

(2008) 07 KL CK 0008

In the High Court Of Kerala

Case No : Writ Petition (C) No. 15570 of 2008

Zoom Developers Pvt. Ltd.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 03-07-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226

Citation : (2008) 07 KL CK 0008

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : A.M. Shaffique, Santhosh Mathew and Sathish Ninan, for the Appellant; C.P. Sudhakara Prasad, General, T.B. Hood Government Pleader, V. Chithambareesh, Rajeev Nayyar, Abraham Vakkanal and M.K. Damodaran, K. Gopalakrishna Kurup and Jacob Sebastian, for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—The second Respondent, a Government of Kerala undertaking, hereinafter referred to as "Sponsor", was appointed by the Government of Kerala as the Nodal Agency for development of a modern, all weather, deep-water seaport and container transshipment hub at Vizhinjam in Thiruvananthapuram District, Kerala, with focus on International Container Transshipment on BOOT (Build, Own, Operate and Transfer) basis. The Government of Kerala is the Licensor for that project. The Sponsor accordingly invited proposals from private developers/investors. The third Respondent, hereinafter, the "Advisor", for short, was appointed the Strategic Advisor for project development, bid process management and selection of developer. M/s L and T-RAMBOLL Consulting Engineers Limited, in association with ROGGE Marine Consulting GMBH, Germany, RAMBOLL, Denmark and L and T Capital Company Limited were appointed Technical Consultants, having carried out feasibility studies.

2. The Petitioner was one among those who submitted proposals in terms of

Ext.P-1 Request for Proposals. This writ petition is filed seeking a declaration that the stand taken by Respondents 1 to 3 treating the proposal submitted by the Petitioner's consortium as non-responsive is arbitrary and illegal and violative of Articles 14 and 19(1)(g) of the Constitution of India. A further direction commanding those Respondents to open the technical bid and financial bid submitted by the Petitioner and to take steps to award the tender to the consortium which has submitted most competitive bid, is also sought for.

3. In paragraph 9 of the writ petition, it is pleaded that the proposal by the Petitioner's consortium consisting of Zoom Developers as the Lead Member, Portia Management Services and Peter Frankel and Partners as members was submitted on 31-1-2008. According to the Petitioner, five consortia submitted bids on that day, as is evidenced by Ext. P-8. The Petitioner contends that the third Respondent evaluated the bids submitted by the Petitioner and issued Ext.P-9 communication making six observations, including that Portia Management Services has signed the consortium agreement on behalf of Peel Ports Limited but Peel Ports Limited is not a member of the consortium and that necessary documentations from various consortium members authorizing the signatories of the different documents have not been submitted along with the bid. It is contended that in terms of the direction contained in Ext. P-9, the Petitioner collected the documents from the third Respondent and as per Ext. P-11, the Petitioner forwarded the documents enumerated therein and reiterated in paragraph 15 of the writ petition. Thereafter, according to the Petitioner, the third Respondent had granted time to place further materials as were required, which, according to the Petitioner, were provided and hence, the Petitioner bona fide believed that in view of the clarifications/supporting documents submitted by it and because the third Respondent did not call for any further clarification, the statement of Qualification of the Petitioner's consortium would be found to be substantially responsive to the requirements set forth in the proposal and that the bid submitted by the Petitioner would be found to be in order leading to their technical and financial proposals also being opened. The Petitioner says that Ext. P-24 brought home the information that the fourth Respondent has been selected for the work and that the Petitioner thereupon had certain discussions with the Minister for Ports in the Government of Kerala and also with different other authorities. The writ petition is hence filed challenging the exclusion of the Petitioner's consortium by treating its proposal as non-responsive.

4. In pith and substance, the plea of the Petitioner is that the consortium led by it had submitted the proposal which was responsive in terms of the requirements of Ext. P-2 Qualification criteria and all relevant requirements in terms of the invitation for proposals and that the Petitioner's consortium having answered all the queries of the third Respondent and having provided all clarifications and further supporting documents, there was no reason to treat the proposal of the Petitioner's consortium as non-responsive, thereby excluding it from the zone of consideration after the initial stage.

5. The relief sought for in the writ petition is essentially for a direction that the proposal of the Petitioner's consortium be treated as responsive and hence, for appropriate direction, to have the evaluation of the technical bid on the basis of which the financial bid could also be considered.

6. As directed by this Court, the first Respondent has placed on record the report of the High Level Committee, constituted for the purpose of evaluating the bids in so far as it related to the Petitioner's bid.

7. The second Respondent sponsor has filed a counter-affidavit. It is has contended that as per a Government Order dated 23-1-2008, the Government constituted a Bid Opening Committee to open the bids and constituted an Evaluation Committee chaired by the Chief Secretary, as per Government Order dated 19-2-2008 to evaluate the bid proposals. The bids were received from five consortia. The outer cover and cover No. 1 (statement of Qualification) of the bids were opened on 31-1-2008 by the Bid Opening Committee in the presence of the representatives of the bidders and the contents of the outer cover were read out. The Evaluation Committee met jointly with the Advisor, on 25-2-2008, 13-3-2008, 8-4-2008, 6-5-2008, 7-5-2008 and 14-5-2008 for evaluation of the bid proposals. The Bid Evaluation Committee, along with the Advisor, considered the bid received from die Petitioner's consortium along with those of the other bidders, at the meeting held on 25-2-2008. The Bid Evaluation Committee, sitting jointly with the Advisor, as evidenced by Exts. R-2 (c) and R-2 (d), found that further additional informations from the Petitioner in respect of three different matters were required, namely, the Annual Reports of last three years with all schedules up to December, 2008; the Annual Reports for the last three years relating to Portia Management Services Limited; and Annual Report of Peter Frankel and Partners, UK. After the receipt of further documents as resubmitted, a meeting of the committee was again held jointly with the Advisor, on 8-4-2008 and remarks were submitted by the Advisor to the Bid Evaluation Committee as regards the Petitioner. The comparison made between the original documents submitted and the observations made thereon and the revised documents obtained and the observations regarding compliance are noted in a tabular form in paragraph 9 of the counter-affidavit of the second Respondent, the sponsor. The Advisor also pointed out the matters which needed to be considered by the Law Department of the Government of Kerala. Those are also enumerated in paragraph 9 of that counter- affidavit. On 8-4-2008, the Bid Evaluation Committee found it necessary to consider the reasonableness of the bids submitted by the consortium led by the Petitioner, keeping in view the agreement dated 4-10-2007. The Committee also took note of the remarks of the Law Firm consulted by the Advisor and decided to seek the views of the Secretary (Law) in the Government of Kerala. A detailed examination was required to ascertain whether the documents submitted would comply with the provisions of law and the bid documents. That was provided by the Secretary (Law). The Bid Evaluation Committee met thereafter and considered the opinion of the Secretary (Law) that the changes made by the Petitioner in the agreement dated

11-3-2008 make it a totally new agreement and that M/s Portia Management Services Limited had signed on behalf of M/s Peel Ports Limited, which is the principal contracting agency as per the agreement dated 4-10-2007 and that no document was produced in support of the authorization of M/s Portia Management Services by M/s Peel Ports Limited in that regard, while the new agreement dated 11-3-2008 produced by the Petitioner had changed the contracting party by substituting M/s Portia Management Services Limited as the contracting party instead of M/s Peel Ports Limited. Accordingly, the view taken was that there was a change in the constituents of the consortium and hence, the bidding parties, as per the new agreement created after the opening of the bids for the project, which change of bidding parties after submission and opening of bids is not permissible. It is also contended that the Secretary (Law) had opined that the new Consortium Agreement of the Petitioner's consortium did not answer the requirement as stipulated in the request for proposal and that the Committee, with the Secretary (Law) participating in the deliberations as a Special Invitee along with the Advisor, considered the opinion and after due deliberations had unanimously concluded that the bid submitted by the Petitioner was non-responsive/non-admissible as per the bid provisions.

8. Portia Management Services Limited applied for impleadment in the writ petition as per I.A.7587/2008. That has been allowed listing it as the additional fifth Respondent.

9. Pleadings are also on record in the form of reply affidavit and statement on behalf of the additional fifth Respondent.

10. In considering the case, the nature of the invitation for bids needs to be clearly understood. The Request for Proposal, hereinafter referred to as "RFP", provides for the submission of the proposal along with a covering letter in the format given at Annexure-3 to the RFP. The bidders are to submit their completed, detailed proposal in accordance with the THREE-cover system in terms of Clause 15 of section IV of Ext. P-4; Cover 1 containing the statement of Qualification with supporting documents, Cover 2 containing Technical Proposal and Cover 3 containing the Financial Proposal. The said three separate envelopes are to be sealed by the bidders superscribing on them the identity of the cover in terms of that clause of Ext. P-4. Clause 21 of section IV of Ext. P-4 provides for opening of proposals by Sponsor. It enjoins that Cover 2 (Technical Proposal) of only those bidders who have passed the Qualification criteria shall be opened and evaluated and Cover 3 (Financial Proposal) of only those bidders who become eligible after the evaluation of technical proposals shall be opened. Thus, the outer cover and Cover 1 containing the statement of Qualifications of all the bidders who submitted the proposals are to be opened before consideration of Cover 2 (Technical Proposal). Clause 22 of Section IV of Ext. P-4 provides that the Sponsor shall examine the proposals to determine whether they are complete and any proposal found to be non-responsive for different reasons mentioned in Clause 22.1 will be rejected and not included for further consideration. This

includes, among other reasons, inconsistencies between the proposal and the supporting documents.

11. In its meeting held on 8-4-2008 with the Secretary (Law) as Special Invitee, in so far as the consortium led by the Petitioner is concerned, the Bid Evaluation Committee noted that the reasonableness of that bid needs to be ascertained keeping in view the consortium document dated 11-3-2008. The Secretary (Law), after scrutiny of the documents submitted, informed that a detailed examination was required to ascertain whether the documents submitted would comply with the provisions of law and the RFP documents. In view of that, Clauses 4.2 and 4.3 of the Minutes of the 3rd Meeting of the Bid Evaluation Committee held on 8-4-2008 show that it was decided that the Committee will decide on evaluation of the Qualification Criteria, for the consortium led by the Petitioner and opening of their Technical Bid, after receiving the opinion of the Secretary (Law) and that the Technical Bid of the three consortia who have been found to comply with the provisions of RFP (Outer Envelope submissions) and meet the Qualification criteria, be opened.

12. Agenda notes for the 4th Meeting of the Bid Evaluation Committee held on 6-5-2008 were circulated with the opinion of the Secretary (Law) and on 6-5-2008, after considering the opinion of the Secretary (Law), the Committee including the Special Invitee, Secretary (Law) unanimously concluded that the bid submitted by the consortium led by the Petitioner is non-responsive/non-admissible in terms of RFP provisions.

13. Though materials are placed to refer to the financial status of Portia Management Services Limited and Peel Ports Limited, independently and collectively, and different submissions are made to show that Portia Management Services Limited is essentially a subsidiary of Peel Ports Limited and therefore, the financial status of Peel Ports Limited and Portia Management Services Limited have to be considered and applied accordingly, such considerations do not really arise for decision in this case for the simple reason that the Bid Evaluation Committee has not rested its decision on that aspect at all. This is unequivocally clear from the fact that the decisions in the meeting of the Bid Evaluation Committee on 8-4-2008, as regards the consortium led by the Petitioner, never rested on any consideration regarding the financial status of either Peel Ports Limited or Portia Management Services Limited. This is abundantly explicit from the fact that as evidenced by Clause 2.5 of the Minutes of the Meeting dated 8-4-2008, the Bid Evaluation Committee had decided that the decision regarding evaluation of statement of Qualifications as regards the consortium led by the Petitioner can be taken after the opinion of the Secretary (Law) is obtained. Thus, what fell for the opinion of the secretary (Law) was the consortium agreement and it was such opinion that was to be considered by the Bid Evaluation Committee which met subsequently on 6-5-2008. It is also apparent from the opinion given by the Secretary (Law) that the opinion was confined to the consortium agreements, including the supplemental agreement and the

terms of the consortium agreement Therefore, even if the Petitioner succeeds in this writ petition, the process will have to commence from the stage of the decision of the Bid Evaluation Committee recorded at Clause 4.2 of the Minutes of the Meeting of the Bid Evaluation Committee held on 8-4-2008 to the effect that the Committee will decide on evaluation of Qualification criteria for the consortium led by the Petitioner and opening of their technical bid, after receiving the opinion of the Secretary (Law). So much so, the controversy raked up in this writ petition, on either side, with reference to the financial status of either Portia Management Services Limited or Peel Ports Limited, is not germane for a decision in the case in hand.

14. The decision of the Bid Evaluation Committee on 6-5-2008 concluding that the bid submitted by the consortium led by the Petitioner is non-responsive/non-admissible in terms of RFP provisions, is founded on three limbs of the opinion given by the Secretary (Law). The first is that the consortium agreement dated 4-10-2007 was signed by M/s Portia Management Services Limited on behalf of M/s Peel Ports Limited, though no such authorization is found issued in that regard by M/s Peel Ports Limited. The second is that in the new consortium agreement dated 11-3-2008, M/s Peel Ports Limited, the party to the consortium as per the consortium agreement dated 4-10-2007 has disappeared and M/s Portia Management Services Limited has come in the picture as a party to the consortium agreement and that such a change has been made after the submission of the original bid documents, without explaining under whose authority such change has been made in the consortium. The third limb of the legal advice was that as per the eligibility criteria for the bidder, as specified in Clause 3.5 of section IV of RFP, all members of the consortium are required to state that they shall be jointly and severally liable for the execution of the project and a statement to that effect shall be included in the consortium agreement. But, instead of incorporating such a clause in the consortium agreement, it is stated therein that the members of the consortium shall be jointly and severally responsible at every stage of the implementation of the project. The opinion is that "liability is different from responsibility". Apart from these basic reasons, in the opinion of the Secretary (Law), the consortium agreement dated 11-3-2008 and the earlier one of 4-10-2007, taken together, show that the earlier one became a non-entity by the creation of the latter.

15. Clause 29.1 of section IV of Ext. P-4 states that the law applicable for the RFP documents would be Indian Law. Clause 2 of the said section provides, among other things, that consortium agreement to be entered into among the members of the consortium is to be submitted on the proposal due date. Clause 3.5 provides that all members of the consortium shall be jointly and severally liable for the execution of the project in accordance with the terms of the Licence Agreement and a statement to that effect shall be included in the Consortium/ Shareholder's Agreement. Clause 4 i.e. provides that a copy of the consortium agreement entered into by and among the members of the consortium and the Lead Member shall be submitted with the proposal and the consortium

agreement shall be specific to the proposal in question and shall clearly allocate responsibilities and duties between the Members and the Lead Member, including percentage of shareholding and still further, notwithstanding that, the Consortium Members shall be jointly and severally liable to Licensor for implementation of the project. From the aforesaid clauses, two things are clear. The sponsor and the State Government as the Licensor had clearly called upon the proposer to categorically state that all the members of the consortium shall be jointly and severally liable and that such a statement shall be included in the Consortium/Shareholder's Agreement. Secondly and more importantly, any distinction between the terms "responsibility" and "liability" or any possible identity of meaning between those terms has been clearly understood and contrasted by the Sponsor and the Licensor, while they categorically stated in Clause 4.1 .e. of Section IV of Ext. P-4 requiring that the Consortium Agreement shall clearly allocate responsibilities and duties between the Members and the Lead Member and notwithstanding such statement, the Consortium Members shall be jointly and severally liable. Therefore, even though the Petitioner wants it to be held by this Court that there is really no difference between "liability" and "responsibility" and that therefore, it is of no consequence that the word "liability" was not used in the Consortium Agreement, I am clear in my mind that the invitation to offer by holding out Ext. P-1 Request for Proposal and the issuance of Ext. P-4 have been made by the State Government as the Licensor and the second Respondent as the Sponsor, understanding that there is a clear cut distinction between the terms "responsibility" and "liability" for the purpose of interpreting the provisions of Ext P-4 RFP Document. The privilege in this regard has essentially to be that of the sponsor and/or the Licensor. It cannot be left to the reasoning of any bidder or proposer. This is all the more so because, in dealing with a project of international importance, huge public interest and ultimate turnover in public funds, the Sponsor and the Government are expected to act with the greatest sense of responsibility and caution and are, therefore, entitled to require the inclusion of such term as, in their wisdom, on the basis of appropriate advice, is required, to enter into a contract with a successful bidder. Therefore, it has to be necessarily taken that in Ext. P-4, the Sponsor and the Licensor Government had maintained the clear understanding of a distinction between the terms "responsibility" and "liability" and had called upon the proposer to express categorically that all members of the consortium shall be jointly and severally liable for the execution of the project and also to express clearly the responsibility, inter se the members of the consortium and vis-a-vis, the lead member, including as to the sharing of duties. The word "responsibility", in the context of Ext. P-4 RFP Document, is only one that runs ejusdem generis with duty qua the participants in the consortium, to identify the mutuality of the duties and responsibilities among themselves in the execution of the contract. That term is irrelevant to decide the concept of liability which shall be joint and several and be expressed so, categorically, notwithstanding the mode of sharing of responsibilities and duties among the members of the consortium, including the lead member. The "liability", as is conceived in the RFP, is of the consortium

members qua the Licensor Government and the Sponsor.

16. Ext. P-4 is an RFP Document which contains clear and specific requirements in relation to a contract for providing state of the art facilities and equipment with an initial project cost involving an estimated INR 23.9 billion. The RFP Document is a very elaborate one, including many prescribed forms. The same is easily comparable with documents issued in relation to very many technical contracts which are issued with specific instructions to bidders. One such case considered by the Apex Court, *W.B. State Electricity Board v. Patel Engineering Co.* (2001) 2 S.C.C. 451 dealt with the application of instructions to bidders (for short, ITB). As in the case in hand, that was also one where the controversy had arisen at the threshold. In that case, the plea of the proposer (bidder) was that the mistakes that had crept into the bid documents were unintentional and due to the fault of computer. Apart from stating the quality of vigilance in checking the bid documents before submitting them, the Apex Court laid down as follows:

24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The Appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfill prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the Appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest.

17. Having thus noticed that the most appropriate, or the best, principle to be followed in the best public interest is adherence to the instructions given to the proposers, the principle governing judicial review and the scope of such a procedure in such matters require to be considered.

18. In *Tata Cellular Vs. Union of India*, , in broadly stating the requisites of a

valid tender, it was specifically held that it must be unconditional and must conform to the terms of obligation and must be made in proper form. Adverting to the different precedents, it was laid down in Tata cellular's case (supra) as follows:

113. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract, in other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

19. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , it has been held as follows:

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, , *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, , *Tata Cellular Vs. Union of India*, , *Ramnislal N. Bhutta and another Vs. State of Maharashtra and others*, and *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, , The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding

to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

20. With the aforesaid in mind and having already noticed the intrinsic materials in Ext. P-4 to conclude on its own interpretation that the Sponsor and the Licensor were clear in their mind that there is a dichotomy between the terms "liability" and "responsibility", I do not find any reason to conclude that any intervention is called for or that there is any overwhelming public interest which requires interference in the case in hand, on that point. I have also perused the Consortium Agreements of those consortia whose technical bids were scrutinized. Those agreements contain the liability clause as prescribed in the RFP documents.

21. Be that as it may, I shall proceed to consider whether the Petitioner has made out any legal point on the interpretation of the term "liability", qua the word "responsibility".

22. On behalf of the Petitioner, it was attempted to be pointed out that on a survey of the different dictionaries, including Black's Law Dictionary, the concepts of "liability" and "responsibility" are one and the same and it was unreasonable and arbitrary for the Sponsor and the Licensor Government to have treated the bid of the consortium led by the Petitioner as non-responsive on the ground of absence of use of the term "liability" in the Consortium Agreement. The opinion given by the Secretary (Law) in that regard was criticized as too hipertechical.

23. "Liability" is "the state of being bound or obliged in law or justice"- See Bouvier's Law Dictionary, it is the state of being bound or obliged in law or justice to do, pay or make good something; legal responsibility-See Anderson's Law Dictionary. "Liability", going by Oxford English Dictionary, means "the condition of being liable or answerable by law or equity". Webster defines "liability" to be the state of being bound or obliged in law or justice; responsibility. Feil v. Coeur D'alene 43 Lawyers Reports Annotated (N.S.) 1095

(1103) has been quoted in First National Bank Ltd. (in Liqn.) Vs. Seth Sant Lal, as having laid down that the term "liability" is of large and comprehensive significance, and when construed in its usual and ordinary sense, in which it is commonly employed, it expresses the state of being under obligation in law or injustice. Noticing the aforesaid meanings of the term "liability", it was laid down in First National Bank's case (supra) that the concept of liability in the context of debt, due etc. has to be understood as something what is due in terms of an enforceable legal obligation. Noting the aforesaid precedent as one laying down that when liability was construed as a term having large and comprehensive significance and in its usual and ordinary sense, in which it is commonly employed, it expresses the state of being under obligation in law or injustice, that decision was quoted by the Full Bench of the Delhi High Court to decide Mohd. Yaqub v. Union of India AIR 1971 Del 45. That a clear understanding of the term "liability" had always been maintained by the Indian Courts as referable to a responsibility with reference to legal incidence, can be clearly noticed, reading the decision of the Apex Court in The State of Tripura Vs. The Province of East Bengal, . Reference was made therein to the concepts of liability in respect of an actionable wrong, liability for damages, for tortious acts etc. in Zunjarrao Bhikaji Nagarkar Vs. U.O.I. and Others, , liability has been understood and applied as something that visits a person.

24. The term "liability" takes different shades of meaning in different contexts. The different concepts; criminal liability, tortious liability, civil liability, contractual liability etc. and the remedies available in relation to such liabilities, as also the penalty that one may be visited with, give the term "liability" a very specific meaning in the context of nature and quality of the liability. Wide it may be. Equally wide may be the scope of the word "responsibility". But, in all contexts, all responsibilities need not be liabilities, while in most of the situations, all liabilities may be responsibilities, though liability may be the result of the omission to discharge a responsibility. A situation of liability of deprivation is available when a conviction takes place. Liability to compensation is a liability of deprivation. One may be responsible to another. He may be responsible under a relationship which may be contractual or otherwise, such responsibility may call for performance or abstinence. The omission to perform or a commission in defiance or defeasance of a required abstinence would result in the breach of a responsibility. That responsibility may be one which the law recognizes to provide a remedy to one who has suffered on account of that breach. Or, as in criminal law, the non-adherence to the responsibility to commit or omit to commit, may result in the liability of a punishment or even compensation. Therefore, the term "liability" is more specific in its relation to those obligations, rights and duties referable to the laws. Incurring a liability in the realm of fiscal loss is yet another instance which germinates and sustains on foundations which are not, in common parlance, referred to as responsibilities.

25. Having regard to the wide spectrum of legislations, common law principles, Judge-made law, law referable to other sources in an ever developing global

scenario, no authority inviting proposals can be compelled to take any term which is not the very one specified in the invitation for proposal unless that authority decides otherwise, in its wisdom. Therefore, the insistence by the Sponsor and the Licensor Government that the term "liability" being absent in the Consortium Agreement of the consortium led by the Petitioner, they cannot be compelled to treat the proposal of the Petitioner's consortium as responsive, is sustained.

26. Ext. P-21 Consortium Agreement is dated 11-3-2008, Ext. P-5 Consortium Agreement is the earlier one dated 4th October, 2007. In both these documents, the provision is only that the members of the consortium shall be jointly and severally responsible at every stage of the implementation of the project. There is no provision in those Consortium Agreements regarding the joint and several liability of the consortium members as is required by the RFP Document. In this regard, the legal opinion given by the Secretary (Law) cannot be treated as either perverse, arbitrary or wholly unavailable and the Licensor Government and the Sponsor cannot be held to have acted against public interest or in defiance of the terms of the RFP Document, in refusing to treat the Consortium Agreement of the Petitioner's consortium as unacceptable on that count and having therefore treated the proposal of the Petitioner's consortium as non-responsive.

27. The next limb of the legal opinion on which the bid of the Petitioner's consortium has been treated as non-responsive is the change in the identity of one of the participants in the consortium. Clause 3-4 of section IV of Ext. P-4 provides that the applicant is free to select the other members of the consortium and finalize the shareholders of the consortium before the submission of the proposal. This has the exception regarding the Lead Member, governed by the first limb of Clause 3-4. That is, however, not of much relevance. But what is more important is that the finalization of the identity of the other members of the consortium has to be before the submission of the proposal. The date fixed for the submission of proposal was 31-1-2008.

28. In Ext. P-5 Consortium Agreement dated 4-10-2007, the second party is described as follows:

PORTIA MANAGEMENT SERVICES LTD., on behalf of Peel Ports Limited of the UK, having its office at Maritime Centre, Port of Liverpool, L21 1LA, U.K., engaged in providing management, advisory, consultancy, training, and other services to ports and related organizations throughout the world (hereinafter referred as "Portia").

The Petitioner contends by stating as aforesaid that all that was meant is that Portia Management Services Ltd. is a subsidiary or an extended limb of Peel Ports Ltd. and that, therefore, by the issuance of Ext. P-21 Consortium Agreement dated 11-3-2008 by deleting Peel Ports Ltd., the original party in Ext. P-5, namely, Portia Management services Ltd. alone survives and the mentioning of Peel Ports Ltd. which was a surplusage in Ext. P-5 has been deleted, while

entering into Ext. P-21. The second party to Ext. P-21 Consortium Agreement dated 11-3-2008 is described as follows:

PORTIA MANAGEMENT SERVICES LTD., having its office at Maritime Centre, Port of Liverpool, L21 1LA, U.K., engaged in providing management, advisory, consultancy, training, and other services to ports and related organizations throughout the world (hereinafter referred as "Portia").

29. A plain reading of the description of the second party in the earlier Consortium Agreement, Ext. P-5, clearly shows that Portia Management Services Ltd. was acting on behalf of Peel Ports Ltd. The phrase "on behalf" is one that has come up and is coming up frequently for consideration in the realm of contracts and in different other jurisdictions in different Courts, particularly, in relation to fixing liabilities for actions of agents; of partners; by nominees; of guarantors etc. The evolution of law would also show that with the passage of time, even criminal liability is sometimes fastened on vicarious counts. More than four decades ago, in *Kripa Shankar D. Worah Vs. Commissioner of Wealth Tax*, , it was noticed that the expression "on behalf of" conveys a specific meaning. It was laid down therein that the expressions "for the benefit of" and "on behalf of" are not synonymous with each other and that they convey different meanings. It was held that the term "on behalf of" connotes an agency which brings about a relationship as between principal and agent; between the parties, one of whom is acting on behalf of another. To notice so, the decision of the Apex Court in *W.O. Holdsworth and Others Vs. The State of Uttar Pradesh*, was relied on. Therefore, Portia Management Services Ltd., the fifth Respondent herein, having described itself in Ext. P-5 as acting on behalf of Peel Ports Ltd. cannot be heard to turn round to contend that what it really meant in Ext. P-5 was that it was acting by itself and for itself only and that it is the said position that is vouchsafed by the manner of description of the second party to Ext. P-21 Consortium Agreement. Even if a different view is possible, the Licensor Government and the Sponsor should not be compelled by the writ Court to take a view different from that which they have taken, namely, that in Ext. P-5, Portia Management Services Ltd. purported to act on behalf of the Peel Ports Ltd. and in Ext. P-21, Peel Ports Ltd., to use the words of the Secretary (Law), has "disappeared". For this reason, that contention of the Petitioner also fails.

30. Having regard to the aforesaid, the decision of the Sponsor and the State as the Licensor, arrived at through a High Level Bid Evaluation Committee, with the junction of the secretary (Law) as a special invitee, having regard to the legal issues involved, cannot be treated as vitiated on any count warranting interference in judicial review, in exercise of authority under Article 226 of the Constitution of India. No question of comparative financial status requires to be gone into in this case because, the impugned decision does not rest on any such ground or finding against the interest of the Petitioner.

In the result, this writ petition fails and is hence dismissed. No costs.