- EXT.P2: TRUE COPY OF THE TENDER DOCUMENTS SUBMITTED BY THE PETITIONER.**
- EXT.P3: TRUE COPY OF THE EXPERIENCE CERTIFICATE ISSUED TO THE PETITIONER FOR THE DESIGN AND CONSTRUCTION OF 5 ROB'S AT PONNURUNNI, ANAYARA, THIRUNAVAYA YARD, DEVDHAR, CHERUVATHUR YARD.**
- EXT.P4: TRUE COPY OF THE PROVISIONAL CERTIFICATE FOR COMPLETION OF WORK AND THE CERTIFICATE ISSUED BY THE NATIONAL HIGH WAY AUTHORITY TO THE PETITIONER.**
- EXT.P5: TRUE COPY OF THE CERTIFICATE ISSUED TO THE PETITIONER FOR EXTENSION OF SOUTH JETTY BY 100 METERS.**
- EXT.P6: TRUE COPY OF THE CERTIFICATE TO THE PETITIONER BY THE DELHI METRO RAIL CORPORATION LTD.**
- EXT.P7: TRUE COPY OF THE PRINTOUT OF THE BID SUBMISSION CONFIRMATION ISSUED BY THE TENDER INVITING AUTHORITY, I.E.THE THIRD RESPONDENT.**
- EXT.P8: TRUE COPY OF THE COMMUNICATION RECEIVED FROM THE THIRD RESPONDENT ON 12.06.2015 BY THE PETITIONER.**
- EXT.P9: TRUE COPY OF THE TENDER SUMMERY REPORT 12.06.2015 IN RELATION TO THURAVOOR PAMBA ROAD RENOVATION AND CONSTRUCTION OF THYKKATTUSSERI NEEREKADAVU BYE PASS AND BRIDGE (PHASE IV- CONSTRUCTION OF MACHEYKADAVU NEEREKADAVU BRIDGE ACROSS VEMBANADU LAKE).**
- EXT.P10: TRUE COPY OF THE E-MAIL SENT BY THE PETITIONER DATED 12.06.2015 TO THE TENDER INVITING AUTHORITY.**
- EXT.P11: TRUE COPY OF THE PRINTOUT TAKEN FROM THE WEBSITE OF THE PUBLIC WORKS DEPARTMENT BY THE PETITIONER RELATING TO TENDER NO.PQ 1/SESC/2015-16.**
- EXT.P12: TRUE COPY OF THE CERTIFICATE ISSUED BY THE EXECUTIVE ENGINEER, PUBLIC WORKS DEPARTMENT, ROADS DIVISION, ALAPPUZHA IN FAVOUR OF SEGURO FOUNDATIONS AND STRUCTURES (P) LTD.**

- EXT.P13: TRUE COPY OF THE NOTICE INVITING TENDER DATED 30.10.2012 ISSUED BY PUBLIC WORKS DEPARTMENT.
- EXT.P14: TRUE COPY OF THE JOINT VENTURE AGREEMENT ENTERED INTO BETWEEN SRI.C.V.RAJEEV, MANAGING DIRECTOR, SEGURO FOUNDATIONS AND STRUCTURES (P) LTD. AND SRI.P.T.MATHAI, MANAGING DIRECTOR OF P.TMATHAI CONSTRUCTION COMPANY PVT.LTD.
- EXT.P15: TRUE COPY OF THE PRINT OUT EVIDENCING THAT THE ENDER FOR CONSTRUCTION OF THYCATTUSSERY BRIDGE ACROSS OLAVAIPPU KAYAL IN THURAVOOR-PAMBA ROAD SUBMITTED BY SRI.C.V.RAJEEV, UNDER SEGURO FOUNDATIONS AND STRUCTURES (P) LTD. (J.V).
- EXT.P16: TRUE COPY OF THE PRINT OUT OF THE RELEVANT PAGE TAKEN FROM THE WEBSITE OF PUBLIC WORKS DEPARTMENT RELATING TO THAT THE TENDER FOR CONSTRUCTION OF THYCATTUSSERY BRIDGE ACROSS OLAVAIPPU KAYAL IN THURAVOOR-PAMBA ROAD.
- EXT.P17: TRUE COPY OF THE GOVERNMENT ORDER G.O.(RT)NO.407/2013/PWD DATED 22.03.2013.
- EXT.P18: PHOTOGRAPHS RELATING TO THE AROOR-KUMBALAM BRIDGE CONSTRUCTED BY THE PETITIONER.
- EXT.P19: PHOTOGRAPHS RELATING TO THE WORK CARRIED OUT BY THE PETITIONER RELATING TO THE EXTENSION OF SOUTH JETTY.
- EXT.P20: PHOTOGRAPH RELATING TO THE VENDURUTHY RAILWAY BRIDGE CONSTRUCTED BY THE PETITIONER.
- EXT.P21: PHOTOGRAPH RELATING TO THE GOSHREE BRIDGE FOR COCHIN PORT TRUST CONSTRUCTED BY THE PETITIONER.
- EXT.P22: PHOTOGRAPH RELATING TO THE AYIRAM TENGU BRIDGE BY THE PETITIONER FOR KPWD.
- EXT.P23: PHOTOGRAPH RELATING TO THE PERUMON BRIDGE CONSTRUCTED BY THE PETITIONER FOR SOUTHERN RAILWAY.
- EXT.P24: PHOTOGRAPH RELATING TO THE KANDALUNDY RAILWAY BRIDGE CONSTRUCTED BY THE PETITIONER FOR SOUTHERN RAILWAY.
- EXT.P25: TRUE COPY OF THE LIST PERTAINING TO THE VARIOUS BRIDGES COMPLETED BY THE PETITIONER.
- EXT.P26: TRUE COPY OF THE RELEVANT EXTRACT OF TENDER ISSUED BY THE COCHIN PORT ROAD COMPANY LIMITED.

- EXT.P27: TRUE COPY OF THE CERTIFICATE ISSUED BY M/S.SREE GIRI CONSULTANTS IN FAVOUR OF THE PETITIONER.**
- EXT.P28: TRUE COPY OF EXPERIENCE CERTIFICATE DATED 16.08.2012 PRODUCED BY THE 4TH RESPONDENT PURSUANT TO EXHIBIT P13 NOTICE.**
- EXT.P29: TRUE COPY OF CERTIFICATE DATED 01.03.2012 ISSUED IN FAVOUR OF SHRI.ROJER MATHEW, DIRECTOR, M/S.P.T.MATHAI CONSTRUCTION COMPANY PVT.LTD.**

RESPONDENT(S)' EXHIBITS :

- EXT. R3(A): TRUE COPY OF MINUTES OF THE CHIEF ENGINEER'S COMMITTEE MEETING FOR EVALUATING PREQUALIFICATION WORK HELD ON 11.06.2015.**
- EXT.R3(B): TRUE COPY OF RELEVANT PAGE OF SCHEDULE C WHICH FORMS PART OF EXHIBIT P1 TENDER.**
- EXT.R3(C): TRUE COPY OF THE AGREEMENT DATED 26.04.2013.**
- EXT.R3(D): TRUE COPY OF THE WORK ORDER NO.DB 8/2980/12 DATED 20.12.2012 ISSUED BY THE SUPERINTENDING ENGINEER (ROADS & BRIDGES), SOUTH CIRCLE, THIRUVANANTHAPURAM.**
- EXT.R4(A): DATED 26.04.2013 A TRUE COPY OF THE MODIFICATION AGREEMENT MODIFYING EXT.P14 JOINT VENTURE AGREEMENT.**
- EXT.R4(B) SERIES: DATED 02.05.2015 & DATED 30.04.2014 TRUE COPIES OF CERTIFICATES AND DEDUCTIONS OF TAX BOTH VAT AND INCOME TAX AT SOURCE IN RESPECT OF RESPONDENT NO.4.**

//TRUE COPY//

P.A.TO JUDGE.

Msd.

K. VINOD CHANDRAN, J.

W.P.(C) No. 17882 of 2015 (I)

Dated this the 9th day of July, 2015

J U D G M E N T

The petitioner, a contractor who was not pre-qualified in Ext.P1 tender notification, is before this Court challenging his rejection as also the qualification of the 4th respondent.

2. The pre-qualification of the petitioner was rejected as per Ext.P8 communication which does not show any specific reason, but a monotonous refrain that the petitioner's tender was rejected for the reason 'rejected'. The petitioner, having failed to cross the threshold technical evaluation, was not considered in the financial bid. The grant of the award itself was stayed by this Court for reason of the rejection having not disclosed any perceivable cause.

3. I have heard the learned counsel appearing for the petitioner, learned Additional Advocate General for the State, learned Senior Counsel Sri. K. Jayakumar for the 4th respondent and Sri. M.V. Thamban, learned Standing Counsel for the 5th respondent.

4. The petitioner essentially points to Ext.P1 tender notification and the description of work which is available in Ext P7, which reads as follows:

“DESIGN TENDER Budget speech
2011-12 Thuravoor Pamba road
Renovation and construction of
Thykkattusseri Neerekadavu Bypass
and bridge (Phase IV - Construction of
Mackeykadavu Neerekadavu bridge
across Vembanadu lake) including
preparation of suitable designs”

The pre-qualification condition as indicated in Ext.P1 is that every tenderer ought to have completed at least one similar work costing more than 40% of the estimated Probable

Amount of Contract (PAC). The PAC which was notified as per Ext.P1 was Rs.93,79,00,000/-; 40% of which will come to Rs.37,51,60,000/-. The petitioner relies on Exts. P3, P4, P5 and P6 certificates which he had submitted along with the tender. The certificates so produced amply satisfy the pre-qualification condition, argues counsel.

5. The contention essentially is that the Technical Evaluation Committee's minutes, as is produced along with the counter affidavit of the 3rd respondent at Ext.R3(a), speaks of consideration of Ext.P3 certificate alone, while the counter affidavit filed by the 3rd respondent specifically says so in paragraph 5:

“The tender submitted by the petitioner was rejected as Exhibits P3 to P6 certificates submitted by the petitioner did not comply with the pre-qualification norms specified in the notice inviting tender.”

Hence it is evident that the Technical Evaluation Committee has not considered the other certificates and it is evident that they were produced along with the technical bid.

6. The learned Additional Advocate General however would contend that the counter affidavit, would itself indicate that an evaluation of the certificates also were made and the deponent to the counter affidavit, has specifically spoken on why the said tender certificates could not relied on, to permit the petitioner to be pre-qualified.

7. The learned Senior Counsel appearing for the 4th respondent would, in fact, contend that on a mere perusal of the certificates produced, it would be evident that the petitioner could not have passed the pre-qualification threshold. This Court is invited to look into the certificates itself to understand whether a re-consideration is warranted.

8. However, on an overall view of the circumstances, this Court has to accept the contention of the petitioner that a public authority cannot rely on the statements, made in the counter affidavit, to substitute or substantiate the findings in the order itself. The Superintending Engineer was not a member of the Committee and he cannot presume that there was a consideration of all the certificates, when, in fact, such consideration is not disclosed in the minutes of the meeting.

9. Reliance is placed on **Mohinder Singh Gill v. Chief Election Commissioner - (1978) 1 SCC 405** which has been followed in the recent decision of the Hon'ble Supreme Court in **Rashmi Metaliks Limited and Another v. Kolkata Metropolitan Development Authority and others - (2013) 10 SCC 95**. Paragraph 8 of **Mohinder Singh Gill's** case (supra), is extracted hereunder:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.”

10. In the present case, evidently Ext.R3(a) does not speak of consideration of any other certificates other than Ext.P3. It may not be proper for this Court to enter upon a technical evaluation for the simple reason that this Court does not have the expertise so to do.

11. In such circumstance, Ext.P8 rejection is set aside and it is only proper that the petitioner's technical bid be re-considered by the Technical Evaluation Committee within a period of ten days from the date of receipt of the certified

copy of this judgment. The 3rd respondent Superintending Engineer shall place the certificates before the Committee for consideration. In the circumstance of the orders passed, this Court would not enter into the further contentions raised as to the eligibility of the 4th and 5th respondents. That question would be left open.

Writ petition is allowed without making any observations on the pre-qualification eligibility of the petitioner, which is within the exclusive discretion of the Technical Evaluation Committee. If the petitioner is not pre-qualified then definitely the Government would be entitled to go ahead with the award already made.

Sd/-
K.VINOD CHANDRAN,
JUDGE