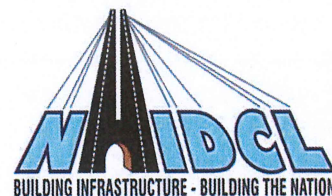


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**National Highways & Infrastructure Development Corp.Ltd.**  
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**WITHOUT PREJUDICE**

RO/PMU-JRT/R&amp;M/J-D/Tender/2022/1/11465

Date: 23.01.2023

To,

**M/s Shiva Harlalka**1<sup>st</sup> Floor, Parmeshwari Building,

Chatribari Road, Guwahati,

Assam-781001

e-Mail: shiva.harlalka@gmail.com

(Kind Attention: Mr. Shiva Harlalka, Proprietor)

**Sub.:** Repair & Maintenance under M&R in FY:22-23 in the section of Jhanji to Demow of NH-37 from Km 491.050 to Km 535.250 (Design Km 490.800 to Km 534.800) in the State of Assam: **ORDER of DEBARMENT for a period of THREE MONTHS** from participating in the future projects of NHIDCL - Reg.

Sir,

Whereas, on account of the inevitable termination of the EPC Contractor (engaged for the 4-laning work in the section of Jhanji-Demow of NH-37) and requirement of maintenance on emergent basis, bids for the Maintenance & Repair of the subject cited stretch were invited (as per the Policy of NHIDCL dated 18.09.2020) by the Regional Office, Guwahati (hereinafter referred to as "Authority") on 13.04.2022 with Bid Due Date 23.04.2022 at an estimated cost of Rs. 15.50 Cr. The bids were opened on 25.04.2022 and 7 bidders had participated. Considering the emergency of the work, the Tender Evaluation Committee in the Regional Office, Guwahati had expeditiously evaluated the bids and in its meeting on 28.04.2022 had recommended that out of the 7 bids, 4 bids were found to be "Technically Non-Responsive" and 3 Bidders were found to be "Technically Responsive". The financial proposals were opened on 30.04.2022 and "M/s Shiva Harlalka" was found to be the L-1 Bidder (hereinafter referred to as "Contractor") at a quoted price of Rs. 12.39 Cr (20.01% below the Cost put to Tender). The "LoA" was issued on 02.05.2022 and the "Notice to Proceed with Work" was issued on 06.05.2022. The duration to complete the work was 90 Days, i.e upto 05.08.2022. The work has been physically completed on 20.09.2022.

2. Whereas, a complaint was lodged by Mr. Devendra Kumar (hereinafter referred to as "Complainant") on 22.07.2022, to the Chief Vigilance Officer, NHIDCL alleging that the Contractor has hid the value of "B, i.e. Existing Commitments of Work" while uploading its documents in CPPP. The complaint was later on also forwarded by the Vigilance Division to this office for investigation on 05.09.2022. Noteworthy to mention that the Contractor had intimated the value of "B" as "NIL" in the bidding documents it had uploaded during the bidding of the M&R work. As the complaint dated 22.07.2022 was also copied to this office, vide letter dated 27.07.2022, this office sought clarification from "M/s Shiva Harlalka". The chronology of the correspondences in this regard are as below:



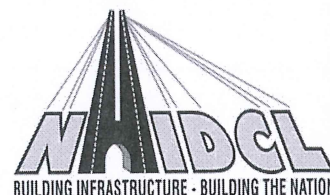
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Sl.No.	Date	Remarks
(i)	22.07.2022	Complaint of Mr. Devendra Kumar to CVO under intimation to this office (subsequently forwarded to this office for investigation, by CVO, NHIDCL on 05.09.2022).
(ii)	27.07.2022	This office's letter to "M/s Shiva Harlalka" seeking clarifications
(iii)	30.08.2022	1 <sup>st</sup> Reminder to "M/s Shiva Harlalka" for furnishing clarifications
(iv)	27.09.2022	2 <sup>nd</sup> Reminder to "M/s Shiva Harlalka" for furnishing clarifications
(v)	29.10.2022	3 <sup>rd</sup> & Final Reminder to "M/s Shiva Harlalka" for furnishing clarifications stating that non submission of details will be considered as Non-Compliance of the instructions of the Vigilance Division and the same will be reported.
(vi)	31.10.2022	Reply of "M/s Shiva Harlalka".

3. Whereas, the Contractor vide its letter dated 31.10.2022 conveyed the following:

*"Inviting your attention towards your letters dated 27.09.2022, 30.08.2022 & 27.07.2022 I have the honour to intimate you that with regard to the work: Repair & Maintenance under M&R in FY:22-23 in the section of Jhanji to Demow of NH-37 from Km 491.050 to Km 535.250 (Design Km 490.800 to Km 534.800) in the State of Assam, bearing Tender ID: 2022\_NHIDC\_683935 invited through the Central Public Procurement Portal (CPPP), all requisite documents as per the requirement of the RFP were uploaded based on which my firm was declared as the "SELECTED BIDDER". The documents furnished during the process of bidding are actual and correct. Further, furnishing additional details at later stage is not mentioned in the RFP Document and I am not bound to provide the same. The complete set of correct documents is already available in the CPPP.*

*In this regard, I have come to know that the person Mr. Devendra Kumar has also filed RTI pertaining to my works and seeking information related to me. That Sir, information sought by him are in nature if commercial confidence, trade secrets and disclosure would harm my competitive position and the information sought for is in personal nature which would cause unwarranted invasion of my business policy and privacy of the individual unless it is in larger public interest. Such complaints were also made to the PWD, Assam State Government and I have requested the State Govt. of Assam, to not provide any informant related to my firm ex parte. I have life threat from Mr. Devendra Kumar.*

*In the instant case, I request your kind office to not pay any attention to the complaints made by Mr. Devendra Kumar and not provide any information related to me to Mr. Devendra Kumar."*

4. Whereas, the submissions of the Complainant made in its complaint dated 22.07.2022 were attempted to be examined by this office. As no work was ever executed by the Contractor earlier in NHIDCL, the office could not solely examine the submissions made in the compliant. However, the EPC Work of Jhanji-Demow Section of NH-37 was awarded to "Kamac-Shiva JV" on 25.07.2022 by HQ, NHIDCL where M/s Shiva Harlalka is the "Other Member" of the JV. The work had been awarded by HQ, NHIDCL after the award of M&R work.



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5. Whereas, upon further investigation, it has been noted that in the Bid of the EPC Work, invited by HQ, NHIDCL, the documents submitted by the Contractor, for demonstrating the value of Existing commitments (i.e. "B") did not match with the documents submitted by the Contractor for demonstrating the value of "B" during the bidding process of the subject captioned work.

6. Whereas, this office vide its letter dated 02.01.2023 had asked the Contractor to clarify the reason for submitting un-identical documents during the bidding of the Subject Work (M&R Work) & the EPC Work and the misrepresentation of facts thereof. Further, the Contractor was also required to intimate the value of "B" for the M&R Work.

7. Whereas, in reply to the said letter dated 02.01.2023, the Contractor vide its letter dated 13.01.2023 has submitted the following:

*"In reply to your letter dated 02.01.2023, I, the Undersigned, hereby enclosing my CA Audited Statement (dated 13.07.2022) indicating "Balance Value of Work" i.e. the value of existing commitment. It is to bring into your notice that there are 11 work-projects indicated in this list with balance amount of work as Rs. 95.98 Cr, which includes the M&R Work of Jhanji-Demow, amounting to Rs. 12.40 Cr. The balance amount of work, in my hand, without the M&R Work is Rs. 83.58 Cr. This audited statement has already been uploaded at the time of Financial Opening of the EPC Work of Jhanji-Demow Section of NH-37.*

*The maximum value of Civil Engineering Work executed by the Undersigned in each year of the last 5 years is Rs. 99.92 Cr (2020-21 level). The Bid Capacity of the Undersigned for the M&R Work works out to be  $\{(2 \times 1.1 \times 99.92 \times 0.5) - 83.58\} =$  Rs. 26.332 Cr (evaluated as per Pg 11&12 of the RFP), along with the value of Rs. 83.58 Cr as "B". It is pertinent to mention here that the threshold requirement of Bid Capacity is Rs. 15.50 Cr. Therefore, it is very much clear that the Undersigned is eligible as well as capable for the concerned M&R Work.*

*For the ready reference of Your Goodself, the Undersigned is hereby reproducing a relevant portion from a judgement of Hon'ble Supreme Court i.e., EMAMI POWER LIMITED Versus NTPC LIMITED & ANR (W.P.(C) 7493/2016 & CM No. 30823/2016) which supports the request and clarifications of the Undersigned:*

*43. A plain reading of the definition of fraud under the "Fraud Prevention Policy" indicates that for any action to be characterized as „fraud“, it is necessary that it fulfills the following conditions:*

*(a) The action ought to be a willful act intentionally committed;*

*(b) That the act must have been committed by deception, suppression, cheating or any other fraudulent or illegal means;*

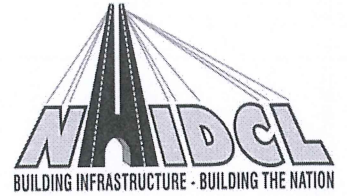
*(c) The act must have caused wrongful gains to self or any other individual and wrongful loss to others;*

*I, the Undersigned, humbly submit that the M&R Work was the first tender experience in*



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*NHIDCL of the Undersigned and, in good faith however, in hurry the Undersigned indicated the value of "B" as NIL, purely as a MISTAKE. From the kind perusal by Your Goodself of para 2 above, it may be verified that with correct details and the formula given in Pg 11&12 of the RFP for Bid Capacity. Therefore, the Undersigned is still eligible for the M&R Work and has mistakenly submitted the value of "B" as NIL. The Undersigned urges Your Goodself with utmost humility to consider the case in the light of the above given submission. The Undersigned assures best services and cooperation at all times."*

8. Whereas, with the letter dated 13.01.2023 of the Contractor, the following are established:

(i) The Contractor has MISREPRESENTED the value of "B: Existing Commitments of Work" during the process of bidding of the subject cited work.

(ii) The Contractor has submitted the CA audited statement dated 13.07.2022, indicating "Balance Value of Work" i.e. the value of existing commitment which was also uploaded by the Contractor during the bidding process of the EPC Work, indicating 11 project works including the M&R Work. The Bid Capacity has been calculated to be Rs.26.332 Cr, which is more than the threshold requirement of Bid Capacity is Rs. 15.50 Cr, thereby making it eligible for the M&R Work with the updated details also. The evaluation has been carried out by the Contractor as per the stipulations of the RFP and the same has been found to be in order.

(iii) The Contractor has submitted that the subject cited M&R Work was its first Tender Experience in NHIDCL and in good faith however, in hurry the value of "B" was indicated as "NIL", purely as a mistake.

(iv) On account of misrepresentation of fact, the Contractor has quoted a judgement of the Hon'ble Supreme Court (in WP(C) 7493/2016 & CM No.30823/2016-Emami Power Limited v/s NTPC & Others) wherein the term "fraud" has been defined & requested to consider its submission with utmost humility, based on the grounds that the Contractor has not committed any "fraud" but has committed a "mistake". The term "fraud" has been defined as the following, in the said judgment of the Hon'ble Supreme Court:

*"(a) the action ought to be willful act intentionally committed.*

*(b) the act must have been committed by deception, suppression, cheating or any other fraudulent or illegal means.*

*(c) the act must have caused wrongful gains to self or any other individual and wrongful loss to others."*

(v) The Contractor has been given substantial opportunity to submit its deliberation, already.

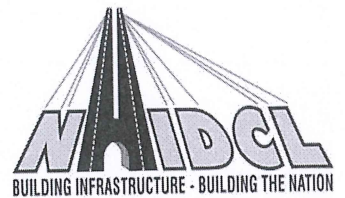
9. Whereas, Section II, Instructions to Bidders (ITB) A. General, Section 4.7 stipulates the following:

*"4.7 Even though the bidders meet the above qualifying criteria, they are subject to be*



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*disqualified if they have:*

- i. *Made misleading or false representations in the forms, statements, affidavits and attachments submitted in proof of the qualification requirements; and/or*
- ii. *Record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial failures etc. or debarring from MoRT&H/NHA/NHIDCL/State PWD work etc.*
- iii. *Tampered the bid document in any manner."*

10. Whereas, Section II, Instructions to Bidders (ITB) F. Award of Contract, Section 36 stipulates the following:

### **"36 Corrupt or Fraudulent Practices**

*The Employer will reject a proposal for award if it determines that the Bidder recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question and will declare the firm ineligible, either indefinitely or for a stated period of time, to be awarded a contract with NHIDCL and any other agencies, if it at any time determines that the firm has engaged in corrupt or fraudulent practices in competing for the contractor, or in execution.*

*The Employer requires the bidders/Contractors to strictly observe the laws against fraud and corruption enforced in India, namely, Prevention of Corruption Act, 1988."*

11. Whereas, Section 53 of Conditions of Contract-"Termination" stipulates the following:

*"The Employer may terminate the Contract if the Contractor causes a fundamental breach of the Contract.*

*Fundamental breach of Contract include, but shall not be limited to the following:*

*(g) if the Contractor, in the judgment of the Employer, has engaged in the corrupt or fraudulent practice in competing for or in executing the Contract.*

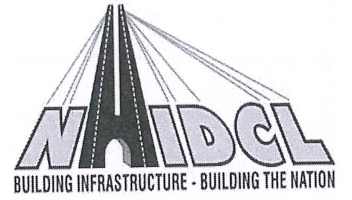
*"Fraudulent Practice" means a misrepresentation of facts in order to influence a procurement process or the execution of the Contract..."*

12. A harmonious appreciation of the above indicate that the Contractor has accepted the misrepresentation of facts, made at the time of the bidding of the subject captioned work, which has also been intimated to be purely unintentional. Further, on account of the misrepresentation, no benefit has been extended to the Contractor, as the Contractor was still Technically Eligible for the subject cited work, as per the stipulations of the RFP. Thus, it may not be tenable to consider its act of misrepresentation as "FRAUDULENT PRACTICE/FRAUD", in light of the judgement passed by the Hon'ble Supreme Court vide EMAMI POWER LIMITED Versus NTPC LIMITED & ANR (W.P.(C)



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7493/2016 & CM No. 30823/2016). However, the act of misrepresentation by the Contractor at the time of the bidding of the subject cited work, does attract action in light of the various stipulations of the RFP, when read in true letter and spirit.

13. The Ministry of Road Transport & Highways, vide its recent Order Nos.: NH-35014/35/2022-H dated 05.01.2023 & NH-35014/35/2022-H dated 05.01.2023, while taking action on the erring firms involved in "Corrupt Practices", has debarred them "for a period of 03 Months, from the date of issue of the order of debarment", in light of the provisions *inter alia* the guidance available in the Rule 151 of GFR 2017 and the Debarment Guidelines of the Ministry of Finance, dated 02.11.2021.

14. In view of the above facts and circumstances, "M/s Shiva Harlalka" is hereby debarred for a period of 03 (Three) Months, from the date of issue of this order of debarment, from participating in the future projects of NHIDCL in accordance with the relevant provisions of the RFP and GFR 2017.

14.1 M/s Shiva Harlalka is also being WARNED herewith, to be cautious while participating in future bids/tenders.

15. This order of debarment is hereby issued without prejudice to the rights of the NHIDCL available under the relevant provisions of the RFP/Contract Agreement as well as applicable laws.

16. This issues with the approval of the Competent Authority.

Yours Faithfully,

(Binayak Kumar)

Dy. General Manager (P)

**Copy for kind information to:**

1. PS to MD, NHIDCL.
2. PS to Director (T).
3. CVO, HQ, NHIDCL.
4. All ED(T)s of NHIDCL: with a request for kind circulation in the respective Technical Division.
5. All ED(P)s of NHIDCL: with a request for kind circulation in the respective PMUs/SOs.
6. GM(IT), HQ, NHIDCL: with a request to host the order on NHIDCL Website.
7. Control Room, HQ, NHIDCL.