

Madhya Pradesh Urban Development Company Limited

(CIN No. U75110MP2015SGC034139)

(Department of Urban Development and Housing, Government of Madhya Pradesh)

Project Management Unit

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No./PMU/ENGG/2022/ 6272

Bhopal, Dated 15 /07/2022

Appeal No. 02/22

Subject: Appeal filed by M/s P C Snehal Construction Co., Ahmedabad, Gujrat against the order of Blacklisting dated 23-06-2022.

ORDER

(Dated- 15th July 2022)

The joint venture of M/s Rean Watertech Pvt. Ltd. and M/s P C Snehal Construction Co. with M/s Rean Watertech. Pvt. Ltd. in the capacity of lead partner, (hereinafter referred to as "Contractor") was awarded four contracts for providing water supply services under the Asian Development Bank funded MPUSIP Package – 1A, 2B, 4D & 6A. Clause 9.2 of GCC read with Clause 9.2 of Particular Conditions of Contract stipulated the Contractor to complete for design and build works within 850 days of signing the contract. However, the Contractor has failed to complete the work within the stipulated time provided for the said contracts.

In the interest of completion of projects and also on the request made by the contractor, the periods for completion of design – build works of the respective contracts were extended in accordance with the Sub-Clause 9.3 [Extension of Time for Completion of Design-Build] and 9.13 (Failure to Complete) of GCC of the contracts for the respective package.

In the extended period also, the Contractor has failed miserably to carry out the work as per the revised and agreed work-plan for the respective contract. Time and again the Contractor was advised to deploy sufficient manpower & machinery and procure sufficient material to expedite implementation of works to ensure catching up with the work-plan schedule.

Since the Contractor, despite various notices and reminders, has persistently delayed and failed to complete the work in accordance with the contractual provisions, a show cause notice no. PMU/ENGG/2022/344 dated 13-01-2022 was issued to the contractor to initiate action as per Order No. 11240/PMU/MPUDCL dated 17-12-2021.

The Contractor was given 15 days' time to submit its reply to the show cause notice. On behalf of JV, Mr. Rishi Arora, Director, M/s Rean Watertech Pvt. Ltd. in the capacity of lead partner and authorized signatory of the JV Firm, vide letters dated 31-01-2022 submitted the responses. The respondent on examination of reply furnished by the contractor did not find any merit in the explanation so proffered. Consequently, the contractor i.e. {M/s Rean Watertech Pvt. Ltd; and M/s P C Snehal Construction Co. (JV)} was blacklisted and debarred for a period of two years from participating in the ongoing and future bids of the respondent. Being aggrieved by the order dated 23-06-2022, M/s P C Snehal Construction Co., the appellant, has filed the present appeal.

(E-Mail dt. 15/07/2022)

The appellant has challenged the order, essentially, on the following grounds:

1. At present the appellant is executing independently 3 packages with MPUDCL namely ADB assisted MPUSIP Package 2D, 4I which are water supply projects and The World Bank assisted MPUDP Package WB-10 for Under Ground Sewerage project.
2. The appellant is executing the above said three packages with utmost seriousness and the progress is also satisfactory. In Package 2D and 4I, even the trial run has also commenced. The appellant submitted the Physical and Financial progress (as in June 22) of the packages 2D and 4I as under:

Package 2D

S.No.	Name of the Town	Physical Progress	Financial Progress
1	Bhavra	86%	79%
2	Meghnagar	95%	
3	Petlawad	97%	
Total Package 2D		92.79%	79%

Package 4I

S.No.	Name of the Town	Physical Progress	Financial Progress
1	Shadora	91.00%	73.5%
2	Raghogarh	77.50%	
3	Badarwas	30.15%	
Total Package 4I		76.02%	73.5%

3. The packages namely 1A, 2B, 4D and 6A are entirely and exclusively executed by M/s Rean Water Tech Pvt. Ltd. and the appellant had no role in execution of these packages. Appellant has alleged that its role is limited to only giving technical assistance to the lead partner i.e. M/s Rean Watertech Pvt. Ltd., required for these contracts.
4. Appellant has never been blacklisted by any contracting authority till date.
5. Appellant has alleged that all the payments are being done by MPUDCL to M/s Rean Watertech Pvt. Ltd.;
6. Order will tarnish appellant's clean image, will hamper appellant's further business plans in the State of Madhya Pradesh and would cause immense hardship to appellant and thousands of people connected with appellant's organization. This Order is after the award of the contract and not part of the tender and contract;
7. Further in the contracts the penal provisions are liquidated damages as per clause no. 9.6 of GCC and termination under clause 9.13 of GCC and nowhere in the contract is **Blacklisting** provided. Thus the action of Deputy Project Director (T-2) of MPUDC to blacklist the contractor is not in accordance with the provisions of the contract.;

8. The order dated 23-06-2022 has been passed in complete violation of the principles of natural justice without issuing any show cause and without giving the appellant a reasonable opportunity of being heard in the matter.

Respondent's submission is as under:

9. The respondent contended that a show cause notice dated 13-01-2022 for initiating action of blacklisting as per Order No. 11240/PMU/MPUDCL dated 17-12-2021, was issued jointly and separately to each and all of the JV members, i.e. the contractors, in Package 1A, 2B, 4D & 6A. Consequently, the Appellant was also put to notice regarding proposed action of blacklisting as per order dated 17-12-2021. On behalf of JV, Mr. Rishi Arora, Director, M/s Rean Watertech Pvt. Ltd in the capacity of lead partner and authorized signatory of the JV Firm, submitted the reply. Before taking a decision on blacklisting, an opportunity of being heard was also given to the contractor by way of hearing. Notices for hearing held on 14-03-2022 and 20-06-2022 were issued jointly and separately to each of the JV partners including the appellant. Mr. Rishi Arora, Director, M/s Rean Watertech Pvt. Ltd in the capacity of lead partner attended the hearing at respondent company office, held on 14-03-2022 and 20-06-2022 on behalf of JV. The lead partner of the JV submitted its reply to the show cause notice and no objection / reply was submitted by appellant before the respondent at relevant time. Hence from the records available it is clear that the appellant was put to notice about the action of blacklisting initiated by the respondent and hence there is no violation of natural justice principle on the part of respondent company.
10. The respondent contended that the appellant was blacklisted as the progress of work in all the aforementioned contracts in which the appellant is a partner in JV with lead partner M/s Rean Water Tech Pvt. Ltd., was on an average 55% approximately and the records further reveal that the contractor was not taking interest in his work. Further respondent has contended that as per Clause 4 of JV agreement, all members of JV will be jointly and severally liable and responsible to respondent for performance of contract. Respondent has contended that the Appellant, as a member of JV, is jointly and severally liable for performance of the Contract. After hearing both the members of JV, respondent has blacklisted the Joint Venture comprising of M/s Rean Watertech Pvt. Ltd. as lead partner; and M/s P C Snehal Construction Co. as a member of JV.
11. Therefore, in view of the progress of design-build works in packages MPUSIP 1A, 2B, 6A, 4D as per records available with MPUDC, and keeping in view the unsatisfactory reply of Mr. Rishi Arora, Director, M/s Rean Watertech Pvt. Ltd submitted on behalf of JV firm, action of blacklisting the contractor has been taken after following the natural justice principles and giving reasonable opportunity of being heard to the contractor.
12. The appellant has alleged that Order No. 11240/PMU/MPUDCL dated 17-12-2021 was not a part of the tender document and contract and has been issued afterward the contracts have been awarded. The respondent contended that in the present situation, the power of blacklisting is not flowing from the contract. The respondent further referred the judgment of M/s Kulja Industries Ltd. vs. Chief General Manager WT Proj. BSNL & Ors.



Reported in AIR 2014 SC 9 wherein the Hon'ble Supreme Court of India has held that power to blacklist the contractor is inherent power of the employer even though there is no power has been provided under the agreement. The respondent further submitted that in view of the principle laid down by the Apex Court, it is evident that the respondent has inherent power to blacklist a contractor and that power can be invoked even in absence of clear stipulation regarding the same in the contract.

13. In the present case the respondent has blacklisted the contractor as it has failed to make proportionate progress of work for MPUSIP Package – 1A, 2B, 4D & 6A as mentioned in the schedule of work. Despite several reminders and notices, he contractor was found to be non-serious in executing the contracted works. Appellant being the member of JV is also liable and responsible to respondent for performance of contract. and debarred from participating in future bids of the MPUDCL for a period of 2 years. It is pertinent to mention here that one of the reasons for blacklisting stipulated in Order No. 11240/PMU/MPUDCL dated 17-12-2021 is “if the contractor is found to be non-serious in executing the agreeded works or leaves the agreeded work incomplete, irrespective of the expiry of the full contract period”.

Order:

14. Having heard both the parties and on perusal of records, the undersigned is of the considered opinion that the legality and validity of impugned order must be judged on the basis of the proportionality principle.
15. The contractor has been blacklisted primarily on the allegation of slow progress of work for MPUSIP Package – 1A, 2B, 4D & 6A. Even after giving ample opportunities to the contractor has failed to improve the progress of work for MPUSIP Package 1A, 2B, 4D, 6A and complete the work. It is admissible undisputedly that the appellant is a JV partner in these contracts and as per the clause 4 of the JV agreement it is lucid that all members will be jointly and severally liable and responsible to respondent for performance of contract. Blacklisting order of respondent appears to be prime facie correct and is in accordance with the terms of contract and order dated 17-12-2021.
16. The Appellant has contended that it is executing independently 3 packages with MPUDCL namely MPUSIP Package 2D, 4I which are water supply project and Package WB-10 which is Under Ground Sewerage project. In 2D and 4I even the trial run has also commenced and progress of work is satisfactory and is executing all these packages with utmost seriousness. The appellant's submission was verified from the respondent's records and progress of works in contracts in which the appellant is the lead partner or sole contractor, is found satisfactory. Thus, as per the said records of the respondent, it cannot be said that the appellant is non-serious in executing the agreeded works or leaves the agreeded work incomplete.
17. The undersigned understands that the basic objective of blacklisting as per MPUDCL order dated 17-12-2021 is to discipline deviant contractors who are not completing or taking interest in the work awarded to them. The object of blacklisting is not to

commercially eliminate the contractor but to impose a punitive measure commensurate with his actions. It is common for the Government and Public Sector Undertakings to stipulate that a contractor who is blacklisted by another entity would also be ineligible to participate in the tenders invited by such entities.

18. The past/present conduct of contractor is also be considered while taking decision of blacklisting or debarring the contractor as it amounts to the Civil Death of the contractor. The factor that appellant has successfully performed various contracts for MPUDC, is also to be taken into accounts. These are relevant and important factors to be taken into consideration while considering the issue of banning the appellant from future contracts & duration thereof.
19. As per the records available and progress report of package 1A, 2B, 4D, 6A and package 4I, 2D and WB-10 it is undisputed that the contracts in which the M/s Rean Watertech Pvt. Ltd; is lead partner i.e. is 1A, 2B, 4D, 6A the progress of work is very sluggish and poor and in these contracts Appellant involvement is to a lesser degree. As per JV agreement sharing ratio of M/s Rean Watertech Pvt. Ltd and Appellant is 75% and 25% respectively. From the records and evidences available including the affidavit on the letter head of M/s Rean Watertech Pvt. Ltd, it is lucid that the lead partner is responsible for execution of contacts under MPUSIP Package – 1A, 2B, 4D & 6A and the role of appellant was limited to providing technical guidance to the lead partner. The progress of work for packages 4I, 2D and WB-10 in which the appellant is lead partner or responsible fully for execution of work is found to be comparatively satisfactory with respect to the time lapsed.
20. In the present case the undersigned is of the opinion that respondent while blacklisting the contractor, should have considered the progress of works in which Appellant is lead partner or sole contractor i.e. MPUSIP Package 2D, 4I and Package WB-10. In the present case blacklisting the appellant would have an adverse consequence on these contracts as well.
21. In view of the above findings, the appeal is allowed and the portion of the order directing that the appellant be placed in the blacklist in respect of future contracts is set aside." However, aforesaid order dated 23-06-2022 will remain applicable to M/s Rean Water Tech who is leading all the four contracts under considerations.


(Deepak Ratnawat)
Engineer in Chief
MPUDCL



No./PMU/ENGG/2022/ 6273

Bhopal, Dated 15 /07/2022

Copy to:

1. Managing Director, MPUDCL for information.
2. Additional Managing Director, MPUDCL for information.
3. Deputy Project Director (T-1& 2), MPUDC, Bhopal for information.
4. Chief Engineer, Planning and Budget (State Registration Officer) office of Engineer-in-Chief, PWD, Nirman Bhavan, Arera Hills, Bhopal for information.
5. Financial Controller, MPUDCL, Bhopal for information.
6. Deputy Project Director (A), MPUDCL, Bhopal for information.
7. Concerned Project Managers, PIU, MPUDCL.
8. Director, M/s Rean Water Tech Pvt. Ltd, Kolkata for information.
9. Director, M/s P. C. Snehal Construction Co. Ahmedabad for information.
10. Team Leader, PMC (MPUSIP), Bhopal.


Engineer in Chief
MPUDCL

