

IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, C.J

MR. JUSTICE IJAZ AHMED CHAUDHRY

MR. JUSTICE SH. AZMAT SAEED

CONSTITUTION PETITION NO. 33 OF 2013

Asaf Fasihuddin Khan Vardag

.... Petitioner

Versus

Govt. of Pakistan through Secy. Defence & others

.... Respondent

For the Petitioner

Mr. Asaf Fasihuddin Khan Vardag, ASC
(In Person)

For Respondent No.1

Qari Abdur Rashid, AOR

For Respondent No.3

Syed Iftikhar Hussain Gilani, Sr. ASC
Syed Safdar Hussain, AOR
Air Marshal (R.) Khalid Chaudhry, DG CAA
Mr. Obaid ur Rehman Abbasi, Sr. Law Officer

For Respondents No. 4:

Mr. Shahid Hamid, Sr. ASC
Mr. M. S. Khattak, AOR

For Respondent No.5:

Mr. Ozair Karamat Bhindari, ASC

For Technical Associates:

Mr. Makhdoom Ali Khan, Sr. ASC
Mr. M. S. Khattak, AOR

Date of hearing

08.07.2013

ORDER

In pursuance of our order dated 24.6.2013 a report prepared by General (R) Shahid Nawaz has been placed on record. Contents of the report under the caption

"CONCLUSIONS" have been read over including the following paras:

- "viii. As per the prevailing practice of FIDIC or PEC based contracts the bills of the contractors for actual work done are verified by the Consultants before payment. However, in case of claims these are first referred to project authorities for their views and clearance and are then verified by the Consultant/Engineer (PMC in this case) for allowing payments. The insertion of sub clause (e) under the heading certificates and payments clause 60.1, in all ongoing contracts, has accrued the benefit to the contractors to lodge claims directly to the PMC. The consultant/Engineer PMC has been vetting/recommending these payments ON ACCOUNT which made it mandatory for the client to allow payments for claims.*
- ix. The major beneficiary on this account has been the JV (Logan – Tech – Habib), who has already received payment worth over Rs.4.0 billion, with verified claims of Rs.0.5 billion lying pending for payment. Over and above these, claims worth over Rs. 5.0 billion are pending with the PMC. This is a major drain on the project, and existence of this provision in the contract is an indirect enticement to the contractors to prolong the execution period to generate claims. This practice has been discontinued in the recently awarded work (one contract only) through appropriate structuring of contract document. However, all ongoing contracts have this provision with huge financial implications. This needs to be addressed through mutual consultations/negotiations with the contractors, as there is no clear cut legal remedy available. This is a very serious lapse on part of the P&D dept of CAA which without due deliberations concluded these contracts.*
- x. Arbitrary decisions taken by the client at various stages of the project has led to not only major cost escalations, but has also indirectly affected the scheduled working of the overall design process. This has further delayed the process of award of contracts and execution of work. Various committees/over sight bodies constituted at different stages gave recommendations for major changes in the scope of the project, which were then approved by the CAA Board. The Board obviously cannot be blamed as it was not a technical forum to deliberate/discuss such matters in the absence of detailed technical studies. Some of these issues are indicated as under:*

- a. *The change in the scope of the terminal building (PTB) in utter disregard to the planning parameters of the Master Plan/feasibility study (2006) initially designed to cater for 6.5 mppa, for midterm period up to 2020 was enhanced to 9 mppa, which was the ultimate figure for third phase of development up to year 2035. This excess space created on the completion of PTB, will most likely remain under utilized, though it has caused major design changes, delay in execution and enormous cost increase.*
- b. *Under the package 01 the contract was awarded for construction of one Main Runway, Parallel taxiway and link taxiways to cater for the needs of air traffic load of 2020, as per the approved Master Plan of NBBIAP. It was also decided that the parallel taxiway could also be used for an emergency landing if the situation so arose. Subsequently the parallel taxiway was converted into a full fledged secondary runway by the CAA on the recommendations of the Steering Committee which held its meeting in Dec 2010 and accordingly its specifications were modified. The accumulated financial effect for this major change is around Rs.3.4 Billion. It is pertinent to mention that due to distance of 230 meters instead of 1030 meters between the two runways, simultaneous flight operations cannot be undertaken.*
- c. *These changes made during construction of Airside pavements have further generated the requirement of a 3rd runway for future operations, with cost effect of Rs 8-10 Billion including parallel Taxiway but exclusive of cost of land. Another serious issue is regarding provision of lighting system for the Secondary runway. As at night only one runway can be used for operations because of the absence of appropriate lightening system for taxi operations. Other proposed option given by CAA is to add link Taxiway for the landing aircrafts to go all the way to the end of the runway.*
- d. *The Airside Infrastructure contract was awarded in August 2008 to M/s Legan-Husnain JV at a cost of Rs 11,825 million. The progress of this package till January, 2010 stood at only 7-9% against the planned progress of 65%, primary reason being internal rift between the JV partners, Termination Notice was issued to the JV by the project authorities on instructions of M/o Defence. In sharp contrast to the contractual obligations requiring termination due to default/imposition of penalties and re-award of a new contract, the CAA*

on the recommendations of a Committee under the chairmanship of Joint Secretary Admn. M/o Defence allowed formation of a new JV (Legan 60% TAPL 35% and Habib 5%) with exclusion/addition of partners to implement the contract on the same terms & conditions.

Though provided in the above mentioned contract of JV to change its composition but only in the event of normal performance by the JV. However, in this case the JV was at a default stage, and the only course available was to terminate the contract. Despite recommendations of the PMC for termination of the contract, undue favour was given to the new JV by taking all the responsibilities of delays by the Project Management, which has accrued the right of claiming idle charges by the new JV. This has already resulted into payment of charges/claims of Rs. 3.5 billion till to date to the new JV, with Rs 0.5 Billion claims vetted and pending and another Rs 5.0 Billion claims already lodged. This has resulted in to not only enormous increase in the contract value but also has caused expected 30 months delay in the contract implementation.

- xi. There have been frequent changes of the Project Director i.e. Five Project Directors have worked during the period 2006 – till date 2012, which has adversely affected the progress and management of the project as a whole. The bifurcation of the project in to numerous packages entailed proper staffing of the PMU, with experienced and technically sound engineers who could oversee and coordinate the various activities with contractors and the PMC. This however has remained a weak link. There has been some improvement in the physical progress of the project during last six to seven months, however, there is an urgent need to further restructure and strengthen the PMU, besides delegation of appropriate authority to the PD for facilitating site decisions."*

While going through the above contents of sub para ix. we enquired from the learned counsel appearing for respondent No.3 and the learned counsel for other parties to explain the composition of JV LTH (Logan-Tech-Habib). Mr. Makhdoom Ali

Khan, learned Sr. ASC stated that "Logan" is a limited company incorporated in Northern Island, U.K. but no one has appeared on their behalf, however, office of the same is situated in 16 Mayfair Royal Apartments, Diplomatic Enclave, Islamabad. The composition of the share-holders is not known. As far as "Tech" is concerned, it stands for Technical Associates Private Ltd. and the name of its Chief Executive is Mr. Faisal Munir, whereas according to Form 29, Mian Munir is the share-holder whereas Mr. Muhammad Shakeel s/o Jamil, etc. are the Directors. Their address is 5-Baba Park, Upper Mall Road, Lahore. As far as "Habib" it stands for Habib Construction Ltd. and Mr. Shahid Saleem is its Chief Executive and their address is House No.15-A, Canal Bank Road, near Doctors Hospital, Johar Town, Lahore.

2. It is informed that there are following 10 other contractors whose names have been furnished but without disclosing names of other partners, directors or the share-holders:-

1. M/s. Husnain Cotex Limited
2. M/s CRFG-CWE-TTP (JV)
3. M/s China State-FWO (JV)
4. M/s Sambu Sachal-HRL (JV)
5. M/s Al-Tariq Constructors (Pvt) Ltd.
6. M/s Siemens
7. M/s Jaffer Brother-JECI (JV)

8. M/s Beixin-Gammon (JV)
9. M/s Abid Brothers & Gul Gorden (JV)
10. M/s Izhar (Pvt) Ltd.

Respondent No.31 is directed to furnish details of their Directors, Share-holders and their addresses from the agreements which are executed with them from time to time. Notice to all of them be issued for the next date of hearing.

3. Mr. Shahid Hamid, learned counsel stated that he is appearing on behalf of Mian Muhammad Munir who is not the Chief Executive of Technical Associates Private Ltd. but as the notice was served upon him being respondent No.4 in the amended petition, therefore, he has appeared in response to the same.

4. Mr. Ozair Karamat Bhindari, learned ASC stated that he has received instructions from Ms. Louis Berger consultants for Benazir Bhutto International Airport and he also needs time to file a response. Let all the respondents file replies including respondents No.1 & 2 the Government of Pakistan and others whose names have been mentioned hereinabove if their replies have not already been submitted. They are also required to file reply/comments of the paras of the report which have been reproduced hereinabove.

5. It is important to note that respondent No.3 himself is a signatory of the report but when we enquired from him what action he had taken after having gone through the parts of the report which have been reproduced hereinabove, he could not answer satisfactorily except saying that another committee has been constituted. We feel that in view of the observations which have been made in the report, he had to take a prompt action in order to save the public exchequer. He is directed to file reply in this regard before the next date of hearing. The learned Additional Attorney General shall also assist the Court on behalf of the Federation on the points highlighted hereinabove. He would also assist the Court about the method/procedure for the appointment of respondent No.3 Air Marshal (R) Khalid Chaudhry, DG, CAA and to explain as to whether his appointment has been made in a transparent manner under the Pakistan Civil Aviation Authority Ordinance, 1982 and the rules made thereunder.

6. It is to be noted that the Auditor General of Pakistan has also published a report copy of which has been procured in HRC No. 24852-G of 2013. Respondents are also directed to give their re-action/comments on the said report as according to its contents which has been published in the Daily News under the headings "A Huge Loss of 30.37 Billion has been caused in the

construction of Benazir Bhutto International Airport Islamabad".

They may also get Photostat copy of the Auditor General's Report from the office.

7. Adjourned to **11th July, 2013 at SI. No.1.**

Chief Justice

Judge

Judge

Islamabad
09.07.2013
(Zulfiqar)