

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Writ Petition No.1938 of 2019

M/s. D D Builders Limited, A Company registered under the provisions of the Companies Act, 1956, through its Authorised Signatory & Director

Shri Suubrat s/o Damarudhar Agrawal

Versus

Vidarbha Irrigation Development Corporation, Nagpur, through its Executive Director, Office of Executive Director, Nagpur-440001, and others.

Office Notes, Memoranda of Coram,
 appearances, Court's orders or directions Court's or Judge's orders
 and Registrar's order

Shri Shyam Dewani, Advocate for Petitioner.

Shri J.B. Kasat, Advocate for Respondent Nos.1 to 3.

Shri J.T. Gilda with Shri M.R. Joharapurkar, Advocates for Respondent No.4.

Coram : R.K. Deshpande & Vinay Joshi, JJ.

Dated : 6th March, 2019

The acceptance of the tender of the respondent No.4 for the work in question is the subject-matter of challenge in this petition by one of the bidders, who was qualified. The argument of Shri Dewani, the learned counsel appearing for the petitioner, is that the respondent No.4 has failed to fulfill the minimum eligibility criteria prescribed in Clause 3.3.0 of the Tender Document and sub-clauses therein, which are reproduced below :

“3.3.0 Eligibility Criteria

3.3.1 General Experience :

The bidder should have executed prescribed minimum quantity of following main items of work in any one year during last five years.

<i>Sr.No.</i>	<i>Item</i>	<i>Minimum Quantity executed during any one year</i>
<i>1</i>	<i>Earthwork (Excavation + Banking)</i>	<i>663128 Cum</i>
<i>2</i>	<i>Cement Concrete</i>	<i>1373 Cum</i>
<i>3</i>	<i>C.C. Lining</i>	<i>21172 Cum</i>
<i>4</i>	<i>Steel (Reinforcement)</i>	<i>44.22 M.T.</i>

3.3.2 Experience of Similar Type of Work:

The contractor should have successfully completed directly at least one work of similar nature on a single contract having cost not less than Rs.2886.72 Lakhs at price level of 2017-18. A weightage of 10% compound annually shall be given for updating the cost. Work done as 'Sublet' from other contractors will not be considered.

Note :- *While calculating the general experience given in para 3.3.1 and experience of similar type of work given in para 3.3.2 for individual partners of JV consortia shall be worked out individually proportionate to the share of partner in JV for work done certificate.”*

According to Shri Dewani for the petitioner, the minimum quantity executed during any one year required under the tender in question was of 21172 cubic meters for C.C. Lining, with which the present petition is concerned. The Joint Venture of M/s Musale Construction and M/s. Srinivasa Construction Corporation Limited, the respondent No.4 herein, is in the ratio

of 40 : 60. According to him, the experience of M/s. Musale Construction falls short of 8468 cubic meters, which would be 40% of 21172 cubic meters and, therefore, the respondent No.4 was ineligible.

We have heard the learned counsels appearing for the parties. The experience of work calculated in the present matter is on the basis of the interpretation of Clause 3.3.2, reproduced above, and particularly Note therein, which states that while calculating the general experience given in para 3.3.1 and experience of similar type of work given in para 3.3.2 for individual partners of JV consortia shall be worked out individually proportionate to the share of partner in JV for work done certificate. According to the respondents, both the partners in the Joint Venture have produced the work done by each of them in the proportion of 40 : 60 and it is calculated on the basis of the work done and the certificate produced. It is the case of the respondents that the percentage is not required to be calculated on the basis of the work to be done, but it has to be seen with reference to the previous work executed.

In the decision of this Court in the case of *Atasha Ashirwad Builders (J.V.), Nagpur v. State of Maharashtra and others*, reported in 2011(1) Mh.L.J. 282, relied upon by Shri Gilda, the learned counsel for the respondent No.4, it is held in

Paragraph 10 as under :

“10. In view of above, we find that for judging the credentials of a Joint Venture, the past experience of the constituents of the Joint Venture will have to be taken into account to arrive at the experience of Joint Venture. Admittedly, in the present case, if that is considered and taken together, the experience of Joint Venture is more than 5433 Cum. of cement concrete work during one working season on any one work site and 12000 Cum. cement concrete works on all work sites as required by Sub Clause II of Clause 2.9 reproduced supra.”

In the decision of the Apex Court in the case of *Afcons Infrastructure Limited v. Nagpur Metrol Rail Corporation Limited and another*, relied upon by Shri Gilda, it is held in Paragraph 15 as under :

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the

terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

In view of the law laid down by the Apex Court in Paragraph 15 of *Afcons'* case, relied upon by Shri Gilda for the respondent No.4, we find that the employer- VIDC has interpreted the essential conditions in the contract and has accordingly worked out the proportion in which the work done by the partners in the respondent No.4- Joint Venture is to be ascertained. In the similar matter, in the case of *Atasha*, cited by Shri Gilda, this Court held that the past experience of the constituents of the Joint Venture will have to be taken into account to arrive at the experience of Joint Venture. In view of this, we do not find that any perversity is involved in the interpretation done by the employer- VIDC. No *mala fide* is alleged.

The petition is dismissed.

(Vinay Joshi, J.)

(R.K. Deshpande, J.)