43. Accordingly, the present writ petition is **allowed as above**. No order as to costs.

(2024) 10 ILRA 178
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.10.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Writ C No. 8606 of 2024

M/s Theme Engg. Services Pvt. Ltd. ...Petitioner
Versus
National Highway Authority of India & Anr. ...Respondents

Counsel for the Petitioner:
Geetika Yadav, Anshuman Singh, Ashok Kumar Singh, Nishcay Anand

Counsel for the Respondents:
Samidha, Sarvesh Kumar Dubey

(A) Contract Law - Debarment in tender process - Request for Proposal (RFP) - Clauses 10.4, 10.5 - Blacklisting and debarment - Tender evaluation - Proportionality of penalty - Debarment is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission - It is for the State or the appropriate authority to pass an order of blacklisting/debarment in the facts and circumstances of the case - Debarment is never permanent and the period of Debarment would invariably depend upon the nature of the offence committed by the contractor. (Para -38,39)

Petitioner challenged the debarment order – Allegations - incorrect financial proposal - citing calculation errors by the Tender Evaluation Committee - bid was as submitted and denied calculation errors - Petitioner requested upward correction of its bid after being declared H1, which was denied, citing RFP rules.(Para - 2 to 30)

HELD: - Respondents' actions were within the scope of RFP clauses, and the petitioner was found non-compliant. Six-month debarment was deemed reasonable. (Para - 40,44 ,45)

Petition dismissed. (E-7)

List of Cases cited:

1. Oryx fisheries Pvt. Ltd. Vs U.O.I., 2010 (13) SCC 427

2. Siemens Ltd Vs St. of Maha., 2006 (12) SCC 33

3. M/S BCITS Pvt. Ltd Vs P.V.V.N.L.Ltd, Writ-C No.15363 of 2022

4. Ramlala Vs St. of U.P, Writ-C No.31059 of 2023

5. M/S Pooja Jaiswal Vs F.C.I., Writ-C No. 1349 of 2023

6. VetIndia Pharmaceuticals Ltd. Vs St. of U.P., 2021 (1) SCC 804

7. S.E.C. Ltd Vs S Kumar`s Associates AKM (JV), 2021 (9) SCC 166.

8. UMC Technologies Pvt. Ltd Vs F.C.I. & ors., 2021 (2) SCC 551

9. Gorkha Security Services Vs Govt. of NCT of Delhi, 2014 (9) SCC 731

10. St. of Punj. Vs Davinder Pal Singh Bhullar, 2011 (14) SCC 770

11. St. of Odisha & ors. Vs Panda Infraproject Ltd., 2022 (4) SCC 393

12. Erusian Equipment & Chemicals Ltd Vs St. of W.B. & anr., 1975 (1) SCC 70

13. Grosons Pharmaceuticals Pvt Ltd Vs St. of U.P., 2001 (8) SCC 604

14. Kulja Industries Ltd. Vs C.G.M., Western Telecom Project, BSNL & ors., 2014 (14) SCC 731

15. BTL EPC Ltd. Vs Macawber Beekay Pvt Ltd & ors. , 2023 SCC OnLine SC 1223

16. Tata Motors Ltd. Vs Brihan Mumbai Electric Supply & Transport (BEST) & ors., 2023 SCC OnLine Supreme Court 671

17. Michigan Rubber (India) Ltd. Vs St. of Karn., 2012 (8) SCC 216

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.
&
Hon'ble Brij Raj Singh, J.)

1. We have heard Sri Prashant Chandra, learned Senior Advocate assisted by Sri Anshuman Singh and Ms. Geetika Yadav, Advocates, for the petitioners and Sri Sanjay Bhasin, learned Senior Advocate, assisted by Sri Sarvesh Kumar Dubey, learned counsel for the respondents.

2. This Writ Petition, namely, Writ-C No. 8606 of 2024 has been filed by the petitioner arraying the National Highways Authority of India through its Chairman as the respondent No.1, and the Regional Officer, National Highways Authority of India, as the respondent no.2. The petitioner has challenged its debarment order dated 26.09.2024 and prayed for a mandamus to be issued to the respondents not to treat the petitioner as debarred from participating in future tenders and to allow it to participate in forthcoming tenders ignoring the impugned order dated 26.09.2024.

3. The brief facts of the case as disclosed in the writ petition and as argued by learned counsel for the petitioners are:-

A Notice Inviting e-Tender for commissioning of an Independent Engineering Service to supervise the operation and maintenance of 100.840 kms of six lanning of NH-24 from Hapur Bypass to Moradabad Section was uploaded on the website of N.H.A.I. on 23.12.2023. The Notice Inviting Tender is hereinafter referred to as "Request For Proposal (RFP)". The last date for receiving queries was 07.01.2024. A pre-Bid meeting at a specified venue was to be held on 27.01.2024. The N.H.A.I. was to respond to the queries latest by 30.01.2024. The Technical bid and the Financial bids had to be uploaded with effect from 0000 hrs 06.02.2024 up to 1100 hrs. The opening of the Technical Bids was to be done on 07.02.2024 at 11 AM, and 5 bidders having highest number of technical points were to be shortlisted for opening of Financial bids. It is the case of the petitioner that it downloaded the RFP and participated in the pre bid meeting and submitted its Technical and Financial bid before 06.02.2024 in the format downloaded from the web portal, omitting to notice that a corrigendum was issued on 05.02.2024. It has been alleged that the firms which had been provided with the RFP were required to only fill up specific columns containing per item rate in Appendix-C to Section 5 of the RFP. The final calculation was to be done by the Tender Evaluation Committee on the basis of information submitted by the bidder. The Tender Evaluation Committee instead of adding Rs.1.39 crores mentioned by the petitioner in its financial bid against the column of Supporting Staff, added only Rs.7.80 lakhs which was with regard to salary of an Office boy. In view of this error of calculation committed by the Tender Evaluation Committee, instead of a total of Rs.6.08 crores, the financial bid was calculated at Rs.4.76 crores. As a

significant part of expenditure on supporting staff had been omitted to be taken into consideration, the bid of Rs.4.76 crores was found to be the lowest and without further reference to the petitioner, the said financial proposal was forwarded to the Competent Authority for approval for award of tender. With the approval of the Competent Authority, a Letter of Acceptance was issued on 09.05.2024 by the respondent no.2. By the said letter the petitioner was required to confirm the availability of all key personnel and to accept, sign and return the duplicate Letter of Acceptance in acknowledgment thereof within seven days of issuance of such letter. It was also requested to furnish an unconditional Bank Guarantee from a nationalized bank for an amount equivalent to 3% of the total contract value, being Rs.14,30,099/- within 15 days from the date of issuance of the Letter of Acceptance.

4. It has been argued by Sri Prashant Chandra that in view of the timelines indicated in the Letter of Acceptance, it is clear that submission of Bank guarantee was to follow a formal acknowledgment by signing of the Letter of Acceptance. This Letter of Acceptance further stipulated that upon submission of required performance guarantee and finalization of interview of key personnel by an expert committee, a contract agreement would be required to be signed. In case the Letter of Acceptance was not signed and returned within seven days, none of the conditions following the acceptance of the LoA would be required to be complied with by the bidder. It has been argued that a perusal of the RFP would also clarify that it is only after acceptance of LoA as provided in Clause 7, that the subsequent Clauses 8, 9 and 10 would come into play, which provide the procedure after acceptance of LoA and after submission of bank guarantee and execution of agreement. The RFP is not an agreement between the parties; nor it is an offer to the bidders, and as such contractual relationship will not come into existence between the respondent and the bidder. Only after the acceptance of the LoA and the execution of agreement and completion of other formalities such as submission of bank guarantee and interview of key personnel could it be said that there was a contract.

5. It has further been argued that the petitioner upon receipt of the LoA on 09.05.2024, responded by its letter dated 17.05.2024, indicating that the rates submitted by the petitioner as per the format given in the downloaded file would work out to Rs.6.08 crores and not Rs.4.76 crores which had been mentioned in the LoA. Request was made to revise the Letter of Acceptance and incorporate the corrections in the calculations. The respondent issued a Show Cause Notice on 03.06.2024, even without the LoA having been accepted and any contract having been signed between the parties. In such Show Cause Notice, it was alleged that the petitioner had not returned the LoA as acknowledgment of the award of work within seven days and had also failed to furnish performance guarantee. Reference was made to paragraph 3.1 of Section 2 of the RFP and it was emphasized that the proposal had to be submitted in two parts using the format enclosed with the tender. The petitioners Financial proposal had to be submitted strictly in accordance with the format attached in Section 5, and no additional items/quantities should be proposed by the consultant and in case they are, the same shall not be considered for evaluation/award. The Show Cause Notice

dated 03.06.2024, further stated, that the petitioners financial proposal was duly considered and it was found that the petitioner had offered to work as independent engineering consultant for a sum of Rs.4.76 crores and upwards revision of financial proposal after determination of H1 cannot be made. In case the financial proposal of the petitioner is allowed to be treated as Rs.6.08 crores then the petitioner would not be adjudged as H1. The Notice directed the petitioner to provide performance security in terms of Clause 10.4 of the RFP and acknowledge the LoA, failing which action was proposed to be taken under Clause 10.5 and other relevant provisions of the RFP. Also, the N.H.A.I. had reserved its right to claim damages and realise any dues/losses and take such other remedies as were available under the applicable laws, against the petitioner's consultancy service.

6. It has been argued by the learned Senior Counsel for the petitioner that a perusal of the Show Cause Notice dated 03.06.2024 would show that the Authority had already taken a decision that the petitioners financial proposal was for a sum of Rs.4.76 crores and the petitioner could not be permitted to alter the same. It was also clear that the Authority considered the petitioner to have breached the conditions of the agreement which infact had not been entered into at all and had not been executed between the parties till the date of filing of the petition. The action proposed to be taken was under Clause 10.5 of the RFP regarding deeming of the withdrawal of the LoA by mutual consent and for debarring of the petitioner for a period of up to 2 years was unwarranted.

7. It has further been argued that in response to the Show Cause Notice, the petitioner replied on 08.06.2024, that there was a calculation error and an incorrect amount of Rs.4.76 crores had been taken as financial proposal of the petitioner instead of Rs.6.08 crores. As such, the LoA needed revision. It was also pointed out that corrigenda dated 05.02.2024 was not noticed by the petitioner and it had uploaded the financial proposal on 06.02.2024 in accordance with the format annexed to Section 5 of the RFP. A request was made to withdraw the Show Cause Notice, dated 03.06.2024. However, the N.H.A.I. refused to respond for nearly three weeks and a second Show Cause Notice dated 28.06.2024 was issued. It was reiterated that the financial proposal of the petitioner had been found to be of Rs.4.76 crores, and it had been accepted as H1 only on the basis of such proposal. The petitioner was informed that it was required by the LoA to sign and return the LoA in duplicate within seven days and to submit an unconditional Bank guarantee within 15 days of its issuance. Since the petitioner did not sign and return the LoA dated 09.05.2024 within seven days and failed to furnish performance guarantee within 15 days, action under Clause 10.5 of the RFP and other relevant provisions of the RFP were proposed to be taken against the petitioner including Debarment from future projects of the N.H.A.I., for a period of up to 2 years. The financial proposal had been read by the Tender Evaluation Committee and approved by the Competent Authority and it could not be altered as the petitioner would not then be adjudged as H1 bidder.

8. It has been argued that a perusal of the Show Cause Notice dated 28.06.2024 indicates that a firm decision had already been taken by the Authority. However, the petitioner was called upon to appear on 10.07.2024 before the respondent no.2 for

personal hearing. On 10.07.2024, the representatives of the petitioner, during the course of personal hearing demonstrated that a mistake had been committed by the Tender Evaluation Committee in calculating the rates given by the petitioner in its financial proposal, and the petitioner was only requesting for correction of the error in calculation which had occurred on the part of the Authority, and was not requesting for a revision of rates. The petitioner was told that in case a revision is undertaken, the entire tender will have to be reconsidered. It might mean that the petitioner will not be adjudged the successful bidder and the decision may have to be altered. The petitioner agreed that recalculation for the purpose of correcting the error may be done and in the process if the tender is to be re-evaluated, the petitioner gave his consent. The said consent was given in writing the very next day on 11.07.2024. After submission of consent for re-evaluating of the tender, another letter was sent by the petitioner on 13.07.2024, in which it detailed as to how the Tender Evaluation Committee had erred in calculating the financial proposal and it was again requested that in case any further clarification is required, the petitioner was ready to appear in person and explain. The petitioner pointed out that the bidder is required to submit its rates in Appendix C-3 and thereupon Appendix C-2, summary of costs is calculated automatically by the portal and thereafter evaluated by the Tender Evaluation Committee. The error in calculation was on the part of the Tender Evaluation Committee. However, a third Show Cause Notice was issued to the petitioner on 26.07.2024 rejecting the request of the petitioner to correct the financial proposal from Rs.4.76 crores to Rs.6.08 crores. It was reiterated that the Authority had not committed any error in its calculation, which was in accordance with the format which was uploaded in corrigendum.

9. It has been argued that it is apparent even from the earlier Show Cause Notices dated 03.06.2024 and 28.06.2024, that a firm decision had already been taken and the Show Cause Notice dated 26.07.2024, reiterated such decision. Moreover, a fresh ground was taken that all other bidders had submitted their financial proposal in the excel sheet provided through corrigendum uploaded on 05.02.2024 on the portal and that the petitioner had chosen to offer the financial proposal amounting to Rs.4.76 crores only to win the contract as H1 Bidder. The request of the petitioner by its letter dated 13.07.2024 for a personal hearing to explain the error in calculation was also granted and it was called for personal hearing on 31.07.2024. The notice dated 26.07.2024 did not indicate that the petitioner could be debarred or blacklisted. The Show Cause Notice dated 26.07.2024, only stated that action was proposed "without prejudice to the Authority to claim damages and/or realise any dues, losses or damages, or to exercise any other remedy from successful bidders, jointly and severally, which are available under RFP and the applicable laws."

10. It has further been argued by the counsel for the petitioner that during the course of personal hearing on 31.07.2024, it was impressed upon the petitioner's representative that since the rates of the petitioner were calculated by the Tender Evaluation Committee and Rs.4.76 crores had been submitted before the Competent Authority and had also been approved, the officers involved in miscalculation would be embarrassed. The petitioner's representatives were requested to agree to

execute the work at the price calculated by the Tender Evaluation Committee. In view of the long-standing relationship of the petitioner with the respondents, the petitioner even at the cost of suffering losses in order to retain goodwill it had earned over the years, agreed to execute the works at a loss, and within a week thereafter submitted a performance guarantee of Rs.14.30 lakhs and accepted the LoA on 05.08.2024. The petitioner requested for fixing a date for signing of the agreement which request has not been considered and instead a debarment order has been issued after about two months of the issuance of the third Show Cause Notice dated 26.07.2024, and despite the petitioner having submitted the performance guarantee on 05.08.2024. The impugned order dated 26.09.2024 has been issued debarring the petitioner for a period of six months. It has been argued that before doing so, the petitioner was not put to notice and no opportunity of hearing was afforded. It has been argued that reliance was placed on earlier Show Cause Notices which had passed into oblivion and which had recorded that the petitioner had failed to submit the performance security in the form of bank guarantee, but thereafter the performance guarantee was submitted on 05.08.2024, and was accepted and retained by the respondents.

11. It has been argued that the order dated 26.09.2024 is unsustainable as it in the teeth of provisions of Clauses 10.4 and 10.5 of the RFP, which provisions can be invoked in case of breach of an agreement and such agreement did not exist as there was no concluded contract between the respondents and the petitioner. The impugned order dated 26.09.2024 has its genesis in the breach of terms of the RFP, which is merely an invitation to apply/bid for tender and not a work order, and in any case as per Clause 1.3 of the RFP, it is not an agreement nor an offer by the authority to the prospective applicants or to any other person. The learned counsel for the petitioner has read out Clause 1.3 of the RFP, which provides as under: –

Clause 1.3:-"The purpose of the RFP is to provide interested parties with information that may be useful to them in the formation of their proposal pursuant to the RFP. The RFP includes statements and assumptions which reflect various assessments arrived at by the Authority in relation to the consultancy. Such assessments and statements do not purport to contain all the information that each applicant may require. The information contained in this RFP may not be complete, accurate, adequate or correct. Each applicant should therefore conduct its own investigation about the assignment and the local conditions before submitting the proposal by paying a visit to the client and the project site, sending written queries to the client, before the date and time specified in the date sheet."

12. It has also been argued that the Show Cause Notices dated 03.06.2024 and 28.06.2024 are premeditated in as much as a decision had already been taken and recorded in the said Show Cause Notices that the petitioner was at fault by not accepting the LoA and submitting a performance guarantee within time prescribed. The issue regarding there being a calculation error in the bid amount has been cursorily rejected without examining it as requested by the petitioner. The counsel for the petitioner has placed reliance *upon Oryx fisheries Private Limited versus Union of India, 2010 (13) SCC 427; Siemens Ltd versus State of*

Maharashtra, 2006 (12) SCC 33; and judgement rendered by this Court in Writ-C No.15363 of 2022: M/S BCITS Private Ltd versus Purvanchal Vidyut Vitaran Nigam Ltd; and in Writ-C No.31059 of 2023: Ramlala versus State of U.P.; to argue that a Show Cause Notice recording a definite conclusion of guilt is premeditated and vitiated on account of unfairness and bias.

13. It has also been argued that the third Show Cause Notice issued on 26.07.2024 overrides the earlier Show Cause Notices dated 03.06.2024, and 28.06.2024, and a fresh ground has been taken in it that the petitioner had not submitted the bid in the prescribed format, which had led to the calculation error. This finding regarding petitioner being at fault has been recorded without giving any reasons and without putting the petitioner to notice.

14. Also, it has been argued that the impugned order dated 26.09.2024 has been issued following the Show Cause Notice dated 26.07.2024, which did not propose that the petitioner would be debarred or blacklisted. It has also been argued that since the order of debarment dated 26.09.2024 has been passed on grounds in excess of the Show Cause Notice, it is unsustainable.

15. It has also been argued that the impugned order of debarment is in blatant violation of the principles of natural justice in as much as no opportunity of hearing was ever provided to the petitioner before the Competent Authority, i.e. the Chairman who is the authority to approve an order of Debarment. The Respondent no.2 alone gave an opportunity of personal hearing. Had the petitioner been given opportunity to place its case before the Competent Authority, it may have been able to convince it that the calculation error was on the part of the Tender Evaluation Committee and the petitioner was not asking for a revision of rates, but was only praying that the calculation error be corrected.

16. It has been argued by the learned counsel for the petitioner that even otherwise the impugned order dated 26.09.2024, debarring the petitioner for a period of six months is highly disproportionate to the alleged breach of the RFP guidelines. Any decision to blacklist/ debar, a person should be strictly within the parameters of law and has to comply with the principles of proportionality. The petitioner has been subjected to a disproportionate penalty.

It has also been argued that there is an apparent malice in law in the debarring the petitioner as the Respondents even during the pendency of the writ petition have finalized other Tenders in which the petitioner had participated and in which it was found technically qualified and was seemingly also the lowest bidder. The petitioner has been declared as non-responsive in such Tenders during the pendency of the petition.

17. The learned Senior Counsel for the petitioner has placed reliance upon a judgement rendered by this Court in Writ-C No. 1349 of 2023*: M/S Pooja Jaiswal versus Food Corporation of India,* decided on 20.02.2023, to argue that the order of blacklisting is disproportionate and in violation of the principles of rationality as well as natural justice.

18. The learned Senior Counsel for the petitioner has also placed reliance upon a

judgement rendered by the Supreme Court in the case of *Blue Dreamz Advertising Private Limited versus Kolkata Municipal Corporation* reported in 2024 SCC OnLine Supreme Court 1896; to argue that blacklisting of a firm without reasons specified amounts to civil death; debarment is a drastic measure and should not be invoked for ordinary breaches of contract and that too without proper intimation. The counsel for the petitioner has also placed reliance upon *VetIndia Pharmaceuticals Limited versus State of U.P.*, 2021 (1) SCC 804; and *South Eastern Coalfields Ltd versus S Kumar's Associates AKM (JV),* reported in 2021 (9) SCC 166.

19. It has also been argued that the Show Cause Notice must specify the intention to blacklist and reliance has been placed upon judgement rendered in *UMC Technologies Private Ltd versus Food Corporation of India and others*, 2021 (2) SCC 551; and Gorkha Security Services Vs. Government of NCT of Delhi, 2014 (9) SCC 731.

20. The learned counsel for the Respondent, on the other hand, has argued that after the Letter of Acceptance was issued on 09.05.2024, requesting the petitioner to sign and return its duplicate within seven days and to furnish unconditional bank guarantee of Rs.14.30 lakhs towards performance security within 15 days, the petitioner however wrote to the authority on 17.05.2024 that it had quoted Rs.6.08 crores and not Rs.4.76 crores and requested to revise the Letter of Acceptance accordingly. The respondent no.2 rejected such request by its letter dated 03.06.2024 and intimated that financial proposal was submitted in electronic form as per Clause 3.1 of Section 2 of the RFP and it had been duly considered, and it was found that the petitioner had categorically quoted a sum of Rs.4.76 crores as per Appendix C1 under Section 5 of the RFP. Therefore, revision of financial proposal was not possible and a request was made to acknowledge the LoA and submit performance security in terms of clause 10.4 of the RFP failing which action may be initiated as per clause 10.5 of the RFP and other relevant provisions of the RFP. In response to the said letter, the petitioner wrote again on 08.06.2024, repeating the same request for modification of LoA. The respondent no.2 issued another Show Cause Notice on 28.06.2024 as it was entitled to proceed with the actions as envisaged in the RFP. However, before taking any action in order to comply with the principles of natural justice, the authority issued Show Cause Notice requiring it to Show Cause as to why action of debarment of the petitioner (both firms), from participation in future Tenders for a period of upto 2 years should not be taken. The petitioner was given opportunity to submit its written explanation within 15 days of receipt of Show Cause Notice. The petitioner desired for an opportunity of personal hearing and the same was also given on 10.07.2024, and in case the petitioner failed to reply to the Show Cause Notice within the said period of 15 days it would be presumed that it had nothing to say in the matter, and the N.H.A.I. would be entitled to move ahead in terms of clause 10.5 of the RFP for debarment of the petitioner (both firms), namely Theme Engineering Services Private Ltd and M/s Ishita Infosolutions Private Ltd, for future projects for a period of up to two years.

21. It has been argued on behalf of the respondents that after personal hearing was given to the petitioner on 10.07.2024, the petitioner again wrote on 11.07.2024 and

13.07.2024, repeating the same request for upward revision of the LoA, and it also sought another personal hearing to explain the matter. The Respondent No.2 issued issued another Show Cause Notice on 26.07.2024, indicating that the submissions made by the petitioner in its letters dated 11.07.2024, and 13.07.2024 were mere repetition of its previous submissions, which had already been replied to after due examination. However, the petitioner was asked to appear for personal hearing again on 31.07.2024. It has been argued that since the Letter of Acceptance was issued on 09.05.2024, the last date for submission of performance security was 24.05.2024. As per Clause 10.4 of the RFP, there was a provision for extension of the period for another 15 days i.e. upto 08.06.2024, for submission of performance security. Also, damages to be levied on the petitioner for delay in submission of performance security were calculated at Rs.7,15,050/-. The petitioner did not respond for almost two months. After two months of expiry of the permissible period, the petitioner wrote a letter on 05.08.2024, submitting performance security in the form of Bank guarantee amounting to Rs.14,30,099/- only and returned the signed LoA in duplicate and took the plea that due to some unavoidable circumstances, there was a delay in submission of Bank guarantee for performance security and requested that the delay be condoned.

22. It has been argued that since the Letter of Acceptance was issued on 09.05.2024, the petitioner had to submit performance guarantee latest by 24.05.2024, which could have been further extended up to 08.06.2024 on request and on willingness to pay damages, however, the petitioner submitted the performance security on 05.08.2024 with the delay of 58 days and without any prior permission for extension of time as per Clause 10.4 of the RFP. As per Clauses 10.4 and 10.5 of the RFP, if the bidder fails to submit performance security within extended period of submission, the agreement shall be deemed to be terminated on expiry of the additional 15 days time period and the Authority may take action to debar such firm for future projects for a period of one to two years. In case of the petitioner, a lenient view has been taken and the petitioner has been debarred only for a period of six months. The petitioner had been given Show Cause Notices on 03.06.2024, 28.06.2024 and again on 26.07.2024. Personal hearing was also given to the petitioner on 10.07.2024 and again on 31.07.2024.

23. The Debarment order has thereafter been passed only on 26.09.2024 taking into account clauses 10.4 and 10.5 of the RFP. It is settled law that till such time that the contract/agreement is signed between the parties, the RFP would hold the field and as such in the absence of Contract, once the entire procedure of allotting the Tender was done in pursuance of the RFP, the proposed action of Debarment has also been passed in terms of the relevant clauses of the RFP. It has also been argued that the petitioner had chosen to quote only Rs.4.76 crores in its financial proposal to win the bid. After it was declared H1 bidder and Letter of Acceptance was issued on 09.05.2024, the petitioner chose to escalate the financial proposal and prayed for a revision which was impermissible. Moreover, based on the technical proposal and financial proposal of five shortlisted firms, the petitioners rate being the lowest he was declared H1 bidder if upward revision was allowed as

requested by the petitioner it would no longer be adjudged the H1 bidder.

24. It has further been argued that the petitioner's claim that the component of supporting staff was not added by the Tender Evaluation Committee is wrong. The petitioner itself had submitted Appendix C1 showing Rs.4.76 crores. There is no provision to edit or change the financial proposal once submitted. The letter dated 03.06.2024, informed the petitioner that correction is not permissible. The bidder is required to submit the proposal in two parts using the formats enclosed with the RFP. The financial proposal had to be submitted only in electronic format, no additional items/quantities other than those specified in the format could be proposed by the consultants, and in case they were so proposed they would not be considered for evaluation/award. Since the petitioner had offered Rs.4.76 crores its bid had been evaluated for award as per Clauses 5.8 and 5.9 of Section 2 of the RFP. It was adjudged H1 bidder based on such financial proposal. It has also been argued that a successful bidder is required to submit performance security in terms of Clauses 10.1 and 10.4 of the RFP after acknowledging the LoA however, the petitioner repeatedly requested upward revision of its financial proposal and did not seek any extension of time in terms of Clause 10.4 of the RFP for submission of performance security.

25. In response to the argument made by the learned counsel for the respondent that the petitioner has not challenged the Show Cause Notices dated 03.06.2024, 28.06.2024, and 26.07.2024, the counsel for the petitioner has argued that the petitioner is not aggrieved by the Show Cause Notices, the petitioner is aggrieved only by the debarment order dated 26.09.2024. The Show Cause Notices have merged in the debarment order. The debarment order is based on the Show Cause Notices, which are themselves defective, and it has also been argued on the basis of judgement rendered in the case of State of *Punjab versus Davinder Pal Singh Bhullar*, 2011 (14) SCC 770, that if the Show Cause Notice is defective then all subsequent proceedings would fail relying upon the Latin maxim *"sublato fundamento cadit opus".*

26. Having heard the learned counsel for the parties at length, we had initially passed an order on 30.09.2024, which is being quoted here in below: –

1. Heard Sri Prashant Chandra, learned Senior Advocate assisted by Sri Anshuman Singh, learned counsel for the petitioner and Sri Sarvesh Kumar Dubey, learned counsel appearing for the respondent.

2. This writ petition has been filed with the following main prayers:

"(a) issue a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the impugned order dated 26.09.2024 passed by the Respondents contained in Annexure No. 1 to this writ petition.

(b) issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding the Respondents not to give effect to the order dated 26.09.2024 passed by the Respondents contained in Annexure No.1 to this writ petition and not to treat the petitioner as debarred from participating in future tenders and to allow the petitioner to participate in all forthcoming tenders

ignoring the impugned order dated 26.09.2024."

3. It has been submitted by learned counsel for the petitioner that the petitioner is aggrieved by its blacklisting because when there was a disagreement with regard to the price quoted by the petitioner in its financial bid and the respondents were insisting that the petitioner had quoted only Rupees 4.76 Crores whereas the petitioner was insisting that there is a calculation error and Rupees 6.08 Crores were quoted by it. The petitioner had agreed to work on lessor price on Rupees 4.76 Crores only to continue to do the work of NHAI amicably for other contracts as well. However, the petitioner submitted a performance guarantee they did not correspond for a period of two months and later on issued a debarment order straightway to the petitioner without issuing the show cause notice and also rejected the proposal of the petitioner to carry out the work contract even for a lessor price of Rupees 4.76 Crores.

4. Learned counsel for the petitioner has also pointed out that the bank guarantee is still with the NHAI, which has not been returned, which was submitted after the petitioner agreed to work on a lessor price.

5. Learned counsel for the petitioner has also placed reliance upon an order passed by this Court in Writ-C No. 1349 of 2023, 'M/S Pooja Jaiswal A Proprietorship Form Lko. Vs. Food Corporation of India, New Delhi' and paragraph 26 onwards where this Court had dealt with the doctrine of proportionality.

6. Sri Sarvesh Kumar Dubey, learned counsel for the respondent on the basis of pleadings on record says that at page 85 which is an order dated 03.06.2024 and at page 89 which is an order dated 08.06.2024 which have not been challenged by the petitioner.

7. Learned counsel for the petitioner says that both such letters are only show cause notices. The petitioner was given a personal hearing and the petitioner has availed the opportunity on 10.07.2024 and 31.07.2024 and it was orally agreed upon by the parties including the petitioner that he will take into account the calculation even if made wrongly by the respondents and is ready to work for that particular tender for Rupees 4.76 Crores as calculated by the respondents.

8. Learned counsel for the respondents shall seek specific instructions from the respondents with regard to petitioner's contention that he is willing to work even at a lessor price of Rupees 4.76 Crores in case he is allowed to continue to work as contractor and not debarred as it would effect it financially in other contracts as well.

9. Put up this case tomorrow i.e. on 01.10.2024, as fresh.

27. When the matter was taken up on 01.10.2024, the learned counsel for the respondents appeared and informed this court that the respondents have declined to allow the petitioner to work, emphasising that the petitioner had committed default by not submitting the performance guarantee in time. The counsel for the Respondent also took time to file a counter affidavit within 24 hours and the learned counsel for petitioner also prayed for time for filing rejoinder affidavit to the same and the matter was posted on 03.10.2024 by the Court (as 02.10.2024 was a National holiday for Gandhi Jayanti). In the meantime, two tenders of the respondents were opened and the petitioner was

declared as non-responsive in view of the debarment order dated 26.10.2024.

28. It has been argued by the Senior Counsel appearing for the petitioner that the respondent no.2 was interested in ousting the petitioner for the purpose of awarding pending tenders to parties of their choice. It has further been argued by the learned counsel for the petitioner that against the statements made by the Respondent no.2 in the Show Cause Notice dated 26.07.2024, the counter affidavit falsely claimed that the petitioner had filed a financial proposal on the basis of corrigendum issued by the respondents on 05.02.2024. Also, the learned counsel for the Respondent had pointed out that no prayer was made in the writ petition to allow the petitioner to work on the reduced price for which bank guarantee had already been given, ignoring the pleadings on record in Para 31 & 32 of the writ petition.

29. On conclusion of arguments we had reserved the judgement on 03.10.2024, and granted an interim stay of operation of the debarment order dated 26.09.2024 till delivery of judgement. On careful perusal of the record, we have found several discrepancies in the case set up by the learned counsel for the petitioner. M/s Theme Engineering services Private Ltd had applied for the tender in association with M/s Ishita Info Solutions Services Private Ltd. The writ petition has been filed on behalf of the two firms by their authorised representative, Mr Sumeet Asthana. The entire pleadings on record and the arguments made by the learned Senior Counsel appearing on behalf of the petitioner is with respect to filling up of the Financial Proposal on the electronic format as per clause 3.1 given in Appendix C-2 and C -3 of Section 2 of the RFP on the basis of which the Tender Evaluation Committee had to calculate the actual costs of supervision and monitoring by the consultant and determine the final financial proposal of a Bidder on its own in Appendix C-1 of such format.

30. However, while going through the contents of the initial Show Cause Notice dated 03.06.2024, we have found in paragraph 8 thereof a reference having been made to a copy of the financial proposal made by the petitioner, Appendix C-1 being enclosed to such notice. This enclosure to the Show Cause Notice date 03.06.2024 has not been filed along with the writ petition. It was produced before this Court by the learned counsel for the respondent Sri Sarvesh Kumar Dubey during the course of argument which was taken on record. The counsel for the petitioner had emphatically argued on the basis of page 74 to 78 of the paper book that the financial proposal submission form had blank spaces marked in grey which alone had to be filled up by a bidder. On careful examination, we have found appendix C-1 to have been filled up by the petitioner mentioning only Rs.4.76 crores both in words and in figures. This factual aspect has been repeatedly mentioned in subsequent Show Cause Notices issued to the petitioner on 28.06.2024 and 26.07.2024.

31. Moreover, in the first such notice issued on 03.06.2024, the petitioner was asked to provide performance security in terms of clause 10.4 of the RFP and acknowledge the LoA, failing which action would be taken as per provisions of clause 10.5 of the RFP and other relevant provisions of the RFP. This was without prejudice to the authorities right to claim damages and/or to realise any dues, losses

and damages, and to exercise any other remedy from the bidder jointly and severally, which may be available under the applicable laws. We have gone through Clause 10.4 and 10.5 of the RFP and we find that under Clause 10.4, the bidder has to provide performance security within 15 days of issuance of the LoA and the bidder may seek extension of time for a period of 15 days on payment of damages for such extended period in a sum calculated at the rate of 0.1% of the contract price for each day until the performance security is provided. It has also been stated clearly that the agreement shall be deemed to be terminated on expiry of additional 15 days time period.

32. The petitioner did not ask for any extension of time in any of the letters written by it to the Authority. The damages that have been calculated for the delay in submitting of performance security are of more than Rs.7 lakhs and the petitioner while submitting the performance security eventually on 05.08.2024 by way of bank guarantee, only submitted Rs.14.30 lakhs. In the show cause notice dated 03.06.2024, mention was made of taking action as per provisions of Clause 10.5 of the RFP and other relevant provisions in case of failure to submit performance security in terms of Clause 10.4 of the RFP and acknowledgment of the LoA. Clause 10.5 is being quoted here in below: –

*"Notwithstanding anything to the contrary contained in **this agreement**, the parties agree that in the event of failure of the consultant to provide the performance security in accordance with the provisions of clause 10.1 within the time specified there in or such extended period, as may be provided by the Authority, in accordance with the provisions of clause and thereupon all rights, privileges, claims, and entitlement of the Consultant under or arising out of **this Agreement**, shall be deemed to have been waived by, and to have ceased with the concurrence of the Consultant, and the LoA shall be deemed to have been withdrawn by mutual agreement of the parties. Authority may take action debarring such firm for future projects for a period of 1 to 2 years."*

The initial Show Cause Notice dated 03.06.2024 mentioned the likelihood of the Authority taking action against the consultant in case of failure to comply with the various clauses of the RFP Under clauses 10.4 and 10.5.

33. We have also gone through the notice dated 28.06.2024 which also mentioned in detail the reply submitted on 17.05.2024 by the petitioner and it reiterated that neither the bidder had acknowledged the LoA nor had submitted any performance security. It had also not sought any extension of time in terms of clause 10.4 of the RFP. Therefore, the bidder was liable for action under Clause 10.5 of the RFP. Clause 10.5 of the RFP was quoted in paragraph 14 of the Show Cause Notice and reference was made of clause 10.5 and the likelihood of Debarment from participation in future tenders for a period of two years in paragraph 16 and 17 and 18 of this Show Cause Notice. Reference was also made of the deeming provision in clause 10.5 regarding withdrawal of the Letter of Acceptance by the Authority. The words 'debarment' and that of the Letter of Acceptance being deemed to have been withdrawn have been clearly mentioned in the notice dated 28.06.2024.

34. The petitioner asked for personal hearing, which was given on 10.07.2024

and on the petitioner giving consent for revaluation of tender of all five shortlisted bidders, it was informed by Show Cause Notice dated 26.07.2024, that in the personal hearing that was given the petitioners representative was shown Appendix C-1, the financial proposal submitted by the petitioner company, and such fact was also admitted by the petitioner's representative. The financial proposal as per appendix C-1 submitted by the petitioner was admitted by the petitioner's representative as being only Rs.4.76crores.

Paragraph 4 onwards of the notice dated 26.07.2024 are relevant and are being quoted hereinbelow: –

4. Your representative was shown Appendix C-1 Financial Proposal submitted by your company, which was admitted by your representative. The Financial Proposal as per Appendix C-1 by your company was admitted by your representative as Rs.4,76,69,970.00 (Rs. Four Crore Seventy Six Lakh Sixty Nine Thousand Nine Hundred Seventy only)

5. Reference is made to para 1.8 of your letter dated 13.07.2024 wherein, you have submitted that "….The fact remains that the error is not on the part of the selected Bidder Consultant but in the format of financial proposal which was downloaded by us from the E-tender portal. Authority never countered that the error was not there in its format as uploaded on E-tender Web Portal".

(i) The submission made by you under para 1.8 of your letter is completely false and denied and it is reiterated that no error has been committed by Authority in its format. The Financial proposal sheet was duly uploaded on tender portal vide corrigendum dated 05.02.2024. In your letter dated 08.07.2024 para 1.2, it has been stated that "In this file from the E-tender portal format, one component amount is not added in the total sum, and the calculation works to Rs.4,76,69,970/- only which should be Rs.6,08,70,030/-. However, NHAI had issued a corrigendum subsequently thereby revising the file which was not in our notice". It may please be noted that corrigendum was issued before the last date of submission of bid.

(ii) It is admittedly accepted by you that the corrigendum was not noticed by you. The bidder is required to submit his bid duly considering all corrigendum issued before bid due date and any prudent bidder cannot take any excuse of not noticing the corrigendum.

iii) This office vide letter dated 03.06.2024 and para-08 stated that, "your financial proposal as submitted in Electronic form for requirement of Clause 3.1 of Section 2 of RFP has been duly considered as per Clause 3.6 of Section 2 of RFP. Accordingly, you financial proposal as per Appendix-C-1 Financial Proposal Submission from you have categorically offered you financial proposal for the sum of Rs.4,76,69,970/-. The copy of your financial proposal Appendix-C-1 is enclosed for your reference".

iv) It is further to intimate that this office vide Corrigendum dated 05.02.2024 has uploaded excel sheet for financial offer on the E-Tender portal and accordingly remaining all other five bidders have submitted financial proposal in the excel sheet provided through corrigendum.

Thus it is clear that Authority had uploaded excel sheet for submitting Financial Proposal through Corrigendum dated 05.02.2024 and same has been used in submitting Financial Proposal with all

other 5 bidders. You have chosen to offer your Financial Proposal amounting to Rs.4,76,69,970.00 to win the bid as successful bidder.

6. Refer para 2 of your letter dated 13.07.2024, you have submitted that "It is further to submit that our representative; Mr. Malchand Choudhary from the Business Development Wing had attended your office on 10.07.2024 to explain and clarify that the said error was not on our part and shown the Electronic File which was having an error due to which Bid Price comes out to be Rs. 4,76,69,970/- as adopted by instead of Rs.6,08,70,030/- as was worked with our quoted Rates and accordingly we have issued a letter dated 11.07.2024 as desired by your good office".

The submission made by you regarding issuance of letter dated 11.07.2024 as desired by this office is denied. Your representative attended this office on 10.07.2024 in reference of personal hearing called by this office against show cause notice issued vide letter dated 28.06.2024 and nothing has been desired by this office to be submitted by the bidder. On asking by your representative that our management would like to further add, it was advised to your representative that if your company wants to add in defense of your submission the company may submit and we shall duly examine it. We have considered your submission dated 13.07.2024 for personal hearing inline of the advise and same has been duly reviewed, examined and clarified herein above paras.

7. You have requested for personal hearing to explain the matter in person. In this reference, as desired by you the opportunity for personal hearing is hereby granted inspite of already done personal hearing on dated 10.07.2024 and it is requested to appear on 31.07.2024 in the office of undersigned.

8. Your other submissions are repetition of the previous submissions and same has already been replied after due examination vide this office letters referred herein above and same are not being repeated for the sake of brevity. This letter be read as in continuation of Show Cause Notice dated 28.06.2024 without prejudice to Authority's right to claim damages and/ or realize any dues, losses, damages and or to exercise any other remedy from successful bidder(s) jointly and severally, which are available under the RFP or the applicable laws."

35. As is evident from the perusal of the contents of the Show Cause Notices, one of which has been quoted hereinabove the respondents have provided enough opportunity of hearing to the petitioner at every stage. Merely because the Show Cause Notice was issued after referring to the contents of the financial proposal and Appendix C-1 of the Format submitted by the petitioner itself and also referring to the provisions of Clause 10.4 and 10.5 of the RFP, by itself cannot be said that the order of blacklisting was predetermined. The correspondence undertaken by the respondent with the petitioner can only be said to be a proposed decision to initiate proceedings for blacklisting. The notices specifically mentioned that action can be taken for blacklisting. It is evident that before any Show Cause Notice is issued for any action, when a tentative decision is taken, it cannot be said that subsequent decision followed by a Show Cause Notice, and even by giving personal hearing, can be said to be predetermined. Before initiation of any proceeding for blacklisting, there can be a tentative decision on the basis of material available,

forming a tentative/prima facie opinion that action in such terms is required. Before the blacklisting order was actually issued three Show Cause Notices were issued to the petitioner. Twice personal hearing was also given to the petitioner. Reference was also made specifically to Clause 10.4 and 10.5 of the RFP. The respondents considered every reply submitted by the petitioner and also referred to the proceedings relating to personal hearing of the petitioners' representative in its correspondence with the petitioner. It cannot be said therefore that such correspondence undertaken by the Respondents was with a predetermined mind; reference can be made in this respect to the observations made by the Hon'ble Supreme Court, in paragraph 17 onwards of its judgement in State of Odisha and others versus Panda Infraproject limited, 2022 (4) SCC 393. In Erusian Equipment and Chemicals Ltd versus State of West Bengal and another, 1975 (1) SCC 70, the Supreme Court had observed that-

".....where the State is dealing with individuals in transactions of sales and purchase of goods (services also), the two important factors are that an individual is entitled to trade with the government and an individual is entitled to fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations, but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the government for the purpose 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…"

36. The judgement in Erusian Equipment (supra) has been reiterated in Gorkha Securities (supra), the Supreme Court had observed that "the fundamental purpose behind the serving of a show cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations, detailing out alleged breaches and default he has committed, so that he gets an opportunity to rebut the same. Another requirement is the nature of action which is proposed to be taken for such a breach."

37. In *Grosons Pharmaceuticals Pvt Ltd versus State of U.P.* 2001 (8) SCC 604; the Supreme Court had observed that it was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted. The Court had observed that the contractor was given an opportunity to show cause and its reply was also considered, therefore, the procedure adopted by the Government while blacklisting the contractor was in conformity with the principles of natural justice.

38. As per law lay down by the Supreme Court in its various judgements, debarment is recognised and often used as

an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission. It is for the State or the appropriate authority to pass an order of blacklisting/debarment in the facts and circumstances of the case.

39. In *Kulja Industries Limited versus Chief General Manager, Western Telecom Project, Bharat Sanchar Nigam Ltd and others*, 2014 (14) SCC 731; the Supreme Court observed that Debarment is never permanent and the period of Debarment would invariably depend upon the nature of the offence committed by the contractor. In the said decision the court had emphasised on prescribing guidelines for determining the period for which blacklisting should be effective. It had observed that while determining the period for which the blacklisting should be effective, for the sake of objectivity and transparency, it is required to formulate broad guidelines to be followed. It had further observed that different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines.

40. In the instant case, we find that although the Authority has been given power to debar a consultant for period extending up to two years, debarment in the case of the petitioner has been made only for a period of six months. This period we find reasonable as once the Letter of Acceptance issued to the petitioner is deemed to be withdrawn, fresh tenders would have to be issued. It is apparent from the conduct of the petitioner that he has not been honest and upfront with the Authority and also it has not been honest with this Court as the case set up by it was with regard to incorrect calculation being made by the Tender Evaluation Committee in Appendix C-1. However, we have found on basis of pleadings on record and Annexures to the petition that the petitioner had itself filled up appendix C-1 and the Tender Evaluation Committee was not at fault in mentioning Rs.4.76 crores as the financial proposal of the petitioner. Such financial proposal was given by the petitioner only for the purpose of winning the contract as a Consultant for supervision and monitoring in terms of the Notice Inviting Tender. It gave such a low and attractive bid which the Competent Authority could not refuse, thus ousting other shortlisted bidders. Now the Authority will have to carry out the entire process of issuance of Tender and finalization of bidders afresh, which would lead to time over run and cost over run also.

41. The Supreme Court in the case of *BTL EPC Limited versus Macawber Beekay Pvt Ltd and others* reported in 2023 SCC OnLine SC 1223, has observed that in contracts involving complex technical issues, the Court should exercise restraint in exercising the power of judicial review. Even if a party to the contract is 'State' within the meaning of Article 12 of the Constitution, and as such is amenable to jurisdiction of the High Court or the Supreme Court, the Courts should not readily interfere in commercial or contractual matters. The Supreme Court relied upon observations made by it in Tata Motors Limited versus Brihan Mumbai Electric Supply & Transport (BEST) and others, 2023 SCC OnLine Supreme Court 671, where the Supreme Court had observed in paragraph 48 as follows:-

"48. This Court being the guardian of Fundamental Rights is duty bound to interfere when there is

arbitrariness, irrationality, malafides and bias. However, this Court 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 malafides 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. 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 public exchequer."

42. In *Michigan Rubber (India) Limited versus State of Karnataka*, 2012 (8) SCC 216, the Supreme Court held that a court while interfering in tender or contractual matters, in exercise of power of judicial review, should itself pose the following questions:

(i) Whether the process adopted or decision made by the authority is Mala fide or intended to favour someone;

or

whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible Authority, acting reasonably, and in accordance with relevant law could have reached?; And

(ii) whether the public interest is affected?.

43. We find that neither of the aforesaid two questions as we pose them to ourselves can be answered in favour of the petitioner.

44. Consequently, the writ petition stands ***dismissed.***

45. Interim order, if any, shall stands discharged.

(2024) 10 ILRA 195
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.10.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 10523 of 2024

Mohd. Muslim & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

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