$~

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

Date of Decision: 12.02.2021

\+ W.P.(C) 1853/2021, CM APPL. 5361/2021 & CM APPL. 5362/2021

SHRI SWAMI SAMARTH ENGINEERS LTD.

..... Petitioner

Through: Mr. Vinay Navare, Sr. Adv with Mr. Prashant S. Kenjale, Adv.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Respondent

Through: Mr. Ankur Mittal, Mr. Abhay Gupta & Mr. Karan Setiya, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J (ORAL)

1. The present petition has been preferred by the petitioner/ M/s Shri Swami Samarth Engineers Ltd. to seek the following reliefs:-

> *"(i) ISSUE appropriate writ (s) or writ in the nature of mandamus directing Respondent to withdraw and cancel the Technical Evaluation Report dated 03.02.2021 and allow the Petitioner to participate in the bidding process and clarify and submit any documents necessary;*
> *AND/OR;*
> *(ii) ISSUE appropriate writ or writs to protect the rights of Petitioner to proper hearing and direct the Respondent to consider Petitioner's bid in oral hearing;"*

2. The petitioner, alongwith its joint-venture partner, responded to the Tender/Request For Proposal (RFP) issued by the respondent/NHAI for 4-laning of Pangare to Waranga Phata section from Km 134.500 to Km 174.645 (Design Chainage) of NH-161 including Bypasses at Kalamnuri and Akhada Balapur and additional lengths of 800 m from Waranga Junction to Nanded (NH-161) (existing Chainage 244.360) and 700 m road from Waranga Junction (NH-161) to Mahagaon (NH-361) (existing Chainage 253.700) in the State of Maharashtra on EPC mode. The bid was submitted in the name of the joint-venture, namely M/s Shri Swami Samarth Engineers Ltd.-M/s L B Kunjir (JV).

3. Learned counsel for the respondent/NHAI who appears on advance notice, at the outset submits that the present writ petition is not maintainable, having been filed by one of the members of the joint-venture. He submits that if the joint-venture was aggrieved by any decision of the respondent, the petition should have been preferred by the joint-venture itself and not by one of the partners solely. We find merit in this submission. The petitioner being only a member of the joint-venture cannot act singly, and would have no *locus standi* to prefer this petition. It is the joint-venture which is the party dealing with and recognised by the respondent and only the joint-venture can raise a grievance with regard to rejection of its bid. On this short ground, this petition is liable to be rejected. However, we have heard the submissions of learned senior counsel for the petitioner on merits as well, and so we proceed to deal with them as well.

4. The case of the petitioner is that in response to the bid submitted by the joint-venture, the respondent had issued a communication on 05.01.2021

seeking certain clarifications from the joint-venture regarding its bid. The relevant extract of the said letter reads as under:

"NHAI/Tech/MH/PangareWarangaPhata/PATSC/2019/00152

To,
M/s M/s Shri Swami Samarth Engineers Limited – M/s L.B. Kunjir (JV)
773/3, PradyumnApts, Lano No. 9,
Bhandarkar Road, Pune 411004
Tel. No: 020 25679011/99
E-mail: sssengineers@hotmail.com
Fax No. 020 25679099

Kind Attention: Mr. Kuldeep Dattatray Patil (Authorized Signatory)

Sub: 4-Laning of Pangare to WarangaPhata section from Km 134.500 to Km 174.645 (Design Chainage) of NH-161 including Bypasses at Kalamnuri and AkhadaBalapur and additional lengths of 800 m from Waranga Junction to Nanded (NH-161) (existing Chainage 244.360) and 700 m road from Waranga Junction (NH-161) to Mahagaon (NH-361) (existing Chainage 253.700) in the State of Maharashtra on EPC mode – ***Evaluation of Technical Proposals – Reg.***
Ref: Your RFP Application submitted on 07.12.2020
Sir,
With reference to your proposals submitted on 07.12.2020 w.r.t. subject project it is to inform that while evaluating the bid, following has been observed:

S. No.	*Head*	*Appendix/ Clause reference*	*Clarification Required*

x x x

4.	*Financial Capacity*	*Annex III*	*In case of SSSEL* • *Net worth certificate submitted,*

			net worth is mentioned as on 29.07.2020 instead of 31.03.2020. Further, net worth calculated is not as per the methodology mentioned in RFP. ***Bidder to clarify how the U/s Loan can be considered for calculation of net worth duly certified from the statutory auditor of the bidder.*** • *As per RFP, bidder is required to submit the statutory auditor certificate certifying the Net worth as on 31.03.2020 for the FY 2019-20 and in case the Financial Statements are not audited then the same us required as on 31.03.2019 for the FY 2018-19 after providing the undertaking under clause 2.2.2.0 (ii) of the RFP.* • *The Networth of bidder as on 31.03.2019 is Rs. 12.10 cr (i.e., the Share Capital of the Partners), Bidder to Clarify how it is meeting the required criteria of net worth as per the RFP* • *Bidder has submitted Annual Report for the FY 2018-19 signed by its Statutory Auditor dated 21.10.2019.* ***However, UDIN is not mentioned on the same which was required as per ICAI Guidelines.*** • *Annual Reports submitted are blurred and Annual report for the FY 2014-15 are not found in the submitted bid.*

			• *Further it has been observed that Bidder has considered consolidate figure for turnover. Standalone figures are required for amounts considered for consolidation (bifurcation) are required duly certified from the statutory Auditor of the Bidder.* ***Bidder to clarify for above points.***
5.	*Financial Capacity*	*Annex III*	*As per RFP, in case the annual accounts for the latest financial year are not audited and therefore the Bidder cannot make it available, the Bidder shall give an undertaking to this effect and the statutory Auditor shall certify the same.* *However, undertaking for an audited Annual Accounts for FY 2019-20 has not been found in the submitted bid for both the members.* ***Please provide the location in the submitted bid from where the same can be found duly stamped and signed by the Statutory Auditor of the bidder (along with UDIN).***
6.	*Technical Capacity*	*Annex IV (Details of Eligible Projects)*	*In case of Shri Swami Samarth,* *Project Code A claimed is related to irrigation work.* ***Bidder to clarify through some substantial proof (like client/SA certificate) that how the subject projects covered under category 3 (either it is NH or SH or MDR or ODR) as per clause 2.2.2.5 of the RFP.*** *Project Code C & D –* ***Bidder to clarify through some substantial proof (like client/SA certificate) that how the***

			subject projectscovered under category as per clause 2.2.2.5 of the RFP. *All projects- in statutory auditor certificates submitted, date of completion of projects are not mentioned.* ***Bidder to clarify.*** *In case of L B Kunjir,* *Project code A & B –* ***Bidder to clarify through some substantial proof (like client/SA certificate) that how the subject projects covered under any category as per clause 2.2.2.5 of the RFP.***
7.	*Technical Capacity*	*2.2.2.2(ii)*	*As per RFP, at least one similar work of 20% of Estimated Project Cost Rs. 149.28 crore shall have been completed from the Eligible Projects in Category 1 and/or Category 3 specified in Clause 2.2.2.5. (****project completed or 90 & completed as on 31.03.2020.)*** ***Please provide the location in the submitted bid from where the completed project or 90% completed project (in absolute terms and percentage terms) of similar nature in last five years (i.e. 01.04.2015 to 31.03.2020) can be found.***

2. You may submit your corrections, if any, at the earliest within 7 days (i.e. 11.01.2021), after that no representations will be considered.

Sd/

(Santosh K Bajpai)

DGM (T)

Maharashtra Division"

(The relevant aspects have been underlined by us)

5. By this communication, the joint-venture was called upon to *"submit your comments, if any, at the earliest within 7 days…."*.

6. The joint-venture, of which the petitioner is a partner, sent a detailed response thereto by its letter dated 09.01.2021 which was followed by another letter dated 22.01.2021**.** After consideration of the said representation, the respondent has issued the impugned communication dated 03.02.2021**,** informing the joint-venture that it was unable to establish its eligibility in terms of the tender conditions.

7. The submissions of Mr. Navare, learned senior counsel for the petitioner is that the decision arrived at by the respondent, as contained in the communication dated 03.02.2021, is patently incorrect. In order to examine his submissions, it would be apposite to refer to the impugned communication dated 03.02.2021, which reads as under:-

> *"To,*
> *M/s M/s Shri Swami Samarth Engineers Limited – M/s L.B. Kunjir (JV)*
> *773/3, PradyumnApts, Lano No. 9,*
> *Bhandarkar Road, Pune 411004*
> *Tel. No: 020 25679011/99*
> *E-mail: sssengineers@hotmail.com*
> *Fax No. 020 25679099*
>
> ***Kind Attention: Mr. Kuldeep Dattatray Patil (Authorized Signatory)***
>
> *Sub: 4-Laning of Pangare to WarangaPhata section from Km 134.500 to Km 174.645 (Design Chainage) of NH-161 including Bypasses at Kalamnuri and AkhadaBalapur and additional lengths of 800 m from Waranga Junction to Nanded (NH-161) (existing Chainage 244.360) and 700 m road from Waranga Junction (NH-161) to Mahagaon (NH-361) (existing*

*Chainage 253.700) in the State of Maharashtra on EPC mode – **Evaluation of Technical Proposals – Reg.***
Ref:
(i) Your RFP Application submitted on 07.12.2020.
(ii) NHAI HQ letter no. NHAI/Tech/MH/PangareWarangaPhata/PATSC/2019/00152 dated 05.01.2021.
(iii) Your letter no. SSSEL/Tender/100/2020-2021 dated 09.01.2021.

Sir,

Please refer to your proposal submitted on 07.12.2020 and observations communicated to you vide ref. - ii, wherein 7 days' time was provided to you for representation, if any. Further, you have submitted clarifications w.r.t. observations communicated to you vide ref. – ii, vide letter dated 09.01.2021.

2. In this regard, it is to inform that your proposal has been considered as Non – responsive pursuant to the provisions of RFP on following basis :

2.1 AS per clause 2.2.2.3 (i), The Bidder shall have a minimum Net Worth (the "Financial Capacity") of Rs. 37.32 crore at the close of the preceding financial year.

2.2 Bidder has been claimed the net worth for the FY 2019-20 based on the unaudited books of accounts for the FY 2019-20. Clarification was sought from the Bidder for the same.

2.3 Bidder in its reply has submitted its Audited Annual statements for the FY 2019-20 which is dated 17.12.2020 i.e. after the Bid Due Date.

2.4 As the Annual Accounts of the Bidder for the FY 2019-20 was not audited as on Bid Due Date, therefore net worth of the Bidder for the FY 2019-20 may not be considered.

2.5 Also net worth certificate submitted by the Bidder is not submitted by the Statutory Auditor of the Bidder.

*2.6 Based on above facts net worth for the FY 2018-19 is calculated from the Audited Financial statements submitted in the Bid for the FY 2018-19 which works out to be Rs. 12.10 cr i.e. **less than the required criteria.***

2.7 As per clause 2.2.2.2 (ii) of RFP, "Provided that at least *one similar work of 20% of Estimated Project Cost Rs. 149.28 crore shall have been completed from the Eligible Projects in Category 1and / or Category 3 specified in Clause 2.2.2.5. For this purpose, a project shall be considered to be completed value of work is equal to or more than 20% of the estimated project cost. "* ***No such project found in the submitted bid.***

2.8 Bidder has claimed two projects. Details of which are as follows:

Project 1 *– Constructions of Barrages on Painganga River at Rajgaon, Ukali, Songhavan, Tanka, Dhilli, Jaipur. Dist. Washim for Irrigation Department Govt. of Maharashtra.*

The project includes Construction of Barrages for Irrigation Department which covers under category 4 therefore said project cannot be considered pursuant to above mentioned criteria.

Project 2 *– Rehabilitation and Upgradation of Khamgaon todeulgaonSakarsha Section of NH-548C from design Ch.0+000 to 35+786 in the state of Maharashtra to 2 lanes with paved shoulder on EPC mode.*

Based on the documents submitted, completion status of the project as on 31.03.2020 cannot be ascertained. Hence, eligibility of the Bidder pursuant to clause 2.2.2.2 (ii) for completed project cannot be established.

3. In view of the above, your proposal has not been considered for next stage of Bidding Process.

Sd/
(Santosh K Bajpai)
DGM (T)
Maharashtra
Division"

8. Learned senior counsel submits that along with the clarification furnished on 09.01.2021, the joint-venture had submitted duly audited accounts for the financial year 2019-20. He, thus, contends that the respondent was not justified in rejecting the said audited annual statements of the financial year 2019-20, only on account of the fact that the said

statements were audited on 17.12.2020 *i.e,* after the bid due date of 07.12.2020.

9. Moreover, the respondents in the impugned communication have also stated that the joint-venture had not submitted the net-worth certificate from its statutory auditor along with its bid. On a query put by us, Mr. Navare states that the said document was subsequently submitted, *i.e.,* after the issuance of the impugned communication.

10. By drawing our attention to Clause 2.2.2.8(ii) of the tender conditions, which deals with submission of documents in support of the bidder's financial capacity, he contends that once the audited financial statements itself were provided, there was no requirement of any undertaking being furnished. The said clause reads as under:

> *"2.2.2.8(ii) In case the annual accounts for the latest financial year are not audited and therefore the Bidder cannot make it available, the Bidder shall give an undertaking to this effect and the statutory auditor shall certify the same. In such a case, the Bidder shall provide the Audited Annual Reports for 5 (five) years preceding the year for which the Audited Annual Report is not being provided."*

11. The annual accounts of the joint-venture for the latest financial year *i.e.* 2019-20 were not audited at the time of submission of the bid. The joint-venture should, therefore, have submitted the undertaking in terms of the aforesaid clause. The joint-venture, admittedly, did not submit the undertaking as required by the aforesaid clause along with its bid, and submitted the audited annual account statement for the financial year 2019-20, only after the bid due date. As noticed hereinabove, even the net-worth certificate initially submitted by the bidder was not prepared by its statutory

auditor, and the said certificate as prepared by its statutory auditor was provided only subsequently.

12. In our view, the aforesaid itself was sufficient to reject the bid of the joint-venture. There is no gainsaying that the terms and conditions of the NIT have to be strictly adhered to and followed by all bidders in order to keep the entire process above board and free from allegations of bias or irregularities. In the process of tendering, all bidders have to strictly follow the rules and failure of even the most competent bidder to meet the conditions of the NIT would non-suit him.

13. The Petitioner's joint-venture, admittedly, neither submitted the undertaking in terms of Clause 2.2.2.8(ii), nor did it submit the requisite net-worth certificate from its statutory Auditor along with its bid. The purpose of seeking clarifications was not to grant another opportunity to the bidders to fulfill a deficiency in the bid. The petitioner was only asked to provide clarification and not to complete an incomplete bid. Therefore, for the petitioner to claim that the respondent should have looked into the audited annual accounts for the year 2019-20 which the joint-venture provided with its clarification, has no merit. The joint-venture's bid was, therefore, rightly rejected on this ground.

14. We find that the impugned communication, in fact, contains another ground for rejection of the joint-venture's bid, namely, that it was unable to establish its past experience as required in terms of Clause 2.2.2.2(ii). From the impugned communication, it appears that said clause prescribed that the bidder should have experience of completing *"at least one similar work of 25% of Estimated Project Cost Rs. 189.57 crore (Rs. one hundred eighty nine crore and fifty seven lakhs only) shall have been completed from the*

*Eligible Projects in Category 1 and/or Category 3 specified in Clause 2.2.2.5. For this purpose, a project shall be considered to be completed, if more than 90% of the value of work has been completed and such completed value of work is equal to or more than 25% of the estimated project cost***".** The said communication states that the joint venture had not submitted any documents to establish its past experience in terms of the said clause. The documents submitted by it in relation to construction of barrages for irrigation department were not accepted by the respondent on the ground that these projects were covered by category 4, and did not constitute category 1 and or/category 3 projects as specified under Clause 2.2.2.5.

15. In this regard, the submission of Mr. Navare is that the respondent itself had accepted the similar past experience certificate of the joint venture of construction of barrages for irrigation department, in respect of its bids in relation to other similar contracts and, therefore, there was no reason to hold that the joint venture did not have the requisite past experience.

16. In support of his contention, Mr. Navare has drawn our attention to the legal notice issued by the joint-venture, post the issuance of the impugned communication, wherein it has set out in detail the work awarded to the joint venture on the basis of the same past experience certificate. The relevant extracts of the notice read as under:

<table>
<tr><td rowspan="3">2.8</td><td rowspan="3">Bidder has claimed two projects. Details of which are as follows:

Project 1 – Construction of Barages on Painganga River at Rajgaon, Ukali, Songhavan, Tanka, Dhilli, Jaipur. Dist. Washim for Irrigation Department Govt. of Maharashtra.</td><td colspan="4">On this same certificate of our clients were qualified by MORTH & NHAI for below mentioned Projects.</td></tr>
<tr><td>Sr.No.</td><td>Name of Work</td><td>Cost (Cr)</td><td>Date of Qualification</td></tr>
<tr><td>1.</td><td>Malegaon to Rishod</td><td>227.157</td><td>17 March 2018</td></tr>
</table>

	The project includes Construction of Barrages for irrigation Department which covers under category 4 therefore said project cannot be considered pursuant to above mentioned criteria.	2.	Astamode to Tivatyal	191.53	18 Sept 2019
		3.	Nagaur to Bikaner	291.26	24 March 2020
		4.	Akola to Akot	222.14	09 July 2020
	Project 2 – Rehabilitation & Upgradation of Khamgaon to Deulgaon Sakarsha Section of NH-548C from design Ch.0+000 to 35+786 in the state of Maharashtra to 2 lanes with paved shoulder on EPC mode.	Sr.No.	Name of Work	Cost (Cr)	Date of Qualification
		1.	Malegaon to Rishod	300.99	24 Dec 2020
		2.	Astamode to Tivatyal	191.53	18 Sept 2019
		3.	Nagaur to Bikaner	291.26	24 March 2020
	Based on the documents submitted, completion status of the project as on 31.03.2020 cannot be ascertained. Hence, eligibility of the bidder pursuant to clause 2.2.2.2(ii) for completed project cannot be established.	4.	Akola to Akot	222.14	09 July 2020
		5.	`Khed Sinner section	119.80	24 Sep 2020
		6.	Bidar to Humnabad	300.99	24 Dec 2020
		7.	Indore Gujarat MP Border	258.14	11 Jan. 2021

17. Pertinently, it is not the petitioner's case that the respondent erred in coming to the conclusion that the past experience of the petitioner's joint venture in respect of construction of barrages for irrigation department is covered by the work in category 4 as specified in Clause 2.2.2.5; his submission, however, is that the same experience certificates have been accepted in the past for award of work in respect of various other projects. We are unable to accept this contention as, in the present case, we are examining and are concerned only with the joint-venture's disqualification

from this tender. The circumstances under which the said experience certificate was accepted for award of contracts to the petitioner's joint venture in the past are not a subject matter of consideration in the present petition. Admittedly, the experience certificate submitted by the joint-venture does not relate to work in category 1 and or/category 3 as defined. That being the position, the decision of the respondent to not consider the joint-venture's bid is justified on that ground as well.

18. We, therefore, do not find any merit in the present petition which is dismissed alongwith the pending applications.

VIPIN SANGHI, J

REKHA PALLI, J

FEBRUARY 12, 2021
kk