

Meil - Edb Llc (Jv) vs National Highways Authority Of India on 28 January, 2019

IN THE COURT OF SH. HARGURVARINDER S. JAGGI,
ADDITIONAL DISTRICT JUDGE-02, SOUTH WEST,
DWARKA COURTS, NEW DELHI

CS DJ ADJ No. 16180/2016

MEIL - EDB LLC (JV)
REPRESENTED BY ITS LEAD PARTNER
M/s MEGHA ENGINEERING & INFRASTRUCTURES LIMITED
S-2, T.I.E., BALANAGAR
HYDERABAD

... PLAINTIFF

Vs

NATIONAL HIGHWAYS AUTHORITY OF INDIA
G-5 & 6, SECTOR-10, DWARKA
NEW DELHI-110075

... DEFENDANT

Date of institution of the suit	:	17.04.2015
Date of arguments	:	21.12.2018
Date of pronouncement	:	28.01.2019

SUIT FOR DECLARATION AND RECOVERY OF 45,06,320/-
(RUPEES FORTY FIVE LAKHS SIX THOUSAND THREE
HUNDRED AND TWENTY ONLY)

JUDGMENT

1. The plaintiff has preferred a suit for declaration, consequential relief of restraining the defendant from encashment of the bank guarantee No. 290/2011 dated 04.08.2011 (hereinafter referred to as "bank guarantee") and recovery of 45,06,320/- (Rupees Forty five lakhs six thousand three hundred twenty only) against the defendant out of which an amount of 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) is towards the above stated bank guarantee (hereinafter also referred to as "bank guarantee amount"), and 13,86,320/- (Rupees Thirteen lakhs eighty six thousand three hundred and twenty only) is the interest @12%p.a. on the bank guarantee amount.
2. The said suit had been instituted by the plaintiff in terms of the liberty granted to it by the Hon'ble Supreme Court vide judgment dated 18.03.2015 (Ex.P-10) passed in National Highways Authority of India v. MEIL-EDB LLC (JV) - SLP(Civil) No.15689/2011.
3. This suit is the second round of litigation between the parties, the first round initiated by the plaintiff herein, who preferred a writ petition before the Hon'ble High Court of Delhi titled as,

MEIL-EDB LLC (JV) v. National Highways Authority of India - W.P. (Civil) No. 1758/2011 and sought setting aside the forfeiture of bid security by encashment of the bank guarantee on account of plaintiff's bid being treated as a non-responsive bid by the defendant. Hon'ble High Court of Delhi ruled in in favour of the plaintiff in MEIL-EDB LLC (JV) v. National Highways Authority of India - W.P. (Civil) No. 1758/2011 vide order dated 05.04.2011 (Ex.P-9) and which was challenged by the defendant herein before the Hon'ble Supreme Court.

4. On perusal of the pleadings of the parties, the following facts have been traced:

- a. The plaintiff is a consortium namely, MEIL-EDB LLC (JV) of which, MEIL - Megha Engineering and Infrastructure Limited (hereinafter "MEIL") was a lead partner and the second partner being Energetychno-Dorozhnye Budivnytstvo LLC, Ukraine (hereinafter "EDB"), who jointly by the way of above mentioned consortium bid for a tender floated by the defendant.
- b. The defendant namely, National Highways Authority of India (hereinafter referred to as "NHAI") is an autonomous body set up under the National Highways Authority of India Act, 1948 passed by the Parliament. Section 16(1) of the NHAI Act, 1948, states that the function of NHAI is to develop, maintain and manage the national highways and any other highways vested in, or entrusted to it by the Government of India. NHAI is also responsible for the toll collection on several highways.
- c. As per the averments in the plaint, the defendant company floated a tender for the work of two-laning with/without paved shoulder of Krishnagiri Tindivanam Section of NH-66 from Km. 37.600 to Km. 214-110 (length 182.182 kms.) in the State of Tamil Nadu (hereinafter "Project") under NHDP Phase-III on design, build, finance, operate and transfer (DBFOT) and the project cost was 610.21 crores (Rupees Six hundred and ten crores and twenty one lakhs only).
- d. The process of selection of the bidders comprised of the following two stages:
 - i. pre-qualification of applicants - Request for Qualification (RFQ), which is the qualification stage, and ii. the applicants declared successful at the RFQ stage were then allowed to participate in the second stage for bidding, namely, the bid stage - Request for Proposal (RFP). The RFQ for the said project was invited to pre-qualify and shortlist the applicants. e. MEIL along with EDB entered into a joint bidding agreement, as per the prescribed format given in RFQ by forming a consortium i.e. plaintiff herein. The said agreement was effective from the date of its execution and to continue in full force and effect until the financial closure of the project achieved, in case the project is awarded to the consortium and as per the said agreement MEIL was the lead member/partner and financial member of the consortium. It is averred in the plaint that as per the terms of the RFQ, the EDB had executed a power of attorney in favour of the lead member - MEIL, in accordance with the format given in RFQ and the plaintiff herein (MEIL-EDB LLC (JV)) submitted its bid at the RFQ stage for the aforesaid project and the plaintiff also paid a sum of Rs.70,000/- towards cost of RFQ process. f. The defendant after considering all the documents

submitted at the stage of RFQ by the plaintiff consortium, found the same as responsive, and shortlisted the plaintiff for submission of RFP. It is also averred in the plaint that at the RFQ stage, the documents - board resolution in favour of Mr. K.V. Pradeep, as authorized signatory and its power of attorney were considered valid by the defendant till all the agreements were concluded and signed in respect of the aforesaid project. g. In accordance with the terms of RFP, the qualified bidder in the RFQ stage had to execute power of attorney in favour of the lead member of the consortium and the power of attorney in favour of the lead member's authorized signatory. In pursuance thereto, the plaintiff executed the power of attorney, as per the formats given in favour of the same person, who was designated as attorney in RFQ and enclosed the same with the RFP. The plaintiff also tendered a bank guarantee for bid security amounting to 6,24,20,000/- (Rupees Six crores twenty four lakhs and twenty thousand only) on 28.01.2011 along with RFP. h. At the time of the opening of the bids on 22.02.2011, the defendant informed the plaintiff that the RFP submitted by the plaintiff was non-responsive because the board resolution in favour of the executor of the power of attorney had not been submitted by both the consortium members. In response thereto, the plaintiff through its authorized signatory submitted an explanation that the authorization/chartered documents had already been filed along with the RFQ and it was not necessary to submit those documents again along with the RFP and without submitting those documents the two power of attorneys submitted along with RFP were valid. The plaintiff has also averred in the plaint that the defendant ought to have considered the RFP submitted by the plaintiff without resubmission of two power of attorneys, as the two power of attorneys were already submitted along with the RFQ and the same were valid until the execution of concession agreement. i. As per the plaintiff, the defendant did not consider the representation submitted by plaintiff and issued a letter dated 11.03.2011 to the plaintiff stating that the bid of the plaintiff was found to be non-responsive with regard to clause 3.2 of RFP (Vol. - I), since the board resolution in favour of the executor of power of attorney has not been submitted by both the consortium members. The letter dated 11.03.2011 further stated that the explanation of the plaintiff regarding submission of documents at RFQ stage were valid till execution of concession agreement is untenable and the plaintiff was required to submit the board resolution along with the bid.

Regardless, the defendant called upon the plaintiff to deposit an amount of 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) i.e. 5% of 6,24,20,000/- (Rupees Six crores twenty four lakhs and twenty thousand only) of the bank guarantee in accordance with clause 2.20.07 of RFP within 7 days from the date of issuance of the aforesaid letter.

j. The plaintiff, aggrieved by the said letter dated 11.03.2011 issued by the defendant for treating the defendant's bid, as a non-responsive bid filed a writ petition before the Hon'ble High Court of Delhi titled as, MEIL-EDB LLC (JV) v. National Highways Authority of India - W.P. (Civil) No. 1758/2011.

k. The Hon'ble High Court of Delhi vide its judgment dated 05.04.2011 passed in MEIL-EDB LLC (JV) v. National Highways Authority of India - W.P. (Civil) No. 1758/2011 (Ex.P-9) set aside and quashed the letter dated 11.03.2011 to the extent that it invokes the bid security amount and further observed that the bid security amount of the plaintiff cannot be encashed, regardless of the fact, the bid of the plaintiff being treated as non-responsive as the same is in the nature of penalty. The Hon'ble High Court further directed that the bank guarantee would accordingly stand discharged.

l. Aggrieved by the aforesaid judgment passed by the Hon'ble High Court of Delhi in MEIL-EDB LLC (JV) v. National Highways Authority of India - W.P. (Civil) No. 1758/2011, the defendant herein preferred a special leave petition before the Hon'ble Apex Court titled as, National Highways Authority of India v. MEIL-EDB LLC (JV) - SLP(Civil) No.15689/2011. The Hon'ble Apex Court vide judgment dated 18.03.2015 (Ex.P-10) observed that a writ court may at least as a temporary or preliminary view decide whether the damages imposed by an authority amenable to writ jurisdiction such as NHAI indubitably are punitive or not but it should abjure from going into the minute calculations and that controversy should be left to the civil court to decide as to whether the deduction/forfeiture in the present instance of 5% of the value of the bid security is punitive or otherwise and further relegated the parties to the civil court to determine whether any damages had been suffered by NHAI and if so whether the deduction of 5% was a fair pre-estimate or was punitive in nature.

m. The Hon'ble Apex Court further directed that if the suit is brought by the plaintiff herein within one month from the date of its order i.e. 18.03.2015, the trial court shall decide within 6 months whether or not to release the bank guarantee, which has been furnished by the plaintiff before the Hon'ble Apex Court. It is further submitted that during pendency of the said special leave petition, the Hon'ble Apex Court directed the plaintiff to provide the bank guarantee amounting to 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) i.e. 5% of the bid security deposit till the disposal of the matter and the said bank guarantee was extended upto 02.08.2015 as per the directions of Hon'ble Apex Court.

n. Thereafter, the plaintiff preferred the present suit against the defendant before the Hon'ble High Court of Delhi on 17.04.2015. On account of enhancement of the pecuniary jurisdiction of the subordinate courts in Delhi, the suit was transferred to the South West District, Delhi.

5. The main plank on which the plaintiff has based its suit is that the power of attorney executed by the lead member of the plaintiff i.e. MEIL appointing Sh. K.V. Pradeep was not challenged by the defendant and the power of attorneys submitted at the RFQ stage were valid during entire tendering process and till the award of contract.

6. The declaration by the defendant that the plaintiff's bid was non-responsive is illegal, arbitrary and without application of mind, as the defendant invoked the forfeiture clause 2.20.07 which empowered the defendant to forfeit 5% of the value of the bid security tendered by the plaintiff, if the bid is non-responsive. The plaintiff places reliance upon Clause 3.2 of the RFP, which provides for the circumstance in which a bid may be treated as non-responsive but the same does not mandate that a board resolution was required to accompany the bid. The bid of the plaintiff ought

not have been declared as non- responsive to invoke the forfeiture clause, merely, because of non-enclosure of board resolution, which admittedly had been submitted with the RFQ.

7. The plaintiff in its plaint has pleaded that the stage for submission of the RFP was the second stage in the tendering process, and there is an early scrutiny in pursuance of the RFQ submitted by the parties and a sum of 3,00,000/- (Rupees Three lakhs only) was paid to the defendant, to procure the documents and this amount cannot be the cost of the form but is really a pre-estimated cost of the processing the RFP.

8. The plaintiff has also pleaded in its plaint that the 5% of the bid amounting to 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) cannot be said to be charges for processing the bid. The clause permitting 5% of bid security amount to be forfeited in case of a non-responsive bid is clearly penal/punitive in nature and thus provisions of Section 74 of the Indian Contract Act, 1872 (hereinafter referred to as the "Contract Act") would apply.

9. The plaintiff has pleaded that since the defendant has deprived the plaintiff of its amount which is illegal, mala fide and intentionally kept by the defendant by way of bank guarantee in its name and thus, the defendant is liable to refund the amount of 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) along with interest @ 12% p.a. till date i.e. date of filing of the suit amounting to 13,86,320/- (Rupees Thirteen lakhs eighty six thousand three hundred and twenty only) and the total sum amounting to 45,06,320/- (Rupees Forty five lakhs six thousand three hundred twenty only) is to be recovered from the defendant by the plaintiff along with future interest and cost.

10. The defendant filed its written statement and stated that the defendant reserves the right to reject any bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the authority in respect of such bid as per clause 3.2.2.

11. As averred by the defendant in the written statement, the plaintiff submitted its RFP on 01.02.2011 and the enclosure of plaintiff's bid was opened by an Evaluation Committee comprising of senior officials of the defendant on 01.02.2011, wherein it was noticed that the bid of the plaintiff was accompanied by a power of attorney and the same was not in conformity with clause 2.1.9 and Appendix- III (Note-2) of the RFP documents in so far as the board resolution in favour of the executor of the power of attorney was not submitted by both the consortium members.

12. The defendant in its written statement urged that as per clause 2.20.7(a) of the RFP, which clearly stipulates encashment of 5% of the value of the bid security by the defendant, if the bidder submits a non- responsive bid. Therefore, the defendant vide letter dated 11.03.2011 requested the plaintiff to deposit 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) i.e. 5% of 6,24,20,000/- (Rupees Six crores twenty four lakhs and twenty thousand only) of the bank guarantee in accordance with clause 2.20.07 of RFP within 7 days from the date of issuance of the aforesaid letter. It is averred by the defendant that the plaintiff without any protest or demur submitted its bid accepting the said terms of forfeiture and it does not lie in the mouth of the plaintiff to seek declaratory relief in the nature that the forfeiture of the bid security be declared null and void inter alia other reliefs sought by the plaintiff.

13. The defendant by way of its written statement challenged the suit that the plaintiff has concealed material facts from this court and has not approached with clean hands.

14. The defendant in its written statement has averred that the relief for recovery sought by the plaintiff against the defendant for an amount of 45,06,320/- (Rupees Forty five lakhs six thousand three hundred and twenty only) of which 31,20,000/- (Rupees Thirty one lakhs twenty thousand only) is the 5% of the bid security amount and 13,86,320/- (Rupees Thirteen lakhs eighty six thousand three hundred and twenty only) is the interest calculated on 31,20,000/- (Rupees Thirty one lakhs twenty thousand only) @12 % p.a. on the date of filing of the suit is untenable and impermissible in law.

15. The plaintiff in its replication reiterated the contents of the plaint and denied the claim of defendant.

16. Based on the pleadings of the parties, the following issues were framed by the court on 23.02.2016, which reads as under:

(i) Whether the plaintiff is entitled to decree of declaration to the effect that the defendant has no right and is not entitled for the amount of bank guarantee? ...OPP

(ii) Whether the plaintiff is entitled to recovery of Rs.45,06,320? ...OPP

(iii) Whether the suit is under valued? ...OPD

(iv) Whether the present suit is maintainable in view of the preliminary objections taken by the defendant? ... OPD

(v) Relief.

1. To prove its case the plaintiff examined, Sh. T. Ashok Reddy, as PW-1, who tendered his evidence by way of an affidavit - Ex.PW1/1 and relied upon documents marked as Ex.P-1 to Ex.P-11, and the defendant examined, Sh. Inder Singh Rana, General Manager of defendant, as DW-1, who tendered his evidence by way of an affidavit

- Ex.DW1/A and relied upon documents already marked as Ex.P-1, Ex.P-6, Ex.P-7 and Ex.P-8.

2. PW1 in his cross-examination stated that the plaintiff's bid was orally declared non-responsive. PW1 admitted that the plaintiff voluntarily participated in tendering process after seeing the terms and conditions of RFQ and RFP. PW1 denied the suggestion that proper court fees had not been affixed on the plaint.

3. DW1 in his cross-examination stated that financial consultant are engaged for valuation of the bid documents by NHAI. DW1 also stated that normally, whenever any bid is found to be non-responsive, a written communication is issued to the bidder participants. DW1 admitted that

the RPF documents are standard form documents prepared by NHAI and any person who wishes to participate in tender process of NHAI cannot ask for alteration and modification in the same.

4. Ld. counsel for the parties advanced their submissions on 21.12.2018. Sh. Manjeet Godara, Advocate, Ld. counsel for the plaintiff submitted that the suit of the plaintiff must be decreed as the forfeiture of the bid security by way of an encashment of the bank guarantee sought by the defendant vide letter dated 11.03.2011 is a penalty and being punitive in nature is hit by Section 74 of the Contract Act.

5. Sh. Godara, Ld. counsel for the plaintiff further submitted that as the forfeiture of bid security is hit by Section 74 of the Contract Act, 1872, the defendant has not only failed to prove that the forfeiture amount is reasonable estimate but also any loss had been caused to the defendant on account of the bid being declared non-responsive.

6. Ld. counsel for the plaintiff submitted that the 5% of the bid security of 6,24,20,000/- (Rupees Six crores twenty four lakhs and twenty thousand only) is 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) and it is wholly incomprehensible that an amount of 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) would be the charges for processing the bids. Ld. counsel for the plaintiff further submitted that an amount of 3,00,000/- (Rupees Three lakhs only) along with 70,000/- (Rupees Seventy thousand only) towards other expenses had been taken by the defendant from the plaintiff in advance, thus forfeiture of the 5% of the bid security by encashment of the bank guarantee is illegal and cannot be categorized as a reasonable pre-estimate of damages for a non-responsive bid. Ld. counsel laid emphasis on the statement of the DW1, wherein DW1 could not tell the total expenditure incurred by NHAI in the tendering process relating to the suit. DW1 stated that there is no break-up available, whereby the amount @5% of the bid security amount is defined or calculated by NHAI. DW1 admitted that the RPF documents are standard form documents prepared by NHAI and any person who wishes to participate in the tender process of NHAI cannot ask for alteration and modification in the said documents.

7. Ld. counsel for the plaintiff drew attention of this court to the statement of DW1, wherein DW1 stated that he cannot say what was the actual loss, damages suffered by the NHAI (defendant herein) on account of the plaintiff's bid being declared unresponsive.

8. Sh. Manjeet Godara, Ld. counsel for the plaintiff placed heavy reliance on the judgments passed by the Division Bench of the Hon'ble High Court of Delhi on similar facts, in the case of M/s Madhucon Projects Ltd. v. National Highways Authority of India & Ors. - W.P.(C) No. 8418/2010 dated 10.03.2011 and M/s Gayatri- DLF Consortium & Ors. v. National Highways Authority of India & Ors. - W.P.(C) No. 6833/2010 dated 10.03.2011, wherein it was held that even if the bid was non-responsive, the 5% of the bid security could not have been forfeited by NHAI as the 5% of bid security is neither the charges for processing the bids nor a reasonable pre- estimate within the realm of Section 74 of the Contract Act, 1872.

9. Per contra, Sh. V.B. Gaur, Advocate, Ld. counsel for the defendant submitted that the forfeiture of the bid security is within the agreed terms and conditions. Ld. counsel for the defendant submitted

that forfeiture of bid security is an inbuilt clause to ensure fairness. Ld. counsel further submitted that non-responsive bids have a purpose. The conditions are mandatory to ensure that there is no collusion, conspiracy and behind the back cartelization, as the contracts awarded by the defendant are not only of huge sums of money but also of national importance.

10. Sh. Gaur, Ld. counsel for the defendant submitted that the reliance placed by the plaintiff on the Hon'ble High Court of Delhi' judgments passed in the case of M/s Madhucon Projects Ltd. (supra) and M/s Gayatri-DLF Consortium & Ors. (supra) are misplaced.

11. This court has given due consideration to the pleadings, evidence on record and the submissions advanced by the Ld. counsels for the parties, and the issue-wise findings ensue in the following paragraphs.

Whether the plaintiff is entitled to decree of declaration to the effect that the defendant has no right and is not entitled for the amount of bank guarantee?

12. The onus to prove the issue No. 1 was on the plaintiff. The plaintiff in its pleadings and submissions advanced by the Ld. counsel for the plaintiff has urged that the defendant had no right to forfeit the 5% of the bid security and encashment of the bank guarantee for an amount of 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) is hit by Section 74 of the Indian Contract Act, 1872.

13. As per the plaintiff, neither the amount of 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) is a genuine pre-estimate of compensation and damages likely to flow from the breach i.e. non- responsive bid in the present case nor the defendant incurred any charges for like amount for processing the bids and suffered any loss, damage on account of the bid being declared non-responsive.

14. For the adjudication of the present dispute between the parties and to address the issue No. 1, this court deems it appropriate to reproduce the relevant text reproduced in verbatim from the RFP - Bid Document, Vol I - Clause 2 Instruction to Bidders - A. General; B. Documents; C. Preparation and Submission of Bids; D. Bid Security; Clause 3 Evaluation of Bids - 3.1 Opening and Evaluation of Bids; 3.2 Tests of Responsiveness; 3.3. Selection of Bidder; Clause

6. Miscellaneous; Appendix - III and Appendix - IV, which reads, as under:

"2. INSTRUCTIONS TO BIDDERS A. GENERAL 2.1 General Terms of Bidding 2.1.1 No bidder shall submit more than one Bid for the Project. A bidder bidding individually or as a member of a Consortium shall not be entitled to submit another bid either individually or as a member of any Consortium, as the case may be.

2.1.2 Unless the context otherwise requires, the terms not defined in this RFP, but defined in the Request for Qualification document for the Project (the "RFQ") shall have the meaning assigned thereto in the RFQ.

2.1.3 The Feasibility Report of the Project is being provided only as a preliminary reference document by way of assistance to the Bidders who are expected to carry out their own surveys, investigations and other detailed examination of the project before submitting their Bids. Nothing contained in the Feasibility Report shall be binding on the Authority nor confer any right on the Bidders, and the Authority shall have no liability whatsoever in relation to or arising out of any or all contents of the Feasibility Report.

2.1.4 Notwithstanding anything to the contrary contained in this RFP, the detailed terms specified in the draft Concession Agreement shall have overriding effect; provided, however, that any conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the Concession Agreement.

2.1.5 The Bid should be furnished in the format at Appendix - I, clearly indicating the bid amount in both figures and words, in Indian Rupees, and signed by the Bidder's authorised signatory. In the event of any difference between figures and words, the amount indicated in words shall be taken into account.

2.1.6 The Bid shall consist of a Annuity, to be quoted by the Bidder. Annuity shall be payable by the Authority to the Concessionaire, as per the terms and conditions of this RFP and the provisions of the Concession Agreement.

2.1.7 The Bidder shall deposit a Bid Security of Rs.6.10 crore (Rupees Six Crore and Ten Lakh only) in accordance with the provisions of this RFP. The Bidder has the option to provide the Bid Security either as a Demand Draft or in the form of a Bank Guarantee, acceptable to the Authority, as per format at Appendix - II.

2.1.8 The validity period of the Bank Guarantee or Demand Draft, as the case may be, shall not be less than 180 (one hundred and eight) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder. The Bid shall be summarily rejected if it is not accompanied by the Bid Security. The Bid Security shall be refundable not later than 60 days from the Bid Due Date except in the case of the Selected Bidder whose bid security shall be retained till it has provided a performance security under the concession agreement.

2.1.9 The Bidder should submit a Power of Attorney as per the format at Appendix - III, authorising the signatory of the Bid to commit the Bidder.

2.1.10 In case the Bidder is a Consortium, the Members thereof should furnish a Power of Attorney in favour of the Lead Member in the format at Appendix - IV.

2.1.11 Any condition or qualification or any other stipulation contained in the Bid shall render the Bid liable to rejection as a non-responsive Bid.

B. DOCUMENTS

2.7 Contents of the RFP

2.7.1 This RFP comprises the Disclaimer set forth hereinabove, the contents as listed below, and will additionally include any Addenda issued in accordance with Clause 2.9.

	Invitation for Bids		
Bidders	Section 1.	Introduction	
	Section 2.	Instructions	to
	Section 3.	Evaluation of Bids	
	Section 4.	Fraud and Corrupt Practices	
	Section 5.	Pre-Bid Conference	
	Section 6.	Miscellaneous	
	Appendices		
	I.	Letter comprising the Bid.	
	II.	Bank Guarantee for Bid Security.	
	III.	Power of Attorney for signing of Bid.	
	IV.	Power of Attorney for Lead Member of Consortium.	
	V.	Guidelines of the Department of Disinvestment.	

2.7.2 The draft Concession Agreement and the Feasibility Report provided by the Authority as part of the Bid Documents shall be deemed to be part of this RFP.

2.8 Clarifications 2.8.1 Bidders requiring any clarification on the RFP may notify the Authority in writing or by fax and e-mail in accordance with Clause 1.2.10. They should send in their queries before the date mentioned in the Schedule of Bidding Process specified in Clause 1.3. The Authority shall endeavour to respond to the queries within the period specified therein, but no later than 15 (fifteen) days prior to the Bid Due Date. The responses will be sent by fax or e-mail. The Authority will forward all the queries and its responses thereto, to all Bidders without identifying the source of queries.

C. PREPARATION AND SUBMISSION OF BIDS

2.10 Format and Signing of Bid

2.10.1. The Bidder shall provide all the information sought under this RFP. The Authority will evaluate only those Bids that are received in the required formats and complete in all respects.

2.10.2. The Bid and its copy shall be typed or written in indelible ink and signed by the authorized signatory of the Bidder who shall also initial each page, in blue ink. In case of printed and published documents, only the cover shall be initialed. All the alterations, omissions, additions or any other amendments made to the Bid shall be initially by the person(s) signing the Bid.

2.11.1. The Bidder shall submit the Bid in the format specified at Appendix-I, and seat it in an envelope and mark the envelope as "BID."

2.11.2. The documents accompanying the Bid shall be placed in a separate envelope and marked as "Enclosures of the Bid". The documents shall include:

- a) Bid Security in the format at Appendix - II;
- b) Power of Attorney for signing of Bid in the format at Appendix - III;
- c) If applicable, the Power of Attorney for Lead Member of Consortium in the format at Appendix - IV; and
- d) A copy of the Concession Agreement with each page initialed by the person signing the Bid in pursuance of the Power of Attorney referred to in Clause (b) hereinabove.

2.11.3. A true copy of the documents accompanying the Bid, as specified in Clause 2.11.2 above, shall be bound together in hard cover and the pages shall be numbered serially. Each page thereof shall be initialed in blue ink by the authorized signatory of the Bidders. This copy of the documents shall be placed in a separate envelope and marked "Copy of Documents".

2.11.4. The three envelopes specified in Clauses 2.11.1, 2.11.2 and 2.11.3 shall be placed in an outer envelope, which shall be sealed. Each of the four envelopes shall clearly bear the following identification:

"Bid for the Two Laning with/without paved shoulder of Tindivanam - Krishnagiri Section of NH-66 from km 38.150 to km 214.110 on DBFOT (Annuity) basis under NHDP Phase-III in the State of Tamil Nadu Project" and shall clearly indicate the name and address of the Bidder. In addition, the Bid Due Date should be indicated on the right hand top corner of each of the envelopes.

2.11.5. Each of the envelopes shall be addressed to:

ATTN. OF: Mr. K. Venkata Ramana DESIGNATION: General Manager (Tech) - TN
ADDRESS: National Highways Authority of India G-5&6, Sector 10, Dwarka New
Delhi - 110075 Phone No.: +91-11-25074100 FAX No.: +91-11-25074100/200
Extn.2229 E-MAIL ADDRESS : kvenkataramana@nhai.org 2.11.6. If the envelopes
are not sealed and marked as instructed above, the Authority assumes no
responsibility for the misplacement or premature opening of the contents of the Bid
submitted and consequent losses, if any, suffered by the Bidder.

2.11.7. Bids submitted by fax, telex, telegram or e- mail shall not be entertained and
shall be rejected.

2.14 Contents of the Bid 2.14.1. The Bid shall be furnished in the format at Appendix -
I and shall consist of a Annuity, to be quoted by the Bidder. The Bidder shall specify
(in Indian Rupees) the Annuity offered by him, to undertake the Project in
accordance with this RFP and the provisions of the Concession Agreement.

2.14.2. Generally, the Project will be awarded to the Highest Bidder.

2.14.3. The opening of Bids and acceptance thereof shall be substantially in
accordance with this RFP.

2.14.4. The proposed Concession Agreement shall be deemed to be part of the Bid.

2.15 Modifications/Substitution/Withdrawal of Bids 2.15.1. The Bidder may modify,
substitute or withdraw its Bid after submission, provided that written notice of the
modifications, substitution or withdrawal is received by the Authority prior to Bid
Due Date. No Bid shall be modified, substituted or withdrawn by the Bidder on or
after the Bid Due Date.

2.15.2. The modification, substitution or withdrawal notice shall be prepared sealed,
marked, and delivered in accordance with Clause 2.11, with the envelopes being
additionally marked "MODIFICATION", "SUBSTITUTION" or "WITHDRAWAL", as
appropriate.

2.15.3. Any alteration/modification in the Bid or additional information supplied
subsequent to the Bid Due Date, unless the same has been expressly sought for by the
Authority, shall be disregarded.

2.16 Rejection of Bids 2.16.1. Notwithstanding anything contained in this RFP, the
Authority reserves the right to reject any Bids and to annul the Bidding Process and
reject all Bids at any time without any liability or any obligation for such acceptance,
rejection or annulment, and without assigning any reason therefore. In the event that
the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible
Bidder to submit fresh Bids hereunder.

2.16.2. The Authority reserves the right to proceed with the Bidding Process at any time, without notice or liability, and to reject any Bid without assigning any reasons.

2.17 Validity of Bids The Bids shall be valid for a period of not less than 120 (one hundred and twenty) days from the Bid Due Date. The validity of Bids may be extended by mutual consent of the respective Bidders and the Authority.

D. BID SECURITY

2.20 Bid Security

2.20.1. The Bidder shall furnish as part of its Bid, a Bid Security referred to in Clauses 2.1.7 and 2.1.8 hereinabove in the form of a bank guarantee issued by a nationalised bank, or a Scheduled Bank in India having a net worth of at least Rs.1,000 crore (Rs.one thousand crore), in favour of the Authority in the format at Appendix - II (the "Bank Guarantee") and having a validity period of not (one hundred eight) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. In case the Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by an nationalised bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934.

2.20.2 Bid Security can also be in the form of a demand draft issued by a Scheduled Bank in India, drawn in favour of the Authority and payable at Delhi (the "Demand Draft"). The Authority shall not be liable to pay any interest on the Bid Security deposit so made and the same shall be interest free.

2.20.3. Any Bid not accompanied by the Bid Security shall be summarily rejected by the Authority as non-responsive.

2.20.4 Save and except as provided in Clauses 1.2.4 and 1.2.5 above, the Bid Security of unsuccessful Bidders will be returned by the Authority, without any interest, as promptly as possible on acceptance of the Bid of the Selected Bidder or when the Bidding process is cancelled by the Authority, and in case within 60 (sixty) days from the Bid Due Date. Where Bid Security has been paid by deposit, the refund thereof shall be in the form of an account payee demand draft in favour of the unsuccessful Bidder (s). Bidders may by specific instructions in writing to the Authority give the name and address of the person in whose favour the said demand draft shall be drawn by the Authority for refund, failing which it shall be drawn in the name of the Bidder and shall be mailed to the address given on the Bid.

2.20.5. The Selected Bidder's Bid Security will be returned, without any interest, upon the Concessionaire signing the Concession Agreement and furnishing the Performance Security in accordance with the provisions thereof. The Authority may, at the Selected Bidder's option, adjust the amount of Bid Security in the amount of Performance Security to be provided by him in accordance with the provisions of the Concession Agreement.

2.20.6. The Authority shall be entitled to forfeit and appropriate the Bid Security as Damages inter alia in any of the events specified in Clause 2.20.7 herein below. The Bidder, by submitting its Bid pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Authority will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this RFP. No relaxation of any kind on Bid Security shall be given to any Bidder.

2.20.7 The Bid Security shall be forfeited and appropriated by the Authority as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, time cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority thereunder, or otherwise, under the following conditions:

a) If a Bidder submits a non-responsive Bid;

Subject however that in the event of encashment of bid security occurring due to operation of para 2.20.7 (a), the damage so claimed by the Authority shall be restricted to 5% of the value of the Bid security.

b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Clause 4 of this RFP;

c) If a Bidder withdraws its Bid during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Authority;

d) In the case of Selected Bidder, if it fails within the specified time limit -

i) to sign and return the duplicate copy of LOA;

ii) to sign the Concession Agreement; or

iii) to furnish the Performance Security within the period prescribed therefore in the Concession Agreement; or

e) In case the Selected Bidder, having signed the Concession Agreement, commits any breach thereof prior to furnishing the Performance Security.

3. EVALUATION OF BIDS 3.1 Opening and Evaluation of Bids 3.1.1 The Authority shall open the Bids at 11.30 hours on the Bid Due Date, at the place specified in Clause 2.11.5 and in the presence of the Bidders who choose to attend.

3.1.2 The Authority will subsequently examine and evaluate the Bids in accordance with the provisions set out in this Section 3.

3.1.3 To facilitate evaluation of Bids, the Authority may, at its sole discretion, seek clarifications in writing from any Bidder regarding its Bid.

3.2 Tests of responsiveness 3.2.1 Prior to evaluation of Bids, the Authority shall determine whether each Bid is responsive to the requirements of the RFP. A Bid shall be considered responsive only if:

(a) it is received as per the format at Appendix -

I;

(b) it is received by the Bid Due Date including any extension thereof pursuant to Clause 2.12.2;

(c) it is signed, sealed, bound together in hard cover and marked as stipulated in Clauses 2.10 and 2.11;

(d) it is accompanied by the Bid Security as specified in Clause 2.1.7;

(e) it is accompanied by the Power(s) Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;

(f) it contains all the information (complete in all respects) as requested in this RFP and/or Bidding Documents (in formats same as those specified)

(g) it does not contain any condition or qualification; and

(h) it is not non-responsive in terms hereof.

3.2.2 The Authority reserves the right to reject any Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Authority in respect of such Bid.

3.3 Selection of Bidder 3.3.1 Subject to the provision of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of clause 3.2.1 and who quotes the lowest annuity to be paid by the Authority shall be declared as the selected Bidder (the "Selected Bidder"). In the event that the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bid hereunder.

6. MISCELLANEOUS 6.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the Courts at New Delhi shall have exclusive jurisdiction over all disputes arising under, pursuant to and/or in connection with the Bidding Process.

6.2 The Authority, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to;

(a) suspend and/or cancel the Bidding Process and/or amend and/or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;

(b) consult with any Bidder in order to receive clarification or further information.

(c) retain any information and/or evidence submitted to the Authority by, on behalf of, and/or in relation to any Bidder; and/or

(d) independently verify, disqualify, reject and/or accept any and all submissions or other information and/or evidence submitted by or on behalf of any Bidder.

6.3 It shall be deemed that by submitting the Bid, the Bidder agrees and releases the Authority, its employees, agents and advisers, irrevocably, unconditionally, fully and finally from any and all liability for claims, losses, damages, costs, expenses or liabilities in any way related to or arising from the exercise of any rights and/or performance of any obligations hereunder, pursuant hereto and/or in connection with the Bidding Process and waives to the fullest extent permitted by applicable laws, any and all rights and/or claims it may have in this respect, whether actual or contingent, whether present or in future.

6.4 The Bidding Documents and RFQ are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this RFP, in the event of any conflict of interest between them the priority shall be in the following order:

- (a) The Bidding Documents;
- (b) The RFQ.

i.e. the Bidding Documents at (a) above shall prevail over the RFQ at (b) above.

APPENDIX - III Power of Attorney for signing of Bid (Refer Clause 2.1.9) Know all men by these presents, we, (name of the firm and address of the registered office) do hereby irrevocably constitute, nominate, appoint and authorize Mr./Ms.(Name), son/daughter/wife of and presently residing at

.....

Notes:

The Mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant (s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.

Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution/power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.

For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention, 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Apostille certificate.

APPENDIX - IV Power of Attorney for Lead Member of Consortium (Refer Clause 2.1.10) Whereas the National Highways Authority of India ("the Authority") has invited bids from pre- qualified and short-listed parties for the Two Laning with/without paved shoulder of Tindivanann-Krishnagiri Section of NH-66 from km 38.150 km 214.110 on DBFOT (Annuity) basis under NHDP Phase-III in the State of Tamil Nadu Project ("the Project")

Notes:

The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant (s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.

Wherever required, the Applicant should submit for verification the extract of the charter documents and documents such as a resolution/power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Applicant.

For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention, 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Apostille certificate."

[Emphasis added by underlining and highlighting(bold) of text]

15. The process of selection of bidders comprises of the following two stages: (i) pre-qualification of applicants viz, Request For Qualification (RFQ), which is the qualification stage; and (ii) the applicants declared successful at RFQ stage are then allowed to participate in the second stage of bidding, namely the bid stage, i.e., Request for Proposal (RFP).

16. In or around July, 2010 RFQ for the said project was invited to pre-qualify the shortlisted applicants. The plaintiff being one of the applicants, submitted the RFQ for the aforesaid Project. On or about 24.11.2010, the plaintiff was declared, as "Pre-qualified Applicant"

and thus became eligible for participation at the RFP stage.

17. As per the requirements of the RFP, Clause 2.11.2, the documents accompanying the bid had to be placed in separate envelopes and marked as "Enclosures of the Bid". The said documents shall include:

(i) bid security in the format at Appendix-II;

(ii) power of attorney for signing the bid in the format at Appendix-III;

(iii) if applicable, the power of attorney for lead member of the consortium in the prescribed format at Appendix-IV, and

(iv) a copy of the concession agreement with each page initialed by the person signing the bid in pursuance of the power of attorney referred to in Clause (b) herein above.

18. Prior to the evaluation of the bids, NHAI had to determine whether each bid was responsive to the requirements of the RFP.

Clause 3.2.1 of the RFP lays down the tests of responsiveness, which inter alia, includes in sub-clause (e) that the bid is accompanied by the power of attorney, as specified in clauses 2.1.9 and 2.1.10, as the case may be.

19. Clause 2.1.9 specifically provides that the bidder should submit a power of attorney, as per the format at Appendix-III, authorizing the signatory of the bid to commit the bidder. Appendix-III, while providing for the format for such power of attorney, particularly stipulates in the "Notes" provided as hereunder:

"Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution / power of attorney in favour of the person executing this power of attorney for the delegation of power hereunder on behalf of the Bidder."

20. Clause 2.1.10 contemplates that in case the bidder is a consortium, the members thereof should furnish a power of attorney in favour of the lead member in the format at Appendix-IV. The Appendix-IV, while providing for the format for such power of attorney, particularly stipulates in the "Notes" provided as hereunder:

"Whenever required, the bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution / power of Attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Applicant."

21. Clause 3.2.2 provides that the Authority reserves the right to reject any bid which is non-responsive and on request for alteration, modification, substitution or withdrawal shall be entertained by the Authority in respect of such Bid.

22. As per the defendant, the plaintiff submitted its RFP on 01.02.2011. The enclosure of the plaintiff's bid was opened by an Evaluation Committee comprising of senior officials of the defendant on 01.02.2011 along with 22 other bidders, who had submitted the RFP by due date and time, in the presence of their representatives. Thereafter, the bids were examined for their responsiveness by the said Evaluation Committee. To ensure best evaluation of bids, the Evaluation Committee was also assisted by the independent financial consultants appointed by the defendant.

23. On careful examination of the bids by the Evaluation Committee and the financial consultants, inter alia, it was noticed that the bid of the plaintiff was accompanied by a power of attorney, which was not in conformity with Clause 2.1.9 and Appendix-III (Note-2) of the RFP document, insofar as, the board resolution in favour of the executor of the power of attorney was not submitted by both the consortium members. In view of Clause 3.2 of the RFP document, the bid was found to be non-responsive, and the representative of the petitioner was informed, accordingly.

24. The plaintiff submitted a representation vide letter dated 24.02.2011 (Ex.P-7) to the defendant, wherein the plaintiff stated that certified copies of board resolutions and authorizations from the consortium members were submitted along with the RFQ, which are valid till the date of execution of the concession agreement, therefore the same were not required to be resubmitted along with the RFP.

25. The defendant did not find the explanation rendered by the plaintiff vide Ex.P-7 plausible, as Clause 2.1.9 of the RFP document and Appendix III, clearly stipulates that the bidder should submit for verification the extract of the charter documents and documents, such as, a board resolution, shareholders resolution, power of attorney in favour of the person executing the power of attorney for the delegation of power on behalf of the bidder and there was no scope for laxity or ambiguity of any nature.

26. Clause 2.20.7(a) of the RFP empowers the Authority to encash the bank guarantee, which is 5% of the value of the bid security, in case the bidder submits a non-responsive bid. The forfeiture of the plaintiff's bid security to the tune of 5% of the bid security on account of being declared

non-responsive is seemingly proper. This court finds no impropriety in the defendant's letter dated 11.03.2011 seeking forfeiture of the bank guarantee.

27. Section 74 of the Indian Contract Act, 1872, as it originally stood read thus:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named."

28. By an amendment made in 1899, the Section was amended to read:

"74. Compensation for breach of contract where penalty stipulated for.-- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.-- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.-- When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.-- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

29. In *Kailash Nath Associates v. Delhi Development Authority* (2015) 4 SCC 136, Hon'ble Supreme Court held that Section 74 occurs in Chapter 6 of the Indian Contract Act, 1872 which reads "Of the consequences of breach of contract". It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage, which a party may sustain through nonfulfillment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.

30. This court humbly disagrees with the case pleaded by the plaintiff and the submissions advanced by Sh. Manjeet Godara, Ld. counsel that the case of the plaintiff is squarely covered under Section 74 of the Indian Contract Act and forfeiture of the 5% of the bid security by the invocation of bank guarantee neither is a pre-estimate of compensation and damages and nor any loss had been incurred by the defendant.

31. The *raison d'être* for disagreeing with the plaintiff's understanding and consequentially dismissing the suit of the plaintiff is the legal principles culled out by the Hon'ble Supreme Court with regard to the law of compensation of breach of contract under Section 74 of the Indian Contract Act, 1872 in the landmark judgment of *Kailash Nath Associates v. Delhi Development Authority & Anr.* -

(2015) 4 SCC 136.

32. In *Kailash Nath Associates v. Delhi Development Authority & Anr.* (supra) the Apex Court after traversing through all the relevant cases holding the field of law of damages and compensation under Section 74 of the Contract Act held that in cases where a public auction is held, the forfeiture of earnest money may take place even before an agreement is reached, as bid money is to be accepted only after the earnest money is paid. In such cases, Section 74 of the Contract Act may not be attracted on its plain language because it applies only "when a contract has been broken".

33. The relevant paragraph Nos. 40 - 43 of *Kailash Nath Associates v. Delhi Development Authority & Anr.* (supra) are reproduced, as under:

"40. From the above, it is clear that this Court held that *Maula Bux's* case was not, on facts, a case that related to earnest money. Consequently, the observation in *Maula Bux* that forfeiture of earnest money under a contract if reasonable does not fall within Section 74, and would fall within Section 74 only if earnest money is considered a penalty is not on a matter that directly arose for decision in that case. The law laid down by a Bench of 5 Judges in *Fateh Chand's* case is that all stipulations naming amounts to be paid in case of breach would be covered by Section 74. This is because Section 74 cuts across the rules of the English Common Law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated above, forfeiture of earnest money on the facts in *Fateh Chand's* case was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74.

41. It must, however, be pointed out that in cases where a public auction is held, forfeiture of earnest money may take place even before an agreement is reached, as DDA is to accept the bid only after the earnest money is paid. In the present case, under the terms and conditions of auction, the highest bid (along with which earnest money has to be paid) may well have been rejected. In such cases, Section 74 may not

be attracted on its plain language because it applies only "when a contract has been broken".

42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

4. The Section applies whether a person is a plaintiff or a defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.

6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

[Emphasis added by underlining and highlighting(bold) of text]

40. On perusal of the above and application of the legal principles culled by the Hon'ble Apex Court in *Kailash Nath Associates v. Delhi Development Authority* (supra) this court holds that since the forfeiture of the 5% of the bid security by the defendant took place before agreement is reached between the parties, Section 74 of the Contract Act would have no application.

41. Needless to mention, most tenders project in India by the government or government agencies are detailed documents with extensive plans and data. Tendering conditions commonly have terms describing the manner of selection, terms and methods to be employed and engaged. The Supreme Court has in catena of cases held that both the parties, namely, the tendering authority and the bidder are bound by the terms and conditions of the tender documents and cannot violate or breach the same.

42. This court observes that it is not the case of the plaintiff that the defendant failed to act reasonably and the procedure adopted by the defendant to forfeit the 5% of the bid security is arbitrary, mala fide and intended to favour some other bidder.

43. This court observes that when parties enter into a contract, the natural expectation is that the parties would abide by it. The parties have to maintain solemnity of the contract. The deposit of bid security and forfeiture of bid security in the event of failure to perform the contract and/or remaining part of the contract is a condition really meant to ensure the due performance of the contract. The liability on account of forfeiture of the 5% of bid security i.e. 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only), whereas in the present case the bid security is 6,24,20,000/- (Rupees Six crores twenty four lakhs and twenty thousand only), which is roughly 1% of the project cost i.e. 610.21 crores (Rupees Six hundred and ten crores and twenty one lakhs only) is intended to be a deterrent against breach of contract.

44. This court to further strengthen the findings and reasoning also places reliance upon the law reports of the Hon'ble Supreme Court - *National Highways Authority of India v. Ganga Enterprises and Anr.* - (2003) 4 SCC 410, *State of Haryana v. Malik Traders* - (2011) 13 SCC 200 and *National Thermal Power Corporation Limited v. Ashok Kumar Singh and Others* - (2015) 4 SCC 252.

45. In *National Highways Authority of India v. Ganga Enterprises and Anr.* - (2003) 4 SCC 410, Hon'ble Supreme Court considered the issue relating to invocation of bid security, which arose from the judgment and order dated 30.10.1998 passed by the Hon'ble High Court of Delhi in CWP No. 739 of 1998 titled as *Ganga Enterprises v. Union of India & Ors.* The tender conditions required furnishing of bid security and forbid withdrawal of any bid for a specified period. A bidder, who had tendered for a contract, withdrew its bid prior to the period fixed under the tender and sought return of the bank guarantee submitted as bid security, on the principle that under the Indian Contract Act, 1872, the bidder could withdraw an offer prior to acceptance without any punitive consequences, in that case invocation of the bank guarantee. The Hon'ble Supreme Court reversed the judgment of the Hon'ble High Court of Delhi that a person could withdraw the offer prior to acceptance without penal consequences.

46. Hon'ble Supreme Court in National Highways Authority of India v. Ganga Enterprises (supra) observed that the bid security of 50 lakhs was not for performance of the contract. It was in essence an earnest to be given to ensure that the bidder did not withdraw his bid during the period of bid validity, (which was for 120 days), and/or that after acceptance the performance security is furnished and the agreement signed.

47. The Apex Court in National Highways Authority of India v. Ganga Enterprises (supra) in paragraph of its judgment held as under:

"9. In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such term is always included in order to ensure that only a genuine party makes a bid. If such a terms was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted."

[Emphasis added by underlining and highlighting(bold) of text]

48. The Apex Court in State of Haryana v. Malik Traders - (2011) 13 SCC 200 followed and the applied National Highways Authority of India v. Ganga Enterprises (supra), which pertained to the tenders invited by the State of Haryana from interested persons for appointment as entrepreneur / agent for collection of toll at the toll bridge over river Yamuna on Karnal - Meerut road, near Uttar Pradesh border. M/s Malik Traders was one of the 13 bidders who submitted tenders. As required by the terms and conditions of the bid, all the bidders, including the respondent, deposited the bid security of 20 lakhs in the form of bank guarantee or FDR in favour of the executive engineer. M/s Malik Traders was the second highest bidder and the highest bidder was M/s Gaurav Traders. Since the highest bidder failed to deposit the security amount and the first instalment as per the letter of acceptance, the bid security of M/s Gaurav Traders was forfeited and the letter of acceptance was cancelled and withdrawn. Thereafter, a letter of acceptance was issued to M/s Malik Traders, who

was the second highest bidder and was asked to deposit the security amount and the first instalment. However, M/s Malik Traders failed to deposit the security amount and the first instalment as required by the letter of acceptance and accordingly, the letter of acceptances was cancelled and withdrawn and the bid security of 20 lakhs was forfeited.

49. M/s Malik Traders knocked the doors of the Hon'ble Punjab & Haryana High Court and invoked the extra-ordinary jurisdiction by preferring a writ petition. The Division Bench of the Hon'ble High Court of Punjab and Haryana allowed the writ petition quashing the letter of acceptance and the Memo and directed the Executive Engineer to refund the bid security amount of 20 lakhs to the respondent, Thereafter, the judgment and order dated 07.07.2009 passed in CWP No. 2266 of 2009 titled as Malik Traders v. State of Haryana was challenged before the Apex Court. The Hon'ble Supreme Court relying upon the National Highways Authority of India v. Ganga Enterprises (supra) set aside the judgment and order dated 07.07.2009 passed in CWP No. 2266 of 2009 by the Hon'ble High Court of Punjab and Haryana.

50. Similarly, the Apex Court, in the case of National Thermal Power Corporation Limited v. Ashok Kumar Singh and Others - (2015) 4 SCC 252 followed and applied the ratio of National Highways Authority of India v. Ganga Enterprises (supra) and State of Haryana v. Malik Traders - (2011) 13 SCC 200 and held that the Hon'ble High Court of Judicature of Allahabad, Lucknow Bench by directing refund of the earnest money remained totally oblivious of the true legal position and committed an error. The Apex Court in National Thermal Power Corporation Limited v. Ashok Kumar Singh and Others (supra) held that it is no longer possible for the respondents to contend that the right to withdraw the bid in terms of Section 5 of the Indian Contract Act, 1872, would entitle them to withdraw without suffering forfeiture of the earnest money even in cases where the submission and receipt of bids is itself subject to the condition that in the event of a withdrawal of the bid the earnest money stand forfeited.

51. This court is in consonance with the submissions advanced by the Ld. counsel for the defendant that the reliance placed by the Ld. counsel for the plaintiff on the judgment passed by the Division Bench of the Hon'ble High Court of Delhi in M/s Madhucon Projects Ltd. v. National Highways Authority of India & Ors. - W.P.(C) No. 8418/2010 dated 10.03.2011 and M/s Gayatri-DLF Consortium & Ors. v. National Highways Authority of India & Ors. - W.P.(C) No. 6833/2010 dated 10.03.2011 is misplaced and distinguishable, as in the case of Madhucon Projects Pvt. Ltd. v. National Highways Authority of India & Ors. (supra), Madhucon Projects Pvt. Ltd. had duly completed and performed the contract and it was in those circumstances that the Division Bench of the Hon'ble High Court had concluded that there was no justification whatsoever to carry out any deduction from the bid security. With regard to the applicability of the judgment passed in M/s Gayatri-DLF Consortium & Ors. v. National Highways Authority of India & Ors. - W.P.(C) No. 6833/2010 dated 10.03.2011, Hon'ble Supreme Court in its judgment dated 18.03.2015 held that the reasoning in M/s Gayatri-DLF Consortium & Ors. (supra) is predicated on Madhucon Projects Pvt. Ltd. v. National Highways Authority of India & Ors. (supra).

52. With all humility and deference, this court observes that in a latest judgment, the Full Bench of the Hon'ble High Court of Delhi in the case titled as Carlsberg Breweries A/S. v. Som Distilleries and

Breweris Ltd. - C.S.(COMM) No. 690/2018 & I.A. No. 11166/2018 judgment and order dated 14.12.2018 with regard to the applicability of ratio decidendi relied upon the judgment passed by the Hon'ble Supreme Court in the case of Padma Sundara Rao (Dead) and Others v. State of Tamil Nadu and Others, (2002) 3 SCC 533 and in paragraph No. 5 observed as under:

"5. To understand the ratio of a case, it must be kept in mind that ratio of a case is facts dependent. The observations which are made in a judgment are as per the facts of a particular case. Ratio of a judgment is for what the judgment actually decides. In fact, the Supreme Court has cautioned in its Constitution Bench Judgment in the case of Padma Sundara Rao (Dead) and Others v. State of Tamil Nadu and Others, (2002) 3 SCC 533 that the words of a judgment should not be read like a statute and even difference of a single fact can make all the difference to the ratio of two cases. These observations of the Supreme Court in the case of Padma Sundara Rao (supra) read as under:

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington vs. British Railways Board*. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

(Underlining Added)"

53. The ratio of *Kailash Nath Associates v. Delhi Development Authority* (supra) and *National Highways Authority of India v. Ganga Enterprises and Anr.* apply on its four to the facts of the present case.

54. In view of the above discussions and the legal principle culled out by the Hon'ble Supreme Court in *Kailash Nath Associates v. Delhi Development Authority* (supra), Section 74 of the Indian Contract Act, 1872 is not applicable to the facts of the present case. Accordingly, the issue No. 1 is decided against the plaintiff and in favour of the defendant.

Whether the plaintiff is entitled to recovery of 45,06,320/- (Rupees Forty five lakhs six thousand three hundred twenty only)?

55. The onus to prove the issue No. 2 was on the plaintiff. At the outset, this court observes that since the bank guarantee in question i.e. bank guarantee No. 290/2011 dated 04.08.2011 issued by the Indian Overseas Bank, R.P. Road, Secunderabad for an amount of 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) till date has not been encashed by the defendant, the question of plaintiff seeking recovery of 45,06,320/- (Rupees Forty five lakhs six thousand three hundred twenty only) against the defendant out of which an amount of 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) is towards the 5% of the bid security and 13,86,320/- (Rupees

Thirteen lakhs eighty six thousand three hundred and twenty only) being the interest @12%p.a. on the bank guarantee amount does not arise. On perusal of the case record it is observed that Hon'ble High Court of Delhi vide order dated 29.04.2015 granting interim protection to the plaintiff restraining the defendant from encashment of the bank guarantee.

56. As a matter of fact, the plaintiff initiated the first round of litigation before the Hon'ble High Court of Delhi by preferring a writ petition, wherein the defendant herein was restrained from encashment of the bank guarantee. The second round of litigation has also been championed by the plaintiff herein and the defendant was restrained from encashment of the bank guarantee in question during the pendency of the suit - vide order dated 29.04.2015 passed by the Hon'ble High Court of Delhi in the present suit. In short, there has been no encashment of the bank guarantee in question and thus no question of recovery of 45,06,320/- (Rupees Forty five lakhs six thousand three hundred twenty only) against the defendant out of which an amount of 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) is towards the 5% of the bid security and 13,86,320/- (Rupees Thirteen lakhs eighty six thousand three hundred and twenty only) being the interest @12%p.a. on the bank guarantee amount, arises. Accordingly, the issue No. 2 is decided against the plaintiff and in favour of the plaintiff.

Whether the suit is under valued?

57. The onus to prove the issue No. 3 was on the defendant. This court observes that during the course of arguments, this issue was neither pressed nor any submissions were advanced by the Ld. counsel for the defendant. The issue No. 3 is accordingly, decided against the defendant and in favour of the plaintiff.

Whether the present suit is maintainable in view of the preliminary objections taken by the defendant?

58. The onus to prove the issue No. 4 was on the defendant. This court observes that during the course of arguments, this issue was neither pressed nor any submissions were advanced by the Ld. counsel for the defendant. The issue No. 4 is accordingly, decided against the defendant and in favour of the plaintiff.

59. In light of the above discussions and observations, the suit of the plaintiff fails against the defendant.

60. The order dated 29.04.2015 granting interim protection to the plaintiff restraining the defendant from encashment of the bank guarantee is vacated. The suit of the plaintiff is dismissed. The defendant is at liberty to forfeit the 5% of bid security of 6,24,20,000/- (Rupees Six crores twenty four lakhs and twenty thousand only), which is 31,20,000/- (Rupees Thirty one lakhs and twenty thousand only) by encashment of the bank guarantee No. 290/2011 dated 04.08.2011 issued by the Indian Overseas Bank, R.P. Road, Secunderabad, which had been furnished by the plaintiff and kept alive by the plaintiff on due renewal, as per the order of the Hon'ble Apex Court. Since, no counter-claim had been preferred by the defendant against the plaintiff, this court deems it

appropriate to award the costs of the suit to the defendant.

61. Decree sheet be prepared accordingly.

62. File be consigned to record room after due and necessary compliance.

HARGURVARINDER SINGH JAGGI SINGH JAGGI Date: 2019.01.28 16:24:05 +0530 Pronounced
in the open (Hargurvarinder Singh Jaggi) Court on 28.01.2019 Addl. District Judge-02 South West
District Dwarka Courts Complex New Delhi