

SUBJECT NO: 51

SUB:- VUDA – PROJECTS – Development of High-rise residential complex in an extent of Ac. 15.00 cts. in Plot Nos. 1,2 & 3 in S.No. 134/P of Paradesipalem village – Reg.

- REF:-
- 1) Lr. No. 1736/H2/2009, dated 2.1.2010 of the Principal Secretary To Government, MA & UD Dept., A.P., Hyderabad.
 - 2) Legal Opinion dated 1.2.2010 of the Principal Secretary to Government, MA & UD Dept., A.P., Hyderabad.
 - 3) Letter No. 11736/H2/2009, dated 11.10.2010 of the Principal Secretary to Government, MA & UD Dept., A.P., Hyderabad.
 - 4) Letter NO. APITCO/KLR/VSPK/VUDA/PDP & Kailasagiri/1930/2010, dated 19.03.2011.
 - 5) Legal Opinion of Sri K.V. Ramanamurthy, Sr.Advocate, dated 25.08.2011.
 - 6) Representation dated 08.08/2-13 pf the Director, M/s. Visakha Infra Projects Pvt. Ltd., & M/s.Vidaat Infra Projects Pvt. Ltd.

AGENDA NOTE :

It is to submit that the VUDA has carved out Ac. 15.00 of land in to three (3) Bits admeasuring Ac. 5.00 cts., each as Plot NOs. 1,2 & 3 in S.No. 134/P of Paradesipalem village, Chinagadila Mandal, Visakhapatnam for construction of High Rise Residential Complex on Joint Venture basis with built up area sharing model and a notification to that effect was issued in all leading news papers. The highest quoted offer was of M/s. Vinayagar Promoters & Builders for Plot Nos. 1 & 3 and M/s. Sri Dattaraya Constructions & Services Pvt. Ltd., (Vinayagar Promoters Builders) for Plot NO. 2.

As per the agreement the share details are as follows :

Plot No.	Total built Up area.	VUDA Share on built up area	VUDA share offered on built up area.
1.	11,93,755 Sft.	33%	3,93,939 Sft.
2.	11,50,000 Sft.	30%	3,45,000 Sft.
3.	11,53,125 Sft.	32%	3,69,000 Sft.

Letter of Awards (LOAs) have been issued in favour of M/s.Vinayagar Promoters & Builders and Sri Dattareya Constructions & Services Pvt.Ltd., on 21.07.2007. Special Purpose Vehicles have been formed by the Developer as Visakha Infra Projects Ltd., for the Plot Nos. 1 & 3 and M/s.Vidaat Infra Projects Pvt. Ltd., for Plot No. 2 under Indian Companies Act. Bank Guarantees (BGS) have been furnished for the 3 Plots as detailed below :

Plot No.	BG No. Date.	Name of the Bank	Amount in Crores.
1.	63/2007, dt. 29.12.07	Corporation Bank	Rs. 2.23 Crs.
2.	64/2007, dt. 29.12.07	Corporation Bank	Rs. 2.23 Crs.
3.	2/2007, dt. 29.12.07	Indian Bank	Rs. 2.23 Crs.

Non-refundable Project development fee of 1% for the 3 Plots @ Rs. 89.20 lakhs for each Plot has been paid to VUDA as per the Condition No: 12 of the LoA by way of D.D. vide VUDA Receipt dated 29.2.08, 29.08.08 and 11.03.2008 respectively and the same were credited to VUDA Funds.

Subsequently, combined License-Cum-Development Agreement for the Plot NOs. 1,2 & 3 have been entered with the Developer on 12.03.2008 for combined layout furnished by M/s. Vidaat Infra Projects Pvt. Ltd., Visakhapatnam along with a Resolution as detailed below :

Sl. No.	Plot No.	Extent (in Acs.)	Total Built-up Area for each Plot in Sft.	Minimum guaranteed Share offered (in Sft.)	% of Built-up area offered.
1.	Plot NO. 1	5.00	11,93,755	3,93,939	33
2.	Plot NO. 2	5.00	11,50,000	3,45,000	30
3.	Plot NO. 3	5.00	11,53,125	3,96,000	32
Total		15.00	34,96,880	11,07,939	95
Average % Plots 1,2 & 3					31.67%

After conclusion of the License-Cum-Development Agreement, Sri Devara Appa Rao & Others have filed a W.P. NO. 3169/2008 in the Hon'ble High Court for the land covered in S.No. 134/P of Paradesipalem village and obtained status quo orders. As a result of which, the said land measuring Ac. 15.00 cts., could not be handed over to the Developer.

In response to the request made by the developer, M/s. APITCO, Hyderabad was requested to examine the Article 2 (8), 8 (1), 8(1) (b) and 9.2 (b) and furnish a report in the matter to refund the amounts to the Developer. In turn, the APITCO in its Legal Opinion dt.16.03.2009 has advised that it needs to return the Development fee without any interest and the claim of notional profit said to be lost on account of delay may be rejected.

As the matter stood thus, the Director, M/s. Visakha Infra Projects Pvt. Ltd., in its letter dated 16.07.2009 addressed to the Principal Secretary to Government, MA & UD Department, Hyderabad stated that the VUDA has not handed over the site even after expiry of a period of 16 months from the date of execution of Licence-Cum-Development Agreement and the Article 24 of the LCD Agreement entitles for the modifications/alterations to the terms and conditions of the Agreement with mutual consent with revised terms and conditions with revised Project concept, if suitable land is allotted at Yendada either in one parcel or multiple parcels. Government have in turn requested VUDA to submit a detailed report in the matter so as to circulate the same to the Hon'ble Chief Minister.

In view of the request made by the Developer, the Vice- Chairman, VUDA has been pleased to allot alternative land measuring Ac. 15.00 cts., in S.No. 336/P, 389/P of Madhurawada and Sy.Nos. 35/P, 35/P of Rushikonda as proposed by the Estate Wing and Planning Wing subject to the opinion of the APITCO and the APITCO were addressed in the mater to offer the opinion on allotment of alternative land to the Developer.

The APITCO in its opinion dated 23.10.2009 has agreed for alternate land allotment with the approval of the Government. Accordingly the Government was addressed in this office letter dated 6.11.09. The Government has requested to send the Legal Opinion of the Standing Counsel along with status quo orders of the Hon'ble Court in the matter.

The Government in the reference 3rd cited has requested to clarify how the VUDA will safeguard its returns on the project as the earlier project proposed cost is Rs. 260.67 Crores with a minimum return of 30% to VUDA; whereas the present proposed Project Cost is at Rs. 49.00 Crores with return of 31.67%. The developer was requested to furnish revised proposal in the light of the above observations of the Government. The Government has constituted an expert committee to evaluate specifications related to the projects of PPP, BOT and outright sale mode basis. The committee has discussed with the developer on the previous and present projects and submitted minutes of the meeting which were furnished to the Government.

The Government in response to this office letter dt.13.09.2010 informed that the cost of the original project being reduced from 260.67 Crores to 72.45 Crores as per the revised project proposals of M/s. Visakha Infra Project Pvt. Ltd., resulted in reduced revenue to VUDA which is not desirable to consider any changes to the modalities and norms of the original project and to take further necessary action accordingly.

In view of the Government orders, a final notice was issued to the developer directing to stick on to the original project cost and built-up area share offered to VUDA, as per the agreement concluded. In response to this office letter, the developer requested to refund the amounts with other costs. M/s. APITCO was requested to furnish report on the request of the developer for taking necessary action.

The APITCO in its report has opined as follows;

- I) In the recitals of the Agreement (B) it is clearly and unambiguously mentioned that the land in question is handed over by the Government to VUDA as part of land pooling scheme. As the land is handed over by the Government, for any defects and deficiencies status quo order at the instance of third party, no doubt, is an FM event. The nature of FM event does not matter much.
- ii) In Clause 13.2 of the Agreement, VUDA represented and warranted to the Developer that:
 - a). It has disclosed and raised all facts, information, matters, issues within its reasonable knowledge and its view is material in respect of the project and which the Developer ought and should reasonably know of, for purposes of the project and has/will not conceal any facts/information/matters issued from the Developer.
 - b). This Agreement when executed shall be valid and would constitute the binding obligations of VUDA and would be enforceable against VUDA in accordance with its respective terms;
 - c). The execution, delivery and performance of this Agreement by VUDA will not violate any court order, judgment, injunction, award, decree or writ against, or binding upon, VUDA or upon its securities, properties or business.
- iii) The Very fact that, the status quo orders of the High Court in the WP was on 15.02.2008, the agreement was executed on 12.03.2008, which amounts to false representations and warranties by VUDA in the Agreement.

iv) As after issue of termination notice, both the parties mutually worked for mitigation of the FM event that resulted in failure by virtue of Government's rejection for the revised proposal of the Developer on 11.10.2010. As per VUDA letter dt.15.11.2010, the offer of VUDA for alternate lands at Yendada and Rushikonda stood cancelled, whereby the termination notice stood revived.

In view of Para (ii) above, the APITCO has opined that, VUDA needs to return the Development fee without any interest. The claim of Notional Profit said to be lost on account of delay may be rejected. The Developer has issued a legal notice to VUDA dt.18.03.2011 through his counsel. On the opinion of M/s. APITCO and on the legal notice, the matter was referred to Senior Standing Counsel Sri. K.V.Rama Murthy, Advocate who opined as follows;

He is of the opinion that, even if VUDA holds negotiations with Developers and arrive at an agreed sum towards future interest and damages, for loss of profit etc., the same may have to be approved by Government of Andhra Pradesh and the concurrence of APITCO may be required in view of APITCO's contrary view not to pay interest.

APITCO's observation vide its legal opinion report dt.19.03.2011 at para 4(iii)that " The very fact that, the status quo order of the Honorable High Court in the Writ Petition was passed on 15.02.2008 and the subject agreements were executed on 12.03.2008 which amounts to false representations and warranties

by VUDA in the agreement" is absolutely true and correct and it is certainly adverse to the case of VUDA.

At this point of time it is difficult and also unnecessary to make any guess as to the reasons that prompted VUDA to enter into Development Agreements and receive the advances and guarantees without disclosing the fact of pendency of Writ Petition filed by Sri. Devara Appa Rao and others against VUDA pertaining to the subject lands and consequent interim orders to maintain status quo with regard to delivery of possession. May be that VUDA was confident that the Government of Andhra Pradesh and the District Revenue Administration will take all the necessary steps to get the interim orders vacated at the earliest or might have thought that in any case the Developers would not loose interest and patiently wait till the court adjudicates the writ petition as there was real estate boom at that relevant point of time.

In any case even if the Honorable High Court of Andhra Pradesh decides the matter at this point of time, it may not be final and the aggrieved parties may prefer an appeal before the Division Bench or carryout the matter before the Honorable Supreme court. In the circumstances the issue brooks no further delay."

Sri. K.V.Ramana Murthy, Senior Advocate has suggested that the following courses are open to VUDA.

- a) As requested by the Developers vide this letters dt.24.01.2011, VUDA has to call the Developers for negotiations and put forward the proposal to return the development fee by rejecting the claim for interest and notational profit.

OR

VUDA may prevail over the Developers to wait for some time, meanwhile take up the matter with the District Revenue Administration and a senior official of VUDA may approach the Registrar (Judicial) of High court of Andhra Pradesh and request to list the Writ Petition for expeditious hearing and disposal.

- b)** The developer's legal notice dt.18.03.2011 is a prelude to invocation of arbitration clause. The same is quite evident from the tone and tenor of the notice. Send a befitting reply to Developers Counsel Sri. K. Ravi setting out your stand by returning the development fee. In such an event, the Developers may take recourse to law and invoke the arbitration clauses in the agreement and set the arbitration in motion. As pointed out hereafter, the Developers instead of involving of Arbitration clauses, may approach the Honorable High Court and file Writ petitions seeking refund of the money with interest, costs etc.
- c)** As represented by the Developers the real estate boom that was prevailing at the time of agreements had evaporated after October, 2008 due to global recession. But there are ominous signs of revival of brisk real estate activity at least in Visakhapatnam City. In view of the revival of real estate business in the recent past the Developers may be willing to withdraw their earlier termination notice with fresh Zero date. Even in such case, the dismissal of Writ Petition is a pre-requisite and if the writ petition is dismissed and writ petitioners do not carry the matters in appeal, then a fresh decision can be taken. Even in such a

scenario VUDA may have to take stock of the present market conditions and have to consult APITCO for revival of the agreement of the year 2008. Such an initiative may also require Government's express permission. This possibility is contingent upon happening of some events which by their very nature are uncertain to predict.

d) *If the developers invoke arbitration clauses and set the arbitration proceedings in motion VUDA may have to fight it out. Since there is a suppression of material fact, as pointed out earlier, VUDA may not be on a sound wicket to contend that the Developer being the power of Attorney Holder as provider under the Agreement, the Developer could have taken up the matter on behalf of VUDA and fought the case on behalf of VUDA. Such an argument will not be countenanced in a judicial proceeding. Even if the claim of the Developer for damages on the ground of notional profit said to be lost on account of delays is eventually rejected by the arbitral tribunal or the court, as the case may be; yet the Arbitral Tribunal or the Court, may award interest and costs."*

As the agreement are not engrossed on proper Stamp Duty, the Developer cannot file the same in the court, either seeking appointment of arbitrator or for any other purpose, unless VUDA too waives its right to raise objection on the grounds of nonpayment of Stamp Duty and / or non registration. Arbitration clause is part and parcel of agreement and even

thought Arbitration clause has to be treated as distinct and separate contract, yet in a case of this nature the clause cannot be placated from the agreement and pressed into service as an independent contract. Perhaps the Developer, being aware of this short coming, although got issued notices threatening invocation of Arbitration clause may be seriously disputed by VUDA. It may be noted that in spite of non reply to these notices by VUDA for long and non initiation of threatened action by Developer realizing the handicap is awaiting VUDA'S concurrence for appointment of Arbitration or its non-denial of the existence of Arbitration clause, which is sufficient to constitute arbitration agreement U/sec 7 of Arbitration and Conciliation Act, 1996. As and when VUDA invites the Developers for negotiated settlement, care must be taken not to commit regarding the binding nature of the agreements. Since the agreements are still borne, if the Developer have any grievance they can approach any Civil Court.

May be for this reason the Developers are adopting wait and watch policy and weighing option either to invoke arbitration clauses or Civil court or approach Honorable High Court of Andhra Pradesh depending on the outcome of the final judgment of the High Court which is seize of the said case."

Sri. K.V. Ramana Murthy has also suggested that as a first step VUDA may call the developers for negotiations so as to know their mind. If the differences are not settled amicably within the permissible limits set out to VUDA, VUDA has to refund the amount by it at least with the bank rate of interest on deposits so as to mitigate adverse legal consequences. Simultaneously VUDA may also explore other possibilities set out here in above.

Consequent upon receipt of legal opinion from Sri. K.V.Ramana Murty, Senior Advocate this crucial file was referred to the Senior Standing Counsel to VUDA to offer his opinion. The Senior Legal Officer, VUDA has also referred the facts and circumstances of the case for better understanding.

“The License cum Development Agreement was executed on 12-03-2008 while a status quo order was pending. Taking the date of status quo order it appears both Sri. K.V.Rama Murthy and APITCO felt that the Hon’ble High Court was misled by VUDA. This in fact a gross mistake. This status quo order pertains to further progress of delivering the land. This execution of license cum Development Agreement is continuation of development activity of a notified land which commenced prior to the filing of WP. The Delivery of the land to the developers did not take place as the WP is pending. The progress of accepting offer from developers could not be reported or brought to the notice of Hon’ble High Court because no WP was filed by then. VUDA has not taken steps to meddle with the notified land. The land was not delivered to developer and developers are aware of the situation. So non- informing that fact of Agreement execution is only a mistake and it is not suppressing the fact or misleading the fact.

The learned counsel Sri. KV Rama Murthy opined for return of the amounts paid with interest on amicable settlement and APITCO opined that VUDA is not liable for refund with interest and it referred to various clauses mentioned in Agreement. I do not wish to express any opinion on these opinions. I only suggest the following things for consideration.

Originally 3 plots were notified for development on joint venture. The two developers became successful bidders and LOA was granted. A license cum development agreement was also executed after the successful bidders complied the formalities. Unfortunately the plots could not be delivered to them due to litigation and Hon'ble High Court's orders. So the execution of License or Agreement stands nor existent. The only cause left to the bidders is to take return of the amounts paid by them. VUDA is not responsible for this situation. Somehow the bidders though issued notices of termination have not sought for refund but requested to provide alternative land for development. Government suggested VUDA to provide alternate land for development to the bidders (Developer). The revised proposal given by developer was rejected by Govt. APITCO has rightly stated that this non-acceptance of the proposal of developers revived their termination notice dated: 18-03-2011. So the only option left to developer is to seek refund of their money.

The development of the land in joint venture scheme could not take place because of circumstances for which neither of the parties can be blamed. Both are at loss. The loss has to be shared or borne by both of them. It is not proper to rely on the agreement or its clauses as the very existence of the agreement is in question. When parties are aware of the situation and parties incapacity to work out the Agreement it is to be treated as non existent. So further option available to both parties is to work out the equities. In this situation I advise both parties to sit and workout settlement amicably without going for litigation.

My suggestion to work out the equities is:

- a) VUDA shall keep all the monies paid by developers, in Bank deposits immediately in (FD) for short period:**
- b) Calculate Bank rate of interest on the amount paid by developers from the date of receipt of termination notice till date of our bank deposit.**
- c) Nobody shall claim damages or spl. rate of interests. The developers have lost interest from date of deposit and VUDA has incurred and incurring expenses for notification and other process”.**

As the things stood thus, the Director, M/s. Infra Projects Pvt. Ltd., has submitted representation on 08.07.2013 with a request to return their project development fee of Rs.267.60 lakhs as per conditions of the Licence – Cum-Development Agreement dt.12.03.2008, as the best efforts made by VUDA and the Developer to vacate the statues quo orders on the project site could not succeed.

In view of the above, the matter is placed before VUDA Board to take an appropriate decision.

Sl No	Subject No	Subject	RESOLUTIONS
50	50	Accounts – VUDA – Visakhapatnam – VUDA funds utilized to send to the Government under Resource Mobilization to support State Budget – Requested to release of amount Rs.294.86 crores by the Government to VUDA towards reimbursement of VUDA Funds / Administrative charges – submitted for perusal – reg	Perused. VC to pursue with the government for early release of the funds to VUDA by government
51	51	VUDA – Projects – Development of High Rise residential complex in an extent of Ac.15.00 cts in plot nos.1, 2 & 3 in Sy.No.134/p of Paradesipalem village – reg	It is directed to refer the issue to the Committee as constituted in the Agenda No.36
52	52	VUDA – Govt Lands – Sy.No.126/11P & 12 of Madhurawada village – M/s Berggruen Real Estates, Chennai – Bulk Land disposed through auction for State Budgetary Support – reg	Perused. The registration process completes the responsibility of the VUDA as per the auction conditions. VC to deal accordingly and directed to take action wherever registration is not completed so far.


CHAIRMAN, VUDA


21/11/2013