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

Pronounced on: 3rd December, 2021

\+ **O.M.P.(I) (COMM.) 389/2021**

M/S.GENIUS PRESENTATION PVT. LTD. .....Petitioner
Through: Mr.Abhinav Agnihotri, Mr. Deepak Vohra and Mr. Aniket Gupta, Advs.

Versus

UNION OF INDIA AND ANR. .....Respondents
Through: Mr. Jaswinder Singh, Adv. for R-1 & 2

CORAM:
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

1. This petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 with the following prayers: -

> *"a. Pass an order in favour of petitioner and against the Respondent thereby restraining the respondent from encashing the Performance Bank Guarantee No.027GT02211790014 amounting to Rs.4,50,142 dated 28.06.2021 and;*
>
> *b. Restrain the respondent no.2 from blacklisting/debarring the petitioner in further tender of the remaining work.*
>
> *c. Restrain the respondent no.2 in issuance of the fresh tender in respect of the remaining work,*
>
> *d. Pass an ex-parte interim order in terms of prayers A-C*

above"

2. Mr. Abhinav Agnihotri, learned counsel for the petitioner, submitted that the petitioner/Company, which is engaged in the business of offering pioneer and advance display technologies in total digital display solutions, had participated in the tender issued by respondent No.1/Central Public Works Department (for short, **"CPWD"**) bearing No.01/EE(e)/IITIPED/2021-22 for the work of supplying, installation, testing and commissioning of Video Wall and other equipments at auditorium at the estimated cost of Rs.3,33,80,966/-. The tender was awarded to the petitioner on 22nd June, 2021. The tender was accepted at the amount of Rs.1,50,04,744/- and the time period for execution was fixed at three months. As mentioned in the petition, the petitioner was required to supply the following: -

i. AV over IP Encoder-Decoder (BOQ Item No.3)

ii. 49" 4K Confidence Monitor (BOQ Item No. 4)

iii. Direct LED Video Wall (BOQ Item No. 1)

3. According to the learned counsel for the petitioner, it was the proposal of the petitioner to include the "Make in India" aspect into the tender and it was accepted. Once the tender was accepted, the Performance Bank Guarantee (**PBG**) of Rs.4,50,142/- was also furnished by the petitioner on 28th June, 2021. Thereafter, according to the learned counsel, the respondents began harassing the petitioner by demanding GST invoices/import bills, which had no relevance to the determination

of the "Make in India" content. Further, it was submitted that as per the guidelines, a self certification was sufficient and in case the respondents had any grievance, they had to refer the matter to Standardization Testing and Quality Certification Directorate for verification. According to learned counsel, the respondents had no authority to demand these documents as they had, particularly the GST invoices/import bills.

4. Learned counsel for the petitioner submitted that the petitioner was aggrieved by the attitude of the respondents and had issued a letter on 11th August, 2021, requesting the respondents to invoke arbitration under Clause 25 of the General Conditions of Contract 2020, Construction Works (for short, **"GCC"**) for the settlement of disputes. However, the respondents have not acted thereon so far. On the contrary, the respondents issued the letter dated 16th November, 2021 directing the forfeiture of the PBG and debarring the petitioner from further tendering for this work. At the same time, they had initiated action of calling fresh tenders, which would be finalized after 4th December, 2021. Learned counsel has relied on the judgment of the Supreme Court in ***Gorkha Security Services v. Govt. (NCT of Delhi) & Ors.***, (2014) 9 SCC 105, to submit that there could be no blacklisting without a Show-Cause Notice.

5. It may be mentioned here that this matter had been first listed for hearing on 26th November, 2021, when directions were issued to the petitioner to file the GCC. The matter was then adjourned to 14th December, 2021. However, I.A.15744/2021 was filed by the petitioner for preponement of the hearing on the ground that the tendering process commenced by the respondents would result in grave injustice to the

petitioner, if the matter was not heard. Accordingly, the matter was taken up for hearing on 30th November, 2021. Learned counsel for the petitioner informed that the PBG had already been invoked and therefore, the prayer (a) of this petition has become infructuous. In the course of arguments, the learned counsel for the petitioner has filed an Office Memorandum dated 29th November, 2021, issued by the Additional Director/Scientist 'E', Ministry of Electronics and Information Technology, Government of India (for short, **"MEITY"**) to submit that verification was to be done by the Standardization Testing and Quality Certification Directorate and till then, the tender could not be finalized.

6. Learned counsel for the petitioner has further argued that on account of the action of the respondents debarring the petitioner from tendering for the work, it was prevented from responding to other tenders, namely, tenders which have been floated by Madhya Pradesh Police Housing and Infrastructure Development Corporation; the High Court of Tripura; Municipal Corporation of Karnal and Kerala Industrial Infrastructure Development Corporation (KINFRA), where a disclosure has to be made regarding any blacklisting/debarment of the participants. Thus, it was submitted that interim orders may be passed to protect the interests of the petitioner.

7. Mr.Jaswinder Singh, learned counsel appearing on behalf of the respondents No.1 & 2, has opposed the grant of any interim relief. Learned counsel submits that the respondents have acted strictly in accordance with the provisions of the GCC and the petitioner could not raise any grievance. As regards the communications between the parties,

with regard to the certification of the "Make in India" content of 51%, learned counsel submitted that even as per the Circular dated 7th September, 2020 of the MEITY, self certification was intended only for participation in the tendering process, but thereafter, the concerned agency was entitled to verify the documents submitted in support of the self certification. Learned counsel submitted that throughout, as reflected in the communications placed on record by the petitioner itself, information was sought only for calculating the local content/domestic value addition in terms of Clause 9 of the Circular. The clarifications were sought only on account of the fact that there were inconsistencies/contradictions in the information being provided by the petitioner to the respondents and despite several communications in this regard, no cogent disclosure was forthcoming. The GST invoices/import bills were sought only in this background.

8. Learned counsel for the respondents further pointed out that the letter dated 16th November, 2021 itself refers to 19 communications exchanged by the parties since 22nd June, 2021 and therefore, the petitioner has not been caught unawares. The work had not been performed by the petitioner. Repeatedly, this fact was being brought to the notice of the petitioner, but no remedial action was taken thereon by the petitioner. The claim that the site had not been handed over was without basis as at least two jobs i.e., AV over IP Encoder-Decoder (BOQ Item No.3) and 49" 4K Confidence Monitor (BOQ Item No. 4), that had to be performed by the petitioner, required nothing to be done by the respondents and yet, the petitioner failed to even commence the work.

It has also been submitted that the forfeiture of the PBG was as per the provisions of Clause 5 of the GCC. Further, debarring of the petitioner was only in respect of tendering for this particular work and was not a blacklisting. The same was also in accordance with the GCC.

9. Learned counsel for the respondents submitted that though Clause 25 of the GCC had provided for arbitration, there was a prescribed procedure to invoke the said clause. There was a three-tier system for settlement of the disputes through arbitration and at the first stage, the disputes had to be raised with the Engineer-in-Charge. If there was any dissatisfaction, then the Chief Engineer/CPM or the Additional Director General/Special Director General was to be approached, who would then refer the matter to the Disputes Redressal Committee. If either party was dissatisfied with the decision of the Disputes Redressal Committee/ADG/LDG, then the party could give notice for appointment of an Arbitrator. The petitioner had not adhered to this procedure and therefore, the direct invocation of Clause 25 of the GCC for the purposes of appointment of an Arbitrator was not acted upon.

10. I have heard learned counsel and considered the material on record. In view of the fact that the PBG has already been invoked and encashed by the respondents, the relief sought vide prayer (a) is clearly infructuous. With regard to prayer (c), calling for a restraint on the respondent No.2 from issuing a fresh tender in respect of the remaining work, this also appears to be infructuous, inasmuch as, admittedly, as mentioned in the I.A.15744/2021, the tender has already been called for in respect of completion of work that has not been performed by the petitioner.

Moreover, relief has come to the petitioner in the form of the O.M. dated 29th November, 2021, para No.6 of which reads as under: -

> *"6. In this regard, CPWD/IIT Indore is requested to refer the matter to STQC for verification of local content as claimed by M/s. Genius Presentation Pvt. Ltd. and the <u>tender shall not be finalized until the verification is completed</u>. It is also requested that Public Procurement (Preference to Make in India) Order 2017 should be implemented for procurement of electronic products seriously."* ***(emphasis added)***

In other words, since till the verification is completed by the Standardization Testing and Quality Certification Directorate, the tender is not to be finalized, there is no reason to stop the already commenced tendering process.

11. Thus, the petition has to be dismissed as infructuous qua prayers (a) and (c).

12. As regards the grievance of the petitioner in respect of its debarment in tendering for the remaining work, the various communications exchanged between the petitioner and the respondents need to be considered. It is apparent that the impugned letter dated 16th November, 2021 has not been issued on account of the fact that the respondents were raising queries with regard to the declared "Make in India" content of the products to be supplied by the petitioner. This claim of the petitioner is not borne out from the record. For better appreciation, the communications of the respondents to the petitioner may be referred to — even if not to all of them.

13. As rightly pointed out by learned counsel for the respondents,

under Clause 9 of the Circular of the MEITY, the agency which had called for the bids was required to make calculations in accordance with a particular prescribed formula *“so as to validate the assessments in this regard and ensure that the domestic value addition, that is claimed, is consistent”*. Therefore, the claims of the petitioner, which were self certified for the purposes of the bidding, were rightly sought to be assessed for validation by the respondents.

14. Due to inconsistencies, which have been highlighted in various communications dated 7th July, 2021, 20th July, 2021, 28th July, 2021, 29th July, 2021, 2nd August, 2021, 4th August, 2021, amongst others, the respondents chose to even call for the GST invoices/import bills. Vide communication dated 28th July, 2021, the respondents also explained why disclosures in respect of the expenditure were being sought. Finally, vide letter dated 25th August, 2021, the respondents informed the petitioner that their brand ‘Genius Lets Rise’ was not compliant with the “Make in India” policy and could not be approved but, nevertheless, an opportunity was accorded to the petitioner to supply any of the brands “Chirstie/Barco/Mitsubishi/LG/Samsung”, which were the pre-approved brands in the tender or even any other brand which complied with the Circular of MEITY dated 7th September, 2020 or the two circulars of the respondents.

15. It is, therefore, clear that the action of the respondents in seeking documents for validation of the claim of the “Make in India” content, does not disclose any *mala fides.* Nor did this form the basis for the forfeiture of the PBG and the debarment, which happened due to the non-

commencement of the work by the petitioner.

16. The communications placed on the record reveal that the respondents were drawing attention of the petitioner to the fact that though the period of performance under the contract was passing, the petitioner was not executing the job under the work contract.

On 2nd August, 2021, the respondents intimated to the petitioner that milestones as per the tender conditions were already over and the petitioner had not commenced any work at site despite more than 35% of the contract period having expired. The petitioner was duly informed vide this letter as under:

> *"……You are therefore once again directed to take action as per this letter and previous letter dated 29/07/2021 failing which you(r) performance guarantee will be forfeited absolutely and <u>you shall be debarred from further tendering for work."</u>* ***(emphasis added)***

The petitioner had in fact replied to this letter vide its email dated 3rd August, 2021, however no work was apparently commenced.

On 4th August, 2021, a similar communication was sent with the following warning: -

> *"In lieu of this and the previous letters it is hereby again <u>strongly directed</u> to take action and commence the work at site failing which your performance guarantee shall be forfeited absolutely and <u>you shall be debarred from further tendering for this work</u>."* ***(emphasis added)***

Similarly, on 7th August, 2021, the following communication was sent to the petitioner: -

"This is with reference to the above letters and emails it is hereby again intimated that you have not taken any action as communicated vide above letters and email to commence the work at site and submit necessary documents for approval of LED video wall. You are hereby been given seven more days to take the necessary action and failing which your Performance Guarantee shall be forfeited absolutely and <u>you shall be debarred from further tendering process of this work</u>." ***(emphasis added)***

In a reply of the same date, the petitioner seems to have only accused the respondents of delay, with really no action initiated by it.

17. It is to be noted that despite the communication of the petitioner dated 16th August, 2021, wanting the dispute *"to be referred to arbitration"*, the respondents seem to have, vide their letter dated 25th August, 2021, permitted the petitioner to supply some other brands while noticing that though more than 60% of the contract period was over, no activity had been started by the petitioner and directed the petitioner to submit a program for completion of work and start work at the site within three days of the issuance of this letter dated 25th August, 2021.

18. In its response dated 27th August, 2021, it appears that the petitioner had sought two months and five days' time for the execution of the work. On 28th August, 2021, again, the respondents highlighted to the petitioner that 60% of the contract period was already over and no activity had been commenced at the end of the petitioner. Time was granted for installation of the Encoders-Decoders and confidence monitors within one month from the said date, whereas the LED Video Wall was to be installed as per the programme that was to be submitted

by the petitioner to the respondents for approval.

19. On 25th September, 2021, a communication was sent by the respondents to the petitioner in respect of the approval of 'Samsung make model No. QB49R' highlighting the requirement for extended years of faulty spare part support. It was also recorded as under:-

> *"it is also understood that in case you back out from your undertaking, CPWD will be as its liberty to debar you from all the future tenders."* ***(emphasis added)***

20. Then, on 25th October, 2021, a communication was sent by the respondents to the petitioner again underlining that the timeline for execution and handing over of the equipments except the LED Video Wall, had been intimated to the petitioner on 30th August, 2021, but despite two months' period, no work had commenced at the site. The communication concluded as follows: -

> *"Hence it appears that you are not interested to commence the work at site with absolute disregard to the requirements of IIT Indore. This office is therefore left with no other option but to forfeit your performance guarantee and rescind the work. You are therefore directed to submit the explanation within 7 days after issue of this letter as why action should not be taken under clause 5 against your firm."*

21. This was followed by a communication dated 3rd November, 2021, again highlighting that four months had lapsed, but work had not commenced. It was also directed that manufacturing had to be commenced within three days and the reason for not finishing the work,

other than Video Wall, must be informed to the respondents without any delay. It is thereafter that the impugned letter dated 16th November, 2021 was issued intimating as under: -

> *"I am therefore bound to take action now under clause 5 of the above agreement. Your performance guarantee is hereby forfeited absolutely and you shall be debarred from further tendering for this work".*
>
> ***(emphasis added)***

22. It is more than apparent that this is not a case where the petitioner was kept in the dark about the possibility of his being debarred from the work in question, which, as noticed, was for "Supply, Installation, Testing and Commissioning of Video Wall and Other equipments at Auditorium". Despite the number of cautionary letters issued to the petitioner, as referred to hereinabove, including the letter dated 25th October, 2021, which asked the petitioner to Show-Cause, the petitioner did not commence the work or complete the same (excluding the Video Wall), which led to the forfeiture of the PBG, which was strictly in terms of Clause 5 of the GCC.

23. There is force in the contention of the learned counsel for the respondents that a defaulter cannot be permitted to tender for the very work that he has not performed. It is precisely because of non-performance by the petitioner that a need has arisen for tendering the work afresh. The non-performance cannot be awarded with a premium for fresh participation. It is also apparent that though in the letter dated 25th September, 2021, the respondents had threatened to debar the petitioner from all tenders (i.e., blacklisting the petitioner), in the letter

dated 16th November, 2021, all that the respondents have done is to debar the petitioner from participating in the tender specifically for the completion of the contracted work, which had been previously awarded to the petitioner.

24. Thus, as no equities are shown to exist in favour of the petitioner, there is no merit in the present petition, which is accordingly dismissed.

25. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

DECEMBER 03, 2021
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