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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on : 25.05.2021

+ **W.P.(C) 4616/2021**

NSC PROJECTS PVT LTD AND VARAHA INFRA LTD. JV

..... Petitioner

Through: Mr. Chandra Shekhar Goswami, Ms.
Simran Mulchandani, Mr. Jay Kumar, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA ... Respondent

Through: Ms. Gunjan Sinha Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **VIPIN SANGHI, J (ORAL)**

W.P.(C) 4616/2021 & CM APPLs. 14129/2021, 16537/2021-(STAY)

We have heard the learned counsels for the parties and proceed to dispose of the same at the admission stage.

- 1) This petition was taken up by the Court for the first time on 13.04.2021. The following order was passed by the Court:

"1. The limited grievance of the petitioner is that its bid has been rejected as "technically non-responsive" on the ground that the cost for RFP (i.e., request for proposal) process was short by Rs.10,000/-.

2. According to the learned counsel for the petitioner, in terms of the notice inviting tender (in short "NIT") dated 15.01.2021, the petitioner, as required, made deposit on 05.03.2021, towards costs of the RFP process amounting to Rs. 80,000/-. It is stated that the respondent/NHAI extended the date of submission of the bid twice. The extensions enabled submission of bids in the first instance by 08.03.2021, and thereafter, by 11.03.2021.

2.1. These extensions were notified by the respondent/NHAI on 23.02.2021 and 04.03.2021.

2.2. It is the contention of the petitioner that, since the stipulated cost of the project was enhanced beyond the original estimated cost of Rs.789.29 crores, the cost of the RFP process was also enhanced by Rs.10,000/-. It is also the petitioner's contention that, although, the enhancement of the costs of the RFP process was notified on 04.03.2021, the petitioner was unaware of the said enhancement.

2.3 As per the counsel for the petitioner, the cost of the RFP process, based on NIT dated 15.01.2021 read with notice dated 23.02.2021, amounting to Rs.80,000/- was accepted by the portal set up by the respondent/NHAI.

2.4 Furthermore, the counsel for the petitioner says that the deficiency was brought to the petitioner's notice only on 23.03.2021. Counsel for the petitioner says that the deficit cost of Rs. 10,000/- towards RFP process was deposited on 25.03.2021.

3. It is in these circumstances, that the petitioner has impugned the order dated 07.04.2021, which, as noticed hereinabove, declared the petitioner's bid "technically non-responsive."

4. Counsel for the petitioner submits that the said deficiency cannot be

*the basis for declaring the petitioner's bid as "technically non-responsive" as it was a curable defect. In support of this plea, counsel for the petitioner relies upon the judgment of the Supreme Court rendered in **Poddar Steel Corporation vs Ganesh Engineering Works And Ors. 1991 (3) SCC 273.***

5. We may note that the matter was passed over to enable Ms. Kadambari, who appears on behalf of the respondent/NHAI, to take instructions as to whether the petitioner's financial bid was returned only on the ground as claimed in the writ petition.

5.1 Ms. Kadambari has returned with instructions and says that the petitioner's bid was returned only on account of the fact that the cost deposited by the petitioner towards RFP process was deficient by Rs.10,000/-.

6. Issue notice. Ms. Kadambari accepts service on behalf of the respondent/NHAI. Counter-affidavit will be filed within three weeks. Rejoinder thereto, if any, will be filed before the next date of hearing.

7. In the meanwhile, the respondent/NHAI will allow the petitioner to proceed to the next step which, we are told, concerns the opening of the financial bid and consider the same on merits. The decision, so taken, will be subject to the final outcome in the writ petition.

8. List the matter on 25.05.2021."

- 2) The respondents have filed their counter affidavit and the stand taken by the respondents is that in furtherance to the orders passed by this Court, the bid of the petitioner was placed before the Financial Consultant for its evaluation. On such evaluation, it was found that the petitioner's bid was "technically non-responsive".

The Evaluation Committee found that the petitioner's bid was a Joint Venture bid, and in terms of Clause 2.1.11 of the RFP, the minimum threshold technical capacity required to be fulfilled by the lead JV Member was Rs. 485.66 Crores, and for the other members, the minimum threshold technical capacity prescribed was Rs. 161.89 Crore, which the petitioner did not meet.

- 3) In the case of the petitioner's bid of which M/s NSC Projects Pvt Ltd was the lead member, its threshold technical capacity was evaluated at Rs. 396.37, Crores as against the minimum requirement of 485.66 Crores. Consequently, the technical bid of the petitioner's Joint Venture was held to be non-responsive.
- 4) To this, the submission of the learned counsel for the petitioner is that the technical bid of the petitioner had already been evaluated when the petitioner approached the Court, and the only infirmity found in the technical bid of the petitioner was that the cost of the RFP (i.e. Request for Proposal) deposited by the petitioner was Rs. 80,000/-, and not Rs. 90,000/-. Learned counsel submits that even before the court, it had been stated by the respondent that the next stage of the tender process was the opening of the financial bids.
- 5) Learned counsel for the petitioner has submitted that, therefore, the respondents had no right to re-examine the technical bid of the petitioner (JV), and thereafter to declare the same as non-responsive.

- 6) Learned counsel submits that the petitioner was informed that its technical bid would be opened by the respondents and the conduct of the respondents in trying to retrace their steps and re-evaluate the technical bid of the petitioner is illegal and has been undertaken only to, somehow, oust the petitioner.
- 7) Learned counsel for the petitioner also submitted, by placing reliance on Annexure –II of the bid which describes the technical capacity of the applicant (as submitted with the bid) that the lead member of the petitioner had aggregate technical experience of Rs. 487.02 Crores.
- 8) On the other hand, learned counsel for the respondent has drawn the attention of this court to the manner of evaluation of bids as laid down in the RFP.
- 9) Learned counsel has firstly, drawn our attention to Clause 3.1.6 which lays down tests of responsiveness. Clause 3.1.6.1 is relevant and reads as follows:

3.1.6.1 As a first step towards evaluation of Technical BIDs, the Authority shall determine whether each Technical BID is responsive to the requirements of this RFP. A Technical BID shall be considered responsive only if:

(a) Technical BID is received online as per the format at Appendix-IA including Annexure I, II, III, IV, V, VI (Bid Capacity format) and Annexure VIII;

(b) Deleted;

(c) Technical Bid is accompanied by the Bid Securing Declaration as specified in Clause 1.2.4 and 2.20;

(d) The Power of Attorney is uploaded on e-procurement portal and BIMS portal as specified in Clauses 2.1.5;

(e) Power of Attorney for Lead Member of Joint Venture and the

Joint Bidding Agreement is uploaded on e-procurement portal and BIMS portal as specified in Clause 2.1.6, if so required;

(f) Technical Bid contains all the information (complete in all respects);

(g) Technical Bid does not contain any condition or qualification; and

(h) Copy of online receipt towards payment of cost of Bid document of Rs 80,000/- (Rupees Eighty Thousand Only) in Authority's designated bank account is uploaded on e-procurement portal and BIMS portal transmitted through SFMS gateway;

(i) Certificate regarding Compliance with Restrictions under Rule 144 (xi) of the General Financial Rules (GFRs), 2017, as per format given in Appendix-IX shall be submitted by the Bidder with the RFP Bid duly signed by Authorised signatory & shall be part of the Contract Agreement.

(j) Proof of Registration with the Competent Authority as defined in Public Procurement Order No. F.No. 6/18/2019 – PPD dated 23rd July 2020, if applicable (to be submitted by the "Bidder from a country which shares a land border with India").

- 10) Learned counsel submits that the first-step examination is undertaken of the aspect as to whether, or not, the bidder has submitted all the requisite documents as stipulated in the RFP. It is submitted that so far as the petitioner and one other bidder are concerned, since their cost of the RFP was short by Rs. 10,000, further evaluation of the technical bid was not undertaken and the petitioner's bid was summarily declared as non-responsive, without any further examination or scrutiny. Learned counsel has also drawn our attention to Clauses 3.1.8 and 3.1.9 which read as follow:

"3.1.8 The Authority will evaluate the Technical BIDs for their compliance to the eligibility and qualification requirements pursuant to clause 2.2.1 & 2.2.2 of this RFP.

3.1.9 After evaluation of Technical Bids, the Authority will publish a

list of Technically Responsive Bidders whose financial bids shall be opened. The Authority shall notify other Bidders that they have not been technically responsive. The Authority will not entertain any query or clarification from Applicants who fail to qualify.”

- 11) She has also drawn our attention to the meeting of the Evaluation Committee undertaken to evaluate the technical bids of the petitioner and one of the Contractors, namely, M/s YFC Projects Pvt Ltd held on 03.05.2021. The said minutes are pertinent, and read as follows:

National Highways Authority of India
(Punjab Division)

Sub: Development of Memmadpur (Ambala) – Banur (IT City Chowk) – Kharar (Chandigarh) Corridor under Bharatmala Pariyojana – Package-II – 6 laning of IT City Chowk to Kurali Chandigarh Road (Design length: 31.23 Km) in the state of Punjab on EPC mode - Minutes of meeting of Evaluation Committee held on 03.05.2021 for evaluation of technical bids – Reg.

A meeting of Evaluation Committee for evaluation of technical bids for subject project was held on 03.05.2021.

1. (A) *Members of Evaluation Committee present:*

(i)	Sh. Akhil Khare, GM (Tech.)	-	Convener
(ii)	Sh. S.Q. Ahmad, GM (Fin.)	-	Member
(iii)	Sh. Rajneesh Kapoor, CGM (Tech.)	-	Member
(iv)	Sh. Rohin Kumar Gupta, GM (Tech.)	-	Member
(v)	Sh. Devesh Goyal, Manager (Tech.)	-	Member

(B) *Financial Consultant (M/s Indraprastha Corridor Advisory) Services (P) Ltd.*

2. *The committee was informed that the technical bids for the subject project were opened on 12.03.2021 at 11.30 hrs (IST). The bids have been received from the following bidder:*

S.NO.	Name of the Bidder (M/s)	Status (Sole/JV)
1/14	Ashoka Buildcon Limited	Sole
2/14	Ceigall India Limited	Sole

3/14	CDS Infra Projects Limited	Sole
4/14	GR Infraprojects Limited	Sole
5/14	Gawar Construction Limited	Sole
6/14	HG Infra Engineering Limited	Sole
7/14	NSC Projects Private Limited & Varaha Infra Ltd. (JV)	JV
8/14	Ram Kumar Contractor & Bharat Constructions India Pvt. Ltd. (JV)	JV
9/14	Reliance Infrastructure Limited	Sole
10/14	Sadbhav Engineering Limited	Sole
11/14	Shivalaya Const. Co. Pvt. Ltd.	Sole
12/14	Simplex Infrastructures Limited	Sole
13/14	VRC Constructions (I) Pvt. Ltd.	Sole
14/14	YFC Projects Private Limited	Sole

3. All the above mentioned technical bids received from the bidders were handed over to the financial consultant for examination and evaluation.

4. The financial consultant submitted the evaluation report dated 31.03.2021. The report submitted by the financial consultant has been deliberated by the Evaluation Committee in its meeting held on 01.04.2021 and the following was recommended for approval of the Competent Authority.

(i) To accept the recommendation of financial consultant regarding technical responsiveness/ non-responsiveness of bidders as under:

S.No.	Name of the Bidder (M/s)	Remarks
1/14	Ashoka Buildcon Limited	Technically Responsive
2/14	Ceigall India Limited	Technically Responsive
3/14	CDS Infra Projects Limited	Technically Responsive
4/14	GR Infraprojects Limited	Technically Responsive
5/14	Gawar Construction Limited	Technically Responsive
6/14	HG Infra Engineering Limited	Technically Responsive
7/14	NSC Projects Private Limited & Varaha Infra Ltd. (JV)	Technically non-responsive (Bidder has not submitted the proof of payment of requisite fee of Rs. 90,000/- towards the cost of bid documents before the bid submission due date in terms of Clause 3.1.6.1(h) of RFP read with Corrigendum/ Addendum no.3 dated 04.03.2021)
8/14	Ram Kumar Contractor & Bharat Constructions India Pvt. Ltd. (JV)	Technically Responsive
9/14	Reliance Infrastructure Limited	Technically Responsive
10/14	Sadbhav Engineering Limited	Technically Responsive
11/14	Shivalaya Const. Co. Pvt. Ltd.	Technically Responsive
12/14	Simplex Infrastructures Limited	Technically Responsive

13/14	VRC Constructions (I) Pvt. Ltd.	Technically Responsive
14/14	YFC Projects Private Limited	Technically non-responsive (Bidder has not submitted the proof of payment of requisite fee of Rs. 90,000/- towards the cost of bid documents before the bid submission due date in terms of Clause 3.1.6.1(h) of RFP read with Corrigendum/ Addendum no.3 dated 04.03.2021)

(ii) To open the Financial Bid of above 12 (Twelve) technically responsive bidders after hosting the results of evaluation of E-tender portal for 7 days, if no objection is received.

5. Accordingly, Consequent to the approval of Competent Authority, the result of evaluation of technical bids were published on e-tender portal on 07.04.2021. The financial bids of technically responsive bidders were scheduled to be opened on 14.04.2021 at 1230 hrs IST.

6. Meanwhile, an email dated 09.04.2021 was received from Sh. Narbir Singh enclosing a scanned copy of representation dated 09.04.2021 to consider the bid of NSC-Varaha (JV) for the subject work. However, before examining the representation by the Evaluation Committee, another email dated 12.04.2021 was received from Kamini Tondon, Chandra Shekhar Goswami, Simran Mulchandani and Jay Kumar (Advocate) informing that the petitioner i.e. NSC PROJECTS PVT. LTD. & VARAHA INFRA LTD. (JV) has filed writ petition (Civil) against NHAI before Hon'ble High Court of Delhi and the same is likely to be listed on 13.04.2021. As the matter was sub judice, the opening of financial bids earlier scheduled on 14.04.2021 was extended.

7. The Hon'ble Court in its order dated 13.04.2021 instructed that, "Counter-affidavit will be filed within three weeks. Rejoinder thereto, if any, will be filed before the next date of hearing. In the meanwhile, the respondent/NHAI will allow the petitioner to proceed to the next step which, we are told, concerns the opening of the financial bid and consider the same on merits. The decision, so taken, will be subject to the final outcome in the writ petition."

8. In light of court's directions, the Demand Draft/ Proof of deposition of additional payment of Rs.10,000/- made by both of the bidders after bid submission due date at S. No. 7 & 14 (declared technically non-responsive) was submitted to Finance Division. The proof of payment of cost of bid document submitted by bidders was verified by the Finance Division vide e-office comp. no.71419. The Finance Division has also confirmed deposition/ receipt of additional payment of Rs. 10,000/- from both the bidders earlier declared technically non-responsive i.e. NSC Projects Private Limited – Varaha Infra

Ltd. (JV) & YFC Projects Private Limited besides the initial payment of Rs. 80,000/- in this regard.

9. The Financial Consultant M/s Indraprastha Corridor Advisory Services (P) Ltd. was accordingly, requested to further evaluate the technical bids in respect of both the bidders. The Financial Consultant in its supplementary evaluation report submitted vide letter no. ICAS/NHAI/EPC/Memmadpur-Kharar/D-122Special C dated 28.04.2021 (received on 03.05.2021) has submitted that the bids of these two bidders have now been considered responsive or further technical evaluation i.e. Technical Capacity, Financial Capacity and Bid Capacity. The details of technical evaluation done by the financial consultant is summarized below:

S. No.	Name of the Bidder	Technical Capacity		Financial Capacity		Assessed Available Bid Capacity (Required = Rs. 809.43 Cr.) LM-Rs.485.66 Cr. OM-Rs. 161.89 Cr.	Remarks
		Experience Score Assessed (Required = Rs.809.43 Cr.) LM-Rs.485.66 Cr. OM-Rs. 161.89 Cr.	Whether Bidder meets 20% of EPC (i.e. Rs.161.89 Cr.) require in category 1 & 3 project	Net worth Assessed (Required = Rs. 40.47 Cr.) LM Rs.24.28 Cr. OM Rs.8.09 Cr.	Average Annual Turnover (Required Rs. 121.41 Cr.) LM Rs.72.85 Cr. OM Rs.24.28 Cr.		
7/14	NSC Projects Pvt. Ltd.	Rs. 396.37 Cr.		62.36 Cr.	Rs. 196.44 Cr.	Rs. 626.91 Cr.	Technically non-responsive as the Lead member is not fulfilling the required Minimum Technical Score of Rs. 485.66 Cr.
	Varaha Infra Ltd.	Rs. 1048.17 Cr.	Refer Project Code "B" EPC-Rs. 320 Cr.	Rs. 150.22 Cr.	Rs. 262.37 Cr.	Rs.728.63 Cr.	
14/14	YFC Projects Private Limited	Rs. 1468.71 Cr.	Refer Project Code "A" EPC-Rs.585.05 Cr.	Rs. 120.37.Cr.	Rs. 455.04 Cr.	Rs. 865.21 Cr.	Technically Responsive and Eligible for Financial Opening

10. The Financial Consultant informed that, as per the tender clause 2.1.11 of RFP, in case of the Joint Venture Bidder, the Minimum Experience score required to be fulfilled by the JV members shall be Rs. 485.66 Cr. for the Lead member and Rs. 161.89 Cr. for the Other member. In case of the bid of M/s NSC Projects Private

Limited & Varaha Infra Ltd. (JV), the Experience Score of the Lead Member i.e. M/s NSC Projects Private Limited is Rs. 396.37 Cr. as against minimum requirement of Rs. 485.66 Cr., therefore the bid submitted by the JV is not qualified bidder and is not qualified for financial opening.

11. The Financial Consultant has recommended the Authority to proceed further for uploading the results of Technical Evaluation on its e-portal and intimate the bidders, time and date of opening of Financial Bid for the captioned project.

12. The Evaluation Committee observed that:

(i) The technical bids of (a) M/s NSC-Varaha (JV); & (b) M/s YFC Projects Private Limited were earlier declared non-responsive as these bidders had not deposited the requisite tender fee before bid submission due date. However, in light of the directions of Hon'ble High Court, the bids submitted by M/s NSC-Varaha (JV) has been considered responsive for further technical evaluation i.e. Technical Capacity, Financial Capacity and Bid Capacity. As the other bidder i.e. M/s YFC Projects Private Limited was also declared non-responsive on the similar ground, the bid submitted by M/s YFC is now also considered responsive for further technical evaluation i.e. Technical Capacity, Financial Capacity and Bid Capacity.

(ii) Based on the technical evaluation done by the financial consultant for these bidders, the Committee observed that M/s NSC-Varaha (JV) do not meet the required Threshold Technical Capacity i.e. Rs. 485.66 Cr. for Lead Member of JV (60% of Rs. 809.43 Cr.) as per RFP. Similarly, the financial consultant evaluated the technical proposal of M/s YFC Projects Private Limited & found that the bidder has fulfilled the required Threshold Technical Capacity & Financial Capacity as well and hence, qualified.

13. After detailed deliberation and discussion, the Evaluation Committee recommended the following for approval of Competent Authority:

(i) To accept the recommendation of financial consultant regarding technical responsiveness/ non-responsiveness of bidders as under:

S.No.	Name of the Bidder (M/s)	Remarks
1/14	Ashoka Buildcon Limited	Technically Responsive
2/14	Ceigall India Limited	Technically Responsive
3/14	CDS Infra Projects Limited	Technically Responsive
4/14	GR Infraprojects Limited	Technically Responsive
5/14	Gawar Construction Limited	Technically Responsive
6/14	HG Infra Engineering Limited	Technically Responsive
7/14	NSC Projects Private Limited & Varaha Infra Ltd. (JV)	Technically non-responsive (Lead member is not fulfilling the required Threshold Technical Capacity as per

		<i>RFP)</i>
8/14	<i>Ram Kumar Contractor & Bharat Constructions India Pvt. Ltd. (JV)</i>	<i>Technically Responsive</i>
9/14	<i>Reliance Infrastructure Limited</i>	<i>Technically Responsive</i>
10/14	<i>Sadbhav Engineering Limited</i>	<i>Technically Responsive</i>
11/14	<i>Shivalaya Const. Co. Pvt. Ltd.</i>	<i>Technically Responsive</i>
12/14	<i>Simplex Infrastructures Limited</i>	<i>Technically Responsive</i>
13/14	<i>VRC Constructions (I) Pvt. Ltd.</i>	<i>Technically Responsive</i>
14/14	<i>YFC Projects Private Limited</i>	<i>Technically Responsive</i>

(ii) *To inform the Hon'ble Delhi High Court regarding the results of technical evaluation after considering both the bidders (earlier declared technically non-responsive) as responsive w.r.t. the payment of cost of bid document.*

(iii) *To open the Financial Bid of above 13 (Thirteen) technically responsive bidders after hosting the results of evaluation of e-tender portal.*

14. *The meeting ended with vote of thanks to the Chair.*

(Devesh Goyal)
Manager (T)

(Rohin Kumar Gupta)
GM (T)

(Rajneesh Kapoor)
CGM (T)

(S.Q. Ahmad)
GM (F)

(Akhil Khare)
GM (T)

(emphasis supplied)

12) Learned counsel submits that the said minutes set out the recommendation of the Financial Consultant as initially made upon examination of the bids of all the bidders. The said minutes show that the technical bids were opened initially on 12.03.2021 and so far as the petitioner and M/s YFC Projects Pvt Ltd are concerned, their bids were declared to be technically non-responsive on the ground that *“Bidder has not submitted the proof of payment of requisite fee of Rs. 90,000/- towards the cost of bid*

documents before the bid submission due date in terms of Clause 3.1.6.1(h) of RFP read with Corrigendum/ Addendum No.3 dated 04.03.2021.”

- 13) These minutes also record that the result of evaluation of the technical bids that were published on e-tender portal on 07.04.2021. The financial bids of the technically responsive bidders were scheduled to be opened on 14.04.2021 at 12:30 hrs IST. In the meantime, the petitioner raised its grievance with regard to it being declared technically non-responsive before this court by filing the present writ petition.
- 14) Consequently, since the matter was sub-judice, the opening of the financial bids which was earlier scheduled for 14.04.2021, was extended. The minutes reproduced above show that in compliance of the order dated 13.04.2021 passed by this Court, after taking note of the fact that the petitioner had made good the deficiency of Rs. 10,000/- towards cost of the bid document, the Financial Consultant was requested to further evaluate the technical bids with respect to the petitioner and the other bidder, namely, M/s YFC Projects Pvt Ltd whose bid had also been summarily rejected for the same reason.
- 15) The Financial Consultant in its supplementary evaluation report submitted vide letter dated 28.04.2021, received on 03.05.2021, found the bid of the petitioner as technically non-responsive as the lead member did not fulfil the required minimum technical score

of 485.66 Crores while, at the same time, finding the technical bid of M/s YFC Projects Pvt Ltd to be technically responsive and found to be eligible for financial opening.

- 16) Learned counsel submits that the petitioner has claimed that its lead member of the JV has technical eligibility of Rs. 487.02 Crores, but that position is not correct. She has pointed out that under Clause 2.2.2.2, the technical capacity of the bidder was stipulated to be a minimum of Rs. 789.2 Crores which was subsequently revised upwards to Rs. 809 Crores vide Addendum.
- 17) Clause 2.2.2.4 stipulates that the bid capacity, technical capacity and financial capacity of all the members of the Joint Venture be taken into account for satisfying the conditions of eligibility.
- 18) Further, the lead members shall meet at least 60 % requirement of bid capacity, technical capacity, financial capacity as per Clause 2.2.2.1, 2.2.2.2(i) and 2.2.2.3 and each of other JV member shall meet at least 20 % requirements of bid capacity, technical and financial capacity individually, as per the aforesaid Clauses. Consequently, the lead member of the petitioner (JV) should have had technical capacity of Rs. 485.66 Crores.
- 19) She has also pointed out that Clause 2.2.2.5 lays down the categories and factors for evaluation of technical capacity. The said Clause is relevant and reads as follows:

2.2.2.5 Categories and factors for evaluation of Technical Capacity:

- (i) *Subject to the provisions of Clause 2.2.2 the following categories of experience would qualify as Technical Capacity and eligible experience (the "**Eligible Experience**") in relation to eligible projects as stipulated in Clauses 2.2.2.6 (i) & (ii) (the "**Eligible Projects**"). In case the Bidder has experience across different categories, the experience for each category would be computed as per weight of following factors to arrive at its aggregated Eligible Experience:*

<i>Category</i>	<i>Project / Construction experience on Eligible Projects</i>	<i>Factors</i>
<i>1</i>	<i>Project in highways sector that qualify under Clause 2.2.2.6 (i)</i>	<i>1</i>
<i>2</i>	<i>Project in core sector that qualify under Clause 2.2.2.6 (i)</i>	<i>0.75</i>
<i>3</i>	<i>Construction in highways sector that qualify under Clause 2.2.2.6 (ii)</i>	<i>1</i>
<i>4</i>	<i>Construction in core sector that qualify under Clause 2.2.2.6 (ii)</i>	<i>0.75</i>

- (ii) *The Technical capacity in respect of an Eligible Project situated in a developed country which is a member of OECD shall be further multiplied by a factor of 0.5 (zero point five) and the product thereof shall be the Experience Score for such Eligible Project.*
- (iii) *For the purpose of this RFP:*
- (a) *highways sector would be deemed to include highways, expressways, bridges, tunnels, runways, railways (construction/re-construction of railway tracks, yards for keeping containers etc.) metro rail and ports (including construction/re-construction cost of Jetties, any other linear infrastructure including bridges etc.); and*
 - (b) *core sector would be deemed to include civil construction cost of power sector, commercial setups (SEZs etc.), airports, industrial parks/ estates, logistic parks, pipelines, irrigation, water supply, sewerage, stadium, hospitals, hotel, smart city, warehouses/Silos, oil and gas and real estate development.*

20) Learned counsel submits that some of the works claimed by the

petitioner in category 3, actually fell in category 4, as per the report of the Financial Consultant and, consequently, their value had to be diminished by multiplying with the factor 0.75. It is by the said process that the technical capacity of the lead member of the petitioner (JV) has been found to be Rs. 396.37 Crores and not Rs. 487.02 Crore as claimed by the petitioner.

- 21) Learned counsel submits that in the order dated 13.04.2021 passed by the Court, it appears that it was loosely stated before the Court that the next stage would be the stage of opening of the financial bid. However, since the petitioner's technical bid had not been examined, and had been summarily rejected for the reason that the petitioner had not paid the cost of RFP of Rs. 90,000/- and the same was short by Rs. 10,000/-, the same had to be examined.
- 22) Learned counsel submits that the petitioner cannot take advantage of the observation made by this Court in its order dated 13.04.2021 during the preliminary hearing, when the stand of the respondent was not even on record, and cannot avoid scrutiny of the technical bid on that ground.
- 23) We have heard the learned counsel for the petitioner and the respondent.
- 24) The order of 13.04.2021, strictly speaking directs the respondent to proceed with the next step and permits the petitioner to participate. The only reason that the petitioner was not permitted to participate initially was due to the fact that the petitioner was in

deficit of Rs. 10,000/- towards the cost of RFP. Once having made the shortfall, the next step was to evaluate the technical bid of the petitioner as per clause 3.1.8 of the RFP and to see its compliance to the eligibility and qualification requirements pursuant to clause 2.2.1 and 2.2.2 of the RFP. The petitioner by relying, though erroneously, on the order of 13.04.2021, is seeking to circumvent the rigours of clause 2.2.1 and 2.2.2, which is clearly impermissible. The minutes of the meeting of the Evaluation Committee show that in the first round – when most of the other bids were technically evaluated, the bid of the petitioner and one other bidder were not so examined, and were summarily rejected on account of the deficit of Rs. 10,000/- towards cost of RFP. Thus, it is not a case of the Evaluation Committee having two bites at the cherry.

- 25) Pursuant to order dated 13.04.2021, passed by this Court, the Financial Consultant, M/s Indraprastha Corridor Advisory Services (P) Ltd. was requested to further evaluate the technical bids of both bidders, i.e. the Petitioner's and as well as the other tenderer namely YFC Projects Private Limited.
- 26) The financial consultant in its Supplementary Evaluation Report submitted vide letter no. ICAS/NHAI/EPC/Memmadpur-Kharar/D-1122 Special C (dated 28.04.2021, received on 03.05.2021) observed that *'as per tender clause 2.1.11 of RFP, in case of the Joint Venture Bidder, the Minimum Experience score required to be fulfilled by the JV members shall be Rs. 485.66*

Crore for the Lead member and Rs. 161.89 Crore for the Other Member. In case of the bid of M/s NSC Projects Private Limited & Varaha Infra Ltd. (JV), the Experience Score of the Lead member i.e. M/s NSC Projects Private Limited is Rs. 396.37 Crore as against minimum requirement of Rs. 485.66 Crore, therefore the bid submitted by the JV is not qualified bidder and is not qualified for financial bidding.'

- 27) The Evaluation Committee after considering the Report of the financial consultant observed that the lead member of the petitioner Joint Venture '*M/s NSC-Varaha (JV) do not meet the required Threshold Technical Capacity i.e. Rs. 485.66 Crore for Lead Member of JV (60% of Rs. 809.43 Crore) as per RFP.*' Hence, the petitioner did not fulfil the required threshold technical capacity and was found technically non-responsive.
- 28) The argument of the petitioner that the lead member of petitioner JV had an aggregate technical experience of 487.02 crores as stated that by the petitioner in Annexure-II filed with the bid document submitted by the petitioner, cannot be relied upon by us. Following are the details presented by the petitioner in Annexure-II of the bid document: –

ANNEX-II

Technical Capacity of the Applicant

(Refer to Clauses 2.2.2.2, 2.2.2.5 and 2.2.2.7 of the RFP)

Applicant Type	Project Code	Category	Experience (Equivalent Rs. Crore)		Technical Experience
			Payments made/received for construction of Eligible Projects in Category 3 and 4	Value of self-construction in Eligible Projects in Categories 1 and 2	
(1)	(2)	(3)	(4)	(5)	(6)
Single entity/Lead Member Applicant	A	3	80.36		80.36
	B	3	52.67		52.67
	C	3	45.64		45.64
	D	3	65.82		65.82
	E	3	75.66		75.66
	F	3	51.71		51.71
	G	3	56.58		56.58
	H	4	78.1		58.58
	Aggregate Technical Experience				487.02

For on Behalf of NSC Projects Pvt. Ltd.

Signature Not Verified

Digitally Signed By: ARORA
 Signing Date: 09.06.2021 21:26:48
 P.(C) 4616/2021

- 29) Clause 2.2.2.5 defines “*Categories and factors for evaluation of Technical Capacity*”. It has been argued before us by the respondent that the financial consultant analysed Annexure-II submitted by the petitioner, and opined that the works claimed to have been executed by the petitioner, fell in category 4, and not in category 3. The financial consultant is an expert in his field and has the requisite expertise. Whether the work of the petitioner fell in category 4 and not in category 3 - as stated by the petitioner in Annexure-II of the bid document, cannot be agitated before us, as the same has already been considered by a financial consultant and there is nothing to show patent error, discrimination, arbitrariness, perversity or malafides in the said evaluation by the financial consultant.
- 30) At this stage, it will also be worthwhile to notice the scope of judicial scrutiny by the Courts in tender documents. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. & Anr.*¹, the Supreme Court observed that-

“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

¹ (2016) 16 SCC 818.

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.”

- 31) It will also be relevant to note the judgment of Hon’ble Supreme Court in *Sam Built Well (P) Ltd. v. Deepak Builders*², where the court stated:

“12.....Not having found mala fides or perversity in the technical expert reports, the principle of judicial restraint kicks in, and any appreciation by the Court itself of technical evaluation, best left to technical experts, would be outside its ken. As a result, we find that the learned Single Judge was correct in his reliance on the three expert committee reports. The Division Bench, in setting aside the aforesaid judgment, has clearly gone outside the bounds of judicial review.”

- 32) The analysis and opinion of the experts should be relied upon and should not be lightly interfered with by the Courts while undertaking judicial scrutiny. We do not find any malafides, arbitrariness or perversity in the findings of the financial consultant. The evaluation committee further considered the findings of the financial consultant, applied its independent mind, and came to the conclusion that the Lead Member of the JV of the petitioner did not meet the required “Threshold Technical Capacity” of Rs. 485.66 Crores (60% of 809.43 crores).

- 33) In this view of the matter we find no merit in this Writ Petition

² (2018) 2 SCC 176.

and the same is, accordingly, dismissed with cost of Rs. 25,000.

- 34) The cost to be deposited by the petitioner with the Delhi High Court Bar Association within three weeks from today.

VIPIN SANGHI, J

JASMEET SINGH, J

MAY 25, 2021 / 'ms', 'so '