
(2017) 02 BOM CK 0238
In the Bombay High Court
Case No : 6511 of 2016

Aakar Construction (JV)

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 27-02-2017

Acts Referred:

Citation : (2017) 02 BOM CK 0238

Hon'ble Judges : B P Dharmadhikari, Swapna Joshi

Bench : DIVISION BENCH

Advocate : F T Mirza, N S Rao, V N Morande

Final Decision : Allowed

Judgement

1. Rule made returnable forthwith and heard finally with consent.
2. Heard Adv.Mirza for petitioner, learned AGP for respondent nos. 1 to 4 and Adv. Morande for respondent no.5. Nobody for respondent nos. 6 and 7.
3. The only question is about interpretation of clauses 21 and 22 of Notice Inviting Tenders dated 22.08.2016. Those clauses are couched in the following terms : "21. Whenever the advantage of such combination of two or more contractors is to be taken for quoting for a work, the registered partnership deed should be irrevocable till the completion of work for which they have combined and till all the liabilities thereof are liquidated and the share of the contractor of higher category should not be less than 50%. Further the percentage share of the contractor of the lower category in such a partnership/ combination should not be more than his limit of eligibility to quote for works divided by the estimated cost of work put to tender (i.e. when such a percentage is applied to the cost of the work, his share of cost not exceed his own eligibility limit of tendering for works).
22. The lead partners shall meet not less than 50 per cent of all qualifying criteria like annual turnover, single work, quantities of items and Bid capacity

above. The joint venture must collectively satisfy the criteria of para annual turnover, single work, quantities of items and bid capacity above. The experience of the other joint partners shall be considered if it is not less than 30 per cent of the qualifying criteria like annual turnover, single work, quantities of items and Bid capacity above."

4. The petitioner admittedly is a joint venture whose lead partner fulfills all stipulations of eligibility independently, that is, of itself. The lead or major partner in joint venture is M/s B.K. Construction Company, Pusad; while M/s Aakar Construction, Bhandara is a partner having only 12% share. The joint venture formed by them, is the petitioner before this Court. The petitioner urges that M/s B.K. Construction Co. alone fulfills all terms and conditions and, therefore, nonsubmission of experience certificate or documents of M/s Aakar Construction, Bhandara is not relevant. Its tender cannot be ignored and as petitioner joint venture is lowest, the work must be allotted to it.

5. Learned A.G.P. Mr.Rao as also Adv. Morande, opposed these contentions. According to them, the moment there is joint venture, above clauses i.e. Clause No.21 and 22 require independent consideration of constituent partners. Here, no experience documents of M/s Aakar Construction has been provided and, therefore, that assessment cannot be undertaken.

6. Adv.Morande is relying upon the Division Bench Judgment of this Court dated 5th October 2016 in Writ Petition No.5818/2016, more particularly paragraph 21 therein, to urge that in such circumstances, the consideration of situations by employer needs to be honoured.

7. Perusal of judgment of Division Bench of this Court dated 5th October 2016 (supra), reveals that there the question was whether a particular condition is an essential condition or nonessential in character. The observations made by the Hon'ble Apex Court in judgment in the case of Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation, are quoted. We find that controversy before us is not about essential nature or nonessential nature of any condition.

8. Opening words of clause 21 itself stipulate that only if advantage of such combination is to be taken for quoting for a work, disclosure as suggested by the respondents is necessary. The later scheme of clause 21 then stipulates the proportion in which such other partner must have stake in the project depending upon its standing. This requirement is because advantage of its standing is being taken by the joint venture. If advantage is not being sought for and the major partner i.e. M/s B.K. Construction Co. itself fulfills all norms, clause 21 will have no application.

9. Clause 22, again, requires lead partner to meet not less than 50% of all qualifying criteria like annual turnover, single work, quantities of items and bid capacity above. It is not in dispute that M/s B.K. Construction Co. fulfills these norms. It is thereafter stipulated in Clause 22 that joint venture must collectively satisfy the criteria of annual turnover, single work, quantities of items and bid

capacity. This exercise of clubbing is not necessary in the present matter as the lead partner M/s B.K. Construction Co. itself has satisfied all the norms. The concluding sentence which stipulates that experience of other joint partner can be considered if it is not less than 30% of the qualifying criteria, puts everything beyond doubt. It is obvious that therefore in joint venture other partners may also exist who meet less than 30% of the norms but then their experience cannot be made use of by the joint venture. Here, as already mentioned supra, the lead partner M/s B.K. Construction Co. is not relying upon the experience of the other partner i.e. M/s Aakar Construction.

10. In this situation, as language of Clauses 21 and 22 of the NIT is unambiguous, we find the denial of consideration of eligibility of petitioner in tender process is unwarranted and unsustainable.

11. The impugned order dated 16.10.2016 (Annexure "F") is accordingly quashed and set aside. We direct the respondents to proceed further in the matter in accordance with law while evaluating offer of petitioner.

12. Writ Petition is, thus, allowed. Rule made absolute accordingly. No costs.