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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1332 OF 2022**

Jijau Construction Road Builder Pvt Ltd through ...Petitioners
Authorised Signatory Nilesh Bhagwan Sambre &
Anr

Versus

The State of Maharashtra through Chief Engineer ...Respondents
Public Work Department, Mantralaya, Mumbai &
Ors

Mr Prasad Dani, with Vishal Patil, for the Petitioner.

Mr Yogesh C Naidu, for Respondent No.3.

Mr Akash Rebello, with Yugal Anjana Bhatia, for Respondent No.4.

Mr PG Sawant, AGP, for the Respondent-State.

**CORAM G.S. Patel &
 Madhav J. Jamdar, JJ.**

DATED: 10th March 2022

PC:-

1. We have an Affidavit in Reply and Rejoinder.
2. We have heard counsel for the respective parties.
3. Respondents Nos. 3 and 4 are the two other bidders in competition with the Petitioners for the two tenders floated by the 1st and 2nd Respondents, the State PWD, for improvement of the

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Ambadi Junction and Road on the Wada-Bhiwandi Road SH76 km No.70/100.

4. The second tender at page 175 pertains to the construction of a cement concrete road on the Wada Bhiwandi Road on SH76 km No.85/700 to 88/100.

5. The tender documents are not disputed. They are in identical terms.

6. Very briefly stated, Respondent No.3, Kshatriya Infrastructure Pvt Ltd (**“Kshatriya”**) and Sahayadri Construction (**“Sahayadri”**), Respondent No.4, both entered into virtually identical Memoranda of Understanding (**“MOU”**) with one VV Autotest System Pvt Ltd (**“VVASPL”**). The purpose of these MOUs was to provide soil stabilization technologies and solutions for the road in question. We will take the relevant portions from the Kshatriya MOU with VVASPL in the first tender. It describes VVASPL as a soil stabilization technology company executing works of soil stabilization for roads work for PWD in Maharashtra using a liquid soil stabilizer. It is said to be experienced in mix design, execution and supervision of soils stabilizing layers for various types of roads including State Highways and National Highways.

7. The Kshatriya-VVASPL MOU mentions the work details and a tender condition 1.4.18 (d) in the qualifying criteria. We find this at page 35. It should be read along with sub clause (c) and (d), which read thus:

“(c) Contractor should have successfully executed in any one year during least five years minimum one work of soil stabilization not less than the 1366.87 cubic metre and value on the updated cost should not be less than 80% which is Rs.140.13 Lakhs during last five years at the price level of 2020-2021, certified by the officer not below the rank of Executive Engineer.

(d) Contractor should have an agreement (MOU) with soil stabilizer Technology Company which will work for mix design, execution, supervision and including machinery of the soil stabilized layer and have executed in any one during last five years minimum one work of soil stabilization Technology not less the 1366.87 cubic metre and value on the updated cost should not be less than 80% which is Rs.140.13 Lakhs during last five years at the price level of 2020-2021, certified by the officer not below the rank of Executive Engineer.”

8. The operative portion of the Kshatriya-VVASPL MOU says that VVASPL is to provide material mix design and machines, including those specified in the tender, and to execute soil stabilization layers under supervision. Kshatriya undertook to pay VVASPL for its work at the end of each month on a running bill. Charges were specified. Clause 7 required a sub-contract work order to be issued by Kshatriya to VVASPL.

9. Mr Dani’s case is based on an interpretation of two clauses of the tender document at page 33. These are clauses 2.3 and 2.11 which read thus:

“2.3 The JV shall nominate one lead partner whose share in the partnership shall not be less than 50% in the JV. The lead partners shall meet not less than 50% of all qualifying

criteria such as annual turnover, single work quantities of items and Bid capacity. The experience of the other joint partner shall not be considered if it is less than 30% of qualifying criteria like annual turnover, single work, quantities of items and Bid capacity above.

2.11 No partner in JV shall be permitted to bid for the same work.”

(Emphasis added)

10. According to Mr Dani it was impermissible for VVASPL to enter into MOUs with more than one tenderer. That was, he submits, prohibited by clause 2.11.

11. That a soil stabilizer specialist was required is really not contentious. Clause 1.4.14, captioned “Use Of Specialized Machinery” specifically requires a soil stabilizer specialist and requires certain equipment that may be owned, hired or taken under a MOU or a joint venture. The Petitioner itself has another soil stabilization specialist.

12. The difficulty in Mr Dani’s way, contrary to our prima facie view, is that it is difficult now to hold that VVASPL was anything other than a permitted subcontractor. We find nothing in the MOUs between VVASPL and Kshatriya or Sahayadri to suggest that VVASPL took on anything resembling the responsibility of “a partner” in a “joint venture”. Indeed, clause 7 of MOU on which Mr Dani relies itself destroys the submission that VVASPL is ‘a joint venture partner’. If it was a joint venture partner, it would not require a subcontract work order to be placed on it at all. The very

fact that the MOUs between Kshatriya/Sahayadri and VVASPL contemplate a work order in favour of VVASPL makes it abundantly clear that VVASPL is not a JV Partner. If it is not a JV partner it does not attract the prohibition in clause 2.11 of the tender conditions.

13. Finally, as a matter of law, it is settled, most recently in decision of the Supreme Court in *Agmatel India Pvt Ltd vs Resoursys Telecom & Ors*¹ as also in *Uflex Ltd vs The Government of Tamil Nadu & Ors*² that the tendering authority is the entity best placed to interpret the terms of a tender. Unless that interpretation is shown to be perverse, irrational or failing the test of Wednesbury unreasonableness, i.e. such that no reasonable or rational person could ever take, a writ court will not, cannot and should not interfere. Mr Dani is unable to succeed in his attempt to place his PWD's interpretation on this footing.

14. We also note that there may be a question of the locus of the Petitioner, for the Petitioner's tender has been rejected and the EMD has been returned to it, and which the Petitioner accepted. This last fact is not mentioned in the Petition. We believe that once a party has accepted a return of the earnest money deposit following a rejection of its tender, that party must be deemed to have accepted the rejection of its bid. It cannot thereafter be heard to challenge it.

15. We see no substance in the Petition. It is rejected.

¹2022 SCC Online SC 113.

²2022 1 SCC 165.

16. There will be no order as to costs.

(Madhav J. Jamdar, J)

(G. S. Patel, J)