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NEUTRAL CITATION NO: 2022/DHC/002295



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

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Date of Decision: 31.05.2022

+ W.P.(C) 6256/2022 & CM APPL. 18811/2022, CM APPL. 21495/2022,
CM APPL. 22951/2022, CM APPL. 23077/2022

RAMJI DAS DHAL CONSTRUCTION PVT. LTD - SKS JV

..... Petitioner

Through: Mr. Pradeep Chhindra and Mr. Rajan
Chawla, Advs.

versus

CHIEF ENGINEER (AF) WAC, PALAM & ORS. Respondents

Through: Mr. Harish Vaidyanathan, CGSC.
Mr. Kamal Gupta, Mr. Sparsh Agarwal,
Mr. Ryan Sinha, Ms. Sonakshi, Advs.
for R-4.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (ORAL)

**W.P.(C) 6256/2022 & CM APPL. 18811/2022, CM APPL. 21495/2022,
22901/2022 CM APPL. 22951/2022, CM APPL. 23077/2022**

1. The present petition has been filed seeking the following prayers.

*“A. A writ of Certiorari quashing and set aside
the decision dated 16.03.2022 of the Respondent No.1
rejecting the technical bid of the Petitioner pertaining to
the Tender in question; and*

*B. A writ of Certiorari quashing and set aside
the decision dated 12.04.2022 of the Respondent no. 2*

dismissing the appeal of the petitioner against the
decision of the Respondent No.1: and

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C. A writ A Writ of Mandamus directing the Respondents to allow the Petitioner to participate in the tender process;”

2. The factual context in which the present petition has been filed is that the respondent No.1 issued a tender bearing No. CE/WAC/ADM/T-12/2021-2022 for Provision of Work Services for Project Ghaggar at Airforce Station at Adampur. The work involved certain “Building works” and “Pavement Work”.

3. On 16.03.2022, the Technical Evaluation Committee of the respondent No.1 rejected the technical bid of the petitioner Joint Venture Firm, on the basis that both the constituents of the Joint Venture did not individually and separately meet the prescribed qualifying criteria. On 12.04.2022, the concerned Appellate Authority affirmed this position.

4. The relevant criteria with which we are concerned in the present case is contained in the following provisions of the NIT:

“APPENDIX ‘A’ TO NOTICE INVITING TENDER (NIT)

1.	Name of Work	PROVISION OF WORK SERVICES FOR PROJECT GHAGGAR AT AF STATION ADAMPUR
2.	Estimated Cost	Rs. 115.60Crore (At Per Market)
3.	Period of Completion	18 (Eighteen) Months
4.	Cost of tender documents	Rs. 3000/- in the shape of DD/ Bankers cheque from any Scheduled bank in favour of GE (AF)ADAMPUR payable at ADAMPUR. (Note: In case of refendereing, the contractor who had quoted in the previous call is not required to submit the cost of tender).



5.	Webstie/ Portal Address	www.defproc.gov.in NEUTRAL CITATION NO: 2022/DHC/002295
6	Type of Contract	<i>The tender shall be based on drawings and specifications (IAFW-2159) and GCC (IAFW-2249) with schedule 'A' (list of item of work) to be priced by the contractor/pre priced by MES. The contractor is required to quote the lumpsum amount for parts of Schedule 'A' and quote rate against items of other parts of schedule 'A'</i>
7	<u>Timeline details:</u>	
	(a) Bid Submission start date (b) Last date of bid submission (c) Date of bid opening	<i>Refer critical dates shown below</i>
8	<u>Eligibility Criteria</u>	
	(a) For MES enlisted contractors.	Contractors shall satisfy the following:- (i) Enlistment in class 'SS' Category (i) as per MES enlistment rules. (ii) Shall not carry adverse remarks in Work Load Return or any similar report circulated by the competent engineer authority. (iii) Prequalification criteria as in Note no 1 below.
	(b) For contract or not enlisted with MES.	(i) Contractor not enlisted with MES should meet enlistment criteria of 'SS' class & (i) category contractor with regard to satisfactorily completion of requisite value works with Central/State Government/Central/State PSUs/AWHO/AFNHB/CGEWHO/DGMAP, annual turnover, bank solvency, working capital and other requirement given in Para 1.4 & 1.5 of Section 1 of MES Manual of Contracts 2020 as available in all MES formations as well as MES website (www.mes.gov.in) (ii) Not carrying adverse remarks in Work Load Report (WLR) or any other similar report circulated by any competent authority, if already

			<i>working in MES.</i> NEUTRAL CITATION NO: 2022/DHC/002295 
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APPENDIX 'A' TO NOTICE INVITING TENDER (NIT) (Condt..../-)

		(iii) Not suspended/debarred/blacklisted (either permanently or temporarily) form participated in any bid or for business dealing by any Central/State Government Department or any Central/ State Government PSU or any Autonomous Body under Central/State Government or any Local Body as on the bid submission end date. (iv) Prequalification criteria as in Note no 1 below.
	(c) Technical PQC criteria	a) Experience of having successfully completed similar works during last seven year, ending last day of month previous to the month of bid submission start date should be either of the following:- (i) Three similar completed works costing not less than the amount equal to 40% of the estimated cost. OR (ii) Two similar completed works costing not less than the amount to 50 % of the estimated cost OR (iii) One similar completed work costing not less than the amount equal to 80% of the estimated cost. Notes: (i) The similar work mentioned above shall mean 'Building Works with RCC framed structure (Estimated Cost

		 NEUTRAL CITATION NO: 2022/DHC/002295 – 63.28 Crores) and rigid pavement Work of Roads and Pavement Quality Concrete floors etc. (Estimated Cost – 50.87 Crores) (ii) Contractor shall satisfy above criteria for building works as well as rigid pavement works separately. (b) For the purpose of value of completed works, the value of previously completed works shall be enhanced @5% per year to bring them at par with present cost.
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5. In the context of the “Technical PQC Criteria” hereinabove, Appendix A to notice inviting tender, contained the following crucial stipulations.

“APPENDIX ‘A’ TO NOTICE INVITING TENDER (NIT) Condt...)

Notes:- (i) The similar work mentioned above shall mean ‘**Building Works with RCC framed structure** (Estimated Cost – 63.28 Crores) and rigid Pavement work of Roads and Pavement Quality Concrete floor etc. (Estimated Cost – 50.87 Crores)

(ii) Contractor shall satisfy above criteria for building works as well as rigid pavement works separately.

No. of Works	Building Work with RCC framed Structure (Estimated Cost – Rs 63.28 Crores)	Rigid Pavement work of Roads and Pavement Quality Concrete floors etc. (Estimated Cost – 50.87 Crores or Qty = 119700 sqm)
1	50.62 Crores	40.696 Crores or 95760 sqm
2	31.64 Crores	25.435 Crores or 59850 sqm
3	25.31 Crores	20.348 Crores or 47880 sqm

6. Further, Appendix C of the NIT contains the following relevant

provisions:

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“APPENDIX ‘C’ TO NOTICE INVITING e-TENDER

1. Joint Venture in MES Works

- 1.1 Two firms are permitted to bid for the tender based on Joint Venture agreement between them. Joint Venture(JV) shall not comprise more than two firms (called parties of JV). The format of agreement is at Annexure ‘I’. The JV shall be considered sun-enlisted contractor.

The JV shall submit Earnest Money Deposit for all tenders and individual Security Deposit as per instructions, if contract is awarded.

XXX

XXX

XXX

- 1.5 JV as a single unit or each party of the JV shall have Permanent Account Number (PAN) and GSTIN. However, if the contract is awarded to the JV, then PAN & GSTIN shall be obtained by the JV as a single unit.

- 1.6 The lead party of the JV shall meet minimum 60% or the percentage of share in the JV (whichever is higher) of the qualifying criteria pertaining to (a) past experience of completed works, (b) Average Annual Turnover, (c) Bank Solvency/ Financially Sound for engagement and (d) Working Capital. Both the parties combined shall meet minimum 120% of the above qualifying criteria. The party other than the lead party shall meet the minimum 30% of the above qualifying criteria.

- 1.7 Both the parties of JV shall jointly possess the required T&P, machinery and engineering/supervisory staff. T&P can be either on ownership basis or leasehold as stipulated in NIT/tender documents and documentary proof of the same shall be submitted. Other qualification criteria shall be met fully/jointly by both the parties of JV or as a single unit of JV.”

7. In the context of the above provisions, the petitioner has urged that there is no provision in the NIT which mandates that both the constituents of the Joint Venture Firm must separately/ individually meet the qualifying criteria for both “Building Work” as well as for “Rigid Pavement Work”.

8. The petitioner contends that the very purpose of permitting the Joint

Venture Firms to participate, is to enable different constituents of Joint Venture to gain from each other's experience, and to show their own collective experience of the Joint Venture.



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In this regard, the petitioner has relied upon the judgments of the Supreme Court in the case of *New Horizons Ltd. & Anr. vs. Union of India & Anr., (1995) 1 SCC 478*.

9. In particular, reliance has been placed on Paragraph 23 of the Judgement in *New Horizon* (Supra) in which, there are general observations in the context of the tender conditions examined by the court to the effect, that relevant experience of parent/ group companies/ joint venture constituent could be taken into consideration by the concerned Tender Evaluation Authorities.

10. On the contrary, it has been argued by Sh. Harish Vaidyanathan, learned CGSC that the eligibility criteria has been given in the NIT to filter out capable and experience contractors who have executed similar types of works. It has been submitted that the petitioner did not meet the minimum qualifying criteria "because the lead company i.e. M/s Ramji Das Dhal Construction Pvt. Ltd, has not executed any 'Rigid Pavement Work' during the last seven years therefore, they do not qualify the eligibility criteria of past experience given in clause No.1.6 of the J.V on page No. 25 of the tender. Similarly the other party of JV M/s SKS has not executed any 'building work' during the last 07 years. Therefore, M/s SKS also fails to satisfy the eligibility criteria given in clause No. 1.6 of J.V".

11. Having heard learned counsel for the parties at some length, we have given our anxious consideration to the matter.

12. At the outset, we may note that Clause 1.6 of the Appendix C of the NIT clearly refers to the lead partner of Joint Venture meeting the "qualifying criteria" pertaining to past experience of completed works. The said Clause contains a mandatory tender condition and requires that the lead partner shall

meet the minimum 60% of the “*qualifying criteria*” and the other constituent shall meet the 30% of the “*qualifying criteria*”. Further, both the parties shall jointly meet the 120% of the above “*qualifying criteria*”.



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13. From a conjoint reading of Clause 1.6, read with Note-(ii) of Appendix A of the NIT, it is evident that the “*qualifying criteria*” has been prescribed separately for both “*Building Work*” and “*Rigid Pavement Work*”. Reading the various tender conditions conjointly, leads to irresistible conclusion that the lead constituent of the Joint Venture is mandatorily required to have the requisite minimum experience for both- “*Building Work*” as well as “*Rigid Pavement Work*”.

14. Admittedly, M/s Ramji Das Dhal Construction Pvt. Ltd does not have the requisite past experience in respect of “*Rigid Pavement Work*” at all. Similarly, the other party of the Joint Venture M/s SKS does not have the requisite experience in respect of “*Building Work*”.

15. Although the Petitioner has strenuously sought to argue that a different interpretation must be accorded to the tender conditions, the same does not appeal to us. We are satisfied that the view taken by the Tender Evaluation Authority, as well as the concerned Appellate Authority, is the most logical and plausible view.

16. Even otherwise, it is not within the province of this Court while exercising jurisdiction under Article 226 of the Constitution, to sit in judgement over considered decisions taken by the relevant experts who have carried out the tender evaluation, in light of the relevant tender conditions authored by the tender inviting authority itself. Both the Tender Evaluating Authority as well as the Appellate Authority have reached the conclusion that the tender conditions contemplate that both the constituents of the Joint Venture must satisfy the prescribed minimum stipulated qualifying criteria for both types of works separately. It is not sufficient if one constituent of the

Joint Venture has experience only in respect of “*Building Work*”, and another constituent of the Joint Venture has experience only in respect of the “*Rigid Pavement Work*”.



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17. To satisfy ourselves as to the decision making process, we have also perused the relevant record in respect of the proceedings/ exercise conducted by the Tender Selection Committee.

18. We note that the Tender Selection Committee has analysed the bids of all bidders in minute detail; has uniformly applied the tender conditions and; has taken into account the experience of all bidders. With regard to the Petitioner’s bid, the following conclusion was reached

“M/s Ramji Das Have not enclosed exp of PQC works and M/s SKS have not enclosed exp of Bidg Works”

19. A perusal of the proceedings of the Technical Selection Committee also allays the petitioner’s concern that there has been any discrimination qua the petitioner and/ or any selective application of the qualifying criteria.

20. In essence, the contention of learned counsel for the petitioner is that the relevant conditions of the NIT and the Appendix should have been interpreted differently. He has also sought to contend that the rule of *contra proferentem* must be applied while interpreting the tender conditions so that any ambiguity must be resolved in favour of the Petitioner.

21. Both these contentions are untenable and in contravention of the settled legal position.

22. In case of ***Agmatel India Pvt. Ltd. Vs. Resoursys Telecom and Others, 2002***, SCC OnLine SC 113, the Supreme Court after noticing authoritative pronouncements in the cases of ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.***, (2016) 16 SCC 818, ***Bharat Coking Coal Ltd. v. AMR Dev Prabha 2020***, SCC OnLine SC 335, ***Silppi Constructions Contractors v. Union of India***, 2019 SCC OnLine SC 1133, ***Jagdish Mandal v. State of***

Orissa, (2007) 14 SCC 517 and *Montecarlo Ltd. v. NTPC Ltd.*, (2011) 13 SCC 272, has reiterated the settled legal position and has emphasised as under:



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- (i) the authority that authors the tender document is the best person to understand and appreciate its requirements and its interpretation should not be second guessed by a court in judicial review ;
- (ii) the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second -guessed by a Writ Court;
- (iii) Technical evaluation or comparison by the Court is impermissible. Proceedings under Article 226 of the Constitution of India are concerned with the decision making process and are not meant to substitute the appraisal of any expert body/committee which has carried out the tender evaluation.

23. The Supreme Court has also expressly held that the *contra proferentem* rule cannot be applied in the case of any ambiguity in a tender document. In that regard, reference may be made to Para 54 of the said judgement, which reads as under:

“54. The same aspects apply to the observations regarding ‘contra proferentem rule’ as referred by the High Court with reference to the case of United India Insurance Company Limited (supra). The said rule was referred by this Court while not accepting the argument made on behalf of the insured and while observing that the said rule had no application, when the language of the relevant clauses was plain, clear and unambiguous. We may, however, observe that even from the extracted part of the principles related with the ‘contra proferentem rule’, as reproduced by this Court from the Halsbury’s Laws of England, it is clear that the said rule

was applied in the case of ambiguity in the insurance policy because the policies are made by the insurer and its ambiguity cannot be allowed to operate against the insured. ***This rule, in our view, cannot be applied to lay down that in case of any ambiguity in a tender document, it has to be construed in favour of a particular person who projects a particular view point. The obvious inapplicability of this doctrine to the eligibility conditions in a notice inviting tender could be visualised from a simple fact that in case of ambiguity, if two different tenderers suggest two different interpretations, the question would always remain as to which of the two interpretation is to be accepted? Obviously, to avoid such unworkable scenarios, the principle is that the author of the tender document is the best person to interpret its documents and requirements. The only requirement of law, for such process of decision-making by the tender inviting authority, is that it should not be suffering from illegality, irrationality, mala fide, perversity, or procedural impropriety. No such case being made out, the decision of the tender inviting authority (NVS) in the present case was not required to be interfered with on the reasoning that according to the writ Court, the product "Smart Phone" ought to be taken as being of similar category as the product "Tablet".*** (emphasis supplied)

24. It has also been held in ***Agmatel India*** (supra) that even if the owner or employer of a project gives an interpretation to the tender document that is not acceptable to a Constitutional Court, that by itself is not a reason for interfering with the interpretation therein.

25. We also take note of submissions of Sh. Harish Vaidyanathan, learned

CGSC to the effect that the services in question is in relation  rtain
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sensitive works to be carried out at Airforce Station at Adampur. The scope of
judicial review is even narrower in the context of such specialised work to be
carried out in connection with the requirements of the armed forces.

26. In these circumstances, we find no merit in the instant petition, and the
same is, accordingly, dismissed.

SACHIN DATTA, J

VIPIN SANGHI, ACJ

MAY 31, 2022
AKS

