

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

Reserved on: 14.07.2020

Date of decision: 17.08.2020

+ W.P. (C) 10729/2019 & CM Nos. 44377/2019 & 11633/2019
HARIOM PROJECT PRIVATE LIMITED Petitioner
Through: Mr.Shamik Sanjanwala, Adv.

versus

MILITARY ENGINEER SERVICES, DIRECTOR OF
CONTRACT MANAGEMENT AND ORS.

..... Respondents

Through: Mr.Kirtiman Singh, CGSC with
Mr.Rohan Anand, Adv. for.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioner challenging the order dated 22.04.2019 passed by the respondent no. 1 debarring the petitioner for a period of two years from the date of the order from participating in the tenders of Military Engineering Services (hereinafter referred to as 'MES').

2. The petitioner was awarded a Contract of additions and alterations of certain Pre-Engineered Building (hereinafter referred to as 'PEB') at Air Force Station, Bagdogra, West Bengal, vide Letter of Acceptance dated 30.08.2013, for a lump sum amount of Rs. 5.46 crores.

3. Thereafter a Work Order dated 14.09.2013 was issued in favor of the petitioner. The Work Order described the work to be carried out as under:-

“2. Brief description of work to be carried out, : All works as enumerated in details see IAFW-2212-a, Sheet___(attached). Sch ‘A’ & catered in particular specifications, other documents including drawing forming part of the contract.”

4. The date of commencement and handing over of the site was 26/27.09.2013 and the Scheduled Date of Completion of work was 26.03.2015.

5. Clause 4 of the Contract prescribes the ‘PEB Structure of Schedule A’. Clause 4.1 thereof provides that the work of PEB structure shall be executed through one of the Specialist Firms mentioned in the said Clause. One of such firms was M/s Lloyd Insulations (India) Private Limited, which was initially made respondent no. 4 in the present petition, however, the petitioner thereafter filed an application seeking deletion of the said respondent, being CM No. 53245/2019. The same was allowed by this Court by its order dated 21.01.2020, making it clear that such deletion would be at the peril of the petitioner.

6. The bone of contention between the parties is the scope of work under the said Contract/Work Order. The respondents contend that as per the provisions of the Contract, all work, including design, supply, fabrication and erection of the PEB structure was to be executed by the petitioner through one of the Specialist Firms mentioned under Clause 4.1 of the Contract/Work Order. Whereas, it is the case of the petitioner that the erection of the PEB structure could be done by the petitioner itself and was so done under the supervision of M/s Lloyd Insulations.

7. There is no dispute between the parties that while the design, supply and fabrication of the PEB structure was gotten done by the petitioner from M/s Lloyd Insulations, the erection of the structure was done by the petitioner itself.

8. There is further no dispute between the parties that due to the faulty design supplied by M/s Lloyd Insulations and subsequently vetted and approved by NIT, Durgapur, one long girder of the PEB structure was found sagging, which needed to be replaced, eventually leading to delay in the completion of work. As against the Scheduled Date of Completion of work, which was prescribed as 26.03.2015, the work was eventually completed on 01.09.2017.

9. The respondents thereafter issued a Show Cause Notice dated 05.09.2018 to the petitioner calling upon the petitioner to show cause as to why the Executing Authority not be approached for taking suitable action against the petitioner for violation of the Contract conditions. The allegations as contained in the Show Cause Notice are reproduced hereinunder:-

“3. The scope of work included design, supply, fabrication and erection of PEB structure. As per contract provisions, the work of PEB structure was to be got executed through one of the specialist firms mentioned therein.

4. You have preferred to get the work of PEB executed through M/s Lloyd Insulations (India) Limited (One of the firms mentioned in the CA) but it has been intimated by M/s Lloyd that as per order placed by you

on them, erection of PEB structure was not made part of Agreement. It indicates that erection of PEB structure was carried out by your firm under your own arrangements, which is a violation of contract conditions.

5. During currency of work, one long girder was found sagging due to faulty/deficient structural/fabrication drg. The fault/deficiency in fabrication drg could have been detected timely i.e. before erection of girder, had responsibility of erection of PEB structure been also entrusted to M/s Lloyd Insulations (India) Limited as per CA provisions.”

10. The petitioner replied to the Show Cause Notice by the letters dated 11.09.2018 and 13.09.2018. In the reply dated 13.09.2018, it was stated that the sagging took place due to the fault in design which was made by M/s Lloyd Insulations, the Specialist Firm mentioned by the respondents itself, which in turn was approved by NIT, Durgapur and finally by the Design Section of the Chief Engineer Office. It was also contended by the petitioner in its reply dated 11.09.2018 that the erection of PEB structure was done as per the instructions and under the strict supervision of M/s Lloyd Insulations.

11. The respondents, however, by the Impugned Order dated 22.04.2019, rejected the explanation of the petitioner by observing as under:-

“4. Your letter dated 11 Sep,18 wherein you have brought out that the erection was done as per instructions of M/s Lloyd Insulations (India) Ltd under

their strict supervision was forwarded to them for their comments. They have denied the contents of your letter with documentary evidence. They have brought out that service for supervision was rendered by them only for a brief period when you sought the same after serious problem was faced during execution of PEB, under your own arrangement.

*5. Explanation given by you vide your above mentioned letters has been analysed and is not found satisfactory. In view of the above, Registering Authority (Engineer-in-Chief) has de-barred your company for a period of **two years** for participating in tenders of MES from the date of this letter.”*

PETITIONER’S SUBMISSIONS:

12. The learned counsel for the petitioner, in challenge to the Impugned Order, has placed reliance on the findings of the Board of Officers that was convened to enquire into the sagging of the girder. He submits that the Board of Officers found *inter alia* that the Contract format which was adopted in the present case was not the approved form of Contract inasmuch as though it required 80% of the work to be carried out by a third-party (Specialist Firm), the liabilities of such third-party were not adequately specified. It further found that as per the contract conditions, the erection of the PEB structure was to be done by the Contractor and was so done under the supervision of the Specialist Firm. The Board of Officers further found that the delay in the completion of work was mainly due to the format of the Contract, wherein the Department had no control over M/s Lloyd Insulations. It also

recommended action only against M/s Lloyd Insulations and NIT, Durgapur.

13. The learned counsel for the petitioner further relies upon the recommendations of the Chief Engineer (AF), Shillong, to contend that the said Authority under whose jurisdiction the work in-question was carried out, also recommended action only against M/s Lloyd Insulations and not against the petitioner. He submits that the same was the recommendation of the ADG (NEI) as well, however, the file was sent back by the respondent no. 1 for reconsideration to the CE (AF), Shillong Zone. In his revised recommendations, CE (AF), Shillong Zone, now recommended “suitable disciplinary action” against the petitioner for not adhering to the Contract provision with regard to the erection of the PEB structure through one of the Specialist Firms mentioned in the Contract. The ADG (NEI), in its revised recommendations, recommended a ban of two years on the petitioner and an equivalent ban on M/s Lloyd Insulations. The recommendation qua the petitioner was accepted and the Impugned Order banning the petitioner for a period for two years was passed, however, the main guilty party, which is M/s Lloyd Insulations, was visited with a ban of only six months. Based on the above facts, the learned counsel for the petitioner submits that the Impugned Order is completely unreasonable and arbitrary.

14. He submits that the Impugned Order fails to notice the admitted ambiguity in the contractual terms as also the fact that the delay occurred not because of any mistake in the erection process, but in the design which was supplied by M/s Lloyd Insulations, one of the Specialist Firms

mentioned by the respondents itself in the Contract, and as approved by NIT, Durgapur as also the Chief Engineer. In this entire process, the petitioner could not be held guilty of violation of the contractual terms or having caused any loss or injury to the respondents.

15. The learned counsel for the petitioner has further submitted that even after the passing of the Impugned Order dated 22.04.2019, the CE (AF), Shillong, in its correspondences dated 23.05.2019 and 31.05.2019 addressed to the ADG (NEI), Guwahati, while reiterating that the petitioner was in violation of the contract by carrying out the erection work on its own, opined that the sagging of the girder had taken place due to the inadequacy in the design supplied by M/s Lloyd Insulations, which would have happened even if the execution of the erection work was carried out by a Specialist Firm; the erection work carried out by the petitioner was not the cause of sagging in the girder; and that though the petitioner has defaulted in the contractual terms, its default is not the reason for the deficiency in structural safety of the girder and only M/s Lloyd Insulations is responsible for such deficiency. It was further recommended that though a recovery be made from the petitioner for not deploying a Specialist Firm for erection of the girder, the period of ban imposed on the petitioner be reconsidered.

16. He also places reliance on the ADG (NEI) letter dated 04.06.2019, which recommended that the sagging of the girder would have taken place even if the work of erection was carried out by a Specialist Firm and that the petitioner is not a defaulter in the sagging of the girder, though it may have defaulted in not adhering to the provisions of the

contract and therefore, the period of ban imposed on the petitioner be reviewed. He submits that therefore, the period of debarment is *ex facie* arbitrary, disproportionate and is liable to be set aside by this Court.

17. He further submits, that the Impugned Order fails to appreciate that the petitioner has successfully executed more than one hundred contracts worth approximately Rs. 500 crores in the last twenty years for the MES and has an unblemished record. The petitioner has in fact, been granted an award for excellence in execution of works and successful completion of projects by MES for the years 2015-2016. In such circumstances, the debarring order could not be passed only on account of certain contractual disputes having arisen between the parties.

18. The learned counsel for the petitioner further submits that during the process of erection of the PEB structure, no objection was raised by any officers of the respondents nor any objection was raised to the order placed by the petitioner on M/s Lloyd Insulations. This itself shows that the case of the respondents against the petitioner is founded on an afterthought.

19. He further submits that the conduct of the petitioner has also been unblemished in this entire exercise. He submits that the petitioner, in spite of not being in default, has cooperated with the respondents and in fact, got the design refitted to the new size of 1250mm from the earlier 250mm and carried out the erection of the PEB structure at its own cost.

20. Relying upon the Judgment of the Supreme Court in ***Kulja Industries Limited vs. Chief General Manager, Western Telecom***

Project BSNL, (2014) 14 SCC 731, he submits that the relevant criteria, as laid down in the said judgment, has not been kept in view by the respondents while passing the Impugned Order.

21. He further submits that there is also a violation of equal treatment of the petitioner with M/s Lloyd Insulations, which has been banned only for a period six months as against the two-year ban of the petitioner.

22. He submits that there has also been a violation of the Principles of Natural Justice, with the Impugned Decision having been taken without granting any personal hearing to the petitioner and with a pre-meditated mind.

23. Placing reliance on ***B.C. Chaturvedi vs. Union of India and Ors.***, (1995) 6 SCC 749; ***UEE Electrical Engineers P. Ltd. vs. Delhi Development Authority & Ors.***, 2005 (81) DRJ 256 (DB); ***Coastal Marine Construction and Engineering Limited & Anr. vs. Indian Oil Corpn. Ltd. & Ors.***, 2019 SCC OnLine Del 6542; ***M/s. Avinash Em Projects Pvt. Limited vs. M/s. Gail (India) Ltd.***, 2015 SCC OnLine Del 7135; ***Vinay Construction Co. & Ors. vs. Municipal Corporation of Delhi & Anr.***, 2003 SCC OnLine Del 1141; ***Mekaster Trading Corporation vs. Union of India & Ors.***, 2003 (71) DRJ 376; ***Om Kumar vs. Union of India***, (2001) 2 SCC 386; ***Union of India & Anr. vs. V.G. Ganayuthan***, (1997) 7 SCC 463; and ***Roshni Enterprises vs. Director General of Supply and Transport & Ors.***, 2017 SCC OnLine Del 9580, the learned counsel for the petitioner submits the impugned action of the respondents is to be tested on the touchstone of proportionality, which would mean the least restrictive choice of measure, fairness, non-

discrimination, and equality. He submits that tested on the said yardstick, the Impugned Decision cannot be sustained.

RESPONDENT'S SUBMISSIONS:

24. On the other hand, the learned counsel for the respondents has submitted that the entire work, including the designing and the erection of the PEB structure was to be carried out by the petitioner through one of the Specialist Firms mentioned in the Contract. He submits that there is no ambiguity in the terms of the Contract in this regard. He submits that by carrying out the erection activity under its own arrangements and not through the Specialist Firm, the petitioner has clearly violated the terms of the Contract.

25. He submits that though in response to the Show Cause Notice, the petitioner had sought to shift the liability on M/s Lloyd Insulations, however, M/s Lloyd Insulations by its letters dated 19.09.2018 and 15.05.2019, denied that the erection of the PEB structure was done as per their instructions or under their strict supervision. The Work Order dated 20.05.2014 placed by the petitioner on M/s Lloyd Insulations was also only for supply of the PEB structure and the work of supervision/erection was not within the scope of work awarded to them. He further submits that the petitioner having deleted M/s Lloyd Insulations from the array of parties, cannot now seek to shift the blame on M/s Lloyd Insulations.

26. He further submits that the respondents complied with the Principles of Natural Justice by issuing a Show Cause Notice to the petitioner and granting him an opportunity to respond to the allegations

against it. Recommendations of the Technical Board of Officers, the CE (AF), Shillong Zone, and the ADG (NEI), were also duly considered. In this manner, the decision-making process was completely fair, transparent and not arbitrary.

27. The learned counsel for the respondents further submits that there is no violation of the Principles of Natural Justice as the petitioner never requested the respondents for grant of a personal hearing. He places reliance on the Judgment of the Supreme Court in ***Patel Engineering Limited vs. Union of India & Anr.***, (2012) 11 SCC 257, to submit that principles of natural justice do not mandate personal hearing been granted before passing the banning order.

28. He submits, that the petitioner cannot claim any parity with M/s Lloyd Insulations inasmuch as the Contract of the respondents was with the petitioner and not with M/s Lloyd Insulations.

29. He further submits, that as far as the recommendations dated 23.05.2019, 31.05.2019 and 04.06.2019 are concerned, the same were considered by the Competent Authority, however, no case for review was found and the decision to ban the petitioner for a period of two years was maintained. This was also informed to the petitioner vide letter dated 18.06.2020.

30. He submits that this Court in its exercise of the powers of judicial review, would not interfere with the order passed after due application of mind by the Competent Authority and after following the Principles of Natural Justice. Relying upon the decisions in ***Michigan Rubber (India)***

Ltd. vs. State of Karnataka & Ors., (2012) 8 SCC 216; *Master Marine Services Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd.*, AIR 2005 SC 2299; and *Kanwar Singh Yadav vs. All India Institute of Medical Science (AIIMS) & Ors.*, MANU/DE/0165/2019, the learned counsel for the respondents submits that the power of judicial review vested in this Court is highly circumscribed and does not extend to reviewing the order passed by the respondents on its merit, but extends only to considering the decision-making process. He submits that the decision-making process being fair and reasonable, this Court would refuse to interfere with the Impugned Order.

FINDINGS:

31. I have considered the submissions made by the learned counsels for the parties. As noted hereinabove, it is not in dispute that the sagging of the girder took place because of the defect in the design. The design was admittedly prepared by M/s Lloyd Insulations, which is one of the Specialist Firms mentioned in the Contract by the respondents itself. The design was also approved by NIT, Durgapur as also by the Chief Engineer. It is also not in dispute that the agreement of the petitioner with M/s Lloyd Insulations was placed before the Competent Authority by the petitioner at the time of the execution of the work and the execution of the work was being supervised by the Officers of the respondents. In spite of this, no objection was raised by the respondents at the relevant time.

32. Though it may be correct that the sagging of the girder has caused delay in the completion of the work, the above factors were relevant and important to be considered by the Competent Authority.

33. The findings of the Board of Officers was summarized in the Office Note dated 31.12.2018 of the Director (Contracts), as under:-

“3. A Board of Officers was convened by CEEC vide their letter placed at F/04. Findings of TBOO are placed at F/7B. Findings are summarized as under:-

*(a) EPC format was adopted by CE (AF) Shillong, which is **not an approved form of contract** by this HQ. As per the contract 80% of the work was earmarked for execution by third party (specialist firm), liabilities of third party have not been adequately specified.*

*(b) Similar Blast Pen structures have been executed at different AF Stations. Design of **one of these time tested & successful design** could have been provided for subject work also with revision in foundation design.*

(c) Since design is also to be done by the contractor, it is considered as Specialist Item as defined vide Para 12.5 & 12.6 of Manual on Contracts (F/08). PQC should have been specified as for E&M specialist works.

*(d) As per contract conditions, erection was to be done by PEB contractor. However, **erection done by the contractor** under supervision of the specialist firm.*

*(e) List of PEB firms through which the contractor has to get the work of PEB executed, mentioned in the contract contained 17 firms. Many of the firms were not approved by this HQ. However **M/s Lloyd Insulation (India) Pvt Ltd** was engaged for designing,*

fabrication and supply of PEB structure by the contractor M/s Hariom Projects Pvt. Ltd.

(f) The design was found to be carried out with working stress method with IS 800-1984 (old code). The importance factor considered in wind and earthquake design is 1.00.

(g) Sag in the girder has been attributed to their detailers by M/s Lloyd Insulation (India) Pvt. Ltd.

(h) Standard Steel has been specified to be of Fe 410s, Fe 410-0 confirming to IS 2062, which are grades as per old code. As per new code IS-2012 - 2011, the grades are E-250, E-350 etc. As per specification, hollow tubes of TATA Structure conforming to IS-4923 and also circular hollow tubes conforming to IS 1162 were not to be used. However pipe bracing have been provided which is safe from strength point of view.

(j) As per CA the primary structural steel shall have a minimum yield strength of 340 MPa and secondary members shall have 240 MPa. Designer has considered yield strength as 250 MPa for all members. Thus design has been made over safe. As per third party test reports, steel used was of grade E250 (Fe 410 W) quality 'A'.

(k) Present state of sag after rectification.

(i) Value of sag recorded for blast pens 1 to 4 was 50 mm, for No. 5 it was 42 mm and for No. 6 it was Nil. The permissible value of deflection is $L/325 = 28500/325 = 88\text{mm}$.

(ii) Revised structural design from M/s Lloyd Insulation (India) Pvt. Ltd. has been got vetted by NIT Durgapur.

(l) Delay in vetting of revised design by third party: Initial design was vetted by NIT Durgapur. STE recommended that revised drg be got checked by third party. Being the designer, design was to be got vetted by M/s Lloyd Insulation (India) Pvt. Ltd. After protracted correspondence by deptt with M/s Lloyd Insulation (India) Pvt Ltd, design was got vetted from IIT Bhuvaneshwar. The delay was mainly due to the format of the contract wherein the Deptt has no control over M/s Lloyd Insulation (India) Pvt Ltd. ”

(Emphasis Supplied)

34. A reading of the above would show that the sag in the girder as also the delay in the execution of work was attributed to M/s Lloyd Insulations.

35. The same Note records the recommendation of CE (AF), Shillong, to the following effect:-

“Recommendation of CE (AF) Shillong

- (a) *PQC criteria for execution of PEB structural works may be promulgated by E-In-C’s Branch duly specifying successful exec of similar PEB works in the past.*
- (b) *It is recommended that renewal of enlistment of M/S Lloyd Insulation (India) Pvt. Ltd. may not be considered for designing, fabrication, supply and erection of PEB structures in MES. The firm should be banned for a period of at least 5 years.”*

(Emphasis Supplied)

36. Therefore, no action was recommended against the petitioner.

37. The ADG also recommended as under:-

“5. Recommendations of ADG

a. Though strengthening measures were carried out by contractor without any extra cost appropriate action is recommended against the following for the lapses mentioned against each:-

(i) M/s Lloyd Insulation (India) Pvt. Ltd. - for failure in design. The firm is recommended to be banned for 02 years for designing, manufacturing and execution of PEB/steel structures. The firm is being banned for 02 years for area under AOR of ADG.

(ii) NIT Durgapur – for negligence & improper vetting of design and drawings. It is recommended for deleting the name of institution for vetting of design of steel/PEB structures of MES. The institutions is being excluded for vetting of design of steel/PEB structures in area under AOR of ADG.

(iii) Concerned officers of design section of CE (AF) Shillong Zone during Dec 2013 to Jun 2014-for improper vetting/checking of design of NIT Durgapur.

b. In absence of sufficient firms of PEB approved by E-in-C's Branch during the period of acceptance of CA, PQC for PEB work should have been given in the tender. An advisory may be issued in this regard for future works.”

38. On the above recommendations, the Director (Contracts), however, sought the CE (AF), Shillong, and the ADG (NEI) to specifically consider the accountability of the petitioner on the ground that it had also

failed to control the delays on the part of M/s Lloyd Insulations (India) Pvt. Ltd. and even otherwise, if the company owes responsibility for action of his sub-contractor.

39. It is on this remand that the CE (AF), Shillong, gave its revised recommendations as under:-

“5. The revised recommendation of CE (AF) Shillong Zone (Appx ‘F’) are as follow:-

(a) Suitable disciplinary action should be taken against M/s Hariom Projects Pvt Ltd for not adhering to the contract provision with regard to erection of PEB structure through one of the specialist firm mentioned in the CA.

(b) Warning letter to M/s Lloyd Insulation (India) Pvt Ltd for accepting the purchase order from M/s Hariom Projects Pvt Ltd without inclusion of job of erection.

(c) As far as action against designer of NIT Durgapur is concerned, appropriate action has already been taken.

(d) The GEs/CWEs involved in the execution of the work who had allowed the contractor to execute the work without adhering to the provisions catered for in the contract, be suitably warned to avoid recurrence of such lapse in future.”

40. The ADG (NEI) also submitted its revised recommendations as under:-

“6. The revised recommendations of ADG (NEI) (Appx ‘A’) are as follows:-

(a) Ban on M/s Hariom Projects Pvt. Ltd for violating contract condition for 2 years from issue of tenders.

(b) Ban on M/s Lloyd Insulation (India) Ltd for failure in design for a period of 02 years.

(c) Concerned CWE, GEs, AGEs (B/R) & JEs (B/R) involved during erection of PEB structure for allowing the contracts to execute without adhering to contract condition.

(d) Deleting the name of NIT Durgapur for negligence and improper vetting of design & drawings, from vetting of design of steel/PEB structure in ADG (NEI) area.”

41. Based on the recommendations of the ADG (NEI), the petitioner was banned for a period of two years. The Note dated 09.04.2019, apart from recording the above recommendations of the CE (AF), Shillong and ADG (NEI), does not suggest any other factor, including the past track record of the petitioner and its conduct otherwise in relation to the contract, being considered. It records as under:-

“7. ADG (NEI) has recommended 02 years ban on M/s Hariom Projects Pvt. Ltd. This recommendation is endorsed. Letter debarring M/s Hariom Projects Pvt. Ltd. (Index No. SS-50) is put up for approval, if the recommendation is agreed to.”

42. The petitioner made a representation against the banning order. Recommendations from CE (AF), Shillong were again sought. The same were submitted vide letters dated 23.05.2019 and 31.05.2019. Relevant extracts of the letters dated 23.05.2019 and 31.05.2019 are respectively, reproduced as under:-

23.05.2019:

*“(k) **Para 2(q)** : It is highlighted that excessive sagging in the portal girder has occurred due to inadequacy in design by M/s Lloyd Insulations (India) Ltd. which would have happened even after execution of the erection work by the specialist firm. The erection by the Contractor M/s Hariom Projects Pvt. Ltd is not the cause for sagging in the girder. Thus, it is felt that M/s Hariom Pvt. Ltd. has defaulted in not adhering to Contract provision regarding erection by the specialist firm as per P.S. Clause 4.1 of the CA but his default is not the reason for structural safety of the girder. M/s Lloyd Insulations (India) Ltd is only responsible for the deficiency in design resulting into sagging of the girder. A suitable recovery shall be made from the contractor for not deploying specialist firm for erection of the girder.*

xxxx

*(r) **Para 10** : It is a fact that the sag has already been rectified and no further remedial measures are required as brought by the BOO but M/s Hariom Projects Pvt. Ltd has violated Contract Condition with regard to erection of PEB structure. Therefore, it is considered that the ban imposed on the firm is inevitable. However, the period of debarring the firm may be reconciled at your end considering the facts of the complete case.”*

31.05.2019:

“2. It has already been brought out in our above referred letter that the sagging of the girder beyond

permissible limit has mainly taken place due to design deficiency by M/s Lloyd Insulation (India) Ltd. Also the contractor has co-operated with the department in completing the work with revised design finalized by M/s Lloyd Insulation (India) Ltd. the finalization of the revised design for the structure duly vetted by IIT Bhuvanewar as third party check for structural safety. Itself has taken 15 months time from 18 Nov 2015 (M/s Lloyd Insulation (India) Ltd. letter no: 12/KG/JI-306354/3455 dt 18 Nov 2015) to 18 Feb 2017 (i.e., vetting by IIT Bhuvanewar). Thus, contractor had already suffered on a/c of such delay in finalizing revised design by M/s Lloyd Insulation (India) Ltd. In addition, the contractor was also penalized by banning for issue of tender for 01 Qtr vide WLR for Q/E Jun 2017.

3. In view of the above facts, the ban imposed on the firm may be reviewed.”

43. The ADG (NEI) also recommended as under:-

“(e) i) Sagging in the portal girder has taken place due to deficiency in the design given by M/s Lloyd Insulations (India) Ltd. and not due to wrong technique of erection. The same would have happened even after execution of erection work by the specialist firm. Therefore, M/s Hariom Projects Pvt Ltd. is not a defaulter in sagging of girder though the firm has defaulted in not adhering to contract provision regarding erection of structure through the specialist firm (P S Clause 4.1 of CA). Afterwards, M/s Hariom Projects Pvt. Ltd. has got the erection done through specialist firm M/s Lloyd Insulations (India) Ltd. only.

ii) Redesign of PEB structure by M/s Lloyd Insulations (India) Ltd. & vetting of the same from IIT Bhubaneswar took approx 15 months but M/s Hariom Projects Pvt. Ltd. co-operated with the deptt in completing the work even though work was got delayed

by 15 months due to none of his fault. The firm M/s Hariom Projects Pvt. Ltd. was also penalized by banning for issue of tenders for one quarter in the WLR for QE Jun 2017 on account of slow progress. Main delay was due to rectification of defects which got delayed due to redesign of main girder and vetting of design by other agency.”

44. The Director (Contracts) in his Note dated 15.10.2019, now recommended as under:-

*“13. **RECOMMENDATION** : Following recommendation is made:-*

(a) The extent of technical delinquencies attributable to the designer firm cannot be much less than attributable to contractor from any consideration. Hence the penalties imposed on both the agencies should be equitable and commensurate with the levels of default attributable to them. Contractor has been penalised with two years' ban whereas the designer firm has been penalised only with 6 months ban up to 30 Sep 2019. The parallel contracting firm of the designer firm is also banned only upto 30 Sep 2019.

(b) Since the penalty already imposed on the designer firm cannot be reviewed on severe side being against the basic tenets of law, it would be prudent to review the penalty on contractor.

(c) Recommendation of ADG (NEI) on representation of contractor is to lift the ban with immediate effect from the point of view of equity & natural justice.

(d) Considering all the factors and parameters associated with the issue and applying the principle of natural justice, it is opined that level of penalty to the contractor three months more than that meted out to the designer firm will be equitable and appropriate.

*(e) Accordingly, it is recommended that the debarment period of the contractor may be reviewed and debarment may be lifted after **31 Dec 2019**.”*

45. These were, however, sent back for seeking some explanation. The explanation was rendered by the Director (Contracts) in his Note dated 29.10.2019, which recorded inter-alia as under:-

“3. Para 2(a) : The issue of liability of contractor in the defect is deliberated in para 12(b) of Note 15. It is again brought out that liability of defect cannot be apportioned on contractor singularly in view of reasons given therein. The responsibility for defect rests collectively on agencies involved in design, its vetting and departmental officials involved in approval. Although the contract was with M/s Hariom Projects Pvt Ltd, he was bound by contract conditions to get the design done from agencies listed in contract, get it approved by agencies/Institutions listed in contract and finally get it approved by Departmental officials concerned. Hence the contract was not one-to-one so far as the design part is concerned as the agencies involved in design process were pre-decided/pre-determined by the Department. Accordingly, the liability for defect has to be collective.”

46. The representation was, however, rejected recording as under:-

“2. The lapses, which led to the serious case by ADG TE, are attributable to executives, designers, contract section officials, PEB manufacturer, NIT Durgapur for vetting and the Contractor. Major lapses in respect of contractor are highlighted as under:-

(a) Owes responsibility for all actions of his sub-contractors. He is liable to see if specialist firm has provided material and design as per contract. Contract Agreement Clauses make him fully responsible.

(b) Erection of PEB structure by self in violation to Contract Agreement clause.

(c) Experience supervisor if employed by the contractor would have helped in highlighting the design deficiency prior to erection.

(d) Failed to control delays on the part of PEB contractor.

3. As per the Central Govt Standing Counsel (CGSC), the Contractor has approached Delhi High Court against its ban and filed an application for stay u/s 151 of CPC. The hearing for the same is scheduled on 21 Nov 19.

4. In view of the above and since the subject case is subjudice, it is recommended that the Court case is defended effectively and suitable reply alongwith exhibits are forwarded to CGSC for contesting the same by CE (AF) Shillong/ADG (NEI).”

47. A reading of the above Notings would clearly show that the sagging of the girder took place due to the faulty design and not due to the defect in the erection work. The petitioner has been banned primarily on the allegation of breach of the contractual term for not having carried

out the erection work through one of the Specialist Firms. For such default, in my opinion, and as was the opinion of various Officers of the respondents reproduced hereinabove, the penalty of blacklisting is totally disproportionate and arbitrary. The same, cannot therefore, be sustained.

48. As far as the issue of the petitioner being guilty of breach of the terms of the Contract by carrying out the erection of the girder on its own and not through a Specialist Firm, even assuming there was such a breach of contract, it is settled law that every breach of contract cannot justify an order banning the Contractor from future contracts. It is also to be considered whether such breach was contemptuous or in utter disregard to the contractual responsibility of the Contractor, thereby making the Contractor unsuitable for future contracts, or was it because of a *bona fide* dispute on interpretation of the contractual terms. The past conduct of the Contractor is also to be considered while taking such decision as it amounts to the “civil death” of the Contractor.

49. In the present case, the Board of Officers themselves have opined, that the Contract format adopted by the respondents was not the standard format. There were certain ambiguities in the contractual terms. The factor that the petitioner has successfully performed various contracts for the respondents since the last 27 years with an unblemished record is also not denied by the respondents. In my view, these were relevant and important factors to be taken into consideration while considering the issue of banning the petitioner from future contracts and the duration thereof.

50. It is also evident that the Technical Board of Officers, the Chief Engineer (Air Force), Shillong, and the ADG (NEI), under whose supervision and control the Contract was performed by the petitioner, have all opined that the petitioner was not to be blamed for the sagging of the girder and that though the petitioner may be in technical default of the contractual terms, the sagging of the girder delay and the delay in the completion of work cannot be blamed on the petitioner.

51. It is trite law that blacklisting of a Contractor visits the Contractor with civil consequences inasmuch as it casts a slur, attaches a stigma and creates a barrier between the blacklisted person and the State entities in matters of commercial transactions. It has serious adverse consequences for the person/entity blacklisted. In today's world, an order of blacklisting does not confine itself only to the Authority who has blacklisted the Contractor, but has an all-pervasive effect on the Contractor in its dealings with other Government agencies as well. In most tenders, the Contractor has to disclose if it has been blacklisted by any agency and the eligibility criteria excludes persons or entities who have been so blacklisted. As repeatedly held, it in fact, amounts to "civil death" of the Contractor.

52. In *Kulja Industries Ltd.* (supra), the Supreme Court held that the power to blacklist the Contractor, whether it be a contract for supply of equipment or for execution of any work whatsoever, is inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contract. However, any such decision is subject to judicial review when the same is taken by the

State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the Principles of Natural Justice, but also on the doctrine of proportionality. A fair hearing to the party being blacklisted, thus, becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order must be reasonable, fair and proportionate to the gravity of the offence and is subject to scrutiny by a Writ Court. The Supreme Court further observed as under:-

“20. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law.....”

53. The Supreme Court also considered the Guidelines issued by the Federal Government of USA, prescribing the grounds for debarment and the factors that may influence the debarring official's decision, which include the following:-

“22. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:

a) The actual or potential harm or impact that results or may result from the wrongdoing.

b) The frequency of incidents and/or duration of the wrongdoing.

c) Whether there is a pattern or prior history of wrongdoing.

d) Whether the contractor has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on the basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(h) Whether the contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official."

54. In *Patel Engineering Ltd.* (supra), while reiterating that the authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc., and that there need not be any statutory grant of such power, the Supreme Court held that the only legal limitation upon the exercise of such an authority is that that State is to act fairly and rationally, without being arbitrary in any way. Such exercise of power has to be examined on the touchstones of; (1) the purpose sought to be achieved by the impugned decision to blacklist the Contractor; and (2) the adverse effects the impugned action may have on the rights of the Contractor.

55. The decision to blacklist a Contractor has a more far-reaching effect and adverse consequence on the Contractor than a mere exercise of a contractual power to claim damages or termination of the Contract. Its effect is all-pervasive.

56. This Court, in its Judgment in *Coastal Marine Construction and Engineering Limited & Anr. vs. Indian Oil Corporation Ltd. & Ors.*, (2019) SCC OnLine Del 6542, has held that it would be unreasonable and arbitrary to visit every contractor who is in breach of its contractual obligations with a blacklisting order. If a contractor is to be visited with the punitive measure of blacklisting on account of an allegation that he has committed a breach of a Contract, the nature of its conduct must be so deviant or aberrant so as to warrant such a punitive measure. The conduct must be so reprehensible so as to invite a punitive measure

and cannot be resorted to merely on account of *bona fide* controversies relating to contractual matters.

57. Applying the above test to the facts of the present case, it is found that there is no allegation of fraud or corruption or moral turpitude against the petitioner; the Board of Officers opined that the format of the Contract was ambiguous and was not of the standard format; the fault was admittedly with the design and not the execution; the petitioner was not questioned during the execution/erection work but only later when the work was delayed; and the Authorities, including the Board of Officers, the CE(AF) and the ADG(NEI), have maintained that the penalty of blacklisting the petitioner is harsh. The prior work of the petitioner and the fact that the petitioner would be completely wound up if the Impugned Order is to stand, has not been denied. These were important and relevant factors to be borne in mind by the Competent Authority while taking the Impugned Decision. The only factor, however, which weighed with the Competent Authority was that the petitioner was in default of the contractual terms. Though, this is also an important factor, as explained above, it is not the only factor that should govern or influence the decision to ban a contractor. The other factors play an equal part in the decision-making process and having been ignored. For the breach of the contract the petitioner could have been visited with some other penalty, including a claim of damages, however, the same has not been considered. The Impugned Decision suffers from arbitrariness and cannot be sustained.

58. This order shall not, however, be read as an expression of opinion on the question of whether the petitioner has, in fact, breached the contractual terms in carrying out the erection of PEB structure on its own and if so, the consequences thereof. This order is confined only to considering whether in the present facts, the decision to ban the petitioner for a period of two years was justified or not.

59. The petition is allowed in the above terms. There shall be no orders as to costs.

AUGUST 17, 2020/rv

NAVIN CHAWLA, J



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