IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.1211 OF 2017

1. **Coastal Marine Construction & Engineering Limited**
Off. 402, Madhava, Plot No. C-4,
E Block, Bandra Kurla Complex,
Bandra East, Mumbai 400051.

2. **Manoj Sharma**
Director of Coastal Marine Company
Add. 402, Madhava, Plot No. C-4,
E Block, Bandra Kurla Complex,
Bandra East, Mumbai 400051. ...Petitioners

versus

1. **The Shipping Corporation of India**
Off. Shipping House, 245,
Madame Cama Road, Mumbai 400021.

2. **Union of India**
Add. Aaykar Bhavan, Maharishi Karve Road,
Churchagate, Mumbai 400 021.

3. **Fugro Survey (India) Pvt. Ltd.**
Off. Fugro House, D-222/30, T.T.C. Indl. Area,
Navi Mumbai, Pin- 400706.

4. **Helms Geomarine Sdn Bhd.**
Off. 35L-1-11, KLSC, Jalan Wangsa Delima,
5, Pusat Bandar, Wangsa Maju,
Kuala Laumpur, Malaysia- 53300. ...Respondents

Mr. Venkatesh Dhond, Senior Counsel a/w. Mr. Ashwin Shanker, Bimal Rajasekar and Ms. Riddhi Nyati, for the Petitioners.
Mr. Manoj Khatri a/w. Mr. Arnab Ghosh, Mr. Alvia Crasta, Mr. Kumar Kothari i/b. M/s. Callidus Legal, for Respondent No. 1.
Mr. Dushyant Kumar, for the Respondent No. 2.
Mr. Rahul Narichania, Senior Advocate a/w. Mr. Madhur Rai i/b. PRS Legal, for the Respondent No. 3.
None for the Respondent No. 4.

JUDGMENT RESERVED ON : 10th November, 2017

JUDGMENT PRONOUNCED ON : **16th November, 2017**

CORAM : **SHANTANU KEMKAR &**
G.S. KULKARNI, JJ.

ORAL JUDGMENT: (*Per Shantanu Kemkar, J.*)

. In pursuance to the invitation to the bid floated by the Shipping Corporation on India/first Respondent in February, 2017 for appointment of Geotechnical Subcontractor for provision of Geotechnical personnel/services/equipment maintenance on board ONGC's Geotechnical Vessel (GTV) SAMUDRA SARVEKSHAK for a period of two years, the Petitioners and two other bidders (Respondent No. 3 and 4) submitted their bids.

2. As per clause 6 of the Eligibility/ Experience/Qualification Criteria for the Bidder as notified in the invitation to bid, reads thus:

> *6.1 Bidder must have following minimum experience (as on the date of opening of unpriced bid) in offshore geotechnical investigations.*
>
> *<u>Bidder independently</u> should have minimum of 4 years experience in carrying out offshore Geotechnical soil investigation works in last 10 years from similar Geotech Drilling DP Vessels, of which at least one contract should be in Indian waters.*

<u>Bidder independently</u> should have a proven track record of completing SI boreholes with a total penetration depth of not less than 8000 mtrs in last 4 years.

<u>Bidder independently</u> should have prior experience in carrying out Geotech soil investigation work at a water depth exceeding 200 mtrs in offshore in last 4 years.

Drilling done in shallow waters of depth less than 20 mtrs and on shore experience will not be considered for above experience purpose. The experience must be in both the activities of offshore geotechnical investigations i.e. field investigations involving rotary drilling, wireline operated sampling and Instu Static Cone Penetration Test equipment from a Geotechnical vessel /barge /floters, Laboratory testing, engineering analysis and reporting for offshore structures like steel jacket platforms and jack up rigs etc. The field investigations must have been executed in water depths exceeding 30 mtrs. and bore hole depths exceeding 80 mtrs. below sea bed (deep borehole) for platform location including Geotechnical investigations for boreholes depths exceeding 30 mtrs below sea bed (shallow borehole) for deployment of jack up rigs.

6.2 Bidders should furnish experience details as per format attached at Appendix I alongwith documentary evidence such as contract or work order copy/confirmation from Client Company for jobs as stipulated in the scope of work in support of their claimed experience. Details of experience and past performance of the bidder, on works/jobs done of similar nature in the past and details of current work in hand and other contractual commitments, indicating areas and clients are to be submitted along with the techno-commercial bid, in support of the experience laid down at para 6.1 above.

6.3 Bidder should perform the Geotechnical operations independently, without subcontracting any of the geotechnical operations to any third parties/ companies.

6.4 Bidder should have an established office set up with Project management and dedicated and experienced support staff in Mumbai, for executing the contract. In case the bider does not have the above, he shall be required to submit an

> *undertaking in technical bid stating that he will set up an office in Mumbai, if contact is awarded.*
>
> *6.5 Bids conforming to above eligibility criteria only will be considered. Bids from parties currently blacklisted by ONGC/SCI will not be considered.*
>
> *6.6 Personnel experience : The bidder confirm that bidder will provide personnel of requisite experience and qualification throughout the period of contract as per Annexure III. CV of personnel to be attached (emphasis supplied).*

3. The case of the Petitioner-Coastal Marine Construction & Engineering Limited is that though the third Respondent - Fugro Survey (India) Pvt. Ltd. did not fulfill the experience criteria, the first Respondent had accepted its technical bid by ignoring the mandatory minimum experience requirement. According to the Petitioners the third Respondent was not fulfilling the requisite experience criteria in its "*independent*" capacity and had claimed the fulfillment of the experience criteria by adding the experience of Fugro Survey (Middle East) Ltd. its Group Company/technical collaborator/ Subsidiary.

4. The case of the Petitioners is that experience of the bidder alone was required to be taken and the experience of Group Company/technical collaborator/Subsidiary could not be taken for

consideration in view of the use of the word "*independently*" in clause 6.1 of the criteria for eligibility regarding experience of different types mentioned therein. It is the case of the Petitioners that the interpretation of the term "*independently*" as done by the first Respondent leads to arbitrary exercise of powers. It is stated that had it been made known to the public at large that the experience of others like Group Company/technical collaborator/ subsidiary was also be taken into consideration, there would have been much more competition and many other bidders would have participated in the tender process and thereby there would have been a wide competition in the best public interest.

5. The first Respondent – Shipping Corporation of India in its reply has stated that the Petitioners have wrongly interpreted the term "*independently*" laid down in the tender condition. The term "*independently*" has been used by it to bar any form of association of the third parties by way of joint ventures and/or subcontracts. The same does not bar any form of any association between a parent company and a subsidiary. It has been further stated by the first Respondent that the parent company of the bidder needs to guarantee and undertake to provide the technical

support of the subsidiary as provided in Appendix VII of the tender document and thus the averment of the Petitioners that the bidder cannot make use of the qualification of the parent company is baseless and devoid of merits. It has also been stated that the Petitioners' objection in regard to taking into consideration the experience of the Petitioners' group companies/technical collaborator was considered by the Tender Processing Committee (for short "*TPC*") and after consideration of the relevant documents the TPC has rightly rejected the Petitioners' objection.

6. The third Respondent - Fugro Survey (India) Pvt. Ltd. in its reply has stated that Fugro group is world's largest and leading independent services provider for Geo Survey and Geo-Technical investigation for large constructions, infrastructure and natural resources. It has been stated that Fugro companies have undertaken various similar type of works and is involved in all major Oil and Gas projects in India. It is further stated that so far as third Respondent is concerned, it is involved in all major oil and gas projects in India including ONGC's Mumbai High development and Reliance's eastern offshore Krishna Godavari field development.

7. The Petitioners have filed rejoinder and stated that the bidder cannot rely on the expertise or experience of any joint ventures, consortiums, sub-contactors or group companies or even its parent company, in view of the fact that as per the criteria for experience the bidder should have experience in its "*independent capacity*". It has been stated that law does not recognize entity such as "*Group Companies*" as stated by the third Respondent. It is reiterated that the bidder must "*independently*" meet the eligibility criteria of experience under the subject tender. It has been further stated that at the most a bidder which is wholly owned subsidiary, may rely upon its parent company's experience but the present case is not of that nature.

8. In order to appreciate the controversy involved in the Petition, we had directed the first Respondent to produce the relevant record for perusal. Accordingly the same was produced. During the course of hearing, it has been perused by us.

9. The relevant portion of the decision of TPC which is necessary for the purposes of adjudication of the dispute raised in this Petition reads thus:

4. COMACOE had sent a letter to SCI regarding the eligibility/ experience/ qualification criteria of bidders in the tender document regarding the experience of parent company, Joint Venture in the tender. This was in reference to a particular bidder who has shown the experience of the sister company. (Copy of the letter is attached at Annex.C). The indirect reference was made to another bidder Fugro Survey (India) Pvt. Ltd. In the letter they h ave interpreted the word "independently" which is mentioned in the tender document which as per them means that the bidding party should fulfill the requirements without relying on parent or any other entity. They have also emphasized that there is no scope for JV/Consortium of Sub-contact arrangement for meeting the tender requirements.

. The same was discussed in the TPC meet at length.
. Joint Venture/Consortium is for two unrelated companies. Nowhere it is mentioned in the tender document that the parent, sister experience cannot be used by the bidder for qualifying in the tender. COMACOE has viewed the term "independently" very narrowly.

. Fugro N.V. is an internationally renowned organization. Fugro N.V does the geotechnical operations and surveys in all the major offshore oil producing countries and is a leading company in this field. It has its subsidiaries all over the world and it operates through these subsidiaries. As a company policy, Fugro N.V the umbrella company does not directly bid or operate in India. It operates through its subsidiary, Fugro Survey (India) Pvt. Ltd. in India, which is one of the bidders in this tender. They have used the experience of Fugro Survey (Middle East) Ltd. to fulfill some experience requirements. Informatively, the Indian subsidiary is also a contractor with ONGC. The geotech operations are highly specialized operations with a few players.

. TPC decided that the main purpose of the tendering process was to encourage healthy competition and as the bidder fulfilled the required qualifications, the same should be eligible for qualification in the technical evaluation.

10. The learned counsel for the Petitioners has placed strong reliance on the condition laid down in clause Nos. 6.1 and 6.5 as extracted in paragraph 2 above and argued that since the third Respondent was not having minimum experience in its "*independent capacity*" which was the essential requirement for complying the criteria of minimum experience, the decision of the TPC to hold third Respondent eligible runs contrary to the experience condition notified by the first Respondent. He, therefore argued that since the third Respondent was not having requisite eligibility qualification, the acceptance of its technical bid and the further process of acceptance of price bid be quashed and re-tender be ordered, so that there would be fair opportunity to all aspirants to participate in the tender process thereby giving room for a fair competition. He submits that had it been made known to all that the use of word "*independently*" at various places in clause 6.1 and 6.5 would be construed so liberally to the extent that experience of Group Company which is not a parent company having no legal nexus with the bidder company will also be calculated and was acceptable for considering the experience of the bidder, there would have been many other bidders who would have participated in the bidding process.

11. On the other hand, the Respondent Nos. 1 to 3 have opposed submissions made on behalf of the Petitioners by arguing that the Petitioners had not approached to the Court immediately after third Respondent was qualified for technical bid and having waited till opening of the financial bid, it cannot be allowed to challenge the tender after it failed in the financial bid. It has been argued that in view of the clause 5.1 of the tender document, the decision of the first Respondent is required to be taken to be final and binding in regard to the interpretation of the clause of the tender and therefore the Petitioners interpretation of clauses 6.1 and 6.5 cannot be accepted. According to them the Petitioners are construing the word "*independently*" in a narrow manner. It is also the case of the Respondents that in the aforesaid clauses, nowhere it has been mentioned that the parent or sister company's experience cannot be used by the bidder for qualifying in the tender. In the circumstances, it has been argued that the third Respondent being subsidiary of Fugro Survey (Middle East) Ltd. Company, its experience could have been used and has been rightly used by the third Respondent. The learned counsel for the third Respondent has placed reliance on the judgment passed by the Supreme Court in the case of **Jagdish Mandal vs. State of**

<u>Orissa and Ors. (2007) 14 Supreme Court Cases 517</u> to contend that no case for interference in writ jurisdiction is made out.

12. We have heard the learned counsel for the parties and considered the averments made in the Petition, reply and rejoinder. We have also gone through the record produced by the first Respondent.

13. On 20th June, 2017 this Court had passed following interim order which was continued from time to time :-

> *3. Since the bids are opened and all the parties to the writ petition are aware of the figures, Respondent No. 1 need not seek permission of the Court to proceed with the matter and decide who should get the tender since 30th June is the last date. However, if it is not a petitioner in whose favour the award of tender will be made, then Respondent No. 1 shall not issue work order till the next date of hearing.*

14. True it is, normally the Courts will not interfere in the decision of the tender evaluation committee consisting of experts unless it is *malafide* or wholly perverse. It is also a settled position of law that in the matters relating to tenders if the decision relating to award of contract is *bonafide* and is in public interest, the Courts will not in exercise of powers of judicial review interfere even if procedural aberration or error in assessment or prejudice to a

tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide the contractual disputes. The evaluation of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters, the Court is concerned primarily as to whether there has been any infirmity in the decision making process. The Courts certainly examine whether the decision making process was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution. The Court will not sit as a Court of Appeal but merely reviews the manner in which the decision was made as it has no expertise to correct the administrative action. It is also well settled that the Court is not empowered to scrutinize the terms of the invitation of tenders because it is the realm of contract and as such the decision more often are made collectively by experts. It is also been held by catena of judgments that the Government must have freedom of contract. A fair play is necessary for an administrative body functioning in administrative spare. The Courts have also to consider that the quashing of decision may impose heavy administrative burden on the administration. Even if some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 of the Constitution of India in furtherance of public interest and not merely on the making out of a legal point. [See **Jagdish Mandal vs. State of Orissa, (2007) 14 Supreme Court Cases, 517, (relied upon by the third Respondent), Air India Ltd. vs. Cochin International Airport Ltd. (2000) 2 SCC 617, Tata Cellular vs. Union of India, (1994) 6 SCC 651, B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd., (2006) 11 SCC 548, Raunaq International Ltd. vs. I.V.R. Construction Ltd. (1999) 1 SCC 492].**

15. Having heard the learned counsel for the parties, we find that the only question which is required to be decided in this Petition as to whether the clause Nos. 6.1 and 6.5 permit the TPC/ first Respondent to take into consideration the experience of another company namely Fugro Survey (Middle East) Ltd. along with the experience of the third Respondent bidder company for the purposes of fulfilling the experience criteria.

16. It is pertinent to mention here that from the minutes of the meeting of TPC, it reveals that the TPC had observed that the

company Furgro (Middle East) Ltd. is unrelated company from the bidder third Respondent company. There is no material to accept the contention of the third Respondent that Furgro (Middle East) Ltd. is its Parent Company or the third Respondent is its Subsidiary.

17. On a plain reading of clause Nos. 6.1 and 6.5 we find ourselves unable to agree with the claim of the Respondents that the experience of the "Group Company" can also be taken into consideration while considering the experience of bidder when the clauses are so clear requiring therein that "the bidder independently should have experience". In this view of the matter, even though clause 5.1 provides that in the event of any dispute as regards interpretation of the clauses, the decision of the first Respondent shall be final and binding, the interpretation as has been done by the first Respondent leads to absurdity and provides for arbitrary exercise of powers.

18. In our considered view the condition NO. 6.1 and 6.5 regarding eligibility criteria being fundamental condition of tender for being qualified for the purposes of experience if allowed to be

interpreted as has been done then the said condition would become redundant. By putting the aforesaid clauses, the Respondent No. 1 having restricted the entry of the bidders to those who "*independently should have experience*" could not have allowed the other bidders to claim experience of technical collaborator/totally unrelated Group Companies. By doing so the first Respondent has violated the fundamental experience qualification condition and thereby acted in arbitrary manner vitiating the entire decision making process. As noted above, we also have not come across any document to show that the third Respondent bidder is Subsidiary of Fugro Survey (Middle East) Ltd. or that the said Company is Parent Company or Sister Company of the third Respondent bidder.

19. In what way the "*Group Company*" or "*Subsidiary*" can be termed as parent or sister company of the third Respondent for claiming the experience said company i.e. Furgo Middle East Private Limited" has also not been explained by first or the third Respondent in their reply affidavit. On the other hand, the reply affidavit filed by these Respondents is not touching to the main issue raised by the Petitioners. In reply, it has been stated by the

first Respondent that the term “independently” does not bar any form of any association between a parent company or subsidiary. However it is not the case of the third Respondent that Fugro Middle East Pvt. Ltd company is its parent, sister or subsidiary company. It is also the case of the first Respondent that Appendix VII of the tender provides for guarantee to be given by the parent company. However, admittedly the guarantee in terms of Appendix VII has not been given by third Respondent as during the course of arguments, it has been stated by counsel for both the Respondents that the guarantee in the form of Appendix VII was not required to be furnished in the present case as the said clause is not applicable. We may also note that the third Respondent to support its association with Fugro (Middle East) Ltd. has submitted a document titled “Memorandum of Understanding” wherein the third Respondent has referred itself as the bidder and has referred Fugro (Middle East) Ltd as a “Technical Collaborator” and not that it is Parent Company.

20. Keeping in view the aforesaid facts and the settled legal position as stated above, we are of the view that while accepting the third Respondent's bid, the first Respondent has acted

arbitrary and has violated the fundamental condition of the tender in respect of eligibility criteria. The first Respondent firstly restricted the number of bidders from participating in the tender process by putting the said eligibility criteria and thereafter arbitrarily accepted the bid of the third Respondent by relaxing the condition by interpreting it contrary to its spirit by taking into consideration the experience of altogether unrelated company, in the garb of the technical collaborator/ group company or the Subsidiary company. The use of the expression "*Subsidiary*" company or "*Group Company*" or "*Technical Collaborator*" of the third Respondent company for taking into consideration the experience of Fugro Survey Middle East Ltd. is merely an eye wash and the same is of no use in view of the condition regarding experience criteria as extracted above.

21. Thus the decision of the TPC/first Respondent is wholly arbitrary and contrary to the fundamental tender condition/regarding experience, this Court certainly has jurisdiction to interfere in the matter.

22. As a result, the decision of the TPC holding the third

Respondent eligible in Technical Bid and the decision of the first Respondent to award contract in favour of the third Respondent is liable to be and is hereby quashed and set aside.

23. The first Respondent is at liberty to issue fresh tender fixing the eligibility criteria as it may deem fit. We expect that the first Respondent will adhere to the conditions as may be incorporated in the fresh tender document.

24. With the aforesaid, the Petition is allowed to the extent indicated above.

25. No order as to the costs.

(G.S. KULKARNI, J.) (SHANTANU KEMKAR, J.)

26. At this stage a prayer has been made by the learned counsel for the third Respondent to stay the operation of this order. We decline the prayer.

(G.S. KULKARNI, J.) (SHANTANU KEMKAR, J.)