



# Ocean Sparkle Limited™



(CIN : U05005TG1995PLC021217)

An ISO 9001:2008, 14001:2004 & OHSAS 18001:2007 Company

Registered Office : # 128, Srinagar Colony, Hyderabad - 500 073, Telangana, India.

Phone : +91 40 6653 7720 / 2374 3507 / 2374 1138, Fax : +91 40 2374 8752

E-mail : oslhyd@oceansparkle.in Website : www.oceansparkle.com

Date: 30<sup>th</sup> July 2018

To,

Mr. Mangala Samaraweera  
The Honorable Minister of Finance,  
Government of Sri Lanka,  
Colombo 01

Honorable Sir,

**Sub: Award of SLPA Tender (CES/FP/03/PT/5747(HM), March 2018) – OSL is L1 again but discriminated against on procedural issues**

By way of introduction, Ocean Sparkle Limited (OSL) is one of the largest professionally managed Indian Companies engaged in providing towage services at several ports in India and overseas. It owns and operates a fleet of 112 vessels which are deployed in 30 locations. Established in 1995, its clientele includes renowned port projects such as Reliance Jamnagar, Aditya Birla port in Dahej, Petronet LNG terminals in Dahej and Kochi and all the 12 major ports in India. OSL has successfully executed contracts for harbor towage services in Sri Lanka, Oman and Saudi Arabia. Notably, OSL has a blemish-free record of providing harbour towage services at Colombo Port between the years 2010-2016.

Given our longstanding association with SLPA, track record of operating in Colombo Port and on the assurance that international bidders will be treated on an equal footing, OSL participated in the SLPA Tender. Although OSL's price bid was determined to be the lowest, we were shocked to receive a letter dated 6<sup>th</sup> June 2018 that our bid was rejected on the ground that it was not substantially responsive. **It is our humble submission Hon'ble Sir, that OSL is the lowest, most responsive, more experienced bidder, however we are being discriminated against alleging procedural issues.**

As per the prescribed process, we duly submitted our appeal with the Hon'ble Procurement Appeal Board (PAB) as well as written submissions from *President's Counsel, Mr. Sanjeeva Jayawardena* in support of our appeal. We also made our oral submissions at the PAB Inquiry held on 4<sup>th</sup> July 2018. Through Mr. Jayawardena's submissions and the PAB hearing, OSL strived to prove that it was the lowest evaluated substantially responsive bidder and that the procedural criteria that were given as the reasons for the bid being rejected, were not even requirements to be satisfied by any bidder at the time of bid submission.

It is also pertinent to note Sir, that any insinuation that the Hon'ble PAB has erred with respect to the price bid is incorrect as the amounts were not discussed at the hearing since the Technical Evaluation Committee (TEC) and the CANC both agreed on numerous separate instances that OSL was the lowest cost bidder and the most responsive other than for the procedural issues that were then dealt with at the PAB hearing. Accordingly, the question of incorrect computation of the price bid does not arise and appears to be an afterthought.



Separately, the allegation that OSL's wholly owned subsidiary – Ocean Sparkle Ceylon (Private) Limited (**OSCPL**) is an unknown entity was duly addressed at the PAB hearing. The PAB reviewed the relationship between OSL and OSCPL in depth and only upon being completely satisfied that OSCPL is owned and controlled by OSL and is essentially the alter ego of OSL incorporated for the purpose of satisfying the Sri Lankan Flagging requirement in the Bidding Document, accepted that it is not an “unknown entity”.

We have been reliably informed that PAB has found in our favour and has recommended that the contract be awarded to OSL since **it satisfies the experience and qualification criteria in its own name and it is the “lowest evaluated substantially responsive bidder”.**

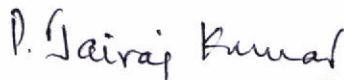
However, we are given to understand that the Ministry of Ports and Shipping has submitted a cabinet paper without attaching the original decision by the Hon'ble PAB, averring that the PAB decision was wrong and that the tender should be awarded to the highest bidder (Sri Lanka Shipping Company Limited).

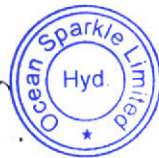
We understand Sir, that the Ministry of Finance has may not have been provided the complete background and set of facts in relation to OSL's bid submission, appeal and the decision of the Hon'ble PAB. We humbly request the Ministry of Finance to kindly reconsider the findings of the Ministry of Ports and Shipping based on the attached note.

In this connection, we would be most grateful for your urgent and kind intervention in this matter and will be happy to address any specific concerns or queries you may have.

Thanking you,

Respectfully yours,  
For Ocean Sparkle Limited





P. Jairaj Kumar  
Chairman & Managing Director

*Encl: As above*

## BRIEF NOTE ON APPEAL BY OSL AGAINST AWARD OF SLPA TENDER

1. The Ministry of Ports and Shipping tendered for the supply of three tug boats for deployment in Colombo Port with the option of supplying up to three tugboats.
2. Ocean Sparkle Limited (OSL), a company owned partly by the IFC and funded by the AD, owning and operating the largest fleet of harbor crafts by far in South Asia (over 100) and who has supplied tugboats to Colombo Port since 2010, tendered for two boats.
3. At the bid opening, the aggregate cost quoted by the bidders was disclosed. Based on this figure, it was determined that average per day per tugboat cost (being the aggregate price bid of each bidder divided by 3 (years), then further divided by the number of tugs (in OSL's case, divided by 2; for other bidders, divided by 3), and further divided by 365 (days)) will be the method of evaluation for the cost. On this method, OSL was judged the lowest cost bidder for the two tugboats it tendered for as shown in Row 'D' in the table below:

Name of Bidders	OSL	Sri Lanka Shipping Company Limited	Investors' Research Group (Private) Limited
(A) No. of Tugboats Bid	2	3	3
(B) No. of Years	3	3	4
(C) Aggregate Price 3yr (as announced)	<b>\$9,460,800</b>	<b>\$15,494,250</b>	<b>\$20,200,500</b>
(D) Effective per day Price per tugboat	\$4,320	\$4,717	\$4,612

'D' - Effective per day Price per tugboat = (C) / (A) / (B) / 365

4. However, OSL's bid was rejected and after OSL appealed to the Hon'ble Procurement Appeals Board (PAB), it was informed (on the last day to prefer an appeal before the PAB) that they didn't meet the requirements of a particular clause (4.1) in the Bidding Document that applied only to joint ventures. OSL's bid was not a joint venture, but because of another requirement in the Bidding Document that required the tugs to be Sri Lankan flagged, OSL created a wholly owned subsidiary in Sri Lanka and included that subsidiary, OSCPL, in its tender submission.



5. At the PAB hearing held on 4<sup>th</sup> July 2018, OSL established at the outset, that the other than the requirements of clause 4.1 and cascading from that, the following alleged deviations as informed to it (*enumerated below*)
- (a) PC is unaware of capabilities and capacities of OSCPL
  - (b) No evidence on JV formal intent, nomination of representative and submission of bid security by JV partners
  - (c) Letter of authorisation is only for OSL and no confirmation of offering the tugs to OSCPL
  - (d) As only OSL is proposing to submit performance bond while the agreement is to be signed with OSCPL, performance bond submitted by the "bidder" cannot be accepted;

there are absolutely no other technical criteria/ deviation that is at variance with the requirements of the Bidding Document and that its bid is the lowest price bid. The Technical Evaluation Committee (TEC) and the CANC both agreed on numerous separate instances at the hearing that OSL was the lowest cost bidder and the most responsive other than for the procedural issues (*listed above*) that were then dealt with at the PAB hearing. Accordingly, the question of incorrect computation of the price bid does not arise and appears to be an afterthought.

6. At the PAB Hearing, OSL established that;
- (a) by using the word "bidder" in the paragraph (e) of the letter 7-1/CAPC/03/2017 of 12.06.2018, Secretary, Ministry of Ports and Shipping established that OSL is the single bidder and not OSCPL.
  - (b) the "bidder" OSL has a clean track record and history of operating tugs in Sri Lanka since 2010.
  - (c) OSL was also the lowest cost, most responsive bidder for the tender in 2016 and that, however, for inexplicable reasons, that tender was withdrawn and a new tender, written very specifically with the view of qualifying a specific bidder was introduced.
  - (d) it is the lowest cost, most responsive bidder in the present tender based on the computation of the "per day per tugboat" price comparison table.
7. OSL also re-established through interrogative from Secretary, Ministry of Ports and Shipping (MPS) that OSL, the "Bidder" is the lowest cost, most responsive bidder, without considering the procedural issues raised in his letter dated 12.06.2018.
8. OSL further established that;
- (a) ***Notwithstanding the flag issue, OSL is not disqualified as a single bidder***



- (b) *Taking the flag issue, OSL/ OSCPL is not disqualified as far as the flag issue is concerned.*
- (c) *There is no substantial affect on the scope, quality or performance specified under the contract and that SLPA will not be prejudiced in any way*

*It is pertinent to note that up to this point in the hearing, both TEC and CANC members present agreed with all of the above.*

9. Subsequently, OSL established before the PAB that:

- (a) OSL is a solo international bidder and that the contract will awarded to OSL (bidder). However, OSCPL will also execute the contract for the purpose of the changing the flag as per the tender requirement. Any concerns SLPA may have on OSCPL being an unknown entity are addressed since OSL has unequivocally stated in its bid submission that OSL and OSCPL jointly and severally liable for execution of the contract (i.e. through a tripartite agreement).
- (b) The requirement for the structure stems in entirety from SLPA's requirement in the Bidding Document (**BD**) to deploy Sri Lanka Flag tugboats since only Sri Lankan Companies can be the owners/ bare boat charterers of Sri Lankan Flag vessels as per the Merchant Shipping Act, 1971 (**MS Act**). OSL also provided additional flexibility and models to SLPA to satisfy the procedural requirement of how to enforce joint and several liability.
- (c) There is no express prohibition in the BD on the structure proposed thereby providing flexibility to solo international qualified bidders such as OSL to participate in the international competitive bidding (**ICB**) process and execute the contract along with its wholly owned subsidiary (OSCPL) in compliance with the provisions of the MS Act.
- (d) If the structure proposed is considered as a major deviation, then there is an inherent contraction in the ICB process. Disqualification on such grounds is akin to stating SLPA does not recognize (a) Exchange Control Regulations which permit 100% foreign direct investment in the business of provision of harbor towage service; and (b) mechanism under MS Act for bareboat charterer's to obtain registration under Sri Lankan Flag.



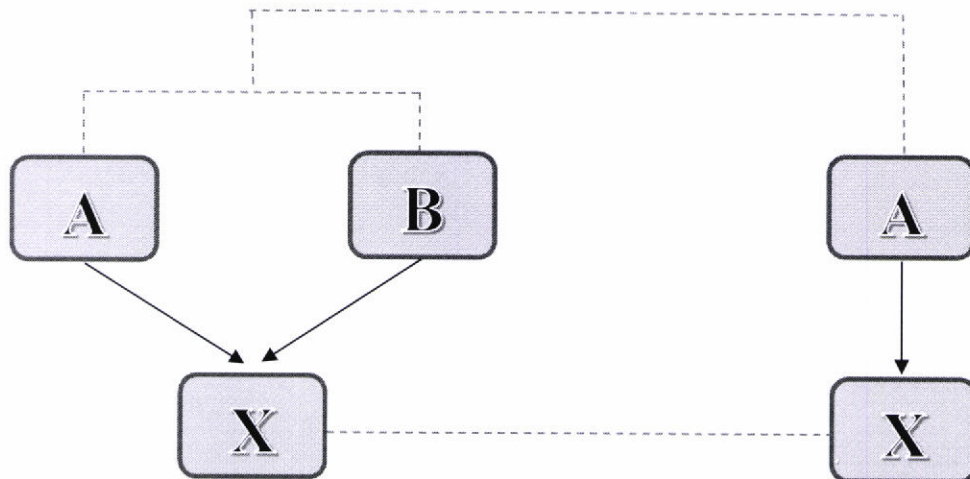
- (e) There is requirement in the BD for a Sri Lankan company to be incorporated/ vessels to be registered under Sri Lankan Flag prior to bid submission. Disclosure of the procedural manner in which a bidder proposes to flag the vessels post award of the contract to comply with the BD is not a pre-requisite for bid submission. Similarly, in a joint venture association (JVA) bid, the joint venture company (JVC) is not required to be incorporated prior to bid submission. At the time of bid submission, only a letter of intent evidencing formal intent to enter into a joint venture agreement/ incorporate a JVC post award, is sufficient.
- (f) OSL meets the eligibility criteria by itself and therefore no averments were made as to the capability and capacity of OSCPL. OSCPL was incorporated for purpose of changing the flag as per the BD requirement. In case of a JVA, since JVC is not in existence/ newly incorporated, experience of all joint venture partners is considered. Similarly, in our case, the experience of the parent entity OSL (i.e. the bidder) is to be considered.
- (g) OSCPL is inextricably linked in terms of ownership and functionality and is the alter ego of OSL, and OSCPL contains the same ownership. Further, the single member on the Board of Directors is the Chairman and Managing Director of OSL. Therefore, SLPA has the full comfort of the weight and credibility and impeccable record of OSL. Further, OSL has undertaken to be jointly and severally liable for the performance of the contract.
- (h) Clause. 4.1 of the Bidding Document permits single entity bidders to participate in the ICB process. The bid was submitted by a single qualified bidder (OSL) – not as a joint venture association. The alleged deviations are additional requirements for JVA bidders to satisfy and do not apply to single bidders.
- (i) Compelling OSL to form a JVA is in clear contradiction to Sri Lanka's Exchange Control Regulations grant general permission for 100% FDI in this field and permit a foreign entity to incorporate a wholly owned subsidiary in Sri Lanka for the purpose of provision of harbor towage services as evidenced by the successful incorporation of OSCPL. There is no requirement for OSL to form a joint venture association with its wholly owned subsidiary OSCPL.
- (j) OSL has taken care to ensure that SLPA's interests are protected in the structure proposed by us in the same manner as the JVA structure, including with regard to liability and responsibility for fulfilment of the contract. Notwithstanding that OSL is a single entity



bidder, *in arguendo*, OSL submitted that OSCPL should be treated on par with the JVC (as shown in the diagram below) since OSL has undertaken to fulfil all corresponding obligations of the lead partner/ representative of the JVAs under the Bidding Document.

**I. JVA BIDDER**

**II. SINGLE BIDDER**



- (k) Structure proposed by OSL (as a single/ solo foreign bidder) is the only possible model that can be adopted within the framework of the ICB process. Rejection of OSL’s bid on these grounds alone would mean that SLPA is compelling a solo foreign bidder to form a JVA (with another foreign entity or local partner) despite satisfying criteria in its own.
- (l) SSPTDL is a wholly owned subsidiary of OSL and in its Letter of Authorizations, it has authorized OSL and its nominees to offer tugs “Ocean Cheer” and “Ocean Bliss” to SLPA in connection with the tender under reference.
- (m) OSL has clearly stated in its Covering Letter to the bid submission (*bullet point 1 on pg.3/4*) that the tug boats will be given on bareboat charter to OSCPL to register under Sri Lankan Flag. This was proposed on the basis of SLPA’s pre-bid clarification No. 7 (*pg.3*) that bareboat chartering is allowed. Accordingly, there is no deviation.
- (n) Given that a tripartite agreement is proposed to be executed, there is no reason for rejection of performance security (a) if submitted by OSL since OSL is the bidder and also a signatory to the contract; (b) if submitted by OSCPL since it is signatory to the contract.



- (o) The requirement to submit the performance bond only arises after award of the contract and not at the bid submission stage and hence cannot be considered as grounds for disqualification of our bid.
10. OSL has been very reliably informed that PAB found in its favour and has recommended that the contract be awarded to OSL as it is the "**lowest evaluated substantially responsive bidder**".

— X —

