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DEBARMENT AND SUSPENSION IN PUBLIC PROCUREMENT: A SURVEY OF IMPORTANT EXECUTIVE GUIDANCE AND CASE LAW IN INDIA

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ABSTRACT. Debarment and suspension of erring contractors are important tools for ensuring compliance with integrity-obligations of government contractors performing procurement actions for the Government. These actions are commonly referred to under Indian government regulations as "banning of business dealings", "sending contractors on a holiday" and "suspension of business dealings"; and executive guidance and case law in India on the subject typically originates from a wide and rich variety of sources. This paper attempts perhaps the most comprehensive and in-depth survey of available regulatory literature and case law on the subject in India, right from early 1970s to as recently as 2015; while suggesting a way forward for procurement reform through early harmonization and consolidation of guidance, particularly in context of ongoing developments under state government regulations as well as those expected under the newly proposed Public Procurement Bill, 2012 of the Central Government in India.

INTRODUCTION

"*Debarment*" and "*Suspension*" of government contractors, in the Indian context, are primarily referred to in regulatory literature as "*Banning of Business Dealings*" and "*Suspension of Business Dealings*" respectively (Indian Railways, 2006). The term "*blacklisting*" has also been prevalent in government practice in India

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(Ministry of Urban Development, 2011), but with India's premier anti-corruption agency—the Central Vigilance Commission of India ("CVC")—advising discontinuation of this term (CVC, undated), its usage has now largely been relegated to informal literature on the subject. Guidelines of some *Central Public Sector Enterprises* ("CPSEs")—*State-owned Enterprises* ("SOEs") as known in international procurement parlance—sometimes mention the phrase "*sending suppliers on holiday"* (ONGC, 2006), which actually refers to removal of a registered supplier from suppliers' lists maintained by the procuring entity because of poor contractual performance (ONGC, 2010), rather than debarment or suspension per se.

There is, of course, some overlap between *debarment* and *removal from a suppliers' list*, since the grounds for these two different actions can be quite similar (Note 1). However, the attendant consequences of these two options are certainly different: for instance, removal from a suppliers' list can *still entitle* a contractor to compete for public contracts at par with unregistered suppliers (Note 2); or such removal may *merely prevent* a supplier from competing for "Limited Tender Enquiry" cases alone (Indian Railways, 2006); although in a few limited cases, such ineligibility upon removal may be attracted for participation in both "Open Tender Enquiry" *as well as* in "Limited Tender Enquiry" procurements (SAIL, 2011).

As is typically the case with government regulations in India, executive guidance on the subject originates from various independent sources; and not all guidance may therefore always be harmonised in all respects. The primary authority on banning of business dealings appear to be a series of memoranda of the *Department of Supply* (hereafter "DOS Memos") issued right since 1971, containing a detailed treatment of, *inter alia*, permissible grounds for banning or suspension, procedures to be followed, applicability to ongoing contracts, and extension of banning or suspension orders to allied firms. The *Vigilance Manual* of the *Indian Railways*—one of the oldest and largest procuring entities in India—repeatedly cites the DOS Memos as the *principal authority* on banning and suspension (Verma, 2012); and a number of state government procurement regulations on banning and suspension appear to be an exact replica of these Memos as cited in the Indian Railways' Vigilance Manual (Note 3).

These DOS Memos are, however, not the only guidance available on the subject. For instance, some reference to banning and suspension is contained in the *Manual on Policies and Procedures for Purchase of Goods* ("Manual") issued by the Ministry of Finance (Ministry of Finance, 2006), even though the *General Financial Rules, 2005*—the core regulations governing government contracts in India, under which the Manual has been issued—themselves appear to be silent on banning or suspension of business dealings. The *Manual* disallows entertainment of registration requests from firms whose stakeholders have any interests in banned firms, and also contains a description of the grounds on which firms are liable to be banned or suspended.

Instructions on banning and suspension have separately also been issued by the CVC that apply equally to government and CPSEs procurements, stating that business dealings with firms/ contractors may be banned *wherever necessary* (CVC, 2005); and that where orders of banning are to be implemented by all Ministries of the Government, the matter is required to be placed before the *Committee of Economic Secretaries* and their approval obtained (CVC, undated). The latter part of the CVC guidance, requiring prior approval of the *Committee of Economic Secretaries*, appears to be different from the principal guidance contained in the DOS Memos, which require such *Government-wide* banning orders to be issued only by the Ministry of Commerce.

This varied and challenging landscape is also replicated in case of banning and suspension regulations prevalent amongst CPSEs, where guidance tends to vary from one CPSE to the other. Some CPSE regulations generally mirror the principal guidance by limiting banning/ suspension primarily for integrity abuses (NHPC, undated), while some other CPSEs allow banning or suspension even in the case of contractual under-performance (Pawan Hans, undated). This complex environment is also impacted by recent developments such as *Integrity Pacts* that provide for penal consequences for integrity violations by government contractors, and have been made mandatory both for pure government purchases as well as for procurement actions of CPSEs.

The subject matter of debarment, suspension and "black-listing" of erring contractors in the context of government contracts in India is also informed by a good amount of case law on the subject,

originating as early as the 1975 *Eurasian* judgment of the Supreme Court of India, until one recently issued by the same court in the *Gorkha Security Service*s case of 2014. Over these four decades of jurisprudence on the subject, the Supreme Court of India and a number of high courts in various states have laid down important precautions and principles to be observed by debarring officers and agencies, ranging from: (i) the connection between due process in debarment and the Article 19 *Right to Busines*s enshrined in India's Constitution; to other equally important aspects such as (ii) proportionality of debarment orders with the error committed by the contractor; (iii) permanency of debarment orders; (iv) requirement for prior notices before issuing debarment orders; (v) the amount of detail required to be disclosed to the erring contractor in the notice of proposed debarment; and such like. There remains, however, some extent of confusion in higher courts on the subject of debarment/ blacklisting: while the Delhi High Court in one of its recent judgments suggests that the Supreme Court of India in the *Kulja Case* has laid down some *guidelines for any action of blacklisting, including factors necessary to be considered by the debarring authority imposing this punitive measure*, the fact remains that these factors were *merely enumerated/ cited* by the Supreme Court in the *Kulja Case* as *factors considered by debarring officials* under the US *Federal Acquisition Regulation*, and were never really laid down by the Supreme Court as "binding guidelines" on debarment in India.

METHODS

This paper is based on an exhaustive review of available executive guidance issued by various ministries of the Government of India, as well as the (state) Government of Rajasthan. Some of this guidance originated in 1971 but had never been studied or analysed from an academic perspective, such as the early memoranda issued by the Department of Supply that appeared in the public domain much later in a public response from the Ministry of Railways. Simultaneously, an intensive review of guidance on the subject of debarment was also undertaken in respect of rules and regulations issued by state-owned enterprises in India, as well as guidance and advisories issued by the premier anti-corruption institution in India, viz. the Central Vigilance Commission. As for case law, a number of important judgments of the Supreme Court of India and various high

courts in the states on the subject of debarment were studied to identify various threads of legal interpretation and identify key issues of administrative importance in terms of policy and procedure.

Given this variety and richness of executive guidance and case law, this paper attempts to undertake a quick survey of rules governing debarment and suspension of government contractors in India. The survey includes important aspects such as grounds for debarment, extension to ongoing/ future contracts, timeframes for debarment, requirements for hearing to affected parties, available fora for appeals & review of debarment orders, and application of debarment orders to allied firms. For reasons of brevity, the paper does not cover debarment or suspension by State Governments in India or by SOEs under the control of such governments, nor does it attempt a comparative analysis of Indian regulations with domestic public procurement frameworks prevalent in other countries.

COMPETENT AUTHORITY FOR DEBARMENT AND SUSPENSION

The Ministry of Commerce alone appears to be competent to pass an order for suspension of business dealings on account of suspected doubtful loyalty to India; and such orders are required to be endorsed to and given effect to by all Ministries/ Departments. However, an order for suspension for *other reasons* may only be passed by the Ministry concerned. Suspension orders of the latter category cover all attached and subordinate offices of the Ministry passing the order, but may not be circulated to other Ministries or Departments.

Orders for banning of business dealings are primarily of two types: (i) banning by one Ministry including its attached and subordinate offices; and (ii) banning by all Ministries including their attached and subordinate offices. Banning orders of the first type are generally considered where an offence is not considered serious enough to merit a banning order of the second type, but at the same time, where an order for mere removal of a firm from the suppliers' list may not be adequate. Banning authority for issuing orders of the first type is the Ministry concerned, after consultation with the Ministry of Commerce if considered necessary, whereas banning authority for an order of the second type is only the Ministry of Commerce, and the latter category of orders are required to be

endorsed to, and automatically implemented by, all Ministries/ Departments including their attached and subordinate offices.

It is the specific government contracting party, or the *Head of a Department* under a Ministry, that generally issues orders for banning or suspension. Interestingly, in case of the *Directorate General of Supplies and Disposal* ("DGS&D")—a *Central Purchasing Organisation* under the Ministry of Commerce that maintains *rate contracts*, the Indian equivalent of a *framework agreement* or an *IDIQ contract*—the competent authority for ordering suspension/ banning of business dealings with an erring firm is the Chief Vigilance Officer, Department of Supply (presently in the Ministry of Commerce).

The competent authority for CPSE-wide banning/ suspension is generally an Executive Director or the General Manager heading the engineering/ technical/ procurement division. In some cases, where the scope of banning/ suspension orders is limited to specific business units or divisions of the CPSE (for instance, procurement of items/ award of contracts only to meet the requirements of a corporate office), a lower-ranking official heading that particular unit/ division may act as the competent authority for issuing such orders. It is also important to note that the authority *finally* approving a banning order *need not be the same* as the one issuing a show cause notice *or* the authority before which a firm has been heard before the passing of a banning order.

CONSEQUENCES OF DEBARMENT AND SUSPENSION

No contracts of any kind whatsoever may be placed with a banned firm (including its allied firms) by the Ministry/ Department issuing the order and by its attached/ subordinate offices, once a banning/ suspension order has been issued. In general, contracts concluded before issuing a banning order are not affected by the banning order. Where the DGS&D receives an indent from an individual Ministry, it may also not place any orders on firms with whom business dealings have been banned or suspended by the indenting Ministry.

In this context, it is important to note that, generally speaking, even in cases of bribery or allied criminal cases as advised by the *Central Bureau of Investigation* (CBI), the quotations/ tenders submitted by an involved firm as advised by the CBI may not be left

out of consideration until orders for banning/ suspending business dealings with the firm have been passed. Exclusion of bids of a firm merely because of pendency of banning dealings against it, in the absence of *a specific order of suspension*, has been considered by Indian courts as arbitrary and unsustainable in law; and it appears that certain DOS Memos similarly allow for bids by such firms to be ignored *only* on the ground of *performance*, and not on the ground of *contemplated* suspension/ banning proceedings where *no order for suspension has been issued*.

CPSEs have similar provisions for making a banning order applicable with prospective effect (i.e. future business dealings) as a default position, although some CPSE regulations may also sometimes permit the banning authority to cancel existing contracts. On the other hand, some CPSEs treat cancellation of ongoing contracts as *the default position*: BHEL, for instance, requires that all existing contracts with a banned supplier should be normally "short-closed"; and specific approval of higher authorities is required to be obtained, if commercial/ technical compulsions require the continuation of existing contracts with banned suppliers under extraordinary circumstances.

Prospective application of banning and suspension orders is thus similar to consequences of putting a firm "on holiday", where also procuring entities are expected not to issue any new tender enquiries, or consider firms' offers in any ongoing tenders. Most CPSEs also specify that where business dealings have been banned with a firm after opening of tenders in a particular procurement case, care should be taken to ensure no orders are finally placed on such firms.

This prohibition on placement of contracts with a banned firm generally extends to contracts in the case of risk purchase also. However, the supply of controlled raw materials, including imported raw materials, may not be denied to a banned firm; and the allocation of such raw material can continue to be regulated by the respective law/ rules governing such allocation. Similarly, applications from a banned firm for grant of export or import licenses are required to be dealt with the provisions of the corresponding Acts, and may not be affected by a banning order. The Ministry of Foreign Trade (presently, the Ministry of Commerce) can ban business dealings with a firm that has been guilty of malpractices involving moral turpitude in relation to

its import or export activities, even if such activities are unrelated to the performance of a government contract.

The aforesaid restrictions on placement of future contracts with a suspended/banned firm are, of course, limited to the time period that is mandatorily required to be mentioned in an order for suspension/ banning. It is also important to appreciate that banning of business dealings is just *one* possible adverse consequence of integrity violations by a government contractor. For instance, the violation of a bidder's obligations under an *Integrity Pact* (forming part of the principal procurement contract) can lead to a number of important pecuniary consequences, such as forfeiture of earnest money deposits, encashment of bank guarantees and performance bonds, recovery of certain sums from the erring firm by the procuring entity, and liability for compensation for losses or damages. Particularly in the case of an *Integrity Pact* violation, these pecuniary consequences can arise *in addition to*: (i) cancellation of the instant contract (without compensation) where such violations have taken place; (ii) possible cancellation of all or any other contracts with the erring bidder/ contractor; and (iii) debarment of the bidder from participating in future bidding processes for five or more years (Ministry of Finance, 2011).

Thus, the ability of a procuring entity to cancel ongoing contracts, in addition to debarment from future contracts, appears to be an important and significant expansion of authority, should a procuring entity choose to process a debarment case under an *Integrity Pact*, rather than exercising its normal authority under the principal guidance that seems to permit exclusion from future contracts only.

EXTENSION OF DEBARMENT ORDERS TO OTHER GOVERNMENT AGENCIES

The general principal appears to be that where a particular Ministry orders suspension/ banning of business dealings, the concomitant restrictions on contracting apply only to offices of the particular Ministry issuing the suspension/ banning order, including its attached and subordinate offices. Such banning orders are to be communicated by Ministries to CPSEs under their control. Similar provisions for communication of orders and restrictions on contracting apply in cases where Government-wide suspension/

banning orders are issued by the Ministry of Commerce, in exercise of its authority in cases of suspected doubtful loyalty to India, or cases where an offense is considered serious enough to merit a Government-wide ban.

As per the original executive guidance cited at ¶1115(c)(iii) of the *Vigilance Manual* of the *Indian Railways*, a banning order is to be automatically implemented by all Ministries/ Departments including their attached and subordinate offices, and thus banning by a Department/ Ministry does not appear to specifically extend to procurement actions of CPSEs under its control. However, a subsequent clarification advises that no contracts can be placed by any Ministry/ Department/ Office of the Government of India, *State Government* or any *PSE* after the issue of a banning order (Indian Railways, 2006). The latter formulation, in particular, restricting placement of contracts by *State Governments* on account of issue of banning order by the Ministry of Commerce, does not seem to be entirely consistent with the autonomous authority of State Governments to enter into contracts under Articles 298 and 299 of the Constitution of India.

A similar provision is contained in the *Integrity Pact*, where violation of a bidder's obligations under this Pact in relation to a particular procurement case can lead to cancellation of all or any other contracts with a bidder. A strict reading of this clause may suggest that the other contracts must also subsist between the erring bidder and the *same* procuring entity exercising the debarment authority, since an *Integrity Pact* is entered into by a *specific* procuring entity. However, this confusing situation perhaps warrants greater clarity on the inter-Departmental and inter-Ministerial implications of an *Integrity Pact* violation, if noticed and acted upon in the case of a particular procurement contract(s) by that procuring entity.

In this context, it is important to note that the procurement rules and practices of certain government organisations and CPSEs seem to allow them to adversely evaluate a bidder's eligibility for the purposes of awarding their own contracts, even when that particular bidder may have been banned by some other Department or Ministry. For instance, RITE—a CPSE under the Ministry of Railways—allows for disqualification of a bid for its *own* procurement actions if a bidder's business dealings have been banned by *some other* Department/

Ministry of the Central Government, any State Government, a Central/ State PSE and even a State Corporation or a local body on account of fraud, misappropriation, cheating or contractual underperformance by that bidder in respect of contracts between the bidders and any of these other entities. Similarly, Pawan Hans—another CPSE—can issue an order banning business dealings with a firm (including inter-connected agencies of such firm) without any further enquiry or investigation, if business dealings with that firm have been banned by the Central or the State Government or by any other PSE. BHEL and NHPC regulations permit them to ban business dealings with a firm for all or any of their units if any communication is received from their respective administrative Ministry to ban the supplier from doing business dealing; while SAIL's banning regulations, similar to Pawan Hans and RITES, permit it to ban business dealings with any firm which has been banned by the Government or any other PSE.

Such confusing practices are apparently not limited to CPSEs alone, and appear to be prevalent in some government departments and (local) municipal bodies as well. For instance, in a case of procurement of Intelligent Tracking System ("ITS") facilities under the JnNURM (Jawaharlal Nehru National Urban Renewal Mission) Programme, one Notice Inviting Tender (NIT) stipulated that a bidder should not have been currently black-listed/ disqualified by any Government/ PSE for supply and installation of ITS components. An even more problematic situation exists in the case of public procurement in Rajasthan, where certain rules relating to use of "Swiss Challenge" method of procurement require that a bidder should not have been debarred by any other procuring entity in the State of Rajasthan or elsewhere in India, even though the legislation under which these rules have been purportedly enacted limits the grounds of debarment for the State's own procuring entities to offenses established to have been committed under the *Indian Penal Code (IPC)*, 1860; the *Prevention of Corruption Act (PCRA)*, 1988; and breach of the prescribed *Code of Integrity*.

EXTENTION OF DEBARMENT/ SUSPENSION ORDERS TO ALLIED FIRMS

In general, all suspension or banning orders issued in respect of a particular entity automatically extend to its "allied firms": allied firms are defined as *all concerns which come within the sphere of effective*

influence of the banned/ suspended firm. For the purpose of this determination, the following factors can be taken into consideration:

(i) Whether the management is common;
(ii) Whether majority interest in the management is held by the Partners or Directors of the banned/ suspended firm; or
(iii) Whether substantial or majority shares are owned by the banned/ suspended firm and by virtue of this, the banned/ suspended firm has a controlling voice.

In fact, a banning order is required to specify the names of all the Partners, Directors etc. of the banned firm *and* its allied concerns; although compliance with such a directive for specifying the *name*s of all allied concerns in a banning order may perhaps be inherently difficult, given the extensive homework and subjective assessments that may need to be undertaken by a banning authority *prior to* issuing a banning order.

Some CPSEs have similar provisions extending banning of business dealings with an entity to *inter-connected agencie*s of that entity: such *inter-connectedness* being established by the existence of any or all of the following features:

(i) If one entity is a subsidiary of the other;
(ii) If the Director(s), Partners(s), Manager(s) or Representative(s) are common;
(iii) If management is common; or
(iv) If one owns or controls the other in any manner.

Debarring entities therefore specifically include all "sister" concerns, partners and licensees/ subsidiaries of a banned firm within the scope of a banning order, albeit without stating the *actual name*s of such concerns. A separate definition of "sister concerns" does not appear in the available regulatory literature, although it should be possible to include, at the bare minimum, all subsidiaries, sister concerns and partners *within the expansive definition already envisaged* for identification of "allied firms".

An important issue here is the apparent difference in scope if contract cancellation by the procuring entity takes place under the authority of an *Integrity Pact*, since the definition of a "bidder" under this Pact, while including its successors and permitted assigns, does not appear to specifically include allied/ sister concerns or its licensees.

GROUNDS FOR DEBARMENT AND SUSPENSION

As commonly understood, authority for suspension or debarment can only be exercised in cases of doubtful loyalty to the State, or for offenses (and investigations for offenses) involving moral turpitude in relation to business dealings such as bribery, corruption and bid-rigging. More specifically, suspension of business can be ordered where, pending full enquiry into the allegations, it is not considered desirable that business with the firm should continue; and the permissible grounds for suspension of business dealings are as follows:

(i) If a firm is suspected to be of doubtful loyalty to India;
(ii) If the CBI or any other investigating agency recommends such a course in respect of a case under investigation; or
(iii) If Ministry/ Department is prima facie of the view that a firm is guilty of an offence involving moral turpitude in relation to business dealings which, if established, would result in business dealings with it being banned.

In view of sub-paragraph (iii) above, the grounds for suspension may need to be read *in conjunction with* the grounds for banning of business dealings; and the latter are prescribed as the following:

(i) If security considerations including question of loyalty to the State so warrant;
(ii) If the proprietor of a firm, its employee, partner or representative is convicted by a court of law following prosecution by the CBI or under normal process of law for offences involving moral turpitude in relation to business dealings;
(iii) If there is strong justification for believing that the proprietor or employee, or representatives of a firm has been guilty of malpractices such as bribery, corruption, fraud, substitution of tenders, interpolation, misrepresentation, evasion or habitual default in payment of any tax levied by law;
(iv) If a firm contemptuously refuses to return Government dues without showing adequate cause, and Government are satisfied that this is not due to a reasonable dispute which would attract proceedings in arbitration or court of law; or
(v) If a firm employs a Government servant, dismissed/ removed on account of corruption, or employs a non-official convicted for an offence involving corruption or abetment of such an

offence, in a position where he could corrupt Government servants.

It appears that alleged acts of bribery need not be a part of legal proceedings before an *Indian* legal/ judicial forum, or that the investigations revealing bribery or misconduct are necessarily undertaken by an *Indian* investigative agency. The Railway Board, for instance, in specific cases, has issued orders for suspension, where certain legal proceedings were undertaken by the Unites States' Justice Department and/ or the Stock Exchange Commission with respect to violations of its *Foreign Corrupt Practices Act*. In terms of case law as well, the settled legal position is that criminal conviction for bribery or criminal misdemeanor is not a necessary pre-requisite to issue of an order for debarment, and strong justification for suspected malpractices is sufficient for this purpose.

It is important to note that the aforementioned grounds for suspension or debarment do not include contractual non-performance or under-performance, although the CVC guidance, separately issued, is far more broad-based, namely, that business dealings with firms/ contractors may be banned *wherever necessary*. Some CPSE regulations, such as SAIL and NHPC's guidelines, similarly permit them to issue banning orders for any *good and sufficient reason*. It is perhaps a result of such omnibus guidance that some CPSEs can invoke their suspension/ banning authority in cases of, inter alia, (i) willful supply of sub-standard material; (ii) willful delays or poor performance; (iii) cartel formation; (iv) violation of labour rules & other statutory requirements; (vi) obtaining official company information/ documentation by questionable means; (vii) submission of fake/ false/ forged documents; (viii) established litigant nature; and (ix) misuse or damage to official property.

Interestingly, while some CPSEs seem to stress that the banning or suspension of business dealings cannot be undertaken on account of a firm's poor/ inadequate performance, many of their regulations also contain specific clauses permitting banning of business dealings on account of substandard supplies and delays or poor performance in contract-implementation by such a firm.

In addition to the aforementioned grounds for banning, an office memorandum issued by the Ministry of Finance in 1989 encourages procuring entities to incorporate a standardised contract clause for enforcement of agency disclosure obligations of foreign suppliers, in

case they engage the services of domestic agents in India; and this memo also permits procuring entities to ban business dealings with foreign suppliers in default of such disclosure obligations (Ministry of Finance, 1989). Per these orders, a specific standardised clause was to be formulated by the Department of Supply, in consultation with the Ministry of Law, and was required to be forwarded to all concerned Departments thereafter for appropriate necessary action; however, no such specific clause has apparently ever been formulated and/ or circulated.

In case banning authority is invoked by a government organisation/ CPSE for violation for a bidder's obligations under an *Integrity Pact*, the permissible grounds for such banning are, *inter alia*, as follows: (i) failure to take all measures necessary to prevent corrupt practices, unfair means and illegal activities at any stage of a bid/ contract; (ii) offering, directly or through intermediaries, bribers, commissions etc. in exchange for any advantage in the particular contract against which an Integrity Pact is signed; (iii) offering or promising to offer, directly or indirectly, any bribe, commission etc. in respect of any other contract with the Government; (iv) failure to disclose names of agents and their foreign principals or associates; (v) failure to disclose any payments made to any broker/ agent/ any other intermediary; (vi) engagement of any individual/ firm/ company to intercede/ facilitate/ recommend the award of a contract, including disclosure of certain relatives; (vii) collusion to impair transparency, fairness and progress of the bidding/ contracting process; (viii) complaining without full and verifiable facts; and (ix) instigating or causing any third person to commit any of the above.

As Integrity Pacts have been made mandatory for purchases by all government departments and by CPSEs, it may perhaps need a clarification whether the *Integrity Pact* grounds available to government departments/ CPSEs for banning are *in addition to* or *in supersession of* the grounds separately mentioned in relevant government orders/ respective CPSE manuals.

However, in a recent case, the power to blacklist (ban business dealings with) erring entities has been held to be an *inherent power of a contracting entity*; and that "...failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder *does not*, by itself, *disable* the (procuring entity) from blacklisting a delinquent bidder, *if it is otherwise justified*...".

Further, the Supreme Court observed that "…there *need not be any statutory grant* of such power; and the *only legal limitation* upon the exercise of such an authority is that State *is to act fairly and rationally without in any way being arbitrary* – thereby such a decision can be taken for some legitimate purpose…". This reasoning was reiterated by the Supreme Court in its *Kulja* judgment of 2013, where the court held that the power to debar or blacklist need not be specifically conferred by statute or be reserved by a contracting party. In other words, it has been successively held by the courts that the authority vested in public contracting entities to blacklist or debar an errant contractor is an *inherent*, *sovereign* power originating from public law principles; and therefore, that the grounds for banning or suspension of business dealings by a competent contracting entity *are not limited* to those contained in government rules or in RFP/ tender documents. Procuring entities in India therefore appear to enjoy *an inherent, expansive authority* to ban or suspend business dealings, the only restraint being that this inherent authority must be exercised in a fair, rational and non-arbitrary manner.

Insofar as the power to *suspend* business dealings with a firm is concerned, it has been held by higher courts in India that: (1) the power to suspend should not be exercised in a routine manner; and (2) that it has to be exercised only in appropriate cases of dire necessity where the facts of the case do warrant exercise of such power, and where without exercise of the interim power, the exercise of the ultimate power would be rendered a farce. In addition, the suspending authority must be satisfied on the material available that: (1) the (suspension) proceedings would ultimately result in blacklisting/ banning; and (2) the public interest demands suspension of business dealings during the pendency of the proceedings.

CONTENT AND PROCEDURAL REQUIREMENTS FOR DEBARMENT AND SUSPENSION

Integrity Pacts, while permitting banning, do not contain any procedural requirements for banning, or the contents of show cause orders to be issued to the affected party(ies), if any; and such requirements are found only in the relevant government instructions or CPSE manuals/ guidelines. However, important case law requires that in case the action of blacklisting/ debarment is contemplated by

the debarring official, the "show-cause" notice (notice of proposed debarment) must mandatorily mention that such action is contemplated, debarment being an extremely harsh action with serious implications for an errant contractor. Thus, a debarring entity/ official is required not only to mention the material/ ground necessitating an action by the government entity, but also the specific penalty/ action (in this case debarment or suspension) which the government entity proposed to take. At the bare minimum, even if debarment is not specifically mentioned in the show-cause notice, but debarment can be safely and clearly be discerned from a reading thereof, then that would be sufficient to meet this requirement to address principles of natural justice. However, merely because a government contract or the inherent sovereign authority of a public entity empowers a public department to debar a contractor, it does not follow that debarment orders can be issued without putting a defaulting contractor to notice to this effect.

The Railway Board and most CPSEs require the service of a show cause notice before any suspension/ banning of business dealings is ordered, as also consideration of a reply, if received from the firm. In case of the Railway Board, the primary purpose of issuing the notice is disclosure of the grounds on which action is proposed to be taken against the firm, rather than conducting a regular trial. Such orders only require the subjective satisfaction of the authority that passes the final orders for suspension/ banning, as the evidentiary standard on the basis of which the administrative decision is made. Some CPSEs such as BHEL also require that commercial interests of the CPSE should be kept in view while taking any decisions regarding suspension/ banning. Additionally, jurisprudence that has evolved in India in the context of debarment requires: (i) observance of reasonableness in issuing banning orders; (ii) fair treatment in the process of a banned firm; and (iii) observance of certain principles of natural justice by the banning authority.

As regards the amount of information required to be disclosed as part of such show cause to an errant contractor regarding facts, allegations or reports on which debarment is proposed, case law in India consistently confirms that "full" disclosure of such facts, allegations or reports may not be necessary; and the body vested with the right to decided upon debarment of an errant contractor is not

bound to disclose (full) details of the information in its possession before debarring such a contractor.

Since banning orders are generally passed for a specific period, it may perhaps be necessary to mention the period of suspension/ banning in the show cause notice. In addition, the Railway Board requires banning orders to mention the names of all the Partners, Directors etc. of the firm and its allied concerns, but is silent if a *separate* show cause notice is to be issued to each such allied firm. In practice, however, Railway Board orders for suspension and banning generally state *only the specific name of a suspended/ banned firm*, while extending such suspension/ banning orders to its allied/ sister concerns/ partners. There is no mention of the specific names of such allied/ sister concerns in these orders; and it therefore appears that there may perhaps be no requirement of issuing separate show cause notices to such allied/ sister concerns.

In terms of case law, suspension of business dealings during pendency of banning proceedings *need not be preceded* by an opportunity of hearing, for the affording of such an opportunity may yield to duplicity of proceedings, and may defeat the very purpose behind suspension. These ends of natural justice, in such cases, can be met by affording an opportunity of a *post-decisional hearing if demanded*. In such cases, the decision as to suspension of business dealings has to be communicated to the affected firm, though the reasons themselves need not be communicated; but the reasons, of course, must exist on the administrative record.

In this context, however, it may be important to note that affording an opportunity of oral or personal hearing is not a mandatory procedural requirement prior/ pursuant to a notice or final order of debarment.

MAXIMUM TIME-PERIOD OF DEBARMENT AND SUSPENSION OF AN ENTITY

Government organisations and CPSEs generally require banning and suspension orders to be operative for a specified period, although some CPSEs limit the period of suspension to periods as small as six months, while some others have apparently debarred firms for indefinite periods. However, important case law in India has held blacklisting (debarment) for an unlimited or indefinite period to

be impermissible based on legal "doctrine of proportionality", as implications of such an indefinite period of blacklisting or debarment would be overwhelmingly adverse on an errant contractor.

Some CPSEs appear to prescribe a *maximum period* for banning; BHEL for instance requires banning orders to stay in force for a specific period of three years with CPSE-wide restrictions. Where banning originates as result of violation of an *Integrity Pact*, the applicable instructions for both government organisations and CPSEs allow them to ban firms from participating in future bidding processes for a minimum period of five years, which can be further extended at the discretion of the procuring entity.

An order for banning/ suspension passed for a certain period is generally deemed to have been automatically revoked on the expiry of that period; and it may not be necessary to issue a formal order for revocation, except that an order of suspension/ banning passed on account of doubtful loyalty or security considerations stays in force until specifically revoked. It is, however, important to note that an order for banning or suspension for a certain specific period may not imply automatic restoration of a firm as a registered supplier; and some government organisations can therefore insist on examining each case afresh on merits for registration of such firms as approved suppliers, as per normal applicable procedures for supplier registration.

ANTI-CIRCUMVENTION PROVISIONS

As already stated above, suspension/ banning orders are also generally applied to allied firms, sister concerns and partners of a suspended/ banned firm. In addition, some government organisations require particular care to be taken to ensure that the same firm does not appear under a different name to transact business with the Government. Some CPSEs require companies under the same management to be kept on a watch list, and care to be taken to ensure that an Partner/ Director of a suspended firm does not get registered under a different company/ firm name.

REVOCATION, REVIEW AND APPEALS

As explained above, an order for banning/ suspension passed for a certain period is generally deemed to have been automatically revoked on the expiry of that period; and it may not be necessary to issue a formal order for revocation, except that an order of suspension/ banning passed on account of doubtful loyalty or security considerations stays in force until specifically revoked. An order for banning on account of conviction following prosecution for offenses involving moral turpitude in business dealings may be revoked if, in respect of the same facts, the accused has been wholly exonerated by a competent Court of Law. In other cases, a banning/ suspension order may be revoked on review, if the competent authority is of the opinion that the disability already suffered is adequate in the circumstances of a case; and thus, Ministries/ Departments concerned can, on representation of appeals from a firm or even otherwise, review their own banning/ suspension orders.

Most CPSEs similarly permit review/ appeals before specific fora, located within the CPSE itself, upon submission of representations by suspended/banned firms. Also, an additional forum of appeal may have become available to suspended/ banned firms where suspension/ banning orders are issued for *Integrity Pact* violations, enabling such firms to appeal before the *Independent External Monitors*, provided they are able to present their case as a violation of any of the procuring entity's commitments for fair/ equal treatment of bidders, or other entity obligations prescribed under the Pact.

Separately, in far as litigating debarment decision before judicial fora are concerned, such decisions of procuring entities are routinely challenged by affected parties before High Courts of states and/ or directly before the Supreme Court of India under their writ jurisdictions, where an affected party is generally required to show: (i) breach of its Article 14 *Right to Equality* and/ or Article 19 *Right to Business*; and (ii) to show that the debarment proceedings are either in breach of the principles of natural justice and/ or in breach of the *Doctrine of Wednesbury Reasonableness/ Proportionality*. When litigating debarment orders in courts, an effected party would be generally required to show some derogation of one or more elements of fairness, relevance, natural justice, non-discrimination, equality, reasonableness and proportionality.

Insofar as *arbitrability* of debarment/ blacklisting orders is concerned, the general consensus in higher courts has consistently been that since debarment authority arises out of public law authority, as against being merely contractual, an order of debarment would not be subject to arbitration under the dispute resolution clauses of contract. However, there have been sporadic cases in India where higher courts have referred debarment disputes for adjudication under ongoing arbitration proceedings, especially when the reasons for debarment are similar/ same as the reasons for contract termination—cases that in view of this author have perhaps not been properly analysed by the courts given that on earlier occasions, as stated earlier, debarment authority is intrinsic to a government contracting party and has its origins in public law, rather than being merely contractual as erroneously interpreted in these handful of cases by the courts.

CONTRACTOR NOTIFICATION AND PUBLICITY REQUIREMENTS

Some government organisations require banning and suspension orders to be classified as "confidential", while simultaneously requiring that:

(i) Such orders are to be mandatorily communicated to the concerned firm; and
(ii) A firm with whom business dealings have been suspended or banned should be automatically removed from (the publicly available) list of approved suppliers.

As a matter of practice, however, it appears that copies of banning orders are routinely made available upon application under the *Right to Information Act, 2005*, and also published on departmental websites by the banning organisations. In addition, almost all government organisations and CPSEs have specific provisions for circulation of names of suspended/banned firms amongst their internal divisions for information of various business units; while some CPSEs specifically provide for publishing names and details of banned entities on their websites as well.

In some cases, depending upon the gravity of misconduct established, a CPSE may circulate the name of a banned firm to other government departments and PSEs for appropriate action; and can also provide them with copies of internal enquiry reports and other

documents upon request. In any case, where a particular Ministry issues a banning order, it is under obligation to communicate the same to its attached & subordinate offices, as well as to CPSEs under its administrative control; and also to send copies of such orders to the Ministry of Commerce, the DGS&D, and the CBI. Where the Ministry of Commerce issues a suspension/ banning order (i.e., in "doubtful loyalty" cases or in cases where a Government-wide ban is envisaged), it needs to send copies of such orders to all Ministries and Departments for implementation and even to all State Governments. Additionally, the Ministry of Commerce is responsible for maintaining an up-to-date list of firms against whom Government-wide banning orders have been issued; and to circulate every quarter a list of additions and deletions during the previous quarter to all other Ministries.

OBJECTIVES OF DEBARMENT AND SUSPENSION

The specific objectives of debarment and suspension do not appear to have been laid down in regulatory literature on the subject, although the DOS Memos, in respect of *removal from a suppliers' list*, apparently mention that removal of a firm can be ordered *when the firm is no longer considered fit* to remain in such a list on account of its performance or other disabilities. Separately, the *Manual on Policy and Procedures for Purchase of Goods* states that "…business dealings may be ordered to be banned or suspended *in public interest*." The Manual of (Administrative) Office Procedures of the Supreme Court of India that applies to its purchases requires that limited tender enquiries can only be solicited from a panel of *reliable suppliers* who are able to satisfy its Registry that they possess necessary equipment and facilities for supply of stores, which they offer. Further, if any supplier is found not serving the Court Registry satisfactorily, then that supplier can be blacklisted and no dealings may be made with such a supplier.

Some CPSEs similarly underline the need for their procuring officers to safeguard the interests of CPSEs by ensuring that contracts are entered with contractors who function with integrity, commitment and sincerity. SAIL for instance, requires its contracting officers to safeguard its commercial interests by dealing only with those agencies that have a very high degree of integrity, commitments and sincerity towards the work undertaken. SAIL's

regulations also categorically state that it is not in the interest of SAIL to deal with agencies who commit deception, fraud or other misconduct in the execution of contracts awarded/orders issued to them. BHEL and Pawan Hans regulations require the protection of their respective commercial interests, by requiring procuring officers to take action against suppliers/contractors who either fail to perform or indulge in malpractices, by suspending business dealings with them, including banning of banning of business dealings. NHPC regulations similarly state that it is not in the interest of NHPC to deal with agencies that commit deception, fraud or other misconduct in the tendering process.

CURRENT AND ONGOING LEGISLATIVE PROPOSALS

Important future changes in regulatory frameworks are contingent upon legislative progress of the Public Procurement (PP) Bill, 2012 tabled before the *Lok Sabha* (India's Parliament) in May 2012. The Bill provides for a *Code of Integrity* to be prescribed by the Central Government, and violation of any provisions of this Code can result in debarment of a bidder/ contractor from participation in future procurements of a procuring entity for a period not exceeding two years, in addition to exclusion from/ cancellation of an instant contract or bidding process. A two-year debarment can also take place for withdrawal of a bidder from a procurement process, or failure to enter into a procurement contract under certain specified circumstances. This period of debarment has been capped at three years for conviction of offenses under the *PCRA* or under the *IPC* or any other law for the time being in force, for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract.

In addition, the PP Bill provides for maintenance of an updated list containing names and other particulars of contractors debarred by the *Central Government*, together with names of the relevant procuring entity, cause for debarment action, and the period of debarment. Also, since debarment orders are not excluded from appeals/ requests for review, it should be possible for erring contractors to file protests against debarment orders, in the first instance, for review before the relevant procuring entity, and in the second instance, as appeals before *Procurement Redressal Committees* ("PRCs") that will be setup under the Bill. Again, since

decisions taken during the process of grievance redressal are mandatorily required to be published on the central portal, it should be possible for all stakeholders to be aware of the contents of debarment orders, protests by erring contractors against such orders, and the final decisions on such protests, once the Bill is enacted.

Interestingly, under the Central PP Bill, while the Central Government (the Government of India) can only debar errant contractors on very limited grounds such as (proven) commission of offences under the *IPC* or the *PCRA*, a *subordinate* procuring entity can debar a contractor on a much wider grounds that are not limited to proven offences of this nature. Given that this proposed legislation formed the basis of enactment of the *RTPP Act* 2012 in the State of Rajasthan, this counter-intuitive problem—namely, that *a superior authority has much more restricted debarment authority as compared to its own subordinate offices*—has actually now been firmly encoded in the State's legal framework. The RTPP Act, as an aside, also contains another counter-intuitive problem where a procuring entity within the State will only disqualify those bidders from tender participation that have been debarred by procuring entities/ the State Government of Rajasthan on certain limited grounds, but there exists another omnibus ineligibility clause whereby any participating bidder debarred by other state government entities/ Central Government shall be treated as disqualified from tender participation *irrespective of the ground of debarment* by that external debarring agency.

Important differences under the *Public Procurement Bill* that may arise once it is promulgated may therefore pertain to: (i) debarment in future procurement of *a procuring entity*, as compared to *existing permissible practices* of Government-wide/ CPSE-wide/ intra-Departmental/ intra-Ministry debarment; (ii) the *absence of any mention of "suspension"*, as distinct from "debarment", under the proposed Bill; (iii) the *limited periods for debarment* under the proposed bill, as compared to the *longer, and sometimes indefinite*, periods of suspension/ debarment under existing practices; (iv) maintenance of an *updated, online list of debarred entities*; (v) availability of *formal fora for filing reviews/ appeals by debarred firms*; and (vi) *publication of decisions on protests*, if any, filed by erring contractors against debarment orders. A fuller and more detailed analysis of the Bill's potential impact on suspension and

debarment may, however, need to await the Bill's passage and promulgation of subsidiary rules thereafter.

CONCLUSIONS AND RECOMMENDATIONS

It is hoped that the aforesaid analysis will throw up useful insights for the reader into India's regulatory landscape for debarment and suspension; and some preliminary assessment of the Indian position can safely be made on the basis of regulations surveyed in this paper. Firstly, and contrary to popular perceptions, there appears to be an impressive wealth of executive guidance available in India, covering almost all important aspects of debarment and suspension such as permissible grounds, periods, application to allied firms etc. This is particularly remarkable, since she has had relatively a short regulatory experience in debarment measuring about four decades, as compared to other developed public procurement markets such as the United States Federal marketplace that have dealt with issues of contractor responsibility since as early as 1884, and with formal debarment procedures since 1928 (Canni, 2009). Of course, some counties have much shorter regulatory histories as compared to India, and particular mention may be made of the recent guidance issued in United Kingdom early this year, detailing new processes for blacklisting high-risk suppliers who have underperformed in the past (ComputerWorldUK, 2012). *Prima facie*, however, UK's new blacklisting procedures appear *to be distinct from*, and *in addition to,* the earlier debarment provisions contained in the *EU Directives on Public Procurement* that kick-in upon certain criminal convictions.

Secondly, the variety and range of executive guidance is very wide indeed, perhaps on account of the various offices/ regulatory bodies independently issuing such guidance, and because of the relative absence of cross-referencing. It may therefore be important, both for procuring officials and government contractors alike, that they keep themselves adequately conversant with important differences in regulations and practices that can change drastically from one procuring entity to another. Any presumptions that debarment and suspensions will operate in a similar fashion across departments, Ministries or CPSEs, can turn out to be quite misplaced. In this context, a key difference between the Indian and the US's evolutionary history of debarment regulations is that executive guidance in the US has been consolidated and streamlined over the

years, particularly since the introduction of Policy Letter PL 82-1 in 1982, and its subsequent refinement as a part of the US Federal Acquisition Regulation (Shannon, 1991). The Indian experience, on the other hand, started off with the issue of rather comprehensive guidance, which, as surveyed in this paper, has become increasingly fragmented and diversified over the years.

Given this range and variety, there also appears to be an important need for early harmonisation and consolidation of existing government regulations and practices in India, particularly since some government organisations and CPSEs also provide for *cross-debarment* actions, even though their own grounds for banning may be very *different* from the grounds invoked by the *original* banning authority (Note 4). That these differences have persisted all these years is by itself remarkable, and may point to possible informal splitting of India's public procurement markets, where contractors working in one government organisation or CPSE may not be readily exploiting procurement opportunities existing elsewhere in some other departments or CPSEs. The future, however, looks brighter, and it is expected that some early harmonisation will take place with the passage of the Public Procurement Bill and consequential rollout of subsidiary rules. The creation of a formal legal framework for government and CPSE contracts in India will certainly push procuring entities to engage in closer re-examination of their rules and regulations, and these developments should therefore also ensure removal of differences and inconsistencies in the existing executive guidance as a part of the ongoing reforms process.

NOTES

1. Some CPSEs such as BHEL allow procuring entities for "putting on hold" erring suppliers for future enquiries for specific items/ works, for reasons such as (i) failure of a supplier to honour his own offer or any of its conditions within the bid validity period; (ii) rejection of consecutive lots of supplies for reasons attributable to a supplier; (iii) failure to respond to tender enquiries; (iv) failure or underperformance in contract-execution; (v) strikes/ lockouts for a long period in supplier's works; and (vi) failure to settle sundry debt accounts.

2. For instance, paragraph 5.8(i) of the Ministry of Finance *Manual on Policies and Procedures for Purchase of Goods* relating to removal from supplier's lists on account of adoption of unethical practices contrasts sharply with paragraphs 5.10(iii) and 5.111(ii)-(iii) of the same manual relating to suspension & banning on account of fraud, bribery etc.

3. The *Standardised Code for Suppliers* at Appendix-3, Chapter I, Part II of the General Financial and Accounting Rules (GF&AR) of the Government of Rajasthan, for instance, appears to be an exact reproduction of the *DOS Memos* as cited by the *Vigilance Manual* of the *Indian Railways*. On a different note, some of the provisions of the GF&AR related to banning and suspension are now in contravention of the recently enacted *Rajasthan Transparency in Public Procurement Act, 2012*; Rajasthan Act No. 21/2012.

4. One such effort has already been made by this author in the context of defence procurement regulations in India, and his proposed model rules on debarment incorporating these harmonisation principles in defence procurement are available at http://ssrn.com/abstract=2441040. These model rules have subsequently been adopted by the State Government of Chattisgarh, both for general open-market procurement, as well as for procurement through registered suppliers' lists; and these new rules were incorporated and published by the State Government of Chattisgarh in 2014-2015.

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