

NHIDCL/CivilWork/DimapurBypass/Nagaland/2019/SPL-1

Dated 13.07.2022

To,

Authorized Signatory,
M/s Yongma Engineering Company Limited
In association with M/s Sterling Indo Tech Consultants Pvt. Ltd.
Branch office: 205, Mohta Building,
Bhikaji Came Place,
New Delhi-110066

Sub: Declaring the Authority's Engineer M/s Yongma Engineering Co. Ltd. in association with M/s Sterling Indo Tech Consultants Pvt. Ltd. as Non-Performer.

Sir,

NHIDCL (National Highways & Infrastructure Development Corporation Limited) (hereinafter referred to as the 'Authority') signed an agreement for Consultancy Services with M/s Yongma Engineering Co. Ltd. in association with M/s Sterling Indo Tech Consultants Pvt. Ltd. (hereinafter referred to as "the Authority Engineer") on 27th December 2017 for the project work of **"Construction of Four/Six laning from Km 132.375 to Km 158.058 (Total New Alignment length of 20.683 Km) of Daboka Dimapur Section (Dimapur Bypass) of NH-36 & 39 in the state of Nagaland and Dimapur Bypass (Assam Portion) from existing Km 159.400 of NH-36 to existing Km 102.500 of NH-39 and upto end point of Assam Portion [Design Km 118.050 to Design Km 132.375] (length 14.325 Km) in the State of Assam under SARDP-NE on Engineering Procurement and Construction basis"** at the contract price of **Rs. 14,49,73,820/- (Rupees Fourteen Crore Forty Nine Lakhs Seventy Three Thousand Eight Hundred and Twenty Only)**, with construction period of 36 months and the Commencement Date as 27th December 2017 on the terms, conditions and covenants contained in the Contract Agreement.

2. **Whereas**, the Authority Engineer is to discharge its obligations as per the provisions of the Contract Agreement and is to ensure compliance of Clause 10 of Section 6 of the Terms of Reference of the Contract Agreement.

3. **Whereas**, the Consultant/Authority Engineer has breached the Contract Agreement, inter-alia, with the following defaults in terms of the Clauses of GCC & TOR of the Consultancy Services Agreement as well as the duties and responsibilities for AE enshrined in the EPC Contract;

3.1 of TOR- The Authority's Engineer shall discharge its duties in a fair, impartial and efficient manner, consistent with the highest standards of professional integrity and Good Industry Practice.

3.2 of TOR- The Authority's Engineer shall perform the duties and exercise the authority in accordance with the provisions of this Agreement, but subject to obtaining prior written approval of the Authority before determining. (a) any Time Extension.

3.4 of TOR- The Authority's Engineer shall inform the Contractor of any delegation of its duties and responsibilities to its suitably qualified and experienced personnel, provided,

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however, that it shall not delegate the authority to refer any matter for the Authority's prior approval in accordance with the provisions of Clause 18.2 Model EPC Agreement.

3.5 of TOR-The Authority's Engineer shall aid and advise the Authority on any proposal for Change of scope under Article 13.

4.1 of TOR- During the Construction Period, the Authority's Engineer shall review the Drawings furnished by the Contractor along with supporting data, including the geo-technical and hydrological investigations, characteristics of materials from borrow areas and quarry sites, topographical surveys, and the recommendations of the Safety Consultant in accordance with the provisions of Clause 10.1.6 of Model EPC Agreement. The Authority's Engineer shall complete such review and send its observations to the Authority and the Contractor within 15 (fifteen) days of receipt of such Drawings; provided, however that in case of a Major Bridge or Structure, the aforesaid period of 15 (fifteen) days may be extended upto 30 (thirty) days. In particular, such comments shall specify the conformity or otherwise of such Drawings with the Scope of the Project and Specifications and Standards.

4.2 of TOR- The Authority's Engineer shall review any revised Drawings sent to it by the Contractor and furnish its comments within 10 (ten) days of receiving such Drawings. The review of drawing should be authenticated by Authority's Engineer.

4.3 of TOR- The Authority's Engineer shall review the Quality Assurance Plan submitted by the Contractor and shall convey its comments to the Contractor within a period of 21 (twenty-one) days stating the modifications, if any, required thereto.

4.4 of TOR-The Authority's Engineer shall complete the review of the methodology proposed to be adopted by the Contractor for executing the Works, and convey its comments to the Contractor within a period of 10 (ten) days from the date of receipt of the proposed methodology from the Contractor.

4.7 of TOR-The Authority's Engineer shall inspect the Construction Works and the Project Highway and shall submit a monthly Inspection Report bringing out the results of inspections and the remedial action taken by the Contractor in respect of Defects or deficiencies. In particular, the Authority's Engineer shall include in its Inspection Report, the compliance of the recommendations made by the Safety Consultant.

4.9 of TOR- For determining that the Works conform to Specifications and Standards, the Authority's Engineer shall require the Contractor to carry out, or cause to be carried out, tests at such time end frequency and in such manner as specified in the Agreement and in accordance with Good Industry Practice for quality assurance. For purposes of this Paragraph 4.9, the tests specified in the IRC Special Publication-11(Handbook of Quality Control for Construction of Roads and Runways) and the Specifications for Road and Bridge Works issued by MORT&H (the "Quality Control Manuals") or any modifications/substitution thereof shall be deemed to be tests conforming to Good Industry Practice for quality assurance.

4.11 of TOR- *The timing of tests referred to in Paragraph 4.9, and the criteria for acceptance/rejection of their results shall be determined by the Authority's Engineer in accordance with the Quality Control Manuals. The tests shall be undertaken on a random sample basis and shall be in addition to, and independent of, the tests that may be carried out by the Contractor for its own quality assurance in accordance with Good Industry Practice.*

4.12 of TOR- *In the event that the results of any tests conducted under Clause 11.10 establish any Defects or deficiencies in the Works, the Authority;s Engineer shall require the Contractor to carry out remedial measures.*

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4.14 of TOR-In the event that the Contractor fails to achieve any of the Project Milestones, the Authority's Engineer shall undertake a review of the progress of construction and identify potential delays, if any. If the Authority's Engineer shall determine that completion of the Project Highway is not feasible within the time specified in the Agreement, it shall require the Contractor to indicate within 15(fifteen) days the steps proposed to be taken to expedite progress, and the period within which the Project Completion Date shall be achieved. Upon receipt of a report from the Contractor, the Authority's Engineer shall review the same and send its comments to the Authority and the Contractor forthwith.

6.2 of TOR- The Authority's Engineer shall determine the period of Time Extension that is required to be determined by it under the Agreement.

8.0 of TOR- The Authority's Engineer shall perform all other duties and functions as specified in the Agreement.

10 of TOR- PERFORMANCE CLAUSE- *Authority's Engineers shall be expected to fully comply with all the provisions of the 'Terms of Reference', and shall be fully responsible for supervising the Designs, Construction and maintenance and operation of the facility takes Place in accordance with the provisions of the EPC Agreement and other schedules. Any failure of the Authority Engineer in notifying to Employer and the Contractor on non-compliance of the provisions of the EPC Contract Agreement and other schedules by the EPC Contractor, non-adherence to the provision of ToR and non-adherence to the time schedule prescribed under ToR shall amount to non-performance.*

2.9.1(d) of GCC- *If the Consultants submit to the Client a statement which has a material effect on the rights, obligations or interests of the Client and which the Consultants know to be false;*

2.9.1(h) of GCC- *if EPC Contractor represents to Employer that the Consultant is not discharging his duties in a fair, efficient and diligent manner and if the dispute remains unresolved, Employer may terminate this contract.*

4.5 (c)(iv) of GCC- *For total replacements beyond 66% of the key personnel the client shall initiate action of higher penalty/termination/debarment upto 2 years as considered appropriate.*

4. **Whereas**, Authority Engineer has been found to be lacking in technical supervision of work at site, which has been pointed out by the Authority from time to time.

5. **Whereas**, Authority's Engineer has failed to issue notices to EPC Contractor on poor quality of work being executed at project site which was observed during the site inspection by the Authority. The Authority Engineer issued Notices and NCRs to the EPC Contractor for the poor quality work only after the issue was highlighted by Authority.

6. **Whereas**, Authority Engineer has approved the QAP of EPC contractor M/s Gawar-Singh (JV) Dimapur bypass Assam Portion after delay of 41 days.

7. **Whereas**, Authority Engineer has unilaterally accorded approval of additional length of RE wall beyond the scope provision in Sch-B of Contract Agreement thereby creating a liability on either party with positive change of scope.

8. **Whereas**, the Authority's Engineer has recommended SPSs without proper scrutiny and had to reconcile the said SPS as per Contract Agreement after observation was raised by the Authority.

9. **Whereas**, Authority Engineer has failed to submit EOT Proposal for extension of its Consultancy services as per Contractual Provisions. In absence of receipt of clear proposal

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of EOT as per the provisions of Contract Agreement, Authority has recommended EOT Proposal to RO- Kohima and has requested the Authority's Engineer to provide his consent to the said EOT proposal. However, the same is still awaited.

10. **Whereas,** Authority's Engineer has failed to submit the EOT proposal of M/s Simplex Infrastructure Ltd. in a time bound manner.

11. **Whereas,** Construction period as per the Agreement signed by the Authority's Engineer was for 36 months duration, however the EPC Contract is still in progress, **Authority's Engineer has submitted that "Authority's Engineer cannot be detained after completion of service as the stage of construction period ended on 27.12.2020".** Subsequently, the Authority Engineer vide letter dated 21.05.2022 revoked his statement and stating that *"Authority's Engineer never conveyed the unwillingness to carry out Authority's Engineer Services beyond the construction period and the same appears to have been misunderstood."* The submission of Authority's Engineer reveals lackadaisical approach in fulfilling its obligation as per the Contract Agreement of Authority's Engineer.

12. **Whereas,** Authority's Engineer has raised piecemeal observations to a proposal on design and drawings of Elephant Under Pass which is against the Good Industry practice.

13. **Whereas,** Authority's Engineer has failed to clarify the technical reasons based on which the thickness of GSB required to be laid in median portion was contested by EPC Contractor.

14. **Whereas,** Authority's Engineer has not finalized the proposal submitted by EPC Contractor i.e. M/s Gawar-Singh (JV) on 09.03.2022 for location of service road and which is pending till date.

15. **Whereas,** during project review meeting held on 14.05.2022 at RO-Kohima, the EPC Contractors have informed the Authority that in absence of Authorized personnel of Authority's Engineer at project site, the proposals of contractors viz EOT of Nagaland portion, Change of Scope of Assam portion, SPSs/IPC's etc. are dealt by Head office of Authority Engineer which is causing delay in processing such proposals and the said delays are jeopardizing the progress of the projects which are at critical stage.

16. **Whereas,** Authority's Engineer has not submitted Monthly Inspection Report since October 2021 upto April 2022 bringing out the results of inspections and remedial action taken by Contractor in respect of defects or deficiencies.

17. **Whereas,** it has been noted that the Authority's Engineer has replaced total Key Personnel by more than 100% till date which is in violation of Clause 4.5 of the GCC of the Contract Agreement.

18. **Whereas,** it has been observed that Authority's Engineer has incorrectly claimed Reimbursable expenditure calculated on man month basis in monthly invoices, which is not as per the Contract Agreement.

19. **Whereas,** the Managing Director/Director of Authority's Engineer has ignored the request of Authority to attend important meetings chaired by ED (P), RO- Kohima which were scheduled to review the progress of Project.

20. **Whereas,** the Authority's Engineer failed to submit suitable relief in time after the previous Team Leader left the project site on 13.09.2021 and submitted the CV of replaced Team Leader on 14.02.2022 leading to the appointment lying vacant for a duration of 3 months. Further, the appointment of Resident Engineer cum Pavement Specialist & Road Safety Expert (Assam Portion) has been vacant since 10.08.2021.

21. **Whereas,** Authority vide letter dt. 04.05.2022 has accorded approval of CV of Sh. KH Ibopishak Singh, Resident Engineer cum Pavement Specialist & Road Safety expert and vide letter dt. 25.04.2022 accorded approval of CV of Sh. Anshuman Mohanty as Lab

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Technician. However, Authority's Engineer has not yet deployed both Resident Engineer and Lab Technician till date.

22. **Whereas**, it has been observed that staff of Authority's Engineer deployed at site have been raising grievances on several occasion for non-receipt of salary on time and other financial issues being faced by them due to this delay.

23. **Whereas**, it has been observed that the Authority's Engineer is lacking in delivery of duties in an efficient manner due to non deployment of Key Professional at site and communication gap among the HQ of the Authority's Engineer and the staff deployed at site.

24. **Whereas**, the Authority's Engineer has caused breach of the following clauses of the Ministry circular no RW/NH-33044/76/2021 S&R (P&B), dated 07.10.2021 and NHIDCL Inter Office Memo no. NHIDCL/F&A/HQ/SOP Contract Management/e-206721 dt. 06.06.2022:

- i. Failed to detect design/ quality deficiency in Non- Key Components.
- ii. Failed to issue follow- up notices to Contractor/Concessionaire for delays in closure of NCRs, delays in furnishing detail of time & cost claims/COS/revised work programmes/Work methodologies, etc.
- iii. Failed to detect deficiency in quantity executed vis-à-vis design not having substantial financial implication (below 1% of civil work cost).
- iv. Delay in processing EOT/COS proposals, inaccurate assessment of COS proposals, not issuing NCRs, delays/improper review of designs/drawings/work programme or failure to submit completion/Provisional Completion Certification as prescribed in Contract.
- v. Failed to detect design/ quality deficiency in Key Component having substantial cost (1% of civil work cost or more) and/or time implication (5% of project completion period or more).
- vi. Failure to propose action (like Cure Period Notice. Levy of damages etc.) on Contractor/Concessionaire as per Contract Agreement for their default/poor progress.
- vii. Improper/ wrong interpretation of provision in Contract Agreement; or wrong certification of payment/COS Value/cost & time claims; or poor performance of services.

25. That vide letter No. NHIDCL/PMU-DMP/AE/DB-NP/2021-22/Vol-IV/3143 dated 31.03.2021, NHIDCL had notified its intention to declare Authority's Engineer as Non Performer as per NHIDCL Office order No. 39/2022 and MoRTH Circular dated 07.10.2021. The defaults as referred in the preceding paragraphs were informed to the Authority's Engineer in vide the notice dated 31.03.2021 for declaring the Authority's Engineer as Non Performer.

26. The Authority's Engineer vide letter No.YMSITC/HO/DB/GMP/2022-23/250 dated 19.04.2022, furnished the reply to the show Cause Notice issued by the NHIDCL for declaring it 'Non-Performer'. Vide the said reply the Authority's Engineer submitted the following amongst others and requested to withdraw the Show Cause Notice:

(i) There is no breach of the Contract Agreement.

(ii) The period of time extension was determined by the authority's Engineer and submitted to PMU Dimapur vide letter dated 12.08.2021 and 09.12.2021.

(iii) With regard to failure to issue follow up Notices to Contractor for delays, it is submitted that during the period since commencement to March-2019 the financial progress was 19.01% only. Because of slow progress EPC Contractor had been issued various slow progress notices.

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(iv) With regard to delay in processing EOT/COS proposal, the Authority's Engineer submitted that based on information submitted by the EPC Contractor EOT was examined and submitted by the Authority's Engineer vide letter no. 10.07.2019.

(v) With regard to Change of Scope, it has been submitted that EPC Contractor M/s SIPL submitted the initial Change of Scope proposal on 02.08.2021, 05.08.2021 and 12.08.2021. Team leader vide letter dated 12.08.2021 conveyed the observations after review the proposal.

27. The reply of the Authority's Engineer has been perused and examined and the same is being rejected on the following grounds:

(i) The Authority's Engineer has failed to issue notice to the EPC Contractor for submission of revised work program. Finally, PMU-Dimapur issued instructions to EPC Contractor for submission of revised Work Program. It is pertinent to mention that as per Clause 10 of TOR of Authority's Engineer Agreement, any failure of the Authority Engineer in notifying to Employer and the Contractor on non compliance of the provisions of the EPC Contract Agreement and their schedules by the EPC Contractor, non adherence to the provision of ToR and non adherence to the time schedule prescribed under ToR shall amount to Non Performance. Reliance is being placed upon the letter dated 09.10.201, 15.03.2022 and 15.03.2022 issued by the NHIDCL/Authority. No letter has been issued by Authority's Engineer in respect of Work program.

(ii) The Authority's Engineer is covering up his own mistake for non performing its duties as per the obligations stipulated under the provisions of TOR, Clause 3.2 and 3.4 of the Contract Agreement. The Authority's Engineer has specifically brought the date of submission of EOT by the EPC Contractor in his submission in the instant letter dated 19.04.2022 which is dated 18.01.2021. PMU vide letter dated 13.04.2021 and letter dated 16.07.2021 has directed AE to submit EOT proposal as per prescribed format duly complying contractual provisions. Even after explicit instructions issued by Managing Director, NHIDCL during several review meetings for finalization of EOT proposals, the Authority's Engineer was unable to conclude the long pending EOT proposal of Dimapur-Nagaland Portion project in time even after several reminders vide PMU letters dated 22.09.2021, 24.09.2021, 28.09.2021, 29.09.2021, 03.10.2021, 05.10.2021, 07.10.2021, 01.12.2021, 06.12.2021, 08.12.2021. Authority's Engineer vide letter dated 09.12.2021 has finally submitted EOT proposal. Thus, it is evident that the Authority's Engineer has failed to process the EOT proposal of Contractor M/s SIL in time bound manner as per the provisions of the Agreement and is trying to hide the facts to manipulate the delay occurred at Authority's Engineer end. Hence, the Authority's Engineer has breached the obligations as per the provisions of Contract Agreement.

(iii) EPC Contractor M/s SIPL vide letter dated 02.08.2021 had submitted the COS proposal of service road for CUP at Ch. 133+099 to the Authority's Engineer. The Authority's Engineer failed to process the COS proposal in time and failed to aid and advice the Authority as per Clause 3.5 of TOR of Contract Agreement. It was observed that AE's vide letter dated 06.01.2022 has not carried out technical evaluation of the submitted proposal of the EPC Contractor and simply forwarded the proposal without any clear recommendation to Authority. The Representative of AE's had failed to visit the site and technically evaluate the proposal based on its merits & demerit and accordingly advised the Authority to take further necessary action as per Contract Agreement. PMU has issued letter for the same to AE on 10.01.2022 apart from the Show Cause Notice dated 11.10.2021 and 27.12.2021. Hence, the Authority's Engineer has unjustifiably delayed/not taken any proactive action in addressing the said proposal.

(iv) The Clauses such as 4.7, 4.8, 4.9, 4.10, 4.11, 4.12, 4.18 of TOR of Contract Agreement, are relied upon by the NHIDCL in connection with the duties of the Authority's

Engineer to inspect the Construction Works and the Project Highway and the Inspection Report bringing out the results of inspections and the remedial action by the Contractor in respect of defects or deficiencies. PMU vide letter dated 21.12.2018, 07.08.2019, 09.10.2021, has instructed AE to issue NCRs for defective work of Contractor. In reply AE has quoted Clause 4.12; Article -04 of EPC Contract Agreement. In the instant case, the defects were pointed out by the Authority during various site visits and actions by Authority's Engineer had been taken thereafter. Hence, the Authority's Engineer has breached the obligations as per the provisions of the Contract Agreement.

(v) The Authority's Engineer had allowed the EPC Contractor for construction of 2 Slab at site (without approval of staging drawings) which is a serious lapse on its part. Hence, the Authority's Engineer has breached the obligations as per the provisions of CA.

(vi) PMU has issued letters to Authority's Engineer to issue notices for defaults in quality of work. Authority's Engineer has failed to issue any notice/advisory to the EPC Contractor w.r.t. the procedures being followed and ensuring quality of works as per Schedule-D. PMU-Dimapur letters dated 07.08.2019, 22.07.2019, 18.10.2019, 06.01.2022, 30.04.2022 is relied upon with reference to inferior quality of material. Hence, the Authority's Engineer has caused the breach.

(vii) That the Authority's Engineer submitted that on receipt of design and drawings the length of RE wall will be decided and necessitated modification in positive and negative COS in principally approved, will be submitted for approval to the Authority; however, on the other hand the Authority's Engineer vide letter dated 11.02.2022 had already unilaterally conveyed the additional approval (beyond the scope of CA) of elevation drawing of RE Wall of length 170m at ch. 128+545 to the Contractor under Cl. 2.10 (ii) of Schedule-B without obtaining prior consent of the Authority which is violation of the contractual provisions. Hence, the Authority's Engineer has breached the obligations as per the provisions of the Contract Agreement.

(viii) The Authority's Engineer is solely responsible for delay and for non mobilization of personnel and therefore breach of contractual provisions viz. 3.1, 4.5, 8.0 and 10.0 of Terms of Reference of Contract Agreement.

28. In addition to above, the Authority's Engineer has neither responded nor attended the meeting schedules to review the various issues/obligation of the Authority's Engineer pertaining the progress of Dimapur Bypass Projects with ED(P), RO-Kohima on 05.10.2021 and 07.10.2021. During the Review Meeting held under the Chairmanship of ED(P), RO-Kohima, on 08.04.2022, the representatives of Authority's Engineer was enquired about the health and completion date of the project which he could not define and found to be ignorant about the status of work.

29. In view of the above facts and circumstances, and Authority's Engineer persistent and sustained gross defaults, Authority in accordance with the MoRTH circular dated 07.10.2021 and the NHIDCL Office Order no. 39/2022, hereby declare M/s Yongma Engineering Co. Ltd. in association with M/s Sterling Indo Tech Consultants Pvt. Ltd. (jointly and severally) as Non-Performer. Upon Declaration of non-performer, the Authority's Engineer will not be able to participate in any bid for National Highways projects with MoRTH or any other executing agencies till such time this order persists or the Authority's Engineer is removed from the list of non- performers. The Authority's Engineer shall include its JV partners, promoters etc. whose credentials were considered while qualifying them for the project.

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30. This is issued without prejudice to the rights and remedies available to the Authority under the Contract Agreement and the governing laws.

31. This issues with approval of the Competent Authority.



(M.RITEN KUMAR SINGH)
EXECUTIVE DIRECTOR(T)

Copy To:

- i. Director(T), NHIDCL, HQ
- ii. ED(T/Ps), NHIDCL
- iii. GM(P)-Pfutsero
- iv. Sr. Manager (IT), NHIDCL, HQ to put the notice on the website.