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

Date of Decision: 13th April, 2023

+ **W.P.(C) 15985/2022 & 13467/2023, 18050/2023**

ISAN CORPORATION

..... Petitioner

Through: Mr. Rahul Sagar Sahay, Mr. Raghav Rajmalani, Advocates. (Mob. No. 9818092206)

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Respondent

Through: Mr. Santosh Kumar and Mr. Daksh Arora, Advocates.

Ms. Pooja Singh, Advocate for R-2. (M:9212527630)

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WITH

+ **W.P.(C) 15986/2022 & 13273/2023, 17991/2023**

ISAN CORPORATION INDIA PVT LTD

..... Petitioner

Through: Mr. Rahul Sagar Sahay, Mr. Raghav Rajmalani, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA
& ANR.

..... Respondents

Through: Mr. Santosh Kumar and Mr. Daksh Arora, Advocates.

Ms. Pooja Singh, Advocate for R-2.

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AND

+ **W.P.(C) 14882/2022 & CM APPL. 45746/2022, 4295/2023**

SPECIALISED ENGINEERING SERVICES PVT
LTD

..... Petitioner

Through: Ms. Pooja Singh, Advocate

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA
AND ANR

..... Respondent

Through: Mr. Santosh Kumar and Mr. Daksh Arora, Advocates.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The NHAI floated a tender as a part of the *Bharat Mala Project* under the *Bharat Mala Scheme* for engaging entities to provide consultancy services, for the preparation of the 'Detailed Project Report' (DPR).
3. The Petitioners- Isan Corporation India Pvt. Ltd. ('*Isan India*') and Specialized Engineering Services Pvt. Ltd., ('*Specialised*') which had formed a consortium, had submitted their bid and were declared successful bidders. Pursuant to this, a 'Consultant's Contract Agreement' (*hereinafter 'the agreement'*) dated 11th May, 2017 was entered into between the Petitioner-consortium and NHAI. The said agreement described the project as under:

“CONSULTANCY SERVICES FOR PROJECT PREPARATION OF FEASIBILITY STUDY/DETAILED PROJECT REPORT OF SELECTED PORT CONNECTIVITY ROAD STRETCHES/CORRIDORS FOR UP GRADATION TO TWO/FOUR LANE NH CONFIGURATION UNDER BHARAT MALA SCHEME. (I) UPGRADING OF EXISTING DEDICATED PORT CONNECTIVITY FROM KRISHNAPATNAM PORT NH-5 IN SPSR NELLORE DISTRICT THE STATE OF ANDHRA PRADESH (II) DEVELOPMENT OF 5KM LONG GREEN FIELD ROAD CONNECTING SOUTH AND NORTH INDUSTRIAL CLUSTER OF KHANDALERU CREEK NEAR KRISHNAPATNAM PORT (III) UPGRADING OF EXISTING R&B ROAD FROM NEAR KRISHNAPATNAM PORT IN SPSR DISTRICT NELLORE (TOTAL LENGTH - 55 KMS) IN THE STATES OF ANDHRA PRADESH UNDER -

CONTRACT PACKAGE NO.NHAI/PC/1 ”

4. In terms of the contract, various deadlines were fixed for submission of the report. The said deadlines are explained in the form of days from the date of the contract at page 411 of the counter affidavit of NHAI in **WP (C) 15986/2022**. The same are set out below-

Schedule for submission of Reports and Documents				
Stage No.	Activity	No. of copies	Category-I Packages	Category-II Packages
1	Monthly Reports	3	by 10 th day of every month	by 10 th day of month
2	Inception Report (i) Draft Inception Report including QAP document	3	21	21
	(ii) Inception Report including QAP document	3	30	30
3	F.S. REPORT i) Draft Feasibility Study Report including option study report	4	90	45
	ii) Comments of client	1	105	60
	iii) Final Feasibility Study Report incorporating compliance of comments of Client.	4	120	75
4	Technical Schedules for EPC/PPP projects	4	130	90
5	Detailed Project Report i) Draft DPR	4	150	90
	ii) Comments of client	4	165	105
	iii) Final DPR incorporating compliance of comments of Client	6	180	120
6	Project clearances from concerned agencies e.g. from MOEF; Rly for approval of GAD and detail engineering drawing of ROB/RUB; Irrigation Dept., Land Acquisitions -3(a), 3(A), 3(D) Notifications	Original letters from the concerned agencies and 5 photocopies of each. 3 copies each	210	150

5. The consortium had to make site visits, conduct topographic surveys and commence work for preparation of the report. The final deadline was

210 days for the submission of the DPR. The writ petitions have exhaustively set out the details of the correspondence between the consortium and the NHAI. It is not in doubt that a draft feasibility report was, for the first time, submitted in February, 2018. However, in view of the urgency involved in the matter, the NHAI appears to have requested the Petitioner-consortium for the submission of the tender documents. The Petitioner submitted the tender documents consisting of the format, template, etc. which were to be part of the DPR, on 21st December, 2017. The tender was floated on 28th December, 2017, however, the draft report was given for the first time in February, 2018. In the meantime, the DPR preparation continued parallelly and the processing of the tender which was floated also continued. Finally, the DPR was submitted only on 6th December, 2018.

6. In the meantime, since the tender had also proceeded further, the contract was awarded to a contractor. NHAI was of the opinion that various issues have been raised by the contractor which pointed to deficiencies in the tender documents submitted by the Petitioner.

7. The case of the Petitioners is that the tender documents were sought before the submission of the DPR itself and was, therefore, tentative in nature. Thus, no blame could be ascribed to the Petitioners. This position was not accepted by NHAI which issued a show cause notice on 5th February, 2021.

8. The case of NHAI in the show cause notice, was that there were various deficiencies in the tender documents which led to delays in the implementation of the project. Further, deficiencies were pointed out by the contractor in the tender documents. The Contractor and NHAI are also in

dispute which is stated to be under resolution, currently. In view of all these complications which arose, according to NHAI, due to the deficient tender documents, the show cause notice was issued.

9. In the reply to the show cause notice on 27th February, 2021, the deficiencies were answered by the Petitioners. However, after perusing the reply, the NHAI came to the conclusion that the reply was not satisfactory and, thus, the Petitioners i.e., both the consortium members, were debarred for a period of one year. The operative portion of the said debarment order dated 26th September 2022 reads as under:

“7. The above stated explanations submitted by the DPR Consultant to the Show Cause Notice have been thoroughly examined by the Competent Authority. It has been observed that the reasons given by the Consultant are unfounded, untenable and unsatisfactory as on the face of it, the assessment of work done by the DPR Consultant was absolutely wrong, which led to variation in the Cost of Project, which in turn is in clear violation of terms of the Consultancy Agreement. Further, the above stated explanations are also not supported by the material available on record and therefore the said explanations deserve to be rejected and are rejected accordingly.

8. It must be noted that such lackadaisical approach towards the obligations under the Consultancy Agreement needs to be taken seriously and must not encourage other DPR Consultants to imply that the contractual obligations can be taken for-granted by the Authority.

9. In view of the above stated facts, contractual provisions and policy circular dated 17.04.2012 on Deterrent Penalty action against defaulting consultants and on account of gravity of the defaults committed by the DPR Consultant that caused grievous harm to

NHAI's reputation along with huge financial losses, M/s ISAN Corporation India Pvt. Ltd. In association with Specialized Engineering Services (SES) Pvt. Ltd. is hereby debarred by the Competent Authority for one (1) year from engagement in National Highway projects either directly or indirectly.

10. This notice is being issued without prejudice to the Authority's other rights/ remedies available now or in future under the Agreement and the applicable laws of India. Thus, by issuance of this notice NHAI should not be deemed to have varied, waived, surrendered or abrogated any of its legal and contractual rights in any manner whatsoever.”

10. Three writ petitions namely, **W.P.(C) 14882/2022**, **W.P.(C) 15985/2022** and **W.P.(C) 15986/2022** have been filed.

- **W.P.(C) 15985/2022** is a petition filed by the principal company of Isan Corporation India Pvt. Ltd. from Korea i.e. Isan Corporation.
- **WP(C) 15986/2022** has been filed by Isan Corporation India Pvt. Ltd. and
- **WP(C) 14882/2022** has been filed by Specialised Engineering Services Pvt. Ltd.

Isan Corporation India Pvt. Ltd. and Specialised Engineering Services Private Limited are the consortium partners in the present case. All the three companies have challenged the debarment on various grounds including the fact that the debarment has been issued by an official who is not competent to do so.

11. The Court has heard the submissions of all the counsels today appearing for the Petitioners in the three petitions as also the counsel for NHAI. A perusal of the reply to the show cause notice shows that the

explanation given by the Petitioner-Isan Corporation India Pvt. Ltd. is that none of the deficiencies were made out. In fact, the Petitioners' case is that the tender itself was floated earlier in point of time and, thus, the blame could not be shifted upon the Petitioners. The argument on behalf of the NHAI is that extensions were repeatedly sought by the Petitioners and the Petitioners were guilty of deficiency of service. The explanation given by the Petitioner is relevant in this matter and is set out below:

Sl.No.	Deficiencies/Errors	Reply/Clarification
1.	Construction of Flyover 4KM 151+400 included in Schedule-B but <u>no payment given in Schedule-H.</u>	It is submitted that the Bids for the Package-I were invited within very short period of time of the preliminary submissions made by us. Accordingly, the draft Schedule-H was forwarded to the Authority on 22.12.2017 through email wherein the indicative overall weightages for road work structure work & other items were tentatively given.
2.	Construction of 5 VUPs/LVUP included in Schedule-B but the <u>weightage in percentage payment to the contract price is very low as compared to the estimated cost of these VUPs/LVUP in Schedule-H.</u>	The Schedule-H was thereafter submitted on 26.02.2018 again with the respective percentages for various sub-items of works under road work, structure work & other items however, <u>on account of inadvertent typographic error, the overall weightages for road work, structure work & other items couldn't be changed and remained as such with were submitted earlier on 22.12.2017.</u> However, <u>this discrepancy was corrected in the DPR and was communicated on 26.4.2018 to the Authority.</u>

		We wish to submit that above mentioned typographic error, which was neither noticed by any bidder nor could be pointed by the Authority, was rectified by us in due course of time however. the same couldn't be corrected in the Contract document. In this regard, it is also mentioned that the weightages of all the items of work in Schedule-H are only for assessment of the financial progress of works for the payment and not for working out the cost of work for considering the negative Change of Scope (COS) of such items. As a matter of fact the negative COS is worked out in accordance with the provisions of Clause 13.2 and is calculated on the current SOR and the actual quantities based on the design for the particular item. Hence, it is submitted that the cost of negative Change of Scope is not required to be worked out on the basis of Schedule-H and therefore, there is no consequent financial implication to NHAI on account of such negative COS.
3.	Construction of 4 Nos. of VUPs and 1 No. of LVUP@Km.2+800 6Km. 6+700@Km. 13 Km.16+200 and 6Km.10+400 respectively included in Schedule-B which were not required as per site conditions.	It is submitted that the drawings, technical schedules and bidding documents were diligently finalized in coordination with PIU/RO and discussed with NHAI HQ along with SCC presentations held on 31.01.2018. Accordingly, the proposed locations of VUP's and LVUP were technically justified in view of various meetings conducted

		with the PD Nellore and RO Vijayawada before finalization of VUP locations. The same was also justified in PATSC and SCC presentations and all needful correspondences were shared with PIU/RO offices in this regard. Hence, keeping in view, the development of the entire area & other related aspects particularly with regard to safety of road users, the location, of these VUP's and LVUP are fully justified. However, in various meetings with RO NHAI and PIU in the matter of alteration of location of these VUPs/LVUP, it was apprised that proposed location VUP's and LVUP are technically justified and based on public demand the alteration in location/removal of the same can be considered. We have amply clarified the above issue of VUPs/LVUP through our letter dated 18.01.2021 (Ref:3) and the copy thereof is enclosed for ready reference.
4.	Slip Road width is 5.5m from 150. g15 Km as per Schedule-B however in TCS IV it is given 7m.	It is submitted that the bid for the Package-I were invited within very short period and at the same time bids for other packages Package II and Package III were also submitted, and extended by one month and later it was cancelled. <u>Due to pressure of several bids at same time there was an inadvertent typographic error regarding width of slip road as 5.5 m</u>

		in Schedule B, as most of other stretches having LVUP/VUP width of slip road of 5.5 m was proposed. The proposed width of Slip Road shall be 7.0 m as given in applicable TCS IV.
5.	Provisions of minimum 5.0 median required including shyness was varied to 3.0 m median including shyness in Scheduled-D however in TCS IV it is given 5.0m.	It is submitted that the median width of 3.0 m was proposed as standard practice based on the existing site condition, where in the existing median was utilized along with 2 lane carriageway and additional lane was on either side was proposed as widening. The same has been clarified in our letter dated 18.01.2021 (Ref: 3) and the copy thereof is enclosed for ready reference. Further the deviation from manual regarding median width has already been incorporated in Schedule D and the same has been given in TCS I. It is submitted that TCS IV mentioned the letter is applicable only for NH16 and not for NH67.

12. As can be seen from the above reply there are five deficiencies which have been pointed out which are sought to be explained by the Petitioners. In most of the deficiencies, it is admitted that the errors were there. For example, qua the non-incorporation of a payment schedule, it is admitted that the same was finally given in April 2018, i.e., four months after the submission of the Package I DPR. On some of the aspects typographic errors and other errors are admitted. The question as to what was the impact of these errors would require analysis of facts and would also require technical expertise for the purpose of determining whether the stand of the Petitioners or that of the NHAI is correct or not.

13. The overall chronology of events definitely point out that there was considerable delay in submission of the DPR and also the DPR was deficient in nature. The case of the Petitioners therein is that the Petitioners are not blameworthy for the delay. In terms of the policy matter and the guidelines for imposing debarment, the relevant clause of NHAI's policy reads as under:

“2. Deficiency of Services

2.1 Consultants in Highways sector are being engaged generally for following services;

- (i) Preparation of pre-feasibility and feasibility reports*
- (ii) Preparation of detailed project report*
- (iii) Supervision of projects and*
- (iv) Proof consultancy*

2.2 It has been observed that major omissions by the consultants lead to substantial time and cost overrun in the projects. Besides, in some cases contractual complications leading to arbitration/court cases, failures of structures etc causing serious accidents etc occur. To ensure a fair degree of accuracy on the part of the consultants in carrying out the tasks assigned to them, it is necessary to take deterrent penalty actions against the erring consultants. In case of minor deficiencies on consultant's part a warning may be issued. In the case of significant deficiencies in services causing adverse effects on the Project or on reputation of the Authority, other penal actions including debarment for a specified period shall be initiated as per this policy. The deterrent penalty action can be taken in any of the following ways:

- (i) Issue warning to the consultants as decided by Employer/client.*
- (ii) Suspend their short-listing with NHAI and debar them from award of future works in NHAI for a period of less than 12 months in case of minor deficiency in services.*

(iii) Debarring the consultants for a period of 1 to 5 years for major negligence/deficiency in services.

2.3 Financial Penalty

In addition to any penalty action (i) or (ii) or (iii) under Para 2.2 above, financial penalty of appropriate percentage of contract value can further be imposed. For avoidance of doubt it is clarified that this financial penalty shall form part of penalty action which is in addition to all other actions such as recoveries, appropriation of Performance Security, liquidated damages etc as per the agreement.

2.4 Wide publicity will be given to the deterrent action taken against the erring consultants for major negligence/deficiency (category (iii) above) through circulation to Ministry of Road Transport and Highways, all State Governments/Government departments dealing with National Highways and centrally sponsored schemes and publication of notices in newspapers and IRC journals. Publicity shall also be given to all concerned on actions taken under category (i) & (ii) above as may be decided in the circumstances of the case.”

14. As can be seen from the above policy, in case of deficiency of service, there are three levels of penalty that can be imposed. The *first* is a warning. The *second* is a suspension or shortlisting and debarment for less than twelve months and the *third* is for debarment for one to five years. The deficiencies which have been pointed out by the Respondent and the explanation given, in the opinion of this court, are not issues which can be gone into in writ jurisdiction. Only a preliminary assessment can be made by the Court. Broadly, the NHAI has given a show cause notice. Reply has been sought and thereafter the impugned order has been passed. There is no arbitrariness or perversity in this process of debarment.

15. Thus, insofar as Isan Corporation India Pvt. Ltd and the consortium

partner are concerned, the matter would have to be relegated to the dispute resolution clause in terms of the contract between the parties.

16. Insofar as Isan Corporation, Korea is concerned, though, the Indian subsidiary has relied upon the Korean company's experience and *vice versa*, from the materials available, the Korean Company appears to have not been directly involved in the implementation of the DPR. Insofar as the Korean company is concerned, the practical work on ground during the implementation of the DPR project was being undertaken by Isan India and its consortium partner. The Korean company has already suffered a seven month debarment and there was no interim order which was granted in this matter.

17. Debarment is like blacklisting which results in civil death as has been held by the Supreme Court in ***Gorkha Security Services v. Government of (NCT of Delhi) & Ors.*** [2014 9 SCC 105].

18. In '***Kulja Industries Limited v. Chief Gen. Manager W.T. Proj. BSNL & Ors.***' [AIR2014SC9], the Supreme Court has also held that the debarment/blacklisting has to be proportional.

“17. That apart the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because 'blacklisting' simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any

constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ Court. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with **Erusian Equipment and Chemicals Ltd. v. State of West Bengal and Anr.** MANU/SC/0061/1974 : (1975) 1 SCC 70 where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the Authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed:

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

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24. Suffice it to say that 'debarment' is recognised and often used as an effective method for disciplining

deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the Regulations under which such contracts were allotted. What is notable is that the 'debarment' is never permanent and the period of debarment would never invariably depend upon the nature of the offence committed by the erring contractor."

19. Considering the overall facts and circumstances of this case, it is directed that insofar as Isan Korea is concerned, the debarment shall be restricted to the period which has already elapsed. Going forward, there shall be no impediment in Isan Korea bidding in future contracts of the NHAI or any tenders of the Ministry of Road Transport and Highways (MoRTH).

20. Insofar as Isan India and the consortium member Specialised, are concerned, there is no cause for interference. The entire period of blacklisting shall be served by the Petitioners. The technical issues which have been raised in terms of the deficiencies, etc., being factual in nature, this court has not rendered any final opinion in respect of the same. The parties are relegated to the disputes resolution clause. The said proceedings shall be adjudicated without being affected by any observations of this Court in the present order.

21. The present writ petitions, along with all pending applications, are disposed of in these terms.

PRATHIBA M. SINGH
JUDGE

APRIL 13, 2023

dj/rp