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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 9206 OF 2023

M/s. Girish Enterprises Pvt. Ltd. .. Petitioner

Versus

Navi Mumbai Municipal Corporation
& Ors. .. Respondents

Mrs. Vaishali Choudhari for petitioner.
Mr. Sharan Jagtiani, Senior Advocate a/w Mr. Tejesh Dande,
Ms. Surabhi Agrawal and Mr. Bharat Gadhvi for respondent
no.1/NMMC.
Mr. Manoj Patil for respondent no.2.
Mr. Abhay Jadhav, Law Officer, NMMC and Mr. Swapnil Desai,
Junior Engineer (Mechanical), NMMC, are present.

**CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.**

DATE: 2nd JANUARY, 2024

P.C.:

1. Heard Mrs. Choudhari, learned counsel representing the petitioner, Mr. Jagtiani, learned senior counsel assisted by Ms. Surabhi Agrawal, representing the respondent no.1-Corporation and Mr. Patil, learned counsel representing the respondent no.2. We have also perused the record available before us on this petition.

2. By instituting the proceeding of this petition under Article 226 of the Constitution of India, the petitioner has challenged the decision of the respondent no.1-Corporation rejecting its technical bid which was submitted pursuant to

the tender notice dated 15th May, 2023 that was published for re-tendering the work of comprehensive contract for operation and maintenance of 37.5 MLD Sewage Treatment Plant based on SBR (C-Tech) Technology for a period of five years at Sector-20, Sanpada, Navi Mumbai. The petitioner has also sought a prayer for declaration that technical bid submitted by the petitioner as responsive and further that an appropriate direction in the nature of mandamus be issued directing the respondent no.1 to open the financial bid submitted by the petitioner and to award the contract to it.

3. The facts, in brief, which are necessary for resolving the issue involved in this petition are that in the month of February, 2022 a tender notice for the aforesaid work was published, pursuant to which the petitioner is said to have applied and according to the learned counsel for the petitioner, the petitioner succeeded being the lowest tenderer, however, no work order was issued in its favour. According to the learned counsel for the petitioner, instead of issuing the work order to the petitioner, the administration of the Corporation took a decision to re-tender the work and accordingly issued notice of re-tender on 15th May, 2023, in which petitioner also participated. However, the petitioner is said to have received an e-mail communication dated 14th July, 2023 informing it that the petitioner has technically been rejected for the tender in question. The petitioner immediately thereafter made a representation on 17th July, 2023 to the Municipal Commissioner stating therein that the petitioner fulfilled all the technical qualifications of the tender and that there was no reason to reject its bid. By representing, the

petitioner requested the Municipal Commissioner to look into the matter and accept its bid, as according to the petitioner, it was technically and financially qualified.

4. Arguing further, the learned counsel for the petitioner submits that since nothing was done on the representation made by the petitioner on 17th July, 2023, the present writ petition was filed on 20th July, 2023, which came up for hearing/admission etc. before the Court on 27th July, 2023. It has further been stated that on 27th July, 2023, during the course of argument, the Court was apprised of an order/communication dated 26th July, 2023 whereby it was informed to the petitioner that the petitioner did not technically qualify because it did not have the requisite experience of having executed similar work as per the tender conditions.

5. The Court, on 27th July, 2023 while taking note of the said communication dated 26th July, 2023, also noticed the submission advanced on behalf of the petitioner based on the experience certificate submitted by the petitioner along with the tender documents i.e., certificate dated 19th/20th April, 2023 issued by the City and Industrial Development Corporation of Maharashtra Limited (CIDCO), which is available before us on this writ petition at page 171.

6. It has been argued by the learned counsel for the petitioner that the certificate dated 19th/20th April, 2023 issued by CIDCO, which was submitted by the petitioner along with tender documents, clearly established that the petitioner did have the requisite experience as required by the tender conditions and, thus, rejection of technical bid by the

respondent-Corporation was absolutely arbitrary and the same cannot be permitted to be sustained.

7. Drawing our attention to the tender condition No.10(ii), it has first been argued by the learned counsel for the petitioner that the requisite experience to be possessed by the tenderer, as per the tender condition, was in three alternatives and that the petitioner fulfilled the requisite experience in terms of the third alternative of experience of having executed three similar works. It has been argued that the work certificate issued by CIDCO dated 19th/20th April, 2023 reveals that in respect of operation and maintenance of Sewage Treatment Plant of a capacity of 85 MLD, the petitioner was awarded the work on 1st January, 2020 and since the date of commencement of the said work as disclosed by the said certificate is 1st January, 2020, hence, the petitioner fulfilled the requisite experience of having worked for three years on the date of submission of the tender as the certificate was issued on 19th/20th April, 2023 and if the period from 1st January, 2020 is counted till issuance of the said certificate, it comes out to three years. It has further been stated by the learned counsel for the petitioner that apart from the work as certified by the certificate dated 19th/20th April, 2023 issued by CIDCO, the petitioner also has an experience of similar work, which is revealed by another certificate dated 2nd November, 2020 issued by CIDCO, according to which the petitioner had carried out operation and maintenance of 85 MLD capacity Sewage Treatment Plant from 14th June, 2019 till 31st December, 2019 (i.e. for a period of six months). In addition to these two works, reliance has

also been placed by the learned counsel for the petitioner on another work done in respect of which certificate has been issued by CIDCO on 7th October, 2019. The said certificate shows the date of commencement to be 26th October, 2015 and the date of completion of main work to be 25th January, 2017, however, as per the said certificate duration of this work is less than three years i.e., one year and three months.

8. According to the learned counsel for the petitioner if the work experience certificates dated 19th/20th April, 2023, 2nd November, 2020 and 7th October, 2019 are taken together, the petitioner fulfills the requisite experience as per the alternative Clause-3 of tender condition No. 10 (ii). Further argument is that so far as the work, as mentioned in the certificate dated 19th/20th April, 2023 is concerned, it was a continuing work and it would have been completed on 30th June, 2023 and, thus, insistence of the respondent-Corporation that only those works will be counted for reckoning the experience which are completed, does not bear any rationale.

9. Alternatively, it has also been argued by the learned counsel for the petitioner that the petitioner fulfills the condition of experience in terms of alternative Clause-1 of tender condition No.10 (ii). According to her, the petitioner has completed three years of a similar work having operated and maintained 85 MLD capacity Sewage Treatment Plant as is evidenced by the certificate issued by CIDCO dated 19th/20th April, 2023. She has, thus, stated that even if the certificate dated 19th/20th April, 2023 did not disclose that the work was completed, it did disclose that the petitioner had

carried out work for a period of three years from the date of commencement i.e., w.e.f. 1st January, 2020 till the issuance of certificate i.e., 19th/20th April, 2023, hence, in terms of alternative experience Clause-1 it has to be held that the petitioner fulfilled the requisite condition of experience and thus, rejection of the technical bid on such count by the respondent-Corporation is absolutely unreasonable, arbitrary and hence, the decision to reject the technical bid of the petitioner deserves to be quashed/set aside.

10. *Per contra*, opposing the writ petition vehemently, Mr. Jagtiani, learned senior counsel representing the respondent-Corporation has argued that even if the information contained in the work certificates, relied upon by the petitioner which are available at pages 171, 172 and 173 of the writ petition, are taken to be correct on their face value, the petitioner neither fulfills the alternative experience Clause-3 nor does it fulfill the alternative experience Clause-1. It has also been argued by Mr. Jagtiani that from a bare perusal of the experience clause contained in the tender conditions, there is no room of doubt that the experience required to be fulfilled by the tenderer was in two folds, (i) experience of successful completion of work and (ii) experience of three years continuous work. His submission, thus, is that even if a tenderer has experience of three years continuous work but if such a tenderer lacks the requirement of completion of such a work, it shall not qualify.

11. Taking the Court through the certificate dated 19th/20th April, 2023, Mr. Jagtiani has stated that the said certificate is in respect of "work in progress" and that the certificate does

not anywhere specifies any information regarding "completed work". He has also argued that so far as alternative experience Clause-3 is concerned, a tenderer has to fulfill the requirement of having experience of three separate (distinct) similar works, that too, completed work for minimum continuous three years, however, the experience certificates relied upon by the petitioner, which are available at pages 171, 172 and 173 reveal that first such certificate dated 2nd November, 2020 issued by the CIDCO gives information that the duration of the work was six months in relation to operation and maintenance of 85 MLD capacity Sewage Treatment Plant, whereas the second certificate dated 7th October, 2019 evidences the duration of the work to be one year and three months only, that too, in respect of 2 MLD capacity high tech Sewage Treatment Plant. Accordingly, the submission is that from these certificates the petitioner can never be said to have fulfilled the alternative experience Clause-3 of the tender condition No.10(ii).

12. Mr. Jagtiani has also argued that the petitioner cannot be permitted to change its stand. He has also submitted that as per tender documents submitted by the petitioner while participating in the tender process, it is abundantly clear that for experience, the petitioner had relied upon alternative experience Clause-3 and not the alternative experience Clause-1. His submission further is that, however, even if the petitioner is permitted to rely upon alternative experience Clause-1, in terms of the information available in the certificate dated 19th/20th April, 2023, the petitioner cannot be said to have fulfilled the requisite experience of "completed

work". It has, thus, been argued that requirement of "completed work" being one of the conditions of experience, the petitioner does not fulfill the requisite experience even as per the requirement of alternative experience Clause-1.

13. Replying to the submission made by the learned counsel for the petitioner that when the writ petition was instituted, the petitioner was never informed about the reasons of rejection of its technical bid, Mr. Jagtiani submitted that the decision-making process in administrative/quasi administrative matters is necessarily different from the decision-making process in tender matters, even if the tendering authority is a State within the meaning of Article 12 of the Constitution of India. He has heavily placed reliance on a Division Bench decision of this Court in the case of ***Universal Cables Ltd. & Anr. vs. State of Maharashtra & Ors.***, reported in 2023 SCC OnLine Bom 588 and submitted that the Division Bench in this judgment has reviewed the law relating to nature of decision making process in the tender matters and has concluded that the tendering authority in such matters needs to be given enough elbow room and that if the tendering authority is able to justify the decision on the basis of submissions made in the affidavit-in-reply in a challenge before Court, no interference would be permissible on that count.

14. Mr. Patil, learned counsel representing the respondent no.2 in whose favour the work order has been issued, has drawn our attention to the information furnished by the petitioner along with the tender i.e., Annexure-4, which is available at page 170 of the writ petition, according to which

the petitioner had relied upon three alleged similar nature of works in support of establishing that petitioner fulfilled the requisite experience. He has also drawn our attention to Annexure-5, which is available at page 174 of the writ petition, enclosed with the tender documents by the petitioner, which mentions List of Work in Hand as on date of submission of the tender and, thus, the submission is that since in the document annexed as Annexure-4 with the tender documents one of the works was shown to be "Work in Progress" by the petitioner itself and, hence, it cannot be said that petitioner had the experience of having "completed work". According to the learned counsel for the respondent no.2, the petitioner on the basis of the documents relied upon by it, cannot succeed, as apparently, it did not fulfill the eligibility condition of having requisite experience.

15. Learned senior counsel for the respondent-Corporation and learned counsel for the respondent no.2 have, thus, urged that the writ petition be dismissed at its threshold.

16. We have given our thoughtful consideration to the respective submissions made by the learned counsel appearing for the competing interests. Resolution of the issue involved in this petition revolves around the experience clause given in the tender condition as one of the eligibility conditions which is contained in Clause 10(ii). Clause 10(ii) of the tender conditions is extracted hereinbelow: -

"10. Eligibility

II)Experience:-Experience of having successfully completion work of Comprehensive

Operation and Maintenance of Sewage Treatment Plant based on SBR (C-Tech Technology) in India.

Following conditions applied for Experience: -

1. One similar completed work of Comprehensive Operation and Maintenance of SCADA operated Sewage Treatment Plant based on SBR (C-Tech Technology) for minimum continuous 3 year including all daily operations of STP, preventive & breakdown maintenance of all electrical, mechanical, instrumentation components with all spares, all consumables, chemicals required for STP and maintenance of all civil structures with Govt., Semi-Govt., Govt. Undertaking, Local self Govt. Capacity not less than 80% of the total average work capacity of 37.5 MLD i.e. 30 MLD.

OR

2. Two similar completed work of Comprehensive Operation and Maintenance of SCADA operated Sewage Treatment Plant based on SBR (C-Tech Technology) for minimum continuous 3 year including all daily operations of STP, preventive & breakdown maintenance of all electrical, mechanical, instrumentation components with all spares, all consumables, chemicals required for STP and maintenance of all civil structures with Govt., Semi-Govt., Govt. Undertaking, Local self Govt. Capacity not less than 50% of the

total average work capacity of 37.5 MLD i.e. 18.75 MLD.

OR

3. Three similar completed work of Comprehensive Operation and Maintenance of SCADA operated Sewage Treatment Plant based on SBR (C-Tech Technology) for minimum continuous 3 year including all daily operations of STP, preventive & breakdown maintenance of all electrical, mechanical, instrumentation components with all spares, all consumables, chemicals required for STP and maintenance of all civil structures with Govt., Semi-Govt., Govt. Undertaking, Local self Govt. Capacity not less than 40% of the total average work capacity of 37.5 MLD i.e. 15 MLD."

17. From a bare perusal of the afore-quoted experience clause of the tender conditions, it is apparent that to fulfill the requisite experience, the tenderers were to have either of the three types of experience in relation to maintenance and operation of Sewage Treatment Plant. The first alternative condition is that tenderer ought to have completed similar work of maintenance and operation of Sewage Treatment Plant based on SBR (C-Tech Technology) for minimum continuous 3 years with the capacity of the Sewage Treatment Plant being not less than 80% of the total average work capacity of 37.5 MLD, which is the requirement of the work for which tender was floated. The other two alternative experience conditions are distinct and such distinction is based on the capacity of the Sewage Treatment Plant.

According to the second alternative experience condition, if the tenderer has experience of having operated and maintained a Sewage Treatment Plant having 50% of the total average work capacity of 37.5 MLD, tenderer should have experience of two similar completed works. Similarly, if the tenderer has the experience of having operated and maintained Sewage Treatment Plant of a capacity of not less than 40% of the total average capacity of 37.5 MLD, the tenderer should have experience of three similar completed works. Thus, the condition of having a particular number of similar completed work was required to be fulfilled by the tenderer.

18. The case, as set up by the petitioner in the writ petition is that it fulfilled the alternative experience condition No.3 as is apparent from the perusal of some of the documents which are available on record on this writ petition and which were submitted by the petitioner along with the tender documents. If we examine the experience certificates relied upon by the petitioner which are available at pages 171, 172 and 173 of the writ petition, what we find is that the said certificates do not evidence that the petitioner fulfilled the requisite experience as per the requirement of the tender conditions. The certificate dated 19th/20th April, 2023 is in relation to 85 MLD capacity Sewage Treatment Plant and according to the said certificate itself the said work is in progress. In other words, the said certificate does not anywhere mention that the work has been completed. The date of commencement as per the said certificate is 1st January, 2020 and the letter of acceptance-cum-work order, as mentioned in the said

certificate is 7th April, 2020. The said certificate though does not disclose as to when the work actually commenced, however, if we treat the date of letter of acceptance i.e., 7th April, 2020, as the date on which the actual work commenced, the period of three years was not completed on the date till when the extension of the said work was approved i.e., till 31st March, 2023, which is shown in the certificate dated 19th/20th April, 2023 itself. It is also to be noticed that the experience clause in the tender condition clearly stipulates "completed work" and hence, any work which is in progress cannot be treated to be a "completed work" and if a tenderer has experience of executing a "work in progress", it cannot be said to have the experience of having executed a "completed work". We are in complete agreement with the submissions made by Mr. Jagtiani when he submits that it is the tender floating authority which is the best judge of interpretation of the different tender conditions as it understands the nature of work the best which needs to be executed by the successful tenderer.

19. The Division Bench of this Court in the case of **Universal Cables Ltd. (Supra)** noticing the judgments of the Hon'ble Supreme Court in the case of **Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd.**, reported in (2016) 6 SCC 818, in the case of **Silppi Constructions Contractors vs. Union of India & Anr.**, reported in (2020) 16 SCC 489 and in the case of **Michigan Rubber (India) Ltd. vs. State of Karnataka**, reported in (2012) 8 SCC 216. The **Universal Cables Ltd. (Supra)**, concludes that:

"the owner or employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It is possible that 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".

The aforesaid extract by the Division Bench in **Universal Cables Ltd. (Supra)** has been quoted from the judgment in **Silppi Constructions Contractors (Supra)**.

20. In view of the aforesaid legal proposition, we have no hesitation to hold that the interpretation sought to be given by the respondent-Corporation to the experience clause to the effect that the requisite experience to be fulfilled by a tenderer to qualify technically was in relation to "completed works", is correct. We also are of the opinion that having a condition of experience of "completed work" has a rationale as well and the rationale is that it can be one of the yardsticks to assess and evaluate the track record of the tenderer.

21. If the experience clause, as extracted above, is interpreted in the light of what has been held by the Division Bench of this Court in the case of **Universal Cables Ltd. (Supra)**, we may observe, at the cost of repetition, that it will include only "completed work" and not the "on-going work", even if the tenderer has the experience of three years and such "on-going work" will not constitute the requisite experience.

22. So far as the certificate dated 2nd November, 2020 available at page 172 of the writ petition is concerned, it is to

be noticed that though this experience is in respect of 85 MLD capacity Sewage Treatment Plant, however, the duration is only six months i.e., from 14th June, 2019 to 31st December, 2019. This certificate, thus, clearly does not evidence that this work was for a period of continuous three years and hence, such work cannot be taken into account for the purposes of reckoning the experience in terms of the experience clause in the tender conditions. Similarly, the certificate dated 7th October, 2019 is in respect of a period of less than three years, to be specific, for a period of one year and three months only. This certificate also shows that it is not in relation to 85 MLD capacity Sewage Treatment Plant neither does it disclose that it was in respect of operation and maintenance of the Sewage Treatment Plant, rather what it discloses is that the work related to "Designing Providing, Constructing, Erecting and Commissioning of 2 MLD capacity high tech Sewage Treatment Plant". Though it states that the work relating to treatment of the domestic raw sewage will also have to be performed, however, since this work is in relation to a Sewage Treatment Plant of only 2 MLD capacity which is much less than 40% of the total average capacity of 37.5 MLD, hence, such experience, as evidenced by the certificate dated 7th October, 2019, also cannot be taken into consideration for counting the experience of the petitioner to consider it to have technically qualified. Thus, the petitioner neither fulfills the alternative experience Clause-1 nor does it fulfill the alternative experience Clause-3 of the tender condition No. 10(ii).

23. For the reasons aforesaid, we are, thus, of the opinion that there was no irregularity, much less any illegality committed by the respondent-Corporation while rejecting the technical bid of the petitioner.

24. Much has been attempted to be argued by the learned counsel for the petitioner that if the petitioner had qualified technically in the tender process which was undertaken pursuant to the earlier tender notice published in February, 2022, there is no reason why the petitioner could be disqualified in the re-tender process. It has also been attempted to be argued that though the petitioner in the earlier tendering process was declared as the lowest tenderer, however, work order was not issued and the decision to re-tender the work was taken which deprived the petitioner of its rights accrued to it on the basis of it having been declared the lowest price quoting tenderer in the earlier tender process. We are afraid we are unable to find ourselves in agreement with such submission made on behalf of the petitioner. There is not even a whisper in the writ petition regarding alleged illegal cancellation of the earlier tender process initiated by publishing the tender notice in February, 2022. There is no prayer in the writ petition that petitioner, being the lowest tenderer pursuant to the tender process initiated in February, 2022, be allotted the work. In fact, participation of the petitioner in the re-tender process without challenging the alleged illegal cancellation of the earlier tender process, in our opinion, debars the petitioner from raising any such issue.

25. For all the aforesaid reasons, we are not inclined to entertain the petition, which is hereby dismissed.

26. There will be no order as to costs.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)

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signed by
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