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

Date of decision: 26th SEPTEMBER, 2023

IN THE MATTER OF:

\+ **W.P.(C) 10845/2023 & CM APPLs. 42036-37/2023**

M/S KAMAC - SHIVA (JV) ..... Petitioner

Through: Ms. Mani Gupta, Mr. Pranav Malhotra and Ms. Vishakha Saluja, Advs.

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. ..... Respondent

Through: Ms. Ruchira Gupta, Mr. Deep Narayan Sarkar and Ms. Sonal Rawat, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court challenging the decision of the Respondent/National Highways and Infrastructure Development Corporation Ltd. (NHIDCL) debarring the Petitioner being joint venture consortium consisting of M/s Kamac Engineers Pvt. Ltd. (KEPL) and M/s Shiv Harlalka, for a period of one year from participating in any tender or Request for Proposal (RFP) issued by the Respondent/NHIDCL.

2. The Respondent/NHIDCL brought out a Request for Proposal (RFP) and a Notice Inviting Tender (NIT) bearing No. Bid/Pkg No: NHIDCL/Assam/JD/Re/2022/2019136 dated 27.04.2022 inviting bids for

"Four Laning of Jhanji to Demow from Km. 491.050 to Km. 535.250 of NH-37 in the state of Assam under SARDP on Engineering Procurement and Construction (EPC) Mode" (*hereinafter referred to as 'Project'*) at an estimated cost of Rs.271.12 crores. The said project was to be completed within a period of 18 months with a defeat liability period of 60 months. The Petitioner is a joint venture created between M/s KAMAC and M/s Shiv Harlalka by way of a joint Bidding Agreement for the purpose of placing the bid for the aforesaid project. M/s KAMAC was to be the lead member of the joint venture. M/s Shiv Harlalka gave Power of Attorney to the Petitioner for the purpose of entering into the contract with the Respondent and signing other documents. The Petitioner placed its bid and also submitted a sum of Rs.2,71,00,000/- as bid security.

3. The relevant clauses of the RPF i.e., Clauses 2.2.2.2, 2.2.2.4, 2.2.2.5 and 2.2.2.6 which are necessary for the adjudication of the present case read as under:

> ***2.2.2.2 Technical Capacity***
>
> *(i) For demonstrating technical capacity and experience (the **"Technical Capacity"**), the Bidder shall, over the past [5 (five)] financial years preceding the Bid Due Date, have received payments for construction of Eligible Project(s) or has undertaken construction works by itself in a PPP project, such that the sum total thereof, as further adjusted in accordance with clause 2.2.2.5 & (ii), is more than (the **"Threshold Technical Capacity")** given in the Data Sheet.*
>
> ***(ii) For normal Highway projects (including Major Bridges/ROB/Flyovers/Tunnels):***

Provided that at least one similar work of 20% of Estimated Project Cost shall have been completed from the Eligible Projects in Category I 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 20% of the estimated project cost. If any Major Bridge/ROB/Flyover/Tunnel is (are) part of the project, then the sole Bidder or in case the Bidder being a Joint Venture, any member of Joint Venture shall necessarily demonstrate additional experience in construction of Bridge/ROBs/Flyovers/Tunnel in the last 10 (Ten) years preceding the Bid Due Date (works completed as on bid due date shall also be considered for this clause) i.e. shall have completed atleast one similar Bridge/ROB/Flyover having span equal to or greater than :

(a) In case, longest span of bridge/ROB/flyover is less than or equal to 60m, no additional qualification is required.
(b) When longest span is more than 60 m: 50% of the longest span or 100 m,
whichever is less, of the structure proposed in this project.

And in case of tunnel, if any, shall have completed construction of atleast one tunnel construction of single or twin tubes (including tunnel(s) for roads/railway/metro/rail/irrigation/hydro-electric projects etc.) having atleast:
(a) In case tunnel is a part of project having length less than or equal to 200 m, then no additional qualification is required.

(b) When length of tunnel more than 200 m: 50% of the cross sectional area of proposed tunnel or two lane

highway tunnel cross-section area, whichever is less and 20% length of the tunnel to constructed in this project or 2 km, whichever is less.

(iii) For Stand-alone specialized projects:

(a) Major Bridges/ROB/Flyovers projects:

(a1) In case the cost of specialized project is less than or equal to Rs. l,000 Cr: The sole Bidder or in case the Bidder being a Joint Venture, any member of Joint Venture shall have completed at least one similar Major Bridge/ ROB/ Flyover project in the last 10 (Ten) financial years preceding the Bid Due Date, having span equal to or greater than 50% of the longest span or 100 m, whichever is less of the structure proposed in this project and also the cost of such similar project shall be atleast 20% of the Estimated Project Cost. 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 20% of the Estimated Project Cost.

(a2) In case the cost of specialized project is more than Rs. 1,000 Cr: The sole Bidder or in case the Bidder being a Joint Venture, any member of Joint Venture shall have completed at least one similar Bridge/ ROB/ Flyover project in the last 10 (Ten) years preceding the Bid Due Date (works completed 30 days prior to the bid due date shall also be considered for this clause), having span equal to or greater than 50% of the longest span of the structure proposed in this project or 100m, whichever is less, and also the cost of such similar project shall be atleast 20% of the Estimated Project Cost or Rs.1000 Cr. whichever is less. 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 20% of the Estimated Project Cost or 1000 Cr., whichever is less.

(b) Tunnel project:

The sole Bidder or in case the Bidder being a Joint Venture, any member of Joint Venture shall have completed atleast one tunnel project in the last 10 (Ten) financial years preceding the Bid Due Date, consisting of single or twin tubes (including tunnel(s) for roads/Railway /Metro rail/ irrigation/ hydro-electric projects etc.) having atleast 50% of the cross-sectional area of the tunnel to be constructed and 20% length of the tunnel to constructed in this project or 2 km, whichever is less and the cost of such project shall be atleast 20% of the Estimated Project Cost or Rs. 1000 crore, whichever is less. 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 20% of the Estimated Project Cost or Rs.1000 Cr., whichever is less.

(iv) The updation factor to update the price of the eligible projects for the year indicated in table below:

Year	*Year-1*	*Year-2*	*Year-3*	*Year-4*	*Year-5*
Up-dation fator	*1.00*	*1.05*	*1.10*	*1.15*	*1.20*

2.2.2.4 In case of a Joint Venture:

(i) The Bid Capacity, Technical Capacity and Financial Capacity of all the Members of Joint Venture would be taken into account for satisfying the above conditions of eligibility. Further, Lead Member shall meet at least 60% requirement of Bid Capacity, Technical and Financial Capacity as per Clause 2.2.2.1, 2.2.2.2(i) and 2.2.2.3 and each of other JV members shall meet at least 20% requirement of Bid

Capacity, Technical and Financial Capacity individually as per Clause 2.2.2.1, 2.2.2.2(i) and 2.2.2.3. For avoidance of doubt it is further clarified that the Joint Venture must collectively and individually satisfy the above qualification criteria i.e. JV shall cumulatively/collectively fulfill the 100% requirement.

(ii) For requirement of 2.2.2.2 (ii)and/or (iii), one similar work should have been completed from the Eligible Projects in Category 1 and/or Category 3 specified in Clause 2.2.2.5 individually by any of the JV members as a single work (in case, the similar work has been executed by any of the JV Member as JV Partner than only the percentage of his share in JV shall be considered).

2.2.2.5 Categories and factors for evaluation of Technical Capacity:

(i) Subject to the provisions of Clause 2.2.2 the following categories of experience would qualify as Technical Capacity and eligible experience (the "Eligible Experience") in relation to eligible projects as stipulated in Clauses 2.2.2.6 (i) & (the "Eligible Projects"). In case the Bidder has experience across different categories, the experience for each category would be computed as per weight of following factors to arrive at its aggregated Eligible Experience:

Category	*Project/ Construction experience on Eligible Projects*	*Factors*
1	*Project in highways sector that qualify under Clause 2.2.2.6 (i)*	*1*
2	*Project in core sector that qualify under Clause 2.2.2.6 (i)*	*0.75*
3	*Construction in highways sector that qualify under Clause 2.2.2.6 (ii)*	*1*
4	*Construction in core sector that qualify under Clause 2.2.2.6 (ii)*	*0.75*

(ii) The Technical capacity in respect of an Eligible Project situated in a developed country which is a member of OECD shall be further multiplied by a factor of 0.5 (zero point five) and the product thereof shall be the Experience Score for such Eligible Project.

(iii) For the purpose of this RFP:

(a) highways sector would be deemed to include highways, expressways, bridges, tunnels, runways, railways (construction/re-construction of railway tracks, yards for keeping containers etc.) metro rail and ports is (including construction/reconstruction cost of Jetties, any other linear infrastructure including bridges etc.); and

(b) core sector would be deemed to include civil construction cost of power sector, commercial setups (SEZs etc.), airports, industrial parks/ estates, logistic parks, pipelines, irrigation, water supply, sewerage, water supply, stadium, hospitals, hotel, smart city, warehouse/Silos, oil and gas real estate development.

(I) In case of projects executed by applicant under category 3 and 4 as a member of Joint Venture, the project cost should be restricted to the share of the applicant in the joint venture for determining eligibility as per provision under clause 2.2.2.2 (ii).

(II) Maintenance works are not considered as eligible project for evaluation. As such works with nomenclature like PR, OR, FDR,SR, site/micro grading, surface renewal, resurfacing work, Tarring, B.T. surface work, temporary restoration, urgent works, periodic maintenance, repair & rehabilitation, one time maintenance, permanent protection work of bank, external pre stressing, repair of central hinge, fabrication work, sho1i term OMT contract of NHAI, any type of work related to border fencing, work of

earthwork alone, construction of buildings/ hostels, etc., or not specified, shall not be considered. However, such maintenance works shall be considered as eligible projects in case of Maintenance works to be taken up on EPC mode.

(III) The works such as Improvement in Riding Quality work (IRQP/IRQ), shall be considered for Technical Capacity [2.2.2.2 (i)] under Category 4 but not for single completed works [2.2.2.2 (ii)]. However, such work shall be considered for single completed works [2.2.2.2 (ii)Category 3] in case of Maintenance works to be taken up on EPC mode.

(IV) Project in Highway sector shall constitute the following for the purpose of consideration under category 1 or 3 as applicable, if:

(i) Widening / reconstruction / up-gradation works on NH / SH or on any category of road taken up under CRF, ISC/ EI, SARDP, L WE.

(ii) Widening/ re-construction/up-gradation works on MDRs with loan assistance from multilateral agencies or on BOT basis,

(iii) Widening/ reconstruction / up-gradation work of roads in Municipal corporation limits, construction of Bypasses,

(iv) Construction of stand- alone bridges, ROBs, tunnels w.r.t roads/railways.

(v) Long term OMT works of NHAI/NHIDCL/MoRT&H.

(V) The projects with the title of RIDF, PMGSY road; link road, city roads, rural road, sector/ municipality road, Bridges for railway line, work of metro rails

(bridges/ tunnel), real estate projects which demonstrate road development/construction bridges or culverts may be considered under category -4.

(VI) In case both the estimated cost of project and revised cost of project are provided, the revised cost of project shall be considered for evaluation.

2.2.2.6 Eligible Experience on Eligible Projects in respect of each category:

(i) For a project to qualify as an Eligible Project under Categories 1 and 2:

(a) It should have been undertaken as a PPP project on BOT, BOLT, BOO, BOOT or other similar basis for providing its output or services to a public sector entity or for providing non-discriminatory access to users in pursuance of its charter, concession or contract, as the case may be. For the avoidance of doubt, a project which constitutes a natural monopoly such as an airport or port should normally be included in this category even if it is not based on a long-term agreement with a public entity;

(b) the entity claiming experience should have. held, in the company owning the Eligible Project, a minimum of 26% (twenty six per cent) equity during the entire year for which Eligible Experience is being claimed;

(c) the capital cost of the project should be more than of the amount specified as the Estimated Project Cost; and

(d) the entity claiming experience shall, during the last 5 (five) financial years preceding the Bid Due Date, have itself undertaken the construction of the project for an amount equal to at least one half of the Project Cost of eligible projects, excluding any part of the

project for which any contractor, sub-contractor or other agent was appointed for the purposes of construction.

(ii) For a project to qualify as an Eligible Project under Categories 3 and 4, the Bidder should have received payments from its client(s) for construction works executed, fully or partially, during the 5 (five) financial years immediately preceding the Bid Due Date, and only the amounts (gross) actually received, during such 5 (five) financial years shall qualify for purposes of computing the Experience Score. However, receipts of or work executed amount less than 5% of the Estimated Project Cost shall not be reckoned as receipts for Eligible Projects. For the avoidance of doubt, construction works shall not include supply of goods or equipment except when such goods or equipment form part of a turn-key construction contract / EPC contract for the project Further, the cost of land and also cost towards pre-construction activities (like shifting of utilities etc.) shall not be included hereunder.

(iii) The Bidder shall quote experience in respect of a particular Eligible Project under any one category only, even though the Bidder (either individually or along with a member of the Joint Venture) may have played multiple roles in the cited project. Double counting for a particular Eligible Project shall not be permitted in any form.

(iv) Experience for any activity relating to an Eligible Project shall not be claimed by two or more Members of the Joint Venture. In other words, no double counting by a Joint Venture in respect of the same experience shall be permitted in any manner whatsoever.

2.2.2.7 Submission in support of Technical Capacity

(i) The Bidder should furnish the details of Eligible Experience for the last 5 (five) financial years immediately preceding the Bid Due Date.

(ii) The Bidder must provide the necessary information relating to Technical Capacity as per format at Annex-II of Appendix-IA.

(iii) The Bidder should furnish the required Project-specific information and evidence in support of its claim of Technical Capacity, as per format at Annex -IV of Appendix-IA."

4. Clause 2.2.2.7 mandates that the bidder should furnish the details of eligible experience for the last 5 (five) financial years immediately preceding the bid due date and the necessary information relating to their Technical Capacity as per format at Annexure-II of Appendix-IA. The bidder was also required to furnish project specific information and evidence in support of its claim of possessing the Technical Capacity, as per format at Annexure-IV of Appendix-IA.

5. Annexure-IV submitted by one of the members of joint venture, namely, M/s Shiv Harlalka for project code (a) reads as under:

Appendix IA
Annex-IV

ANNEX-IV

Details of Eligible Projects

(Refer to Clauses 2.2.2.2, 2.2.2.5 and 2.2.2.7 of the RFP)

Project Code : a | Entity : Member

Item (1)	Refer Instruction (2)	Particulars of the Project (3)			
Title & Nature of the Project	4	Improvement of (1) Dhodar Ali from (Ch. 110.80 to 122.70 km), (2) Mezenga Station feeder road (Ch. 0.00 to 11.20 km), (3) Bortal Gelekey Road (Ch, 8.200 to 14.400 km) under SOPD-G in Nazira & Amguri Territorial Road Division (Package No. 11Nazira LAC			
Category	5	**Category 3**			
Year-wise (a) payments received for construction, and / or (b) revenues appropriated for self construction under PPP Projects	6	**Year**	**Amt.**	**Escalation Factor**	**Technical Capacity Amount**
		2016-17	0.00	1.20	0.00
		2017-18	0.00	1.15	0.00
		2018-19	0.00	1.10	0.00
		2019-20	0.00	1.05	0.00
		2020-21	31.13	1.00	31.13
		Total	**31.13**		**31.13**
Entity for which the project was constructed	7	**The Chief ENGINEER PWD (ROADS), ASSAM CHANDMARI GUWAHATI-3**			
Location		Nazira & Amguri, Assam			
Project cost	8	**36.21 Crore**			
Date of commencement of Project/contract		**30.09.2020**			
Date of completion/commissioning	9	**31.08.2021**			
Equity shareholding (with period during which equity was held)	10	**100%**			

For Shiva Harlalka

Proprietor

Signature Not Verified
Digitally Signed By:SHAZAAD ZAKIR
Signing Date:26.09.2023 20:13:09

6. The certificate of Chartered Accountant substantiating the Annexure-IV submitted by M/s Shiv Harlalka reads as under:

V. PAREEK & Co.
CHARTERED ACCOUNTANTS

H No:25, Dr B. K. Kakati Road, Ulubari, Guwahati- 781 007 : Phone: 86382-23047(M)

Certificate from the Statutory Auditor regarding construction works

Based on its books of accounts and other published information authenticated by it, (this is to certify that **M/s Shiva Harlalka** (the 'Applicant') was engaged by **The Chief ENGINEER PWD (ROADS), ASSAM CHANDMARI GUWAHATI-3** to execute **"Improvement of (1) Dhodar Ali from (Ch. 110.80 to 122.70 km), (2) Mezenga Station feeder road (Ch. 0.00 to 11.20 km), (3) Bortal Gelekey Road (Ch. 8.200 to 14.400 km) under SOPD-G in Nazira & Amguri Territorial Road Division (Package No. 11Nazira LAC"** (**State Highway**) for **Road & Bridge Works**. The construction of the project commenced on 30.09.2020 and the project is likely to be commissioned on 31.08.2021. It is certified that Bidder received payments from its Clients for Construction Works executed by them or work executed and certified by the Engineer-in-charge/Independent Engineer/ Authority's Engineer, in the aforesaid construction works.

We further certify that the total estimated capital cost of the project **is Rs. 36.21 Crore (Rupees Thirty Six Crore Twenty One Lakhs Only)**, of which the Applicant received or has executed the work as certified by the Engineer-in-charge/Independent Engineer/ Authority's Engineer **Rs. 31.13 Crore (Rupees Thirty One Crore Thirteen Lakhs Only)**, during the past five financial years as per year-wise details noted below:

Financial Year	Total Amount (Rs. in Crore)
2016-2017	Nil
2017-2018	Nil
2018-2019	Nil
2019-2020	Nil
2020-2021	31.13
Total	**31.13**

It is further certified that the receipts indicated above are restricted to the share of the Applicant who undertook these works as a Single Entity.

For V. Pareek & Co.
Chartered Accountants
FRN-327055E

Vivek Pareek
(Proprietor)
M. No -066353
UDIN : 21066353AAAAEH4585

Place: Guwahati
Date: 18.08.2021

For Shiva Harlalka

Proprietor

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7. The bids were opened on 31.05.2022 and the Tender Evaluation Committee found the Petitioner to be technically responsive. The Tender Evaluation Committee sought for confirmation on the material so supplied by the Petitioner from the Government of Assam regarding the issuance of work completion certificate for prior ongoing projects to ascertain the veracity of the documents supplied by the Petitioner. The financial bids were opened and the Petitioner was found to be the L-1 bidder and thereafter, a Letter of Award (LOA) bearing No. NHIDCL/Assam/J-D/Re/2022/209136/1724 dated 25.07.2022 was issued and the contract was executed in favour of the Petitioner.

8. Material on record discloses that a complaint was received by the Director (Technical), NHIDCL alleging that there is a misrepresentation of facts on behalf of one of the members of joint venture, namely, M/s Shiva Harlalka during the submission of the bid. The said complaint pertained to the statement of payments received by M/s Shiva Harlalka till financial year 2020-21 in the projects executed by M/s Shiva Harlalka for the State of Assam. On receipt of the said complaint clarifications were sought from M/s Shiva Harlalka seeking details of the payments received by M/s Shiva Harlalka for financial year 2020-21 at the time of submitting the bid. It was found that the reply given by the M/s Shiva Harlalka was not satisfactory inasmuch as in the bid documents it was stated that a sum of Rs.31.13 crores had been received by M/s Shiva Harlalka in the year 2020-21 whereas only Rs.21.96 crores was actually received by M/s Shiva Harlalka. Since there was misrepresentation on the facts in the bid documents, M/s Shiva Harlalka has been debarred for a period of one year from participating in any tender or Request for Proposal (RFP) issued by the Respondent/NHIDCL.

Moreover, a letter dated 26.04.2023 was issued by the Respondent/NHIDCL debarring the lead member M/s KAMAC for a period of one year from participating in any tender or Request for Proposal (RFP) issued by the Respondent/NHIDCL in view of the RFP Clause 2.1.11(f)(iii). The said Clause reads as under:

> *“**2.1.11** In case the Bidder is a Joint Venture, it shall comply with the following additional requirements:*
>
> *(f) members of the Joint Venture shall have entered into a binding Joint Bidding Agreement, substantially in the form specified at Appendix V (the "Jt. Bidding Agreement"), for the purpose of making the Application and submitting a Bid in the event of being pre-qualified. The Jt. Bidding Agreement, to be submitted along with the Application, shall, inter alia:*
>
> *(iii) include a statement to the effect that all members of the Joint Venture shall be liable jointly and severally for all obligations of the Contractor in relation to the Project until the Defect Liability Period is achieved in accordance with the EPC Contract; and”*

9. The Petitioner, thereafter, has approached this Court by filing the instant writ petition challenging the Debarment Order issued by the Respondent/NHIDCL.

10. The principal contention of the learned Counsel for the Petitioner is that even if the correct figures are to be taken into account, the joint venture would still be technically qualified and the fact that wrong figures has been mentioned in the bid documents, the same has not caused prejudice to any person and on the basis of this, the joint venture could not have been debarred.

11. It is contended by the learned Counsel for the Petitioner that it is not as if the Petitioner has been made technically qualified because of the discrepancy in the figures quoted by M/s Shiva Harlalka at the time of placing the bid and that such a discrepancy will not come within four corners of Clauses 4.2 and 4.3 of the RFP which deals with fraud and corrupt practices. It is further contended by the learned Counsel for the Petitioner that the reason given for debarment does not come within the definition of fraud and corrupt malpractices which alone could not have been the reason for debarment for the reason that the figures assuming but not admitting were wrongly given would have disentitled the joint venture from getting the contract. It is contended by the learned Counsel for the Petitioner that in any event the Petitioner would have qualified even if the figures of Rs.21.96 crores had been taken into account and it would not have influenced the bidding process as required under Clause 4 of the RFP.

12. It is further contended by the learned Counsel for the Petitioner that the Petitioner was not given a Show-Cause Notice (SCN) seeking clarification and in the absence of Show-Cause Notice, the Petitioner could not have been debarred. The learned Counsel for the Petitioner places reliance upon the Judgment of Apex Court in Gorkha Security Services v. Govt. (NCT of Delhi), **(2014) 9 SCC 105** to support her contention.

13. Heard learned Counsel for the Petitioner, learned Counsel for the Respondent/ NHIDCL who is appearing on advance notice, and perused the material on record.

14. The short question which arises for consideration in the present case as to whether the decision of the Respondent to debar the joint venture in the facts and circumstances of the present case is sustainable or not.

15. The undisputed fact of the case is that M/s Shiva Harlalka, which is a member of the joint venture, had only received a sum of Rs.21.96 crores in the financial year 2020-21 but M/s Shiva Harlalka at the time of submission of bid had stated that it has received as sum of Rs.31.13 crores from the State of Assam as on 2021. This definitely amounts to a misrepresentation on the part of M/s Shiva Harlalka. Clauses 4.2 and 4.3 of the RFP which is relevant to the present fact reads as under:

> *"4.1 Without prejudice to the rights of the Authority under Clause 4.1 hereinabove and the rights and remedies which the Authority may have under the LOA or the Agreement, or otherwise if a Bidder or Contractor, as the case may be, is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Bidding Process, or after the issue of the LOA or the execution of the Agreement, such Bidder shall not be eligible to participate in any tender or RFP issued by the Authority during a period of 1 (one) year from the date such Bidder, or Contractor, as the case may be, is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practices, as the case may be.*
>
> *4.3 For the purposes of this Section 4, the following terms shall have the meaning hereinafter respectively assigned to them:*
>
> *(a) "corrupt practice" means the offering, giving, receiving or soliciting of anything of value, pressurizing to influence the action of a public official in the process of tendering and execution of the project;*

(b) "fraudulent practice" means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;

(c) "coercive practice" means impairing or harming, or threatening to impair or harm, directly or indirectly, any person or property to influence any person's participation or action in the Bidding Process;

(d) "undesirable practice" means (i) establishing contact with any person connected with or employed or engaged by the Authority with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Bidding Process; or (ii) having a Conflict of Interest; and

(e) "restrictive practice" means forming a cartel or arriving at any understanding or arrangement among Bidders with the objective of restricting or manipulating a full and fair competition in the Bidding Process."

16. Clause 4.3 (b) of the RFP specifically states that fraudulent practice means misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts. Though it also states that omission, suppression or misrepresentation should be in order to influence the bidding process but that cannot permit a bidder to give wrong facts to boost its technical capacity. Annexure-IV submitted by M/s Shiva Harlalka to show that it has capacity to fulfil the project by stating wrong figures would definitely give a right to the Respondent/ NHIDCL not to proceed ahead with the contractor as this can lead to a deficit of trust. Paragraph No.14 of the Impugned Debarment Order which is the basis of debarring the joint

venture reads as under:

> *"14. The Contractor has mis-represented of the facts made at the time of the bidding of the subject captioned work further on account of actual receipt of the payment status upto FY 2020-21 at the time of bidding, although no benefit has been extended to the Contractor, as the Contractor still technically eligible for the subject cited work as per the stipulation of the RFP document. However, in view of the facts and circumstances, the Contractor has misrepresented and therefore under Clause 4.2 of the RFP, the contractor M/s Shiva Harlalka is debarred for one year from the date of issue of letter of debarment i.e. such Bidder shall not be eligible to participate in any tender or RF P issued by the Authority during a period of 1 (one) year."*

17. The Apex Court in Tata Motors Limited vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Others, **2023 SCC OnLine SC 671** has observed as under:

> ***"52.*** *Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this*

Court in Association of Registration Plates v. Union of India, reported in (2005) 1 SCC 679.

53. *The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd., reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.*

54. *As observed by this Court in Jagdish Mandal v. State of Orissa, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at*

> *the cost of public interest, or to decide contractual disputes."*

18. The Apex Court in N.G. Projects Ltd. vs. Vinod Kumar Jain, **(2022) 6 SCC 127** has observed as under:

> ***"23.*** *In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work."*

19. The Apex Court in Silppi Constructions Contractors vs. Union of India, **(2020) 16 SCC 489** has observed as under:

> ***"19.*** *This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias.*

However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. *The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate*

> *authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."*

20. A perusal of the above judgments shows that the scope of interference by the Courts while exercising jurisdiction under Article 226 of the Constitution of India in interfering with administrative decisions and more particularly with tender matters is very limited and until and unless it is not shown that the said decision has been arrived at is completely arbitrary or with a view to oust the bidder or in order to favour somebody, courts should loathe to interfere with such decision. Award of contracts involves a trust factor and disclosure of incorrect facts does create trust issues. The decision of the Respondent to debar the consortium on the ground of misrepresentation of facts made by the member of the consortium at the time of bidding, therefore, does not call for any interference. The lead member M/s KAMAC has not been debarred. It has only been warned to be careful in future and this Court while considering the correctness or otherwise of the decision taken by the Respondent debarring the consortium does not intend to interfere with the decision taken by the Respondent which according to this Court cannot be said to be completely arbitrary or has been arrived at only to oust the Petitioner.

21. The second contention of the Petitioner that the Petitioner could not

have been debarred in the absence of Show-Cause Notice also cannot be accepted because Clause 4.2 of the RFP clearly states that if a bidder is found to be guilty of a fraudulent or corrupt practices then such a bidder would be barred for a period of one year from participating in any tender or Request for Proposal (RFP) issued by the Respondent/NHIDCL, and therefore, the reliance placed by the Petitioner on the judgment of Gorkha Security Services (supra) contending that in the absence of Show-Cause Notice, the Petitioner could not have been debarred does not hold any water.

22. In view of the above, the writ petition is dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

SEPTEMBER 26, 2023
S. Zakir