

**Exmar Nv and ors. Vs. Union of India (Uoi) and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/681884](http://sooperkanoon.com/681884)

**Court :** Delhi

**Decided On :** Dec-22-2005

**Reported in :** III(2006)BC47; 2005(2)CTLJ373(Del); 2006(86)DRJ610

**Judge :** Markandeya Katju, C.J. and; Madan B. Lokur, J.

**Acts :** [Merchant Shipping Act, 1958](#)

**Appeal No. :** WP(C) No. 23881-84/2005

**Appellant :** Exmar Nv and ors.

**Respondent :** Union of India (Uoi) and ors.

**Advocate for Def. :** Jayant Bhushan Sr. Adv., ; Anil Nag, ; Amit Gupta, ;

**Advocate for Pet/Ap. :** Rajiv Nayyar, Sr. Adv.,; Harish Salve,; Venketer Dhond,

**Disposition :** Petition dismissed

**Judgement :**

Markandeya Katju, C.J.

1. This writ petition is filed by the petitioners praying for issuance of a writ of certiorari for quashing the impugned communication dated 9th December 2005 and for issuance of a writ of mandamus directing respondent No.2, Petronet LNG Limited (hereinafter referred to as Petronet), to withdraw the communication dated

9th December 2005 and to act in pursuance of the communication dated 5th December 2005 addressed to the petitioner. It is also prayed that respondent No.2 be directed not to consider the bid of respondent No.3 Teekay and Great Eastern Shipping Consortium.

2. Heard learned counsel for the parties and perused the record.

3. The contract in question is in respect of building and time chartering of LNG tankers for shipping LNG from Qatar to Dahej. In this connection the respondent No.2 invited tenders. Only four parties obtained the tender forms, and only three submitted bids. It is alleged in paragraph 6 of the writ petition that the bid submitted by the petitioner consortium was accepted by Petronet and by a communication dated 5th December 2005 Petronet communicated this to the petitioner and awarded the contract to the petitioner and only a formal execution of the relevant document remained. However it is alleged that the respondent malafide took a complete 'U' turn in an arbitrary and discriminatory manner and has sought to now re-bid the tender for awarding the said contract.

4. The facts and details are mentioned in paragraph 7 of the writ petition and we are only referring to the relevant part of the same. Under the bid in question bidders were required to make bid for one or two tankers for Dahej and one tanker for Kochi or for all three tankers. The said bid was contained in a set of documents called Bid Documents. A copy of the Request for Proposal Time Charter Agreement and part of addendums are annexed to the writ petition and marked as Annexure A, B and C. Three consortia submitted their bids but the bids of all three bidders departed, in some respects, from the requirements of Request for Proposal. This is technically called a deviation. Petitioner consortium and the Mitsui Consortium dropped these deviations but respondent No.3 consortium however did not and it was thus held technically ineligible. The rejection of the bid of respondent No.3 has been recorded in the Minutes of meeting dated 1st December 2005. A copy of the said Minutes of meeting dated 1st December 2005 are annexed with the writ petition and marked as Annexure D to the petition. It is alleged in paragraph 7 (f) that the bid of the petitioner and Mitsui was open and bid of the petitioner was found to be lower than that of the Mitsui and accepted. The

bid of the respondent No.3 was rejected and was not considered at the price bid stage at all. By a communication dated 5th December 2005, respondent No.1 informed Ras Laffan LNG, Qatar, that the petitioner consortium had been selected for transportation of the LNG from Ras Laffan LNG to Dahej. True copy of the said communication dated 5th December 2005 is annexed with the writ petition as Annexure. It is alleged that the said communication constitutes and/or evidences the acceptance of the bid of the petitioner, and a communication of the said acceptance, a binding concluded and enforceable contract came to be concluded between the petitioner consortium and the respondent No.2 and only a formal document is now required to be sent.

5. However, by subsequent communication dated 9th December 2005 Petronet informed the petitioner that due to a change in the applicable law, the respondent No.2 had decided to call for re-submission of the price bids from all three bidders. All three bidders were requested to submit their unconditional price bid. The petitioners were informed that their bids should be re-submitted by 12th December 2005. True copy of communication dated 9th December 2005 is annexed to the petition and is marked as Annexure F to the petition. The purported reason for re-bidding given by the respondent was that the Government of India had issued directions that the condition requiring the LNG Vessel to be flagged in India, was kept in abeyance. Respondent No.2 therefore decided that due to the aforementioned change bidders could flag LNG tankers in a jurisdiction of their choice. The respondent No.2 treated this as being a change or modification of such significance as to warrant re-tendering.

6. The petitioner has alleged in paragraph 7(l) of the writ petition that since it was the successful bidder and as Petronet had awarded the contract to it by communication dated 5th December 2005, the rebidding by communication dated 9th December 2005 was illegal. Aggrieved by the said communication the present writ petition has been filed.

7. A counter affidavit has been filed by Petronet and we have perused the same. Although it is alleged that Petronet is not 'State' under Article 12 of the Constitution, in our opinion it is not necessary to go into this question as we are of

the opinion that this writ petition is liable to be dismissed on another ground.

8. There is no dispute that if the shipping is done under the Indian flag, the price of LNG will become higher due to taxes, etc.

9. As per the policy decision of the Government of India dated 5th July 2004, the Director General of Shipping, Central Government issued the Guidelines pertaining to grant of license to LNG vessels. These Guidelines provided that no license will be granted for any chartered LNG vessel unless the said LNG vessel is an Indian flag vessel. Clause B.17 of part-I of the Bidding Document permitted the bidders to submit, if considered necessary, their list of deviations pertaining to the technical requirements or commercial conditions of the bid. Pursuant thereto all the three pre-qualified bidders who submitted their bids, including the petitioner, sought deviations pertaining to the commercial condition of the bidder being required to bear the risk of change in direct taxes or imposition of a new direct tax as a result of India flagging requirement. The respondent No.2 refused to make these deviations, and ultimately the petitioner and Mitsui withdrew their deviations and only respondent No.3 did not do so. Accordingly the petitioner being the lowest bidder was short-listed for being awarded the contract. However, it appears that the Government of India re-considered the issue of Indian flagging requirement and its impact on the availability and price of regasified LNG in the country. On such consideration, the Government of India decided to keep the requirement of Indian flagging in abeyance and this was communicated to the respondent by communication dated 9th December 2005. A copy of the said communication is annexed to the counter affidavit and marked as Annexure R-5 to the counter affidavit.

10. Mr. Mukul Rohatgi, learned counsel for the respondent No.2 has handed over to us a copy of the letter of the Assistant Director General, Shipping dated 12th December 2005, which reads as under:

GOVERNMENT OF INDIA

MINISTRY OF SHIPPING, ROAD TRANSPORT AND HIGHWAYS

(Department of Shipping)

DIRECTor ATE GENERAL OF SHIPPING

JAHAN BHAVAN

W.H. MARG

MUMBAI-400001.

Telephone: 22613651-54 22613651-54

Fax: 91-22-22613655

E-mail: dgship@dgshipping.com

Web: www.dgshipping.com

SD-13/POL92)/04 Dated: 12.12.05To,

The Secretary General

INSA

Mumbai.

Subject: Flexibility in transportation of Liquefied Natural Gas (LNG)

Sir,

I am to forward herewith a copy of the Ministry's letter No.SD- 11011/4/2004-MD dt. 7.12.05 on the above subject which is self explanatory. As stated in the Ministry's letter under reference Guidelines issued by DGS vide circular No.SD-13/POL(2)/04 dt. 5.7.04 has been kept in abeyance.

The position in this regard will be reviewed as and when required.

Yours faithfully,

Sd/-

(S.S. Bhandare)

Asst. Director General of Shipping

11. Annexed to the aforesaid letter is a letter of the Deputy Secretary, Ministry of Shipping, Road Transport and Highways, Department of Shipping, Government of India dated 7th December 2005, which reads as under:

GOVERNMENT OF INDIA

MINISTRY OF SHIPPING, ROAD TRANSPORT and HIGHWAYS

DEPARTMENT OF SHIPPING

No.SD-11011/4/2004-MD. New Delhi the 7th December, 2005 To

The Director General of Shipping,

JAHAZ BHAWAN, Walchand Hirachand Marg,

Mumbai-400035.

(Kind attn: Shri Naresh Salecha, Sr. Dy. DG(S))

Subject: Flexibility in transportation of Liquefied Natural Gas (LNG).

Sir,

I am directed to state that the Government have considered the proposal regarding flexibility in transportation of Liquefied Natural Gas. The gist of the proposal is as under:

(i) The guidelines issued by the Director General of Shipping (D.G., Shipping), using his powers under the [Merchant Shipping Act, 1958](#); vide circular No.SD-13/Pol(2)/2004 dated 5th July, 2004 may be kept in abeyance for a period of 3 years.

(ii) No restriction should be placed which will entail the import of LNG only on FOB basis.

(iii) The position may be reviewed, on need basis (but at least once a year before the announcement of the Foreign Trade Policy), by an Inter-Ministerial Committee comprising Secretary (Commerce), Secretary (Petroleum and Natural Gas), Secretary (Power) and Secretary (Shipping) which may keep track of the changing market situation and suggest appropriate changes in the policy, as and when required. In case of a difference of opinion, the matter may again be placed before the Cabinet by the Department of Commerce, in the shortest possible time. As suggested by Department of Shipping, Director General (Shipping) may also be included as a member of the Committee. Director General Foreign Trade (DGFT), who deals with the Foreign Trade Policy, may act as Secretary to the Committee.

2. The Govt. approved the above proposal with the modification that the words for a period of 3 years be deleted in paragraph (i).

3. It is requested that necessary action may please be taken to comply the above decision and the action taken in the matter may please be intimated to this Ministry.

Yours faithfully,

Sd/- (Dinesh Kumar)

Deputy Secretary to the Government of India

12. In view of the above communications, the contract was not finalised and awarded to any bidder, and Petronet amended the bidding document to provide for a tanker in a jurisdiction of the bidder's choice. The price bid submitted till then and the process pursuant thereto were quashed, and all the bidders were required to re-submit their unconditional price bids.

13. It is alleged in paragraph 7 of the counter affidavit that in view of the fact that there is no mandatory requirement of India flagging the amount of hire would be substantially reduced by an estimated 1/7th to 1/8th of the hire quoted in the price bids submitted by the bidders.

14. In paragraph 9 (b) of the counter affidavit it is stated in in order for the lowest bidder to qualify for the contract several steps are required to be completed after the opening of the price bids including evaluation of the price bids in accordance with the bidding document, issuance of letter of acceptance to the bidder whose bid has been determined to be lowest, compliance with the terms of the letter of acceptance by the selected bidder, and the execution of the Time Charter Agreement. None of these steps have been fulfilled in respect of the petitioner, and therefore it cannot be said that a concluded contract has come into existence. Petitioner's own E-mail dated 5th December 2005 states that it has been selected as the most competitive bidder and sought closure of various outstanding issues. This also shows that there was no concluded contract.

15. On the facts of the case, we find no merit in this writ petition. We agree with the learned counsel for the respondent that there is no concluded contract in favor of the petitioner. The decision of the Central Government by communication dated 7th December 2005 as communicated by the letter dated 9th December 2005, shows that the requirement of India flagging has been kept in abeyance. This is a policy decision and it is well settled that the Court cannot ordinarily interfere with policy decisions vide *M.I. Hussain v. N. Singh and Ors.*, LPA No.1650/2005 decided on 7th November 2005; *Visa Steel Ltd. v. Union of India*, WP(C) No.20185/2005 decided on 8th December 2005; and *Aman Services v. Commissioner of Police and Ors.*, WP(C) No.2834/2005 decided on 7th November 2005.

16. The Government had taken a policy decision that India flagging is not necessary, evidently because India flagging was making the contract costlier and hence to reduce the cost this condition was kept in abeyance. We cannot sit in appeal over the decision of the Government and other executive authorities.

17. Since we are of the opinion that there was no concluded contract in favor of the petitioner there can be rebidding and the petitioner can also participate in the re-bidding.

18. It may be mentioned that in the initial bid only four parties took the tender forms, and only three out of them had submitted their bids. Hence, we see no

reason to interfere with the decision of Petronet to confine the re-bid to only these three parties.

19. It has been stated in the counter affidavit that the contract with RASGAS, LNG is to be obtained at a total cost of around US 480 million per year or around US 9.6 billion over a period of twenty years. However, based on the current LNG prices prevailing in the international market, the total cost of similar quantity of LNG would translate into around US 1.5 billion per year or around US 30 billion over a period of 20 years. As such the contract with RASGAS is of vital importance. In fact, there is a great shortage of LNG and despite persistent efforts by Indian entities to secure long term supplies, no such long term LNG contract has been concluded by any other Indian entity till date.

20. The contract with RASGAS requires Petronet to enter into firm arrangement with an LNG transporter for transportation of the LNG from Ras Laffan, Qatar to Dahej, Gujarat. The last date for fulfilling this condition was 31st December 2005. If this condition is not fulfilled by the aforesaid date, it is likely that RASGAS will cancel the contract, in which event either LNG will not be available or will be available at a higher price, thereby adversely impacting the development of power and fertilizer sector, in particular and other industries in general. It is stated that Petronet does not make any profit on the transportation element and the entire cost of the transportation is simply passed through by it to the end consumer. Hence any interference with this process at this stage will have catastrophic affect on the whole economy and the end consumer in general.

21. Since there was no concluded contract in the petitioner's favor no right of the petitioner has been infringed by the rebidding. A writ petition lies only when there is a right of the petitioner which has been infringed, but here there is none. It is well settled that even the lowest bidder has no right to get the contract vide *Asia Foundation and Construction Ltd. Vs . Trafalgar House Construction Ltd. : (1997)1SCC738* . Hence in our opinion the writ petition is not maintainable.

22. For the reasons given above, we find no merit in the writ petition and the same is dismissed.

