

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

WP(C).No. 26649 of 2015 (E)

PETITIONER:

M/S. KEI-RSOS MARITIME LTD.,
(A WHOLLY OWNED SUBSIDIARY OF
GOL OFFSHORE LTD.) #70-17 A-2/9B,
SASHIKANTH NAGAR, NEAR RTO OFFICE,
KAKKINADA - 533 033,
REPRESENTED BY ITS GENERALMANAGER.

BY SRI.R.D.SHENOY (SENIOR ADVOCATE)
ADVS.SMT.SATHYA SHREEPRIYA
SRI.K.LAKSHMINARAYANAN

RESPONDENT(S):

- 1. BHARAT PETROLEUM CORPORATION LTD.,
(A GOVT. OF INDIA ENTERPRISES), KOCHI REFINERY,
AMBALAMUGAL, ERNAKULAM, KERALA - 682 302,
REPRESENTED BY ITS CHAIRMAN.
2. UNDERWATER SERVICE COMPANY LIMITED,
23/24, MB.P.T BUILDING, MALER BUNDER,
MUMBAI - 400 009 (REPRESENTED BY ITS
HEAD SBM TERMINALS AND PORT OPERATIONS).

*ADDL. R3 IMPEADED

3. COSTAL MARINE CONSTRUCTION AND ENGINEERING LIMITED,
C CUBE BUILDING, MIRA-BHAYANDER ROAD, MIRA ROAD(E),
THANE, MAHARASHTRA - 401 107, REPRESENTED BY ITS
GROUP GENERAL MANAGER, MR.RAJAN K.SOOD.

ADDL. R3 IMPEADED AS PER ORDER DATED 30.10.2015 IN IA.15143/2015.

R1 BY ADVS. SRI.M.GOPIKRISHNAN NAMBIAR

SRI.P.GOPINATH
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURRYAN THOMAS

R2 BY ADVS. SRI.M.JITHESH MENON

SRI.SWARAJ KANTA WALA

ADDL. R3 BY ADVS. SRI.K.N.SIVASANKARAN

SRI.SUNIL SHANKER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 30-10-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

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APPENDIX

PETITIONER(S)' EXHIBITS:

- EXHIBIT P1. TRUE COPY OF THE CERTIFICATE DATED 10.08.2015 ISSUED BY THE 1ST RESPONDENT REGARDING THE SERVICES OF THE PETITIONER.
- EXHIBIT P2. TRUE COPY OF THE MINUTES OF THE MEETING DATED 14.11.2013.
- EXHIBIT P3. TRUE COPY OF THE FAX OF LETTER OF INTENT DATED 25.11.13 ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER.
- EXHIBIT P4. TRUE COPY OF THE NOTICE INVITING TENDER DATED 10.06.2015 ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT P5. TRUE COPY OF THE CORRIGENDUM NO.1, 2, 3 & 4 DATED 26.06.2015, 02.07.2015, & 06.07.2015 ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT P6. TRUE COPY OF THE E-MAIL DATED 06.08.15 ISSUED BY THE 1ST RESPONDENT REJECTING THE BID OF THE PETITIONER.
- EXHIBIT P7. TRUE COPY OF THE PARENT COMPANY CORPORATE GUARANTEE AS INDEMNITY BOND DATED 27.07.15.
- EXHIBIT P8. TRUE COPY OF THE CHARTER PARTY AGREEMENT BETWEEN OWNER OF "ALLIANCE" AND ARC OFFSHORE INDIA PVT. LTD. DATED 06.07.15.
- EXHIBIT P9. TRUE COPY OF THE INTEGRITY PACT FORMING A PART OF THE TENDER DOCUMENT.
- EXHIBIT P10. TRUE COPY OF THE PARENT COMPANY OVERVIEW PUBLISHED IN LEXIS NEXIS <http://www.lexisnexus.com>
- EXHIBIT P11. TRUE COPY OF THE TENDER BID SUBMITTED BY THE PETITIONER TO THE 1ST RESPONDENT.

RESPONDENT(S)' EXHIBITS:

- EXT. R1(A) : TRUE COPY OF THE PRE QUALIFICATION CRITERION FOR BIDDERS PUBLISHED BY THE 1ST RESPONDENT.
- EXT.R1(B) : TRUE COPY OF THE E-MAIL DATED 22.7.2015 FROM THE 1ST RESPONDENT TO THE PETITIONER.
- EXT.R1(C) : TRUE COPY OF THE E-MAIL DATED 22.7.2015 FROM THE PETITIONER TO THE 1ST RESPONDENT .
- EXT.R1(D) : TRUE COPY OF THE STUDY REPORT DATED 6.1.2015 EXECUTED BY BPCI, KRL, KOCHI.
- EXT.R1(E) : TRUE COPY OF THE LETTER DATED 29.5.2015 ISSUED 1ST RESPONDENT TO THE PETITIONER.
- EXT.R1(F) : TRUE COPY OF THE MAINTENANCE VESSEL DETAILS SPECIFIED IN TENDER NO.J12/15051 DATED 10.6.2015.

WP(C).No. 26649 of 2015 (E)

- EXT.R1(G) :** TRUE COPY OF THE MAINTENANCE VESSEL DETAILS SPECIFIED IN TENDER NO.J12/13107 DATED 1.7.2013.
- EXT.R1(H) :** TRUE COPY OF THE LETTER OF ACCEPTANCE DATED 26.8.2015 ISSUED TO THE 2ND RESPONDENT.
- EXT.R1(I) :** TRUE COPY OF THE RELEVANT PAGES OF THE GUIDELINES FOR PROCUREMENT OF GOODS & CONTRACT SERVICES PUBLISHED BY THE 1ST RESPONDENT IN JUNE 2015.
- EXT.R1(J) :** TRUE COPY OF THE RELEVANT PAGES OF THE DECISION RIGHTS AND AUTHORITIES PUBLISHED BY THE 1ST RESPONDENT IN JUNE 2015.
- EXT.R1(K) :** TRUE COPY OF THE LETTER DATED 15.7.2015 FROM THE IMPEADING PETITIONER TO THE HON'BLE MINISTER OF PETROLEUM & NATURAL GAS (WITHOUT EXHIBITS)
- EXT.R1(L) :** TRUE COPY OF THE LETTER DATED 23.9.2015 FROM BHARAT PETROLEUM CORPORATION LTD. TO THE PLEADING PETITIONER.
- EXT. R3(A) :** TRUE COPY OF THE LETTER OF THE 3RD RESPONDENT ADDRESSED TO HON'BLE MINISTER OF PETROLEUM AND NATURAL GAS DATED 15.7.2015.
- EXT. R3(B) :** TRUE COPY OF THE LETTER OF THE 1ST RESPONDENT DATED 23.9.2015.
- EXT. R3(C) :** TRUE COPY OF THE LETTER OF THE 3RD RESPONDENT ADDRESSED TO THE 1ST RESPONDENT DATED 15.4.2015.
- EXT. R3(D) :** TRUE COPY OF THE LETTER OF THE 1ST RESPONDENT DATED 6.5.2013.
- EXT. R3(E) :** TRUE COPY OF E-MAIL OF THE 1ST RESPONDENT DATED 6.8.2015.

//TRUE COPY//

P.S. TO JUDGE

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A.MUHAMED MUSTAQUE, J.

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**W.P.(C).No.26649/2015**

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Dated this the 30th Day of October, 2015

J U D G M E N T

The writ petition is filed by a limited company and a subsidiary of GOL Offshore, a public limited company to quash Exhibit P4 notice issued by the first respondent-Bharat Petroleum Corporation Limited inviting tender for contract of “operation and maintenance of Single Point Mooring (SPM) also directing the first respondent to permit the petitioner for extension of the contract of operation and maintenance of SPM for a period of 18 months from 01/11/2015.

2. The pre-qualification criteria for the bidders intending to participate in the tender has been prescribed as per Exhibit R1(a) produced by the first respondent. The financial criteria in the pre-qualification criteria is as follows:

“i. The annual turnover of the bidder shall not be less than Rs.24 Crores in any one of the immediately preceding three financial years (2011-12, 2012-13, and 2013-14).

ii. The financial net worth of the bidder as per the latest audited annual report (2013-14) shall be positive.”

3. The petitioner fulfilled first criteria in the financial aspect. Admittedly, they did not fulfill the second criteria. The Audited Annual Report of the petitioner for the financial year 2013-14 was negative. They were informed about non fulfillment of the criteria. Thereafter, they offered Parent Company Guarantee to fulfill the second criteria. Exhibit P7 is the Parent Company Guarantee. That was not acceptable to the first respondent. Accordingly, they have been disqualified for non-fulfillment of the above criteria.

4. The petitioner-Company have no challenge against rejection of tender. They are present SPM contractor. They seek the following reliefs:

“1. issue a writ of certiorari or any other appropriate writ, order or direction quashing Exhibit P4 notice issued by the 1st respondent inviting tenders for the contract of Operations and Maintenance of Single Point Mooring (SPM) and the subsequent proceedings thereon.

2. Issue a writ, order or direction declaring that the petitioner is entitled for extension of the contract of Operations and Maintenance of Single Point Mooring (SPM) for a period further period of 18 months from 01-11-2015.

3. Issue any other appropriate writ, order or direction in the interests of Justice that that this Honourable Court deems fit and proper in the facts and circumstances of the case.”

5. Heard the learned Senior Counsel appearing for the petitioner Shri R.D.Shenoy who raised following grounds of challenge:

i. The parent company offered guarantee, therefore, the purpose of the financial criteria is fulfilled.

ii. There were only three bidders and the two of the bidders were disqualified. Therefore, contract ought not have been awarded to a single bidder.

iii. There is a huge disparity of the amount quoted by the petitioner and the second respondent. This would show loss of public money by awarding contract to the second respondent.

iv. The second respondent obtained the contract by misrepresenting the fact that they have a support vessel 'Alliance' for SPM operation and maintenance. The petitioner-Company is having the support vessel "Alliance" from ARC India Pvt. Limited, which was offered by them as a support vessel. The contract awarded to the second respondent is impossible to be performed.

6. *Per contra*, the learned Standing Counsel for the first respondent would submit that the petitioner having participated in tender pursuant to Exhibit P4 notice cannot turn around and challenge Exhibit P4. Further, it is argued that the petitioner has been disqualified as per the

norms and pre-qualification criteria. It is also contended that the award of contract to the second respondent is based on the evaluation. It is further submitted that the parent company is a different entity and the parent company's undertaking cannot be accepted.

7. Learned counsel for the second respondent Shri Sujay Kantawala would argue that this is an important project and the offer made by the disqualified entity has no relevance for comparison with the offer made by the second respondent. The learned Counsel also referred to various documents to pin point the importance of the projects as well as the capacity of the second respondent.

8. In this matter, another Company who offered bid pursuant to Exhibit P4 notice got impleaded as an additional third respondent. According to the additional third respondent, the second respondent was a single bidder and therefore, a fresh tender has to be made.

9. The petitioner has been disqualified based on pre-qualification criteria. Admittedly, the audit report would show that the financial net worth of the petitioner for the year 2013-14 was negative. The petitioner offered parent company guarantee. The argument of the learned Senior Counsel is that the guarantee offered by the parent company has to be appreciated in the light of the criteria fixed. The learned Senior Counsel referred to

Tata Cellular v. Union of India [AIR 1996 SC 11] to contend that the rejection was on a ground which is irrelevant for the purpose of awarding contract.

10. It is to be noted that there is no challenge against rejection of the petitioner's tender. Even assuming that there is a challenge, this Court cannot substitute the terms and conditions in a tender notification, by directing the first respondent to accept the parent company's guarantee. It is for the first respondent to satisfy with the financial statement of the bidders. There may be many situations where the disqualified persons may be able to satisfy the first respondent, with other methods to fulfill the criteria of eligibility. The theory of substantial compliance cannot be pressed into service in contractual matters by referring to a method which is not prescribed in the tender notification. The petitioner has taken part in the tender process knowing that the financial statement is negative and without challenging the conditions in the notification. Therefore, the petitioner is estopped from challenging the decision of the first respondent when bid is rejected. Therefore, this Court cannot exercise the power of judicial review to unsettle the decision of the first respondent.

11. The petitioner's case is that the contract cannot be awarded to a single bidder. It is to be noted that the petitioner has approached this

Court as an aggrieved being disqualified from the tender. There were three bidders. The second respondent was not a single bidder. The restriction placed for a single bidder as per the guidelines of the Central Vigilance Commission would not apply in this matter. Assuming that it would apply, in a private interest litigation, this Court cannot extend its scope by extending its enquiry based on a public interest. The restriction of the Central Vigilance Commission was to ensure transparency in awarding public contract. The petitioner cannot extend the scope of the writ jurisdiction based on its *locus standi* to the realm of public interest.

12. The petitioner cannot claim extension as the contract has already been awarded to the second respondent. The petitioner has no right to demand extension.

13. The question of disparity in the amount quoted by the petitioner and the second respondent cannot be a subject matter of judicial review at the instance of a disqualified bidder. It is only when the petitioner's tender is accepted, a comparison would arise for consideration. Therefore, in the absence of creating a possibility for evaluation, the comparison of the amount offered by the petitioner with the amount offered by the second respondent has no relevance. As has been already noted, the scope of private litigation cannot be extended to make an enquiry of

public interest litigation. The existence of a legal right based on a private interest cannot be enlarged as of public interest available to a member of the public for the enforcement of public interest in which the public have larger interest. In law, there is a subtle distinction between the private injury and the public injury. The petitioner's attempt to project the issues based on public interest is rather to protect his own interest.

13. The last part argued by the senior counsel is regarding performance of contract. This is purely a hypothetical argument. Performance of a contract is a matter governing terms and conditions between the first respondent and the second respondent. This Court cannot preempt the award of the contract by the first respondent to the second respondent on a clause referable to performance. If the second respondent fails to perform the contract, the first respondent is free to take action under law. But that cannot be a ground for an unsuccessful bidder to seek a judicial review of the award of the contract to the successful bidder. Therefore, the writ petition fails and it is dismissed.

A.MUHAMED MUSTAQUE, JUDGE

30/10/2015

After pronouncement of the judgment, the learned counsel for the

W.P.(C).No.26649/2015

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petitioner sought retention of *status quo* for a period of one month.
Considering the nature of the issues involved, the request sought for is declined.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

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