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

+ **W.P.(C) 793/2016 & CM Nos3468/2016 & 19603/2016**

LEO DUCT ENGINEERS & CONSULTANTS

LTD.

..... Petitioner

Through: Mr Sudhir Makkar, Se. Advocate with
Ms S. Mukherjee and Mr Mithun
Rao, Advocates.

versus

GAIL GAS LIMITED & ANR

..... Respondent

Through: Mr Ramji Srinivasan, Sr. Advocate
with Ms Purnima Maheshwari and Mr
Tushkar Bhardwaj, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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26.10.2017

VIBHU BAKHRU, J

1. The petitioner has filed the present petition impugning an order dated 08.06.2015, passed by GAIL Gas Limited (hereafter 'GGL'), debarring the petitioner from participating in the bidding process for a period of three years. The petitioner further impugns the order dated 15.12.2015 passed by respondent no.2 (Appellate Authority) rejecting the petitioner's appeal against order dated 08.06.2015 passed by.

2. The impugned order dated 08.06.2015 was passed on the principal basis that the petitioner had submitted incorrect bill(s) indicating that it had performed the work of laying HDD pipeline with casing, whereas in fact the petitioner had laid part of the pipeline without any casing. It was alleged that in this manner financial loss had been caused to GGL. In addition, the Appellate Authority (Committee of Directors) also found that the petitioner

had sub-let the contract in question without the consent of GGL and according to the Appellate Authority, this was in violation of the General Conditions of the Contract (hereafter 'GCC').

3. The petitioner was awarded the work of laying of MDPE Pipeline and associated works in Meerut Zone-1 and Meerut Zone - 2 by GGL vide Letter of Award dated 06.05.2011 (LOA). The contract value of the said works was ₹9.6 crores and in terms of the tender documents, the petitioner was required to provide a Performance Bank Guarantee for 10% of the contract value. Accordingly, the petitioner furnished a Performance Bank Guarantee in the sum of ₹96,51,096/-. The petitioner claims that it completed works of the approximate value of ₹2.5 crores.

4. The petitioner claims that it had appointed M/s Cyclone Energy Private Ltd. as a sub-contractor for executing a part of the works at the insistence of one of the officers of GGL and the petitioner was compelled to execute part of the works through the said sub-contractor. This is disputed by GGL.

5. It is stated that certain complaints were received alleging various irregularities in execution of the work relating to laying of pipeline and an investigation was conducted by the vigilance team of GGL, which submitted a report on 27.09.2013. On the basis of the said report, GGL issued a Show Cause Notice dated 28.04.2015. The relevant extract of the said Show Cause Notice indicating the allegations made against the petitioner are set out as under:-

"It is also not out of place to mention that the above failure i.e. (i) execution of HDD work without casing pipe and (ii) submission of bill claiming HDD work with casing pipe and receiving payment for the same, amounts to violation of the contract including clause no. 55.0 of GCC of the contract document and sl no. 1.7.2 of annexure-1 to LOA, mentioned herein above.

This amounts to clear breach of the contract between the parties and also making a false claim has resulted into financial loss to the company. Further, it amounts to compromising the safety of the pipeline also.

Please note that in terms of clause no. 39.1 of ITB of the tender document, you have been involved in the fraudulent practices by submitting the false bill. Further you have not performed as per the standard specification of the contract hence committed the breach of the contract in terms of clause no. 29.0 of the General conditions of contract i.e. "Failure by the contractor to comply with the provisions of the contract".

6. The petitioner was called upon to respond to the aforesaid allegations and furnish reasons as to why action should not be taken against the petitioner for debarring it from participating in any business with GGL for a period of three years.

7. By a letter dated 04.05.2015, the petitioner accepted that there was an error in submission of the bills and the accounts department had incorrectly written item No. 1.7.2 as item No. 1.7.1; Item No. 1.7.1 was HDD work with casing and item No. 1.7.2 was HDD work without casing. In this manner, the petitioner had charged for HDD work with casing instead of HDD work without casing. The petitioner sought to explain the same by stating that this was a typographical error and the difference in the amount was only ₹18,250/-, which the petitioner was ready and willing to refund.

8. The said explanation did not find favour with GGL and by an order dated 08.06.2015, GGL debarred the petitioner from participating in the bidding process for any of the GGL tenders in future for a period of three years from the date of the said order.

9. GGL also en-cashed the Performance Bank Guarantee furnished by the petitioner.

10. Aggrieved by the blacklisting order dated 08.06.2015, the petitioner preferred an appeal before the Committee of Directors (Appellate Authority) as per the procedure adopted by GGL. The said appeal was rejected by the impugned order dated 15.12.2015.

11. There is no dispute that an incorrect bill had been submitted by the petitioner resulting in certain financial loss to GGL (the petitioner claims the amount to be only ₹18,250/-). Further, there is also no dispute that part of the HDD work done by the petitioner was not in accordance with the contract specifications; whilst the contract specifications were for laying of HDD pipeline with casing, the petitioner had laid HDD pipeline (or a part of it) without casing. Thus, the only aspect that would fall for consideration is regarding the proportionality of the punitive measure imposed on the petitioner.

12. In this regard, it is important to note that one of the principal consideration that weighed with the Appellate Authority in confirming the punitive measure was that the petitioner had sub-contracted a part of the work to M/s Cyclone Energy Pvt. Ltd. without consent of GGL. The Appellate Authority had noted that the vigilance team had in its report

reported that the petitioner had sub-contracted the part of the job, which was in violation of the terms of the contract, and had recommended that action be taken against the petitioner. In the impugned order, the Appellate Authority has further observed that *"M/s. Leo Duct engaged sub-contractor without the consent in writing of Engineer - in-Charge in terms of clause no. 37.0 of GCC of the contract and the same is clear violation of the provisions of the contract."*

13. Mr Sudhir Makkar, learned Senior Counsel appearing for the petitioner had contended that the said finding of the Appellate Authority is palpably erroneous and the petitioner had not violated the provisions of clause 37.0 of GCC. He further submitted that no such allegation had been made in the Show Cause Notice and, therefore, the petitioner had no opportunity to respond to the same.

14. Mr Ramji Srinivasan, learned Senior Counsel appearing for the GGL countered the aforesaid submissions. He stated that the allegations made in the Show Cause Notice were of serious nature and as the factual constituent of the allegations were admitted, the Appellate Authority had sustained the blacklisting order against the petitioner. He further submitted that the issue regarding the petitioner sub-contracting the part of the works to a sub-contractor came into light only pursuant to the response submitted by the petitioner and, therefore, could not be included in the Show Cause Notice.

15. As is noticed above, there is no dispute that the petitioner had submitted an incorrect bill and had also not performed part of the works as per specifications. The only question to be considered is whether the

punitive measure imposed on the petitioner was commensurate with the allegations made against the petitioner. The petitioner contends that its accounts department had made a typographical error in making the bill resulting in an insignificant gain and this did not warrant the petitioner to be blacklisted for a period of three years. GGL, on the other hand, contends that the actions of the petitioner are grave and amount to fraudulent and corrupt practices. GGL further alleges that not performing the work as per specification is a serious breach of contract and has resulted in a loss of confidence in the petitioner.

16. This Court is of the view that the issue as to the quantum of punishment (the period blacklisting) must be considered by the concerned authority. Interference by the Court would be warranted only if there is a flaw in the decision making process or the quantum of punishment is so disproportionate so as to shake the conscience of this Court.

17. In the present case, it is apparent that the decision making process is flawed. The Appellate Authority has also proceeded on the basis that the petitioner had violated the terms of the contract by sub-contracting part of the works to a sub-contractor. Admittedly, this allegation was never put to the petitioner and the petitioner had no opportunity to meet the same. Mr Srinivasan's contention that the fact that the petitioner had sub-contracted part of the works came to light only pursuant to the response submitted by the petitioner, is incorrect. A plain reading of the impugned order indicates that the vigilance team had mentioned this in its report and had further recommended that action be taken against the petitioner on this ground.

18. In view of the above, this Court is of the view that it would be apposite to set aside the impugned order dated 15.12.2015 passed by the Appellate Authority and remand the matter for consideration afresh. Accordingly, the impugned order is set aside and the Appellate Authority is directed to re-consider the issue as to the quantum of punishment imposed on the petitioner after examining the petitioner's response to the issue whether it had violated the terms of the GCC by sub-contracting part of the works. The petitioner shall submit its comprehensive response on the aforesaid question to the Appellate Authority within a period of two weeks from today. The Appellate Authority will take an informed decision within a period of six weeks thereafter, after affording the petitioner opportunity to be heard.

19. As far as the issue of encashment of Performance Bank Guarantee is concerned, this Court is not inclined to entertain any controversy in this regard. The said issue also involves several disputed questions such as whether GGL is entitled to retain the amount received against invocation of the bank guarantee encashed without establishing that it had suffered any damages and if not, the quantum of damages suffered by GGL. This court does not consider it apposite to examine such issues in this petition. It will be open for the petitioner to institute an appropriate proceedings in respect of such disputes. Needless to mention that if such proceedings are initiated, the same would be considered in accordance with law.

20. The petitioner along with the pending application stands disposed of.

21. Order *dasti*.

VIBHU BAKHRU, J

OCTOBER 26, 2017

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