BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER: Order/MC/VS/2022-23/16258]

UNDER SECTION 23-I (2) OF SECURITIES CONTRACTS (REGULATION) ACT, 1956 READ WITH RULE 5 OF SCRA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 2005

In respect of -

NCC Limited (PAN: AAACN7335C) having address at NCC House, Madhapur Telengana – 500081

In the matter of NCC Limited
(formerly Nagarjuna Construction Company Limited)

BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") initiated adjudication proceedings against NCC Ltd. (hereinafter referred to as "**the Noticee**"/ "**the Company**"/ "**NCC**") under Section 23E of Securities Contracts (Regulation) Act, 1956 **(SCRA)** read with Clause 2 (i) of the Listing Agreement entered into between NCC Ltd. and BSE Ltd. for alleged violation of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR Regulations**") read with SEBI Circular No. CIR/CFD/CMD/4/2015 dated 09.09.2015 ("**SEBI Circular**").

APPOINTMENT OF ADJUDICATING OFFICER

2. The undersigned was appointed as Adjudicating Officer (hereinafter referred to as "**AO**") under Section 23-I of the SCRA read with Rule 3 of the SCRA (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005 (hereinafter referred to as the "**Adjudication Rules**"), vide order dated April 5, 2021, to

inquire into, and adjudge under Section 23E of the SCRA, the aforesaid alleged violations by the Noticee.

3. The appointment of the undersigned as AO was communicated vide order dated April 6, 2021.

SHOW CAUSE NOTICE, REPLY AND HEARING

4. Show Cause Notice No. EAD5/MC/VS/ 15879 /2021 dated 20.07.2021 (hereinafter referred to as "**SCN**") was issued to the Noticee, in terms of Rule 4 (1) of the Adjudication Rules read with Section 23-I of the SCRA to show cause as to why an inquiry should not be held and penalty not be imposed against the Noticee in terms of Section 23E of the SCRA for the aforesaid alleged violations.

5. The allegations levelled against the Noticee in the SCN are summarized as follows:-

6. NCC Limited (formerly Nagarjuna Construction Company Limited) ("NCC / "the Company") has its equity shares listed on both BSE (since 1992) and NSE (since 2003). NCC executes construction and infrastructure projects, majority of them being government projects.

7. SEBI received a letter dated October 07, 2019 from RBI with regard to inspection of M/s NCC Infrastructure Holdings Ltd ("NCCIHL"), a subsidiary of NCC registered with RBI as NBFC. As per RBI letter, during 2016-17 there was a claim for an amount of Rs. 288.25 crore and USD 9.04 Million towards liquidated damages for delays in execution of projects by NCC, and a BG given by NCC Ltd. of Rs. 339.85 crore had been invoked. The fact relating to invocation was mentioned in the audited financials of NCC Ltd., stating that NCC Ltd. had appealed to the Hon'ble Supreme Court for stay against invocation of bank guarantees, but the Court had dismissed its appeal. As of March 31, 2018 the matter was stated to be in arbitration and as per the management estimates and legal advice, no provision was required for the

subject matter and the matter was expected to be resolved in the financial year 2018-19. However, there was no mention about such invocation in the 2018-19 audited balance sheet and it was not possible to know whether the matter was resolved.

8. NCC vide its letters dated 7.11.2019, 07.09.2020 and 27.07.2020 to SEBI submitted the following response to the abovementioned observations:-

(a) NCC was awarded the EPC Contract pertaining to a Supercritical technology based Plant in Nellore, Andhra Pradesh by Sembcorp Energy India Ltd ('SEIL'). The project execution was delayed on account of delay in supply of key equipment and delays in fulfilling certain obligations by SEIL. In view of the aforesaid delays, the commercial operations of the Plant Units were started with delay.

(b) Even after starting the commercial operations, SEIL had illegally invoked the Performance Bank Guarantee for Rs. 343.10 Crores and the Company had referred the disputes to Arbitration before a Tribunal. The disputes were still *sub judice*.

(c) The value of the BG that was encashed was less than the threshold limit stipulated in the Company's 'Policy on Determination of Materiality of Events and Information' ("Materiality Policy"). Hence, the Company was under the impression that the provisions of Regulation 30 of LODR would not get attracted.

(d) Despite of the claim amount of (around) Rs. 1500 crores filed by NCC, the authorized person responsible for determining materiality did not consider the said event to be material irrespective of whether the award is decided in favour/ against the NCC considering the history of settlement amount in the arbitration matters which ranges between 25% to 50% of the claims lodged.

(e) A chronology of the events was tabulated as follows –

S. No.	Date of Event	Description of Event
1	3.4.2017	NCCL referred the disputes regarding the Non-Extension of Time to the Senior Officers of NCC & SEIL (Internal Forum) in terms of the contract
2	19.4.2017	SEIL encashed the Bank Guarantee for Rs. 51.50 Crs
3	27.5.2017	As no resolution of the disputes regarding Extension of Time was arrived at before the Internal Forum, NCC invoked the provisions of Arbitration
4	30.6.2017	Arbitration Tribunal was formed comprising of 3 eminent Supreme Court Judges
5	15.9.2017	NCCL filed the Statement of Claim
6	9.11.2017	SEIL encashed the Bank Guarantee for Rs. 291.50 Crs
7	9.3.2018	NCCL amended the Statement of Claim
8	9.3.2018	Counter Claim was filed by SEIL

(f) The requisite disclosures relating to invocation of BG by one of NCC customers and the related disputes were provided under Note No. 60 (Page No. 186) for the FY 2017-18 and Note No. 53 (Page No 192) for the FY 2018-19 of the Notes forming part of the Consolidated Financial Statements (copy placed at Annexure 3 to SCN).

(g) Additionally, the Company had been disclosing the same to the institutional investors during the investor conference calls held in 2017-20 discussing about performance and financial results. (Annexure II to NCC's letter dated September 07, 2020) Further, NCC had been disclosing the transcript of the said investors' meet regularly to the stock exchanges and hosting the same on its website.

(h) Ind AS-1 regarding "Presentation of Financial Statements" does not mandate the disclosure of the names of the parties while disclosing the contingent liabilities. Taking note of SEBI's observations, the name of SEIL has been included while disclosing the contingent liabilities in the Annual Report of NCC for FY 2019-20.

9. According to the Company's 'Policy on Determination of Materiality of Events and Information' ("Materiality Policy") (copy placed at Annexure 4 to SCN): "*An event or information is considered to be material on the basis of quantity, if it is likely to affect the total income or net worth of the Company by 10%, as per the consolidated audited financial statement of the previous year*."

10. As per the consolidated audited financial statement of FY 2016-17, the total income and net worth of the Company was Rs. 9,204.47 crores and Rs. 3,635.30 crores. Hence, the threshold limit for disclosure of event under Regulation 30 of LODR for FY 2017-18 is Rs. 363.53 (10% of the net worth of the previous financial year).

11. SEIL encashed BGs of total amount of Rs. 343.10 crores in FY 2017-18 which is under the threshold limit. However, the claim made by NCC (Rs. 1,571.41 crores) and the counter claim made by SEIL (Rs. 1,071.46 crores) in the arbitration proceedings in 2017-18 exceeded the threshold limit for disclosure (Rs. 363.53 crores).

12. From the submissions of the Company, it was observed that actual award is usually a small percentage of the claim amount in arbitration/disputes (Annexure IV to NCC's email dated September 7, 2020). It was also observed that the Company has made disclosures and answered to investor queries in the Annual Reports and investors / analysts calls during FY 2017-20 with regard to the aforesaid arbitration proceedings.

13. However, from the Company's investor/analyst calls dated November 14, 2017, May 24, 2018, and November 13, 2018 (Annexure II to NCC's email dated September 07, 2020), it was observed that the Company admitted the expected amount that they would recover from the arbitration award to be Rs. 700 crores (retention money plus final bill plus the BGs invoked) plus interest, whereas the client could claim liquidation damages on NCC not exceeding Rs. 250 crores.

14. Considering the above, the expected financial impact from the arbitration proceedings (more than Rs. 700 crores) was more than the threshold limit for disclosure for FY 2017-18 under the Company's Materiality Policy. Further, the quantum of claims was not provided in the investors/analyst calls and expected financial impact was not provided in the annual reports. Hence, the disclosures made in the investors/analyst calls and the annual reports could not be treated as mitigating factors for non-disclosure under Regulation 30.

15. Accordingly, the Company should have disclosed the details of the events of becoming a party to the aforesaid Arbitration proceedings and subsequent changes in status / development in relation to the said proceedings within twenty-four hours of occurrence of the events under Regulation 30 of LODR, and without waiting for disclosures in the investors/analyst calls or annual report.

16. In view of the above, the Company by not disclosing the details of the events pertaining to the aforesaid Arbitration proceedings within twenty-four hours of occurrence of the events was alleged to be in non-compliance with Regulations 30(3), (4) and (6) of the LODR Regulations r/w point no. 8 of para B of Part A of Schedule III of LODR r/w the corresponding provisions of SEBI Circular no. CIR/CFD/CMD/4/2015 dated September 09, 2015 r/w the Company's 'Policy on Determination of Materiality of Events and Information' which states that "*An event or information is considered to be material on the basis of quantity, if it is likely to affect the total income or net worth of the Company by 10%, as per the consolidated audited financial statement of the previous year*.".

17. The SCN was served upon the Noticee through SPAD on 26.07.2021, and vide e-mail on 20.07.2021.

18. Vide letter dated 07.08.2021 the Noticee sought three weeks' extension for filing reply to the SCN, which request was acceded to in the interest of natural justice. The Noticee also intimated that Mr. M.V. Srinivasa Murthy was its Authorised Representative ("AR") for the purpose of the instant adjudication proceedings.

19. Vide reply dated 30.08.2021, the Noticee made the following submissions:-

(a) NCC is a fully compliant entity and all the disclosures as mandated under Regulations 30 of LODR have been made from time to time. Except the captioned proceedings, there has never been any regulatory intervention or show cause notice from the SEBI *qua* NCC.

(b) Under the policy of materiality, disclosure is required to be made to stock exchange only if the impact of any transaction is to the tune of 10% of the turnover/net-worth, whichever is higher. Since the dispute with SIEL was ongoing in a piecemeal manner and all the relevant updates pertaining to the Court orders were in public domain, disclosure was not warranted.

(c) NCC did not consider the underlying claim amount to be material (irrespective of whether the award is decided in favour/ against) considering the history of settlement amount in the arbitration matters which ranges between 25% to 50% of the claims lodged.

(d) Complete details of the Arbitration (and underlying dispute) were disclosed to the public shareholders:

    i. Note No. 45 (on internal page 118) of the Financial Statement for FY 2018-19 published in the Annual Report 17-18.

    ii. Note No. 44 (on internal page 117) of the Financial Statement for FY 2019 20 published in the Annual Report 18-19.

    iii. Note No. 41 (on internal page 115) of the Financial Statement for FY 2019-20 published in the Annual Report 19-20.

(e) The investors were regularly informed about the status of the Arbitration proceedings during the investor calls (ref: discussions in the Investor Meetings between May-2017 to May- 2020). The transcripts of the said meetings were also disclosed/published with the stock exchange.

(f) SEBI had taken note of the information provided by the Company at different points of time although not under Regulation 30 of LODR. Further, even the correspondence exchanged with the stock exchange which is enclosed with the SCN clarified this issue where this was a clearly a disconnect in understanding the issues. While the claim of NCC was high, the same was considered to be non-material because the recoveries would not adversely affect the financials of the company but would be a positive development.

(g) It was the word *"affect"* or *"impact"* which has wide connotations was assumed to mean *"affecting adversely".* Noticee appreciated the concerns of SEBI and did realise that it ought to have been more specific on such information updates. However, all information is in public domain and shared with the investors, detailed discussions and analysis have been made over the calls which too are disclosed and therefore there was no reason whatsoever for Noticee to not provide the required claim when the same would have positively affected the company. It is important to also note that by providing disclosures that Company has made a Claim of such huge amount, there would have been an unrealistic interest and speculation which Noticee did not wish to have at any point of time. It was when specific queries were raised during the analysis of the matter that all required information was provided and disclosed to the exchange. There was no intention or any ill motive in not providing the information in the particular manner and such a lapse may not be considered a ground for levy of penalty.

(h) The letter from the RBI which formed the basis of the proceedings stands resolved and the contents in the letter has been clarified to RBI.

(i) NCC (*formerly, Nagarjuna Construction Company Ltd)* was incorporated as a partnership firm in the year 1978. Eventually, in the year 1990, NCC was converted into a public company. During the last 40 years, NCC has executed several prestigious construction and infrastructure projects for the government (Central and State) as well as private sector.

(j) NCC is at present executing projects in different verticals *viz,* building, water, environment, irrigation, mining and metals. NCC has successfully executed 800 projects in the past decades and currently is in the process of executing 150+ projects (across 23 States and 3 Union Territories). NCC provides direct employment to almost 6000 persons and indirectly to 50000+ persons (through subsidiaries/SPVs *I* Associates and Vendors).

(k) NCC was awarded the EPC Contract pertaining to 2 x 660 MW Supercritical Technology based Plant at village Painampuram & Sivarampuram, in Muttukur Mandai, Nellore (Andhra Pradesh) by SIEL (formerly, SGPL). The project execution was mainly delayed on account of delay in the supply of Boiler, Turbine and Generator (BTG) which are the key equipment's by CNTIC - TEPC Consortium (China) by around 726 days for Unit - 1 and 879 days for Unit - 2. In fact, SEIL had delayed in fulfilling its obligations under the contracts with regard to the availability of Sea Water intake pipeline 400 KV Transmission Line, External Coal Handling Plant, supply of Design Coal etc.

(l) As per the original contract the Unit - 1 facility was to achieve provisional acceptance by November 10, 2015 and Unit- 2 by February 10, 2016. In view of the delays on the part of the BTG Supplier and delays in fulfilling the obligations by SEIL, the Unit- 1 was synchronized with the grid on May 26, 2016 and SEIL started its commercial operations from November 17, 2016. Similarly, Unit - 2 was synchronized with the grid on February 2, 2017 and SEIL started its commercial operations from February 21, 2017.

(m) Despite the fact that the commercial operations (generation of power) had commenced and SIEL had started selling the power that was generated, SEIL had illegally and unilaterally invoked bank guarantees 9"BG") and encashed Rs. 51.60 crores on April 19, 2017 and Rs. 291.50 crores on November 9, 2017. As the value of the bank guarantee that was encashed was less than the threshold limit in terms of the Materiality Policy, disclosure to the stock exchanges under Regulation 30 of the LODR Regulations was not warranted.

(n) Currently, the dispute has been referred to panel of three Arbitrators consisting of former Supreme Court Judges: Mr. Justice B.N. Srikrishna, Presiding Arbitrator, Mr. Justice Cyriac Joseph and Mr. Justice T.S Thakur) and matter is *sub-judice.* In view of the Covid-19 pandemic, the schedule that was previously fixed by Hon'ble Tribunal has been delayed.

(o) By its Order dated September 17, 2017, on an application made by SIEL, the Hon'ble Arbitral Tribunal has directed that *"all documents and correspondence filed with the pleadings, or any other document filed or exchanged in the course of arbitration, shall be treated as confidential by the Claimant and not disclosed except under any order made by a competent Court or any authority under legal provision which obliges the claimant to disclose such documents".* Copy of Order of the Hon'ble Tribunal was enclosed as Annexure-"1" to the reply.

(p) In terms of the LODR Regulations, the Board of Directors have framed the Materiality Policy on November 10, 2015. As per the said Materiality Policy, any event or information considered to be material on basis of quantity, if it is likely to affect the total income or net worth of Company by 10%, as per consolidated financial statement of the previous year is a material event. As and when dispute arise, appropriate legal proceedings are initiated (before Hon'ble Court or by Arbitration mechanism). It is typical of construction industry that since the liability is not ascertainable, instead of making hasty disclosures under LODR, appropriate statements / disclosures are made in the Financial Statement / Annual Report for the benefit of shareholders. As and when required, the investors are appraised about the status of the dispute during the investor meet/analyst meet.

(q) Clause 8 of the SEBI Circular dated September 09, 2015 notified under LODR Regulations was issued as a guidance for events which required disclosure under Regulation 30 of the LODR Regulations. The relevant paragraph no. 8 of the said Circular which was guidance for disclosures of litigation is reproduced as under:

"Litigation(s)/dispute(s)/ regulatory action(s) with impact: The listed entity shall notify the stock exchange(s) upon it or its key management personnel or its promoter or ultimate person in control becoming party to any litigation, assessment, adjudication, arbitration or dispute in conciliation proceedings or upon institution of any litigation, assessment, adjudication, arbitration or dispute including any ad-interim or interim orders passed against or in favour of the listed entity, the outcome of which can reasonably be expected to have an impact".

(r) It is respectfully stated that it is very usual for an infrastructure/construction company to make an arbitration reference wherein claims and counter claims are filed. In such cases, mere invocation of the BG does not make the claim valid at the very first place. The underlying dispute is arising out of contractual obligations and did not stand-out in terms of materiality or gravity. Since the dispute with SIEL was ongoing in a piecemeal manner and all the relevant updates pertaining to the Court Orders were in public domain, disclosure under LODR was not warranted.

(s) Noticee believed that *'impact'* was assumed to mean adverse impact on a company. Since, all information was in public domain and shared with the investors, detailed discussions and analysis have been made over the calls which too are disclosed and therefore there was no reason whatsoever for Noticee to not provide the required claim when the same would have positively affected NCC.

(t) If a disclosure was made to the effect that NCC has a made huge claim on SIEL, there would have been an unrealistic interest and speculation which Noticee did not wish to have at any point of time. It was when specific queries were raised during the analysis of the matter, all required information was provided and disclosed to the exchange.

(u) It is a regular practice among the corporates to not determine 'materiality' based on claim/counter claim amount due to nature of frivolous and excessive claims made by the litigants, especially in the infrastructure sector. Even in one of the investor /analyst calls (ref: disclosure dated November 23, 2018), NCC has stated that expected financial implication cannot be more than 250 Crores (liquidated damages).

(v) Determination of materiality is to be done by Key Managerial Personnel (KMP) by taking into account both the qualitative and quantitative criteria. In this case, the underlying event did not meet both the criteria so as to warrant a disclosure as a 'material ' event since:

i. NCC did not consider the underlying claim amount to be material (irrespective of whether the award is decided in favour/ against) considering the history of settlement amount in the arbitration matters which ranges between 25% to 50% of the claims lodged. Summary of the amounts claimed via-a-vis amount awarded in respect of some of Noticee's Arbitration Claims is enclosed as Annexure-" 2".

ii. Based on the documentary evidence placed before the learned Arbitral Tribunal it is seen that almost all the counter claims filed by SEIL are baseless and based on the legal opinion obtained by NCC, the management was of the considered view that in all likelihood a major portion of the counter claims should be rejected by the learned Arbitral tribunal.

(w) The aforesaid position was also confirmed by the National Stock Exchange of India Ltd ("NSE") wherein a stand was taken that *"SEBI Circular dated September 9, 2015 requires disclosure of both items (expected financial implications and quantum of claims). However, it is not clear about which is to be considered for trigger of material event".* After due enquiry, only an advisory was issued by NSE, as the *"details of litigations were already shared based on other events under the Regulations 30 of LODR Regulations".* There was a disconnect in understanding of issues. While the claim of NCC was high, the same was considered to be non-material because the recoveries would not have adversely impacted the financials of the company but would be a positive development. Copy of NSE's email (provided with the Show Cause Notice) is enclosed as Annexure-"4".

(x) Though in its considered opinion the disclosure under Regulation 30 of LODR was not triggered, NCC has been continuously disclosing the details of the event of invocation of BG in the Annual Reports of the relevant years as under:

I. Note No. 45 (on internal page 118) of the Financial Statement for FY 2018-19 published in the Annual Report 17-18

II. Note No. 44 (on internal page 117) of the Financial Statement for FY 2019-20 published in the Annual Report 18-19:

III. Note No. 42 (on internal page 115) of the Financial Statement for FY 2019-20 published in the Annual Report 19-20.

IV. Copy of the relevant extract of the Annual Report is enclosed as Annexure- "5".

(y) Apart from the aforesaid disclosures, NCC has been disclosing the same to the investors during the investor conference call held on the May 29, 2017, November 14, 2017, May 24,2018, August 13,2018, November 13,2018, February 12,2019, June 4, 2019, August 9, 2019, November 5, 2019, February 7, 2020 and May 29, 2020, while discussing about performance and financial results. Additionally, NCC has been disclosing the transcript of the said investors' meet regularly to the stock exchanges and hosting the same on its website in terms of Regulation 30 read with Schedule III of the SEBI Listing Regulations. Copy of the intimations made to the stock exchange is enclosed as Annexure-"6".

(z) The information was also hosted on the website of the NCC and was available to the public investors on a timely basis.

(aa) The aforesaid clearly establishes Noticee's *bonafide* that it had been transparent with the investors and there was no intent to conceal any material fact. In its humble opinion, the substance and details of dispute were in the public domain. Merely because the disclosure was not in a particular format (regulation), as alleged in Show Cause Notice, ought not be the reason for imposing monetary penalty.

(bb) Even if the learned Adjudicating Officer is to take a view that there was an alleged infraction by NCC during the relevant period, the same is merely technical in nature. It is a settled law that every venial and technical breach should not lead to imposition of monetary penalty. The following precedents are relevant:

I. the case of P. G. Electrop/ast & Ors. vs. SEBI (decided on August 2, 2019), the Hon'ble SAT ruled that:

" ...*18. Penalty can be imposed for failure to carry out a statutory obligation under the SEBI's Act. Factors contemplated under Section 15J are required to be taken into consideration before imposing a penalty. If it is found that aparty has not acted deliberately, then the authority has a discretion, to be exercised judicially, whether in a given case, after taking into consideration of all the relevant circumstances, as to whether a penalty should be imposed or not. Even if a minimum penalty is prescribed, the authority, after considering the circumstances of the case and other factors enumerated in Section 15J would be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act. The above was precisely held by the Supreme Court in M/s. Hindus/an Steel Ltd vs. State of Orissa, 1969(2) SCC 627*...."

II. In the case of National Highway Authority of India vs. SEBI (decided on August 27, 2020) the Hon'ble SAT ruled that:

"*24. Consequently, for the reasons stated aforesaid, we are of the view that even though there has been a violation of Regulation 52 of the LODR Regulations but in the peculiar facts and circumstances of the present case which should not be treated as a precedent for other matters, we are of the opinion that the imposition of penalty imposition penalty of Rs.7 lakhs upon the Appellant cannot be sustained and is substituted with a warning with a further condition that in the event the Appellant violates Regulation 52 of the LODR Regulations in future it will be open to the Respondent to initiate proceedings under the Act/LODR Regulations and proceed in accordance with law. In* *view of the aforesaid, the appeal is allowed in part. The penalty of Rs.7 lakhs is substituted with a warning."*

20. Vide Hearing Notice dated 06.01.2022 the Noticee was granted an opportunity of hearing through videoconferencing by WebEx on 19.01.2022, which was adjourned to 03.02.2022upon the request of the Noticee in the interest of natural justice.

21. During the hearing conducted through videoconferencing on 03.02.2022, the Authorised Representatives of the Noticee viz. Advocates Ravichandra Hedge and Mitravinda Chunduru reiterated the submissions made vide reply dated 30.08.2021. It was reiterated that the issue pertained to professional judgment of materiality based on legal opinion regarding whether the claim under arbitration was a material event requiring disclosure under LODR Regulations. Further, while referring to NSE's e-mail in Annexure 4 to the SCN, it was submitted that NSE had already warned and excused the Noticee regarding the alleged non-compliance with the LODR Regulations.

22. In the light of the allegations contained in the SCN and relevant material available on record, I hereby proceed to decide the case on merits.

CONSIDERATION OF ISSUES AND FINDINGS

23. The issues arising for consideration in the instant proceedings before me are:-
    I. Whether the provisions of Regulation 30 (3), (4) and (6) of the LODR Regulations read with point no. 8 of Para. B of Part A of Schedule III of the LODR Regulations read with the corresponding provisions of SEBI Circular no. CIR/CFD/CMD/4/2015 dated 09.09.2015 and the Company's "Policy of Determination of Materiality of Events and Information" have been violated by the Noticee?
    II. If yes, whether the Noticee is liable for imposition of monetary penalty under Section 23E of the SCRA read with Clause 2 (i) of the Listing Agreement?

III. If yes, what would be the monetary penalty that can be imposed upon the Noticee taking into consideration the factors stipulated in Section 23J of the SCRA read with Rule 5 (2) of the Adjudication Rules?

I. Whether the provisions of Regulation 30 (3), (4) and (6) of the LODR Regulations read with point no. 8 of Para. B of Part A of Schedule III of the LODR Regulations read with the corresponding provisions of SEBI Circular no. CIR/CFD/CMD/4/2015 dated 09.09.2015 and the Company's "Policy of Determination of Materiality of Events and Information" have been violated by the Noticee?

24. The facts leading to the allegations in respect of the Noticee are that during FY 2017-18 NCC was awarded EPC contract for execution of project related to a plant in Nellore by Sembcorp Energy India Ltd. ("SEIL"). However, on account of some delays in execution of the project, which NCC attributed to third party supplier delays, SEIL encashed a bank guarantee of Rs. 51.50 crores on 19.04.2017. In May 2017 NCC invoked arbitration proceedings and on 15.09.2017 NCC filed its statement of claim during arbitration proceedings for approximately Rs. 1571.41 crores. On 09.11.2017 SEIL again encashed bank guarantee for another Rs. 291.50 crore. On 09.03.2018 SEIL filed its counter claim during arbitration proceedings for approximately Rs. 1071.46 crores.

25. The allegation against NCC is that it failed to disclose the expected financial impact of the abovementioned arbitration proceedings, which was more than Rs. 700 crores as per its transcripts of conference calls disclosed to BSE and NSE between 29.05.2017 and 06.06.2020, within 24 hours of the filing of its statement of arbitration claim on 15.09.2017, thus failing to comply with Regulation 30 (3), (4) and (6) read with Point 8 of Para. B. Part A of Schedule III of the LODR Regulations and read with SEBI Circular dated 09.09.2015.

26. The relevant legal provisions are reproduced below for reference:-

LODR Regulations

30.<u>*"Disclosure of events or information.*</u>

(3) *The listed entity shall make disclosure of events specified in Para B of Part A of Schedule III, based on application of the guidelines for materiality, as specified in sub-regulation (4).*

(4) *(i) The listed entity shall consider the following criteria for determination of materiality of events/ information:*

(a) the omission of an event or information, which is likely to result in discontinuity or alteration of event or information already available publicly; or

(b) the omission of an event or information is likely to result in significant market reaction if the said omission came to light at a later date;

(c) In case where the criteria specified in sub-clauses (a) and (b) are not applicable, an event/information may be treated as being material if in the opinion of the board of directors of listed entity, the event / information is considered material.

ii) The listed entity shall frame a policy for determination of materiality, based on criteria specified in this sub-regulation, duly approved by its board of directors, which shall be disclosed on its website.

6) *The listed entity shall first disclose to stock exchange(s) of all events, as specified in Part A of Schedule III, or information as soon as reasonably possible and not later than twenty four hours from the occurrence of event or information:*

Provided that in case the disclosure is made after twenty four hours of occurrence of the event or information, the listed entity shall, along with such disclosures provide explanation for delay:

*Provided further that disclosure with respect to events specified in sub-para 4 of Para A of Part A of Schedule III shall be made within *[the timelines specified therein].*

* *Substituted for the "thirty minutes of the conclusion of the board meeting." by the SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021 w.e.f. 5.5.2021."*

SCHEDULE III
PART A: DISCLOSURES OF EVENTS OR INFORMATION: SPECIFIED SECURITIES

*"**Para. B.** Events which shall be disclosed upon application of the guidelines for materiality referred sub-regulation (4) of regulation (30):*
***8.** Litigation(s) / dispute(s) / regulatory action(s) with impact."*

SEBI Circular dated 09.09.2015

***B.** Details which a listed entity need to disclose for events on which the listed entity may apply materiality in terms of Para B of Part A of Schedule III of Listing Regulations of Listing Regulations*

*"**8.** Litigation(s) / dispute(s) / regulatory action(s) with impact:*
The listed entity shall notify the stock exchange(s) upon it or its key management personnel or its promoter or ultimate person in control becoming party to any litigation, assessment, adjudication, arbitration or dispute in conciliation proceedings or upon institution of any litigation, assessment, adjudication, arbitration or dispute including any ad-interim or interim orders passed against or in favour of the listed entity, the outcome of which can reasonably be expected to have an impact.
8.1 At the time of becoming the party:
a) brief details of litigation viz. name(s) of the opposing party, court/ tribunal/agency where litigation is filed, brief details of dispute/litigation;
b) expected financial implications, if any, due to compensation, penalty etc;
c) quantum of claims, if any;
8.2 Regularly till the litigation is concluded or dispute is resolved:
(a) the details of any change in the status and / or any development
in relation to such proceedings;
b)in the case of litigation against key management personnel or its promoter or ultimate person in control, regularly provide details of any change in the status and / or any development in relation to such proceedings;

c)in the event of settlement of the proceedings, details of such settlement including - terms of the settlement, compensation/penalty paid (if any) and impact of such settlement on the financial position of the listed entity."

27. The requirement of the law laid down in Regulation 30 and Schedule III of the LODR Regulations read with the SEBI Circular of 09.09.2015 is that a listed company is required to disclose material information to the stock exchanges within 24 hours of occurrence of the event or information. While some information is deemed material and disclosure is mandated in terms of Para. A, Part A of Schedule III of the LODR Regulations, certain other information specified in Para. B. Part A of Schedule III of the LODR Regulations is required to be classified as material by the Board of Directors of the company after determining the materiality of the event in accordance with criteria laid down in Regulation 30 (4) (i)(a), (b) and (c) of the LODR Regulations. As per Regulation 30 (4) (i)(a), (b) and (c) of the LODR Regulations, the Board of Directors of the company are required to take into account whether not disclosing the event or information would cause discontinuity of information in public domain, or significant market reaction if the information came to light at a later date, or which in the opinion of the Board is considered material.

28. As per Regulation 30 (4) (ii) of the LODR Regulations which requires a listed company to frame a policy for determination of materiality based on the criteria in Regulation 30 (4) (i), NCC had framed a "Policy on Determination of Materiality of Events and Information". As per the Materiality Policy of NCC, *an event or information is considered material on the basis of quantity, if it is likely to affect the total income or net worth of the Company by 10% as per the consolidated audited financial statement of the previous year*. The Materiality Policy further states that *in cases where the materiality of event or information cannot be determined on the basis of the quantitative threshold given above, Key Managerial personnel authorised by the Board of Directors shall determine the materiality of the event or information in consultation with the Managing Director and/or the Executive Director of the Company*.

29. The Noticee's income and net worth as per consolidated audited financial statement of FY 2016-17 were Rs. 9204.47 crores and Rs. 3635.30 crores respectively. As per Regulation 30 (4) read with Point 8. Of Para B, Part A of Schedule III of the LODR Regulations and Clause 8. of Part B. of Annexure 1 to SEBI Circular dated 09.09.2015, "Litigation(s) / dispute(s) / regulatory action(s) with impact" were required to be disclosed by the Noticee if considered material by the it in terms of the guidelines for materiality in Regulation 30 (4) of the LODR Regulations read with the Noticee's Materiality Policy.

30. I note that discretion is granted under Regulation 30 (4) (i) (c) to the company in determining events or information as material when they are not deemed material events in terms of Para A of Part A of Schedule III of the LODR Regulations and accordingly Noticee framed a "Policy on Determination of Materiality of Events and Information". As per this policy, the decision regarding whether the claim of Rs. 1571.41 crores by NCC and a counter-claim of Rs. 1071.46 crores by SEIL made on 15.09.2017 and 09.03.2018 i.e. in FY 2017-18, was *likely to affect the total income or net worth of the Company by 10%* was required to be taken by the Key managerial personnel authorised by the Board of directors of the Noticee. The allegation rests on considering the claim amount as the relevant amount for the 10% threshold as against the amount of BG invoked as the relevant amount for the 10% threshold which was used by the Noticee to determine materiality of information.

31. I accept the contention of the Noticee that considering the claim amount as threshold and disclosing the claimed amount as part of material information would have generated unrealistic interest and speculation considering that the history of settlement amount in the arbitration matters ranges from 25% to 50% of the claims lodged. This consideration is relevant when seen in the context of discretion granted to the company under Regulation 30 (4) (i) (c) to the company in determining events or information as material. In not disclosing the filing of arbitration claim as a material event, the Noticee has erred on the side of caution so as not to raise unnecessary speculation of receiving the claimed amount particularly when, as submitted by Noticee, the management was of the

considered view that in all likelihood a major portion of the counter claims should be rejected by the learned Arbitral tribunal. I further note that NSE in its e-mail dated 24.09.2020 to SEBI in response to SEBI's specific query to NSE regarding Noticee's compliance with Regulation 30 of the LODR Regulations, submitted that it *has been a practice amongst corporates to not determine materiality based on claim amount because of frivolous and high claims made by litigants in the infra sector.*

32. Further, I note that the information impugned as material and allegedly required to be disclosed by the Noticee in terms of Regulation 30 of the LODR Regulations was available in the public domain through disclosures of annual reports and transcripts of conferences discussing financial results to the exchanges during the relevant period. The disclosures of the Noticee in the Notes to its Financial Statements for the years 2017-18, 2018-19 and 2019-20 and the transcripts of various conference calls discussing financial results of the Noticee during the said period were disclosed to the exchange and it was also stated that as per management assessment, no provision in the accounts of the Company was required in respect of the subject matter.

33. I note that in the Notes forming part of Financial Statements of in Annual Report of NCC for 2017-18, it was stated that "*During the previous year, a customer of NCC Limited had raised claims for an amount of Rs. 2882.50 million and US $ 9.04 million towards liquidated damages claiming delays in execution of the project by NCC Limited. Failing amicable settlement of various issues, NCC Limited had issued a notice of dispute stating that the Delays are not attributable to NCC Limited and subsequently the matter has been referred to Arbitration Tribunal. The claims primarily represents recovery of receivables for the work executed of Rs. 6526 million and additional costs incurred by NCC Limited of Rs. 12010 million with interest. Against which the customer has filed a counter claim of Rs. 10,230 million. While the matter is in arbitration, the customer had invoked the Bank Guarantees of Rs. 3398.50 million and NCC Limited had appealed the matter to the Hon'ble Supreme Court for stay against the invocation of bank guarantees, but the Hon'ble Supreme Court has*

dismissed the appeal. Consequently, the bankers honoured the bank guarantees. As of March 31, 2018 the matter is in arbitration and as per the management estimates and legal advice, no provision is required for the subject matter and the matter is expected to be resolved in the financial year 2018-19." In Notes forming part of Financial Statements of in Annual Report of NCC for FY 2018-19, NCC disclosed "*Consequent to the encashment of Bank Guarantees (BG) of Rs. 343.10 crores in the year 2017-18 by one of the customer (Sembcorp Energy India Ltd.), NCCL invoked the arbitration clause and submitted a claim of Rs. 1571.41 crores towards refund of retention money, refund of BGs amount, payment of pending bills, additional works done and cost incurred on prolongation of the project by the customer. Against which the customer has filed a counter claim of Rs. 1071.46 crores towards liquidated damages, turbine replacement, balance works etc. As per the management assessment and legal advise, no provision is required for the subject matter and arbitration proceedings are expected to be completed within a year's time*". Identical disclosures were made by NCC in Notes forming part of Financial Statements of in Annual Report of NCC for 2019-20.

34. From the above, I note that necessary information regarding the BG invocation and filing of arbitration claims was in the public domain. I also note that NSE in its reply to SEBI confirmed that both "expected financial implications" as well as "claims" had been disclosed by NCC through other disclosure requirements though not within 24 hours.

35. In view of the fact that the Noticee had discretion under Regulation 30 (4) (i) to determine materiality of event for the purpose of disclosure, and that in exercise of such discretion, the Noticee took a conservative view in not raising expectation of large claim amounts through arbitration based on history of settlement of such claims and accordingly applying 10% threshold of its own materiality policy, I find the charge of violation of Regulation 30 (3), (4) and (6) of the LODR Regulations read with point no. 8 of Para. B of Part A of Schedule III of the LODR Regulations read with the corresponding provisions of SEBI Circular no. CIR/CFD/CMD/4/2015 dated 09.09.2015 and the Company's

"Policy of Determination of Materiality of Events and Information" by the Noticee does not stand established.

36. As the alleged violations by the Noticee are not established, Issues II and III do not merit consideration.

ORDER

37. In the light of the findings noted hereinabove, the adjudication proceedings initiated against the Noticee vide SCN dated 20.07.2021 are disposed of.

38. Copies of this Adjudication Order are being sent to the Noticee and also to SEBI in terms of Rule 6 of the Adjudication Rules.

MANINDER CHEEMA Digitally signed by MANINDER CHEEMA Date: 2022.05.02 13:36:54 +05'30'

DATE: May 02, 2022 **MANINDER CHEEMA**

PLACE: MUMBAI **ADJUDICATING OFFICER**