

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 26.02.2019

+ **W.P.(C) 5173/2017**

**CONSULTING ENGINEERING SERVICES
(INDIA) PVT. LTD.**

..... Petitioner

Versus

MINISTRY OF DEFENCE

..... Respondent

Advocates who appeared in this case:

For the Petitioner	:Mr Rajshekhar Rao, Ms Zehra Khan, Mr Zahid Lalq Ahmed, Advocates.
For the Respondent	:Mr Anurag Ahluwalia, CGSC for R-1.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition impugning an order dated 14.05.2017 (hereafter 'the impugned order') passed by the respondent, whereby the petitioner has been debarred from participating in submission of any tenders to the Director General, Married Accommodation Project (DGMAP). The said punitive measure has been taken against the petitioner on an allegation that the petitioner had failed to exercise proper financial checks during the scrutiny of the final bills relating to a contract entered into between the respondent and one M/s Varindera Construction Private Limited (hereafter 'the Building Contractor').

2. Undisputedly, the Building Contractor had been paid an excess sum of ₹96,00,000/- as the mobilization advance paid to him had not been recovered in the bills submitted by him. The respondent alleges that the same is, *inter alia*, on account of the negligence on the part of the petitioner in checking and certifying the bills submitted by the Building Contractor. The petitioner disputes the same, essentially, on two fronts. First of all, the petitioner submits that it had not certified any excess payment made to the Building Contractor but had only certified the quantum of work done. Secondly, it contends that certifying payments to the contractors did not fall within the scope of work contracted to, by the petitioner. According to the petitioner, it was required to certify the works completed and the same had been done without any fault.

3. In addition to the above, the impugned order also indicates that an overpayment of ₹161 lacs (approximately) was made to another contractor as well. However, it is conceded that no such allegation has been leveled against the petitioner in the show cause notice and the petitioner had no opportunity to meet any such allegation. The record also indicates that the said allegation is bereft of any specific details.

4. It is also relevant to observe that no submissions were made on behalf of the respondents to support the impugned order, on the basis of the said allegation of overpayment of ₹161 lacs (approximately). Thus, the controversy in the present case is limited to the dispute regarding blacklisting the petitioner on account of an overpayment made to the Building Contractor.

Factual Background

5. In the year 2002, the respondent issued a notice inviting tenders from eligible entities for performing the work of a Detailed Engineering and Project Management Consultant (hereafter 'DEPMC') for consultancy services in connection with construction of residential accommodation for Defence Personnel at Delhi.

6. The petitioner submitted its bid in response to the said notice, which was accepted and, on 03.03.2004, the parties entered into a Contract Agreement dated 28.02.2004 (hereafter 'the Contract Agreement'). Thereafter, the respondent issued a notice inviting tenders for "*Provision of Married Accommodation for JCOs(100 DUS) and ORS (160 DUS) including allied external services with source development at Mahipalpur (Package-I), Pocket Delhi Cantt., New Delhi*" (hereafter 'the project').

7. On 10.03.2005, the contract for the execution of the project was awarded to the Building Contractor (M/s Varindera Construction Private Limited). The project was completed under the supervision of the petitioner, sometime in the year 2007. The Building Contractor raised its final bill on 05.09.2007, which was certified by the Project Manager – one of the officials of the respondent – on 02.04.2008. Subsequently, on 16.04.2008, the Station Commander also certified the said final bill. And, on 13.10.2008, it was also certified by the Assistant Director (Contracts). The payments as cleared by them, were made in January 2009.

8. It is stated that subsequently in January/February 2015, the respondent discovered that the Building Contractor had been overpaid inasmuch as the mobilization advance provided to the Building Contractor had not been accounted for in the final bill.

9. In view of the above, a Board of Officers was constituted to conduct an inquiry to ascribe the responsibility for such lapse. The Board of Officers conducted the inquiry and found that certain officers of the respondent were remiss. The said Board also concluded that the petitioner was equally responsible for the lapse. On 19.07.2016, the respondent issued a show cause notice to the petitioner, *inter alia*, alleging that the petitioner was responsible for the lapse of overpayment to the Building Contractor, as it had failed to exercise a 'proper check', resulting in the overpayment of ₹96 lacs to the Building Contractor. The petitioner was called upon to show cause as to why action should not be initiated against the petitioner.

10. The petitioner responded to the show cause notice by a letter dated 24.08.2016, *inter alia*, contending that the final bill as per the specified format did not require the petitioner to certify the amounts payable and, therefore, the petitioner could not be held responsible for the overpayment made to the Building Contractor. The said contention was not accepted and, on 24.10.2016, the respondent passed an order holding the petitioner "*guilty of not exercising due diligence in checking of final bill*" and further banning the petitioner from participating in any tender for a period of three years.

11. Aggrieved by the same, the petitioner filed a writ petition being ***W.P.(C) 13366 of 2016*** captioned “***Consulting Engineering Services (India) Private Limited v. Ministry of Defence***”. The petitioner contended that the respondent had not issued any specific notice informing the petitioner that it proposed to blacklist the petitioner. Further, the petitioner also made a grievance of not being afforded an opportunity to be heard.

12. In view of the above, by an order dated 02.12.2016, this Court allowed the petition and set aside the order dated 24.10.2016, with the observation that the respondent was at liberty to proceed in accordance with the law.

13. Thereafter, the respondent issued a fresh show cause notice dated 06.01.2017. The petitioner submitted a detailed response to the same on 17.03.2017. Thereafter, on 31.03.2017, the representatives of the petitioner were also afforded an oral hearing. The respondent did not accept the petitioner’s contentions and passed the impugned order debarring the petitioner for a period of three years.

Submissions

14. Ms Zehra Khan, learned counsel appearing for the petitioner0 advanced contentions on three fronts. First, she submitted that the decision to blacklist the petitioner was wholly unreasonable and arbitrary considering that the petitioner had successfully assisted the respondent in completing several projects in terms of the Contract Agreement. She submitted that even as of date, the petitioner is

performing its obligations in connection with 15 separate projects. Thus, the decision to blacklist the petitioner, at this stage, for an alleged lapse stated to have occurred in the year 2007, is unsustainable.

15. Next, she submitted that in terms of the Contract Agreement, the petitioner was required to certify the bills, strictly in line with MES formats. She submitted that the MES formats did not require the petitioner to certify payments due to contractors and, therefore, no such bill had been certified by the petitioner. She submitted that in this view, the petitioner could not be held responsible for the lapse on the part of the concerned officers in adjusting the mobilization advances made to the Building Contractor.

16. Lastly, she submitted that, in fact, the petitioner had not certified the final bill, but had only certified the quantum of work done after checking the bills submitted by the Building Contractor. She submitted that in this view, the petitioner could not be held responsible for any overpayment.

17. Mr Anurag Ahluwalia, learned counsel appearing for the respondent disputed the aforesaid contentions. He submitted that the petitioner's scope of works under the Contract Agreement included checking and certifying of running and final bills of various contractors. In addition, the petitioner was also obliged to assist the respondent in settlement of all accounts of the contractors and,

therefore, the petitioner could not be absolved of the lapse in overpaying the Building Constructor.

Reasons and conclusion

18. At the outset, it would be relevant to refer to the impugned order indicating the reasons for rejection of the petitioner's contention that it was not required to certify the final bill amounts. The relevant extract of the impugned order is set out below:-

“(B) CERTIFICATION OF ADVANCE ON ACCOUNT AND FINAL BILL AMOUNTS ONLY TO CERTIFICATION OF SUMMARY OF ABSTRACT OF QUANTITIES & PRICE, WHERE AS THE NET PAYABLE AMOUNT IS TO BE INDEPENDENTLY CERTIFIED BY PM, EE (QS&C) AAO & CDA”

The argument hold no ground the very definition of DEPMC in para 1(k) on srl Page No. 98 states one of the duties as “.....recording measurements in measurement Book and in certification of advance on Accounts and final bill’

Thus the first certification of final bill payment is carried out by DEPMC and subsequently the final payable amount in certified by PCDA.

Para 13 on Srl page No 77 of DEPMC contract agreement specifies that DEPMC is required to exercise financial checks of contract which includes monthly cash flow chart, final bill proforma & documents.

Thus one of the job of DEPMC was to certify payments of final bill and financial irregularity noticed at a later date has also to be viewed with concerned it involves public money.

(C) CONTRACTOR'S LEDGER AND CONTRACT ACCOUNT IS MAINTAINED BY CDA AND THEREFORE, CDA IS TASKED WITH THE RESPONSIBILITY OF ENSURING THAT ANY ADVANCE PAYMENT MADE ARE ACCOUNTED FOR AND RECOVERED.

The responsibility of CDA in certifying payment is definitely there, but it does not absolve DEPMC from carrying out the job assigned to him in contract administration.”

19. It is seen from the impugned order that the petitioner's contention, that it was not required to certify the final bill, was rejected by referring to paragraph 1(k) of the contract entered into between the respondent and the Building Contractor. The respondent had held that in terms of the said clause, the first certification of the final bill was required to be carried out by the petitioner and, thereafter, it was required to be certified by the concerned authorities. The respondent had also referred to the provision in the Contract Agreement, which required the petitioner to carry out financial checks of the contract, including monthly cash flow charts, final bill performance and documents. The respondent concluded that it was one of the obligations of the petitioner to certify the payments of the final bill and the financial irregularity noticed, subsequently, was required to be viewed in the aforesaid context.

20. Before proceeding further, it would be relevant to refer to the paragraph 1(k) of the contract entered into between the respondent and the Building Contractor. The said clause is set out below:-

“1(k) DEPM Consultant means Detailed Engineering and Project Management Consultant engaged by the Government for the works. He shall be assisting the Project Manager for supervision of works as per the Condition of this Contract, administration of Contract as per the terms of his engagement with DG MAP Command MAP (CE) / Accepting Officer, in recording measurements in Measurement Book and in certification of Advance on Account and Final Bill.”

21. It is seen from the above that the said clause defines the term ‘DEPM Consultant’. A plain reading of the said clause also indicates that DEPM Consultant would be assisting the Project Manager in provisions of the works as well as the recording of measurement in the measurement book, and in certification of the advance on account of the final bill. It is relevant to note that the petitioner is not a party to the said agreement. More importantly, a plain reading of the said clause merely indicates that the petitioner was required to render assistance *“in certification of Advance on Accounts and final bill”*. There is no dispute that the petitioner was required to render assistance in the aforesaid respect. However, the said clause cannot be read to mean that the petitioner was required to certify the final bill. The expression rendering assistance in certification of a bill cannot be read as synonymous to certifying the bill.

22. As noticed above, the respondent had also referred to paragraph 13 of the Contract Agreement, which, according to the respondent, required the petitioner to exercise financial checks including monthly cash flow chart, final bill proforma and documents.

23. Mr Ahluwalia, learned counsel appearing for the respondent pointed out that reference to paragraph 13 in the impugned order is a reference to paragraph 13 of Appendix 'M' of the Contract Agreement. It is seen that the said paragraph relates to the guidelines for preparation of Detailed Project Report (DPR). At this stage, it is relevant to note that in terms of paragraph 15 of the tender documents (Instructions to Bidders), the scope of services of a consultant was spread over three phases: (a) pre-construction phase; (b) construction phase; and (c) post construction phase. The requirement to prepare a Detailed Project Report (DPR) was specified as a part of the services required under the pre-construction phase. Clause (f) of paragraph 17 of the tender documents is relevant in this regard and is set out below:-

“PRE-CONSTRUCTION PHASE

16. Preparation of Concept Project Report (CPR).....

XXXX XXXX XXXX

17. Preparation of Detailed Project Report (DPR) (4 copies).....

XXXX XXXX XXXX

(f) Financial Control covering the following :-

(i) Cash Flow Chart shall be indicated in the DPR, station wise.

(ii) Proposal for earnest money and security deposits.

(iii) Proposal for penalty on contractors for delay / non-performance.

(iv) Administrative Control Reports / Returns - their format for fortnightly and monthly reports.”

24. Paragraph 13 of Appendix ‘M’ relates to the preparation of DPR, as required for the petitioner in the pre-construction phase. Paragraph 13 of Appendix ‘M’ is set out below:-

“13. Financial checks:

(a) Monthly cash flow chart & planned execution schedule of works.

(b) Earnest money/security deposit proposals.

(c) Penalty proposals.

(d) Conditions for defect liability period including proposed detailment of tradesman/manpower.

(e) Yardstick for payment supported by bill of quantities.

(f) Final bill proforma and documents.

(g) Reports and returns, their format and periodicity for administrative control of the project.”

25. It is apparent from the above that the reference to paragraph 13 in the impugned order is wholly misplaced. The petitioner was only required to prepare a detailed project report, which would also include monthly cash flow charts, final bill proforma and documents etc. The said formats, to be prepared during the pre-construction phase have no relevance to the allegation that the petitioner had incorrectly certified a final bill.

26. In view of the above, the impugned order inasmuch as it holds the petitioner responsible for the financial lapse, in resulting into an overpayment to the building contractor, cannot be sustained.

27. Having stated the above, it is also apposite to consider Mr Ahluwalia's contention. He had sought to support the impugned order by referring to paragraph 22 and 24(a) of the tender documents. According to him, these clauses clearly indicated that the petitioner was responsible for certifying the final bills. It is relevant to note that whereas paragraph 22 of the Contract Agreement specifies part of the services to be rendered in the construction phase; paragraph 24 relates to services to be rendered in the post construction phase. The said paragraphs are set out below:-

“CONSTRUCTION PHASE

XXXX

XXXX

XXXX

22. Responsibility of the consultant team will be inter alia as below:-

XXXX

XXXX

XXXX

(1) Checking and certifying of Running and Final bills of various contractors and organized guarantees as per Contract. All the Bills/certification shall be strictly in line with MES formats.

XXXX

XXXX

XXXX

POST CONSTRUCTION PHASE

24. To assist the DG MAP with the following work:-
- (a) Settlement of all accounts of the contractors.”

28. Although, the scope of work does indicate that the petitioner was required to check and certify running and final bills of various contractors, paragraph 22(1) of the tender documents also clearly indicates that *the certification shall be strictly in line with the MES formats*. Ms Khan had pointed out that MES formats did not require any certification by the petitioner and, consequently, the petitioner had not certified the amount payable to the Building Contractor under different bills. She submitted that the petitioner had verified the quantum of work done and had duly certified the amount for the same. A perusal of the format of the bills indicates that the said contention is merited.

29. This Court had pointedly asked Mr Ahluwalia to point out the relevant bills certified by the petitioner. In this regard, the attention of this Court was drawn to the letter dated 06.11.2007. The said letter reads as under:-

“Ref: NPS/2004029/1562

06 Nov. 2007

The Project Manager (East)
Married Accommodation Project
C/o Station H.Q.
Delhi Cantt. - 110010

Sub: C.A. No. DGMPA/Consultant/Phase-1/4 of 2003-2004 - Married
Accommodation Project, Delhi.

Mahipalpur, Pkg-I (GP-3) : Final RAR

Ref: Your Letter No. 3720/MPA/GP-3(1)/Delhi/RAR/P-03
dt. 25.10.07.

Dear Sir,

The final RAR dated 05.09.2007 on the above contract has been scrutinized by us and comments / recommendations are given below:

1. The bill submitted by the contractor amounts to Rs.319,094,194.00. Major breakup of this amount is:

i) Based on contract item / section (Sec-I to Sec-XI) including non schedule items on Sec-VII and IX Rs. 23,97,89,049.93

ii) Appendix 'A' (DOs) based on approved AIPs Rs.2,19,904.00

Sub - Total 'A' Rs.24,00,08,953.93

iii) Appendix 'B' (DOs) based on other deviations not yet approved or accepted by contractor - Rs.5,83,924.94

iv) Appendix 'C' (DOs) based on various claims of the contractor on work. - Rs.2,49,66,434.94

Sub - Total 'B' Rs.26,55,59,313.81

v) Other claims (Appexure-K) containing financial claims (VAT, Cess, Excise escalation and watch & ward) - Rs.5,35,34,391.00

Total Bill Amount 'C' Rs. 31,90,93,694.81

The portion of bill as mentioned is Sl. (i) & (ii) above have been finalized and corrected amount is Rs.23,87,78,627.47 as against contractor's billed amount of Rs.24,00,08,953.93 (as per 'A' above). The corrected bill is sent herewith.

Amount against (ii), (iv) and (v) above are not scrutinized pending decision on AIP / DOs claims etc.

Thanking you and assuring of our best services at all times,

Yours faithfully,
For Consulting Engineering Services
(India) Private Limited
S/d

(N.P. Singh)
Executive Director (Technical)"

30. It is clear from the plain reading of the aforesaid letter that the petitioner had examined the final RAR bill in respect of the work done and had indicated that the amount of ₹24,00,08,953.93/-, as billed by the Building Contractor was incorrect and the correct amount was ₹23,87,78,627.47/-. Admittedly, the billed amount of

₹24,00,08,953.93/- was with regard to the work done and not the amount payable after deductions. It is further noticed that the petitioner had also clarified that it had not scrutinized the amounts as referred to in Clauses (ii), (iv) and (v) of the bill.

31. The petitioner had also signed the summary of the extract of quantities and prices (which is annexed at Page 226 of the petition). This also did not include the amounts finally payable to the Building Contractor. The final bill in question indicates that the same has been certified by the Project Manager on 02.08.2008 and by the Station Commander on 16.04.2008. It is seen that the format of MES Bills has seven parts captioned with alphabets A to J. Part A contains the certificate to be signed by the contractor certifying that he has prepared the final bill for claiming the entire payment due to him; Part B is to be certified by the Project Manager as well as Station Commander; Part C is to be certified by the Executive Engineer/(QS &C)/SE (QS&C); Part D is to be signed by the AAO, CDA duly certifying that the prices charged are in accordance with the contract rates and the bill passed for payment is correct; Part E is to be signed by the Auditor, AAO and SAO, *inter alia*, certifying that no portion of the amount has been previously passed for payment; Part F is for the receipt, Part G contains the details of the cheque issued; and parts H and J relate to entries to be made in construction accounts and contractors ledger. It is seen that none of the parts of the bill require to be certified by a consultant. Admittedly, none of the said parts of the bills was, in fact, signed or certified by the petitioner.

32. It is seen that the format of the final bill did not include any specific entry for recovery of the mobilization advance. However, the format does include a section for deduction of payments made on running account receipts. A perusal of the bill indicates that against the said entries, a reference is made to Annexure J, which is also annexed to the said bill. The said annexure indicates the advances already paid on running account receipts. A perusal of the said annexure indicates specific notings as to the mobilization advance of ₹60 lacs included in the 5th RAR Bill and ₹36 lacs in the 12th RAR Bill. This clearly indicates that the said payments were duly reflected in the documents supplied. However, it is apparent that the said amounts were not included in the mathematical calculations of the amounts as certified by various officials. This Court is unable to accept that the petitioner is required to bear the responsibility for this error, since the petitioner was not required to certify the mathematical calculations. This, as noticed above, was required to be certified by various other officials. The petitioner on its part had duly checked the value of the work done by the contractor and had forwarded the corrected figures. The contention that the respondent had outsourced the supervision of the entire contract, including the accounting to the petitioner, is unpersuasive and is liable to be rejected.

33. Before concluding, it would also be relevant to note that blacklisting a contractor has severe adverse consequences and it has also been described as ‘Civil Death’ by the Supreme Court in ***Gorkha Securities Services v. Govt. of NCT of Delhi & Ors.: (2014) 9 SCC***

105. It is, thus, essential that such measures be inflicted only after the misconduct on the part of the contractor is conclusively established. In addition, it is also necessary to ensure that the punishment imposed is commensurate with the offending conduct. In the present case, there is no allegation of any *malafide* on the part of the petitioner and the petitioner is sought to be blacklisted on account of an alleged lapse in performance of its obligation. This, too, has not been conclusively established.

34. In view of the above, the petition is allowed and the impugned order is set aside. The parties are left to bear their own costs.

FEBRUARY 26, 2019
RK

VIBHU BAKHRU, J