IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION.

WRIT PETITION (L) NO. 1715 OF 2018

PETITIONER :-

1. Valentine Maritime Ltd., Having Registered address at 80, Broad Street, Monrovia Liberia.
   And its branch / administration office at P.O. Box 53905, Abu Dhabi, United Arab Emirates.

2. Supreme Offshore Constructions and Technical Services Ltd., Having registered address at 410/411, Midas Sahar Plaza, Kondivita M.V.Road, Andheri East Mumbai 400 059.
   And its Administrative Office at 311-324B Wing, Bonanza Sahar Plaza, Andheri East, Mumbai 400 059.

...VERSUS...

RESPONDENT :-

1. The Union of India through The Secretary, Ministry of Petroleum and Natural Gas, New Delhi.
   For the Union of India having office at Aayakar Bhavan, Maharshi Karve Road, Mumbai, 400023.

2. ONGC (M/s Oil Natural & Gas Corporation), Having registered address at Pandit Deendayal Upadhyaya Urja Bhavan, 5, Nelson Mandela Marg, Vasant Kunj, New Delhi-110070.

   &

   Having their Alternate Address at 4th Floor, 11 High Bulding, Bandra Sion Link Road, Sion (West), Mumbai-400 017.

3. Sapura Fabrication SDN. BHD, Having registered address at Sapura@Mines, No.7, Jalan Tasik, The Mines Resort City, 43300, Seri Kembangan, Selangor Darul Ehsan, Malaysia.

   Having their Alternate address at Sapura Fabrication Mumbai, 801, Alfa Building, 8th Floor, Hiranandani, Powai, Mumbai- 400 076.

Mr.Janak Dwarkadas, sr.counsel a/w Mr.Ameet Mehta, Mr. Omkar Khanwilkar, Mr.Devang Sharma, Ms. Priyanka Upadhyay, Ms.Drahti Jani i/b M/s Solicis Lex For petitioner.

Mr.Mustafa S. Doctor, sr.counsel a/w Ms Amrita Joshi i/b M/s The Law Point For respondend No.2.

Mr.Ashok R. Verma, counsel for respondent No.1.

Mr. S. Poria, Mr. C.Keswani i/b M/s. Economic Law Practice For respondent No.3.

CORAM : SHANTANU S. KEMKAR &
NITIN W. SAMBRE, JJ.

RESERVED ON : 18.07.2018.

PRONOUNCED ON : 05.10.2018

J U D G M E N T (Per : Nitin W. Sambre, J.)

Heard. **Rule**. Rule made returnable forthwith by consent of the parties.

2. The petition is directed against the alleged illegal and arbitrary action of the respondent No.2 in awarding the contract of laying sub-sea oil pipeline and other associated works to the respondent No.3. It is claimed by the petitioner that it was a lowest bidder and the arbitrary tender process has caused huge financial loss to the public exchequer.

3. The facts necessary for deciding the petition are as under:-

The petitioner No.1 claimed to be private owned offshore construction company carrying out business of offshore construction of sub-marine pipelines, maintenance and hook up services in India and other foreign countries. The petitioner No.2 claims to be engaged in the field of project management, procurement, manufacturing, fabrication, supply, installation of various equipments and is associated with well established organizations dealing with oil and gas platforms fertilizers chemicals, petrochemicals, etc.

4. The respondent No.1 Union of India is alleged to have supervisory control over the respondent No.2 and respondent No.3 is alleged to be a successful bidder.

5. The respondent No.2 invited tender for the work of laying 29 numbers segment of subsea pipelines, laying of 11 numbers of umbilical and the topside modification of 31 platforms for the Mumbai High, Milan Heera and basement field in 2 phases. The invitation of offer was in 2 bids system and the bids were to be submitted in accordance with e-procurement. According to the petitioner, a bid evaluation criteria was formed to be part and parcel of the tender document wherein it is specified that the criteria for acceptance of bid is to be completed absolutely.

6. According to the petitioner, the tender was floated by the respondent No.2 on 30/06/2017 and the bid submission was on 24/07/2017. The notice of award was scheduled on 14/09/2017 and the bid completion date was 30/04/2019.

7. Due to change in the tax regime, it is claimed that the aforesaid calendar was revised and the last date for submission of bid was changed to 03/11/2017, notice of award changed to 26/12/2017 and the project completion date was given as 30/04/2019. It is claimed by the petitioner that they sought certain clarification from the respondent No.2 under certain heads which were not responded to by the respondent No.2. According to petitioner, the techno-commercial bids were opened and evaluated by the

respondent No.2 on 03/11/2017. It is claimed that the respondent No.2 reduced the scope of work and invited bidders for discussion wherein the petitioner agreed to price reduction to the extent of 13.4%. The recalculation by the respondent No.2 of the price reduction resulted to 12.17% of the reduction of lump sum consideration in proportionate to the reduced scope of work.

8. It is the case of the petitioner that vide communication dated 12/04/2018 the respondent No.2 informed variance in scope of work and accordingly revised the scope of work. The earlier quoted price was to be considered as base price for the evaluation of the bid of each of four tenderers. The petitioner in the light of reduction in scope of work claims that the petitioner accepted the said contents of the communication dated 12/04/2018 vide communication 16/04/2018. Consequently the bid validity was extended till 15/05/2018. In the backdrop of the development pursuant to the contents of letter dated 25/04/2018 issued by the respondent No.2 intimating reduction of scope of work, the bidders were asked to submit reduced lump sum price. According to the petitioners, the financial criteria and PP-LC was to be evaluated based on the original quoted price with original schedule of the completion whereas according to the petitioner, the respondent No.2 has incorrectly revised the evaluation methodology after

price bid opening. According to the petitioner, once the respondent No.2 has reduced the scope of work with respect to the tender/project and has proportionately revised the price, it is not open for the respondent No.2 to evaluate the offers of the tenderer like the petitioner on the originally quoted price. It is also claimed by the petitioner that instead of originally quoted price, the revised price should have been considered as the base and the final price should have been evaluated based on the bid evaluation criteria. According to the petitioner, the respondent No.2 has changed the evaluation methodology after tenders were floated. According to the petitioner, on 04/05/2018 when the price bids were opened, the petitioner was found to be lowest. As compared to lump sum price of US $205.66 million quoted by the Petitioner, the evaluated quoted price by the respondent No.3 was found to be US $211.83 million. According to the petitioner, though it was the lowest bidder/tenderer, the respondent No.2 has by misreading and miscalculating the offers made, favoured the respondent No.3 declaring him successful lowest bidder as such this petition.

9. Questioning the award of tender in favour of respondent No.3, by the order impugned, the petitioner has also prayed for an appropriate writ order and direction to set aside the criteria of evaluation. The petitioner

has also prayed for award of the contract in its favour along with other ancillary reliefs.

10. Senior Counsel Mr.Dwarkadas for the petitioner in the aforesaid factual background would make strenuous submission that once the tender was floated i.e. the game has started, all that was expected from the respondent No.2 is to be fair and reasonable in the tender process. According to him, the petitioner who has consortium of 80:20% of foreign and Indian holding respectively was found to be the lowest one in the financial bid. He would then urge that after the tender was floated and the offers were made, the respondent No.2 has changed the rules of the game, as it has reduced the scope of the work and also consequentially asked the bidders to proportionately reduce their offers, without any authority. According to him, the original contract value and schedule was on the basis of 594 days which was later on reduced to 491 days. He would split up the change in the scope of the work made by the respondent No.2 in the tabular form in the following manner:-

<u>New Worth Calculations for Supreme Offshore</u>

Case I)

Original Contract Value & Schedule as per NIT of 594 days basis NOA dated

14.09.2017 & Completion Dated 30.04.2019

Original Bid Value	20% of annualized bid value as per BEC	15% of the 20% annualized bid value for the consortium member as per BEC	New-Worth submitted	Criteria being met
Rs.1594,77,47,336/- (US$244,110,628/-)	Rs.318,95,49,467/-	Rs.29,39,86,251/-	Rs.30,69,19,070/-	YES

Case 2)

Final Contract Value & Schedule of 601 days basis NOA date 10.05.2018 & Completion Date 31.12.2019

Original Bid Value	20% of annualized bid value as per BEC	15% of the 20% annualized bid value for the consortium member as per BEC	New-Worth submitted	Criteria being met
Rs.1343,62,73,764/- (US$205,667,744.75)	Rs.268,72,54,753/-	Rs.24,48,03,990/-	Rs.30,69,19,070/-	YES

On both the counts, the New-Worth of Supreme Offshore meets the BED (Bid Evaluation Criteria) requirement.

Case 3) As calculated by ONGC

Original Contract Value & Schedule of 491 days basis NOA date 26.12.2017 & Completion Date 30.04.2019

Final Bid Value	20% of annualized bid value as per BEC	15% of the 20% annualized bid value for the consortium member as per BEC	New-Worth submitted	Criteria being met
Rs.1594,77,47,336/- (US$244,110,628/-)	Rs.318,95,49,467/-	Rs.35,56,57,502/-	Rs.30,69,19,070/-	NO

11. The learned Sr.Counsel would then urge that the calculation of 594 days which was original schedule of completion ought not to have been reduced to 491 days. He would claim that the original bid submission on 24/07/2017, prescribed notice of award on 14/09/2017 for which the original date of completion was 30/04/2019 i.e. schedule of completion was 594 days. According to him, vide communication dated 24/10/2017 the aforesaid original bid submission criteria was revised and the bid submission was made permissible on 03/11/2017 and the notice of award was made to 26/12/2017, whereas in the revised date of completion no changes were carried which is mentioned as 491 days instead of 594 days. According to him, once there is a change in the scope of work, instead of 594 days, the period within which the revised scope of work was made in 491 days by changing the rules of the game. According to him, the calculations are made by the respondent No.2 is contrary to clause A.3 of the tender condition.

12. Learned Sr.Counsel Shri Dwarkadas would rely upon the judgment of the Hon'ble Supreme Court in the matter of **Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and others**, reported in **(2015) 13 SCC 233** so as to claim that the judicial review of the tender conditions even if is not permissible, however if it is established that the terms of invitation to tender were tailor-made to suit the

convenience of any particular person, it is open for the Court to intervene. According to learned Sr. Counsel, it is not open for any of the party to the tender to enter into a negotiation unless the terms and conditions of the tender notice in express terms provides so far negotiation. According to him, it was expected of the respondent No.2 to adopt fair and transparent procedure by giving appropriate opportunity to all the interested persons participating in the tender process. He submits that it is a fit case for judicial review. In addition, he would draw support from the judgment of Hon'ble Supreme Court in the matter of **Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries**, reported in **(1993) 1 SCC 71**. Relying on the observations made by the Hon'ble Supreme Court, he submits that the decision of the state in contractual matter are required to be in conformity with the principle of Article 14 of the Constitution of India. According to him, the public authority is duty bound to adopt a procedure which is 'fairplay in action'. He submits that all the above said principles are violated by the respondent authorities. He sought quashing of the order of allotment of tender in favour of respondent No.3.

13. *Per contra* learned Sr.Counsel Mr.Mustafa Doctor appearing for the respondent No.2 submits that if there are change in conditions, if any, those are uniformly applied to all the 4 tenderers. He submits that it is not

the case of the petitioners, pleaded anywhere that the respondent-authorities with *mala fide* intention has changed the tender conditions. He would then urge that the terms of the invitation to tender are not open for judicial scrutiny and would draw support from the judgment of the Hon'ble Supreme Court in the matter of **Reliance Telecom Limited and another v. Union of India and another**, reported in **(2017) 4 SCC 269** particularly in para-35. He submits that the change in the scope of the work has prompted the authority i.e. respondent No.2 to suggest the parties to submit their bids based on the base price. According to him, the present petitioner having participated in the tender process, at this stage can not claim that the tender conditions are unevenly applied. According to him, the respondent-authority has applied prudent principle of commerce while making commercial decision as respondents are spending public money on the contract in question. Learned Sr.Counsel Mr. Mustafa Doctor then would urge that the respondent No.2 Government of India Undertaking must have a free hand in setting terms of the tender. The petitioner has failed to demonstrate that any of the tender conditions is arbitrary, discriminatory and *mala fide.* He would then urge that already there is concluded contract in favour of respondent No.3 and in this eventuality, this Court needs to weigh equity in favour of respondents.

14. Learned counsel Mr.Keswani appearing for the respondent No.3 adopted the submissions made by the respondent No.2 and would add that based on the concluded contract in favour of respondent No.3, it has already commenced the execution of the work in question. According to him, there is intentional delay on the part of the petitioner in pursuing the petition as same was filed on 15/05/2018, however the same was not seriously persuaded for the reasons best known to them. The learned counsel for the respondent No.3 submits that the aforesaid factual matrix is processed by the petitioner of which this Court must take a judicial note of.

15. Considered rival submissions.

16. The tender was floated by the respondent No.2 on 13/06/2017 for which the bids submission date was scheduled on 24/07/2017, the notice of award was scheduled on 14/09/2017 and the completion of project date was scheduled as 30/04/2019.

17. It is an admitted position that the last date for submission of bid was changed to 03/11/2017 from 24/07/2017 and the revised notice of award was changed to 26/12/2017 from 14/09/2017. The fact remains that the project completion date remain same i.e. 30/04/2019. It is then to be

noted that since the techno-commercial bid was to be opened on 03/11/2017 and all the qualified tenderers were informed by the respondent No.2 about the reduction in the scope of work by inviting them for discussion over the issue of price reduction. The petitioner has reduced the price in response to the call given by the respondent No.2 based on the reduction of scope of work.

18. On 12/04/2018 the respondent No.2 has informed the dropping of certain work from the scope of work. The petitioner in categorical terms in para-13 of the petition has stated that the petitioner has accepted letter dated 12/04/2018 unconditionally and was responded to vide communication dated 16/04/2018. The bid validity was then extended for all the 4 bidders till 15/05/2018. All the 4 bidders were informed by communication dated 25/04/2018 by the respondent No.2 calling upon them to submit reduction in the quoted lump sum price.

19. The original quoted price was formed to be a basis for all the qualified bidders and the petitioner in response to the call given by the respondent No.2 without any protest has participated in the tender proceeding by submitting the revised offers pursuant to the reduction in scope of work. The act on the part of the petitioner in accepting the revised

terms viz. reduction in the scope of work by not objecting to the procedure adopted by the respondent No.2 at the relevant time speaks of the petitioner wholeheartedly participating in the tender process.

20. The fact remains that after the tender document was submitted by all the 4 qualified bidders the change in the scope of work is not in regard to the offer made by petitioner but was in regard to all the 4 qualified bidders. As such it cannot be inferred from the record that the petitioner was singled out from the tender process or the conditions of the tender were changed only for the petitioner. It cannot be also inferred from the record that the tender conditions were tailor-made so as to suit the convenience of the respondent No.3. At least, no such case is pleaded by the petitioner before this Court. That being so, the reliance placed by the learned Sr.Counsel for the petitioner on the judgment of ***Rishi Kiran Logistics Private Limited*** and the ***Food Corporation of India*** cited supra will be hardly of any assistance. The procedure adopted by the respondent No.2 in evaluating the offers of all the 4 qualified bidders appears to be transparent and in most fair manner.

21. The modification or change in tender conditions was uniformly

applied to all the 4 qualified bidders and the petitioner without any demur participated in the tender process.

22. Though learned Sr.Counsel Mr.Dwarkadas has tried to impress upon this Court by entering into certain calculations about the original schedule of completion, as observed herein earlier the change therein is in regard to all the 4 qualified bidders and not only for the petitioner, such tender conditions were well within the knowledge of the petitioner. The confusion, if any, in the matter of calculation of the original schedule of completion that is whether 594 days or 491 days cannot be an issue which needs to be appreciated in the extra ordinary jurisdiction in a contractual matter.

23. The fact remains that the petitioner having acted upon the tender conditions by wholeheartedly participating in the tender proceeding has no right to question the tender conditions. The petitioner has failed to demonstrate before this Court as to the mode and manner in which the petitioner is stated unequally amounts to equal.

24. The learned Sr.Counsel for the respondent No.2 in our opinion was right in pointing out the terms of the invitation of the tender are not

open to judicial scrutiny. It appears that the respondent No.2 has adopted the prudent principle of commerce in evaluating the bids and same equal yardstick for all the 4 qualified bidders. Apart from above, this Court need not go into interpretation of the tender conditions at this stage of the proceedings particularly when already there is a concluded contract in favour of respondent No.3.

25. That being so, there is no substance in the petition, the same is dismissed.

(NITIN W. SAMBRE, J.) **(SHANTANU KEMKAR, J.)**

YADAV