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

Date of Decision: 9th January, 2023

+ **W.P.(C) 36/2023 and CM APPL. 90/2023**

REDECON INDIA PVT. LTD.

..... Petitioner

Through: Mr. Suryadeep Singh & Mr. Sumit K. Shukla, Advocates.

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD.

..... Respondent

Through: Mr. Sangram Patnaik, Mr. Rajiv Gupta & Mr. Swamsidha, Advocates along with Mr. K.K. Sharma, DGM (Legal)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through hybrid mode.
2. The Petitioner- Redecon (India) Pvt. Ltd. has filed the present petition challenging the black listing letter dated 8th September, 2022 issued by the Respondent- National Highways and Infrastructure Development Corporation Ltd. (*hereinafter* 'NHIDCL'). Vide the said letter, the Petitioner has been declared as a non-performer. The letter further states that as a consequence of the declaration, the Petitioner will not be able to participate in any bid for National Highways projects with the Ministry of Road Transport and Highways (*hereinafter* 'MoRTH') or any other executing agencies till such time it is removed from the list of non-performers.
3. On the last date of hearing, i.e, 4th January, 2023, Id. Counsel for the Petitioner submitted that the same has adverse consequences for the

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Petitioner as it is unable to participate in any bid for national highway projects with MoRTH or any other executing agencies. Ld. counsel for the Petitioner also submitted that the said declaration is for an indefinite period.

4. On the other hand, Id. Counsel for the Respondent who had appeared on advance notice submitted that the circular dated 7th October, 2021 issued by the MoRTH clearly shows that the said declaration is effective for a period of one year or till deficiencies are rectified by the Petitioner, whichever is earlier.

5. After hearing counsels for the parties, the following directions were passed on the last date of hearing:

“6. A list of other projects for which bids have been submitted by the Petitioner has been placed on record. It is submitted by Id. Counsel that these bids were submitted even prior to the Petitioner being declared as non-performer and hence the impugned order should not affect the said bids.

7. Ld. counsel for the Respondent submits that eligibility of the bidder for a project is ascertained as on bid due date and seeks time to take instructions in the matter limited to this issue.

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11. List on 9th January, 2023 for Id. Counsel for Respondent to revert on whether the impugned letter would affect the bids submitted by the Petitioner before being declared as non-performer.”

6. Today, it is submitted by Id. Counsel for the Petitioner that insofar as the MoRTH circular dated 7th October, 2021 is concerned, the said circular is clear to the extent that the non-performer and debarment status is to be considered on the bid due date. He submits that the list of tenders in which the Petitioner has participated prior to the impugned blacklisting order dated

8th September, 2022 being passed, would show that the Petitioner is being treated as non-responsive even with respect to the bids submitted prior to the said date by the Petitioner.

7. On the other hand, Id. Counsel for the Respondent submits that non-responsive status of the Petitioner's bid is a declaration being issued by MoRTH, which has not been impleaded in the present case and the said Ministry ought to be impleaded and their submissions ought to be heard.

8. As on today, the Court has perused the blacklisting letter dated 8th September, 2022 and the circular of MoRTH dated 7th October, 2021. The circular itself clearly states that prior to any party being declared as non-performer, a written reply and personal hearing, if so desired, shall be given by the competent authority. If a party is declared as non-performer, a representation can also be filed by such a party to the reviewing authority and thereafter, the decision would be taken in the matter. Relevant portion of the circular is set out below:

"5. Before deciding a AE/IE/CSC/PMC as Non-Performer or debarring/penalizing it, the concerned authority shall issue a notice to the AE/IE/CSC/PMC by giving 15 days time to furnish its written reply and allow personal hearing if so desired by the AE/IE/CSC/PMC before the competent authority or any person designated for the purpose. Such a notice shall not be issued without the approval of an officer not below the rank of Chief Engineer/CGM/ED. In case of projects where public safety is endangered by the behavior/conduct/action of the consultant the authority may temporarily suspend the consultant from participating in ongoing/future bidding upto 1 month period during which the regular process of debarment

shall be concluded.

6. *The competent authority for approval of penal action as above will be the DG(RD) & SS in respect NH works being implemented through State PWDs.*

7. *The firm/individuals on which penal/deterrent action is taken may represent to the “Reviewing authority” against the action/penalty imposed. The “Reviewing Authority” shall be the Secretary, RT&H in respect of NH works being implemented through State PWDs.*

8. *NHAI and NHIDCL will designate competent authority for deciding penal action and the Reviewing Authority.*

9. *Upon declaration of non-performer, the AE/IE/CSC/PMC will not be able to participate in any bid for National Highways projects with MoRTH or any other executing agencies till such time the debarment persists or the AE/IE/CSC/PMC is removed from the list of non-performers. The AE/IE/CSC/PMC shall include its JV partners, promoters etc. whose credentials were considered while qualifying them for the project. Non-performer/debarment status of a bidder on the bid due date will be the criteria for eligibility of a bidder to participate in the said bid.*

10. *Each implementing agency shall have a single source/designated officer for maintaining the record/data related to debarment. Ministry’s Monitoring Zone with the help of NIC will maintain a real-time data-base of such Non-Performer and debarred contractor/concessionaire.*

11. *This issues with the approval of the Competent Authority. ”*

9. Ld. counsel for the Petitioner submits that the Petitioner in this case is

only a JV partner and only a consultant to the project. He further submits that the Petitioner has already approached the reviewing authority.

10. A copy of the letter dated 23rd September, 2022 has been perused and the same reveals that it is addressed to the Director (Technical), NHIDCL. The said representation has also been rejected by the NHIDCL on 19th December, 2022. A perusal of the said documents would show that the reviewing authority has yet not been approached by the Petitioner. MoRTH has also not been made party in the present petition.

11. Accordingly, the present position is that under the circular dated 7th October, 2021, the Secretary, MoRTH being a reviewing authority can be approached by the Petitioner. Further, from the said very circular, it is clear that any bids submitted prior to blacklisting order dated 8th September, 2022, cannot be rejected as those bids would have to be considered on the position and strength of the bids as prevalent on the date when the said bids were being submitted. The subsequent blacklisting ought not to have an impact on the same.

12. Accordingly, the following directions are issued:

- (1) The Petitioner is permitted to challenge the impugned blacklisting order and the rejection dated 19th December, 2022 and 20th December, 2022 issued by the NHIDCL before the reviewing authority in terms of the circular dated 7th October, 2021 by approaching the reviewing authority with a detailed representation.
- (2) If a representation is made to the reviewing authority in terms of the circular dated 7th October, 2021, the same shall be decided within 45 days from the date when the said

representation is filed. The remedies of the Petitioner in respect of the said decision are left open.

- (3) Insofar as the rectification of defects is concerned, if the Petitioner rectifies the defects, which have been pointed out by the NHIDCL, the Petitioner is permitted to approach the NHIDCL for review of the status of the non-performer.
- (4) If the NHIDCL has not designated the competent authority for the said review exercise, it shall do so within two weeks. Upon the representation being received by the Petitioner, the NHIDCL shall consider the representation in respect of removal of defects and review in the non-performer status. The above shall be without prejudice to the contentions of both the parties on merits.
- (5) Insofar as the bids which were submitted prior to the impugned letter 8th September, 2022 are concerned, all those bids shall be considered on the basis of merits of the said bids prevailing on the bid submission date and the Petitioner shall not be disqualified merely on the ground of issuance of non-performer letter dated 18th September, 2022, subsequent to the submission of the said bids.

13. With these observations, the present petition along with all pending applications, is disposed of. *Dasti.*

PRATHIBA M. SINGH
JUDGE

JANUARY 9, 2023/dk/hh