

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Not reportable)

O.M.P. No. 313 of 2007

DELHI TRANSCO LIMITED Petitioner
Through: Mr. Rakesh Agarwal with
Mr. Pulkit Agarwal, Advocates.

versus

TECHNO ELECTRIC AND ENGINEERING CO.
LIMITED Respondent
Through: Mr. Narender M. Sharma with
Mr. Abhishek Sharma and Ms. Aarthy
Venkat, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

07.12.2012

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 21st February 2007 passed by the arbitral Tribunal ('AT') in the dispute between the Petitioner, Delhi Transco Limited ('DTL') and the Respondent, Techno Electrical and Engineering Limited ('Techno') arising out of an agreement dated 9th March 1993 entered into between the parties for erection, testing and commissioning of the 400/220 KV Bamnauli sub-station.

2. Under the agreement, DTL [earlier known as Delhi Vidyut Board ('DVB')] was described as the 'Owner' and Techno was described as the 'Contractor'. The relevant Clause 20 of the Instructions to the Bidder

provided as under:

“The bidders insurance liabilities pertaining to the scope of work are detailed out in clauses titled ‘insurance’ in Section GCC, Section CSE & Section ECC of Conditions of Contract Volume – I. The Bidders attention is specifically invited to these clauses. The bid price shall include all the costs in pursuance of fulfilling of the insurance liabilities under the contract.”

3. The responsibility for taking out insurance policy for both the owner supplied as well as contractor supplied items was of the Contractor. This was spelt out in various clauses of the Erection Conditions of Contract (‘ECC’), General Terms of Contract (‘GTC’) as well as Special Conditions of the Contract (‘SCC’) which read as under:

“17.1 Insurance (ECC)

The Contractor shall take adequate insurance coverage for all the risks and hazards which will pertain to all the services to be provided under the Contract and pursuant to his employees. The Contractor in all cases will keep the Owner indemnified against any claim resulting from failure of the Contractor to main all necessary insurance coverage to the required extent both in time and in value to take care of all his liabilities, either direct or indirect in pursuance of the contract.

17.2 In addition to the conditions covered under the Clause entitled insurance in General Terms and Conditions of Contract of this Volume I, the following provisions will also apply to the portion of works to be done beyond the Contractor’s own or his sub-Contractor’s manufacturing works.

19.0 Insurance (GTC)

19.1 The Contractor at his cost shall arrange, secure and maintain all insurance as may be pertinent to the works and

obligatory in terms of law to protect his interest and interests of the owner against all perils detailed herein. The form and the limit of such insurance as defined herein together with the underwriter in each case shall be acceptable to the owner. However, irrespective of such acceptance, the responsibility to maintain adequate insurance coverage at all times during the period of contract shall be of contractor alone. The Contractor's failure in this regard shall not relieve him of any of his contractual responsibilities and obligations. The insurance covers to be taken by the Contractor shall be in a joint name of the Owner and the Contractor. The Contractor shall, however, be authorized to deal directly with Insurance company or Companies and shall be responsible in regard to maintenance of all insurance covers. Further, the insurance should be in freely convertible currency.

19.2 Any loss or damage to the equipment during handling transportation, till sixty days after receipt of the equipment and material at site, (in case of supply contracts) and during storage, erection, putting into satisfactory operation and all activities to be performed till such time the plant in 'Taken Over' by the Owner (in case of Supply-cum-Erection Contracts) shall be to the account of the Contractor. The Contractor shall be responsible for preference of all claims and make good the damage or loss by way of repairs and/or replacement of the equipment, damaged or lost. The transfer of title shall not in any way relieve the Contractor of the above responsibilities during the period of Contract. The Contractor shall provide the Owner with copy of all insurance policies and documents taken out by him in pursuance of the Contract. Such copies of documents shall be submitted to the owner immediately after such insurance coverage. The Contractor shall also inform the owner in writing at least sixty (60) days in advance regarding the expiry/cancellation and/or change in any of such documents and ensure revalidation, renewal etc. as may be necessary well in time.

19.3 All costs on account of insurance liabilities covered under the Contract will be on Contractor's account and will be included in Contract Price. However, the Owner may from time to time, during the pendency of the Contract, ask the Contractor in writing to limit the insurance coverage, risks and in such a case, the parties to the Contract will agree for a

mutual settlement, for reduction in Contract Price to the extent of reduced premium amount. The Contractor while arranging the insurance shall ensure to obtain all discounts on premium which may be available for higher volume or for reason of financing arrangement of the Project.

19.4 The clause entitled 'insurance' under the section CSE/ECC of this Volume-I, covers the additional insurance requirements for the portion of the works to be performed at the site.

15.0 Storage-cum-Erection Insurance (SCC)

15.1 All the equipment and materials being supplied by the contractor (as per the relevant clause of Tech. Spec. Vol. II) shall be kept (*sic.* kept) completely insured by the Contractor at his cost from the time of dispatch from the Bidder's works, up to the completion of erection, testing and commissioning at site and taking over the substation by the Owner in accordance with the contract.

15.2 Further all the equipment and materials being supplied by the Owner for the erection of the substation (as per the relevant clause of Tech. Spec. Vol. II) shall be kept insured by the Contractor against loss, damage, theft, pilferage, fire etc. from the point of unloading up to the time of taking over of substation by the owner including handling, transportation, storage, erection, testing and commissioning etc. The premium paid to the insurance Company by the contractor for such insurance shall be reimbursed by the Owner to the Contractors at actuals against documentary proof to be furnished by the Contractor. The Contractor shall obtain competitive quotations for such insurance and shall take prior approval from the owner before taking the insurance. The insurable value of the equipment being procured by the owner will be intimated to the Contractor for affecting the insurance.

15.3 It will be the responsibility of the Contractor to lodge, pursue and settle all claims with the insurance company in case of any damage, loss, theft, pilferage or fire and the owner shall be kept informed about it.

The contractor shall be responsible for the replacement of loss/

damage etc. in the execution of the contract to any equipment/ material, both owner supplied as well as contractor supplied items irrespective of the time or amount of receipt of insurance claim. Any loss in this shall be to the Contractor's account."

4. It is stated by DTL that initially Techno sought a change in the wording of Clause 15.3. However this was refused by DTL. Therefore, the said clause was retained as such. It is not in dispute that on 14th May 1997 there was a major fire at the store-yard of the Bamnauli Sub-station which was then under the control of Techno. The material supplied by the DVB to Techno the approximate worth of which was Rs. 6.5 crores was destroyed in the fire.

5. Techno had, in terms of the above conditions of contract, taken out the insurance policy in terms of which such owner supplied materials were fully insured for any loss. There was a clause in the insurance policy which provided for 10% towards 'excess deductible'. In response to the claim lodged with it, the Insurer allowed the claim only to the extent of Rs. 5,07,03,819.70 after adjusting certain deductions including 10% towards excess clause in terms of the insurance policy. The salvage value was also deducted.

6. It appears that in terms of the contract, Techno undertook to replace the equipment that was destroyed in the fire. In addition to the sum of Rs.

5,07,03,819.70 which was received by it from the insurance company on behalf of DTL, it sought a further payment of Rs. 5,12,30,366.80, being 10% of the value of the material supplied i.e., Rs. 51,23,036.68. Accordingly, by its letter dated 30th December 1998 Techno requested the DVB to release a sum of Rs. 50 lakhs. Pursuant thereto, a sum of Rs. 50 lakhs was released by DVB to Techno.

7. It is not in dispute that fresh equipment was purchased and then installed and commissioned by Techno. The present dispute began with Techno asking the DVB by its letter dated 8th July 1999 for the salvage which was valued at Rs. 17.51 lakhs and deducted by the insurance company while settling the insured claims. At this stage, DVB appears to have raised an objection that in terms of Clause 15.3 of the SCC any loss on account of the damage prior to the equipment was to be borne by Techno and therefore, even the payment of Rs. 50 lakhs should not have been made by it in the first place to Techno. Accordingly, by its letter dated 25th August 2000 addressed to Techno DVB demanded refund of the sum of Rs. 50 lakhs for the release of salvage value of the burnt material. It was stated that in the event that the said sum of Rs. 50 lakhs was not returned to it within 15 days “the DVB will be free to dispose off the salvage and adjust the amount to their account.”

8. The disputes that resulted were referred to the three-member AT. DTL filed a statement of claim praying that Techno should be asked to pay Rs. 50 lakhs together with interest @ 24% per annum from 12th March 1999 till the date of payment. It was stated by DTL that the said amount was recoverable by DVB from Techno since this amount was short received from the insurance company against the (initial) 'excess' deductibles to be borne by the beneficiary under the insurance policy/contract of insurance.

9. The case of DTL was that under Clause 15.3 of the SCC the above 'excess' was to be borne by Techno. Counter claims were filed by Techno praying that DTL should be asked to release the balance payment of Rs. 6,33,757.76 out of Rs. 56,33,757.76 being the amount not paid by the insurance company in pursuance of provision of insurance policy. Additionally, Techno prayed that DTL should be directed to "immediately release sum of Rs. 17,51,035.72 being the amount deducted by insurance company towards salvage value of material which is in DVB custody since July 1999." Techno also claimed interest @ 18% on the above sums.

10. In the impugned Award dated 21st February 2007 the AT held as under:

- (i) In respect of the owner supplied equipment, the Contractor acted as an agent and the responsibilities of the agent are spelt out in Clause 15.3 of SCC. The responsibility of the Contractor with regard to the insurance provisions in respect of owner supplied items could

not be same, as in respect of contractor supplied materials,

(ii) In respect of the owner supplied materials, the Contractor was to act as an agent and insurance premium was to be reimbursed at actual amount towards excess paid by DTL.

(iii) As regards the excess deductible amount by the insurance company under the insurance policy this was ‘an indeterminate amount’ and could not be passed on the Contractor who was not a party to the said insurance contract.

(iv) In respect of the words ‘loss in this’ in Clause 15.3 of the SCC, “can only be presumed to include such of those liabilities arising out of a default by the Contractor in his providing the insurance coordination services or due to any other act of negligence on his part.”

(v) The excess under the insurance policy could not be classified anything other than a part of total insurance policy cost. The bid document did not envisage the said cost to be on account of the Contractor.

(vi) The counter claims of Techno were not time-barred since the cause of action occurred within three years prior to the date of

Techno making the counter claim, i.e., 27th May 2003.

(vii) The counter claim of Techno for the balance amount of Rs. 6,33,757.76 was allowed together with interest @ 12% per annum within 30 days after 25th March 2002 till the date of the Award. Techno was held entitled to salvage value of Rs. 17,51,035.72 together with simple interest @ 12% per annum with effect from 1st September 1999 till the date of the Award. On both the above amounts, the post-Award interest was granted at 18% per annum from the date of the Award till the date of actual payment.

11. This Court has heard the submissions of learned counsel for the parties. It is submitted on behalf of DTL that the interpretation placed on Clause 15.3 of the SCC by the AT was contrary to the expressed wording of the said clause which made it unambiguously clear that it is the Contractor who will be responsible for the replacement of loss/damage etc. in the execution of the contract and for any equipment/material, both owner supplied as well as contractor supplied irrespective of the time or amount of receipt of insurance claim. The said clause further made it clear that “any loss in this shall be to the Contractor’s account.” It is further submitted that inasmuch even as the stage of entering into the contract Techno’s suggestion for amending the above clause was rejected, the said clause had to be interpreted as meaning that any shortfall in the insurance claim in respect of

the owner supplied equipment had to be made good by Techno.

12. The records show that the insurance company had by its letter dated 16th August 1999 allowed the claim to the extent of Rs. 5,83,67,857.27 and after deducting both 10% excess value as well as salvage value settled it for a sum of Rs. 5,07,03,819.70. At that stage, DTL did not protest. In fact it directed Techno to receive the amount since in terms of the contract the policy was to be taken out and claim was also to be lodged only by Techno.

13. In the circumstances, this Court does not find any error committed by the AT in interpreting the relevant clause to mean that the Contractor was only acting as an agent of the Owner when it took out an insurance policy for the owner supplied material. Subsequently it also lodged a claim in respect of the damage to the said material. As already noted, while making those purchases, Techno asked DTL to give it an *ad hoc* payment of Rs. 50 lakhs to make up the differential amount. This was paid by DTL to Techno. In other words the sum of Rs. 50 lakhs was not relatable to any shortfall of the insurance claim [which was to the extent of Rs. 56,33,757.76] or to the salvage value of Rs. 17,51,035.72. It was relatable to the differential amount in purchasing afresh the owner supplied equipment which came to be installed and commissioned. It was only at the stage of Techno asking DTL to compensate for the salvage that DTL asked for refund of Rs. 50 lakhs. It must be noted that under the contract in question, the salvage was

to go to Techno.

14. The letter dated 25th August 2000 written by DTL to Techno (Ex. C-119 in the arbitral proceedings) has been adverted to by the AT as well. The letter does indicate that DTL did not question that the salvage value was approx. Rs. 17.51 lakhs and that this was deducted by the insurance company while settling the claim. The case of DTL was that the said salvage amount can be released to Techno only if Techno returned to DTL a sum of Rs. 50 lakhs.

15. The cause of action for Techno to claim the salvage value of approx. Rs. 17.51 lakhs arose with the letter dated 25th August 2000 of DTL. Consequently, when Techno lodged the counter claims on 27th May 2003 they were certainly within time as rightly held by the AT. In the above circumstances, this Court is of the view that the conclusion drawn by the AT on reading of Clause 15.3 of the SCC was a plausible view. In any event DTL cannot possibly link the sum of Rs. 50 lakhs to the 10% excess deducted under the insurance policy. There was no reason for DTL to have limited its claim in that regard to Rs. 50 lakhs.

16. In that view of the matter, this Court is not inclined to interfere with the impugned Award of the AT to the extent it rejected DTL's claim for refund of Rs. 50 lakhs. However, this Court finds that the reasons for rejection of

the claim by Techno for the balance amount of Rs. 6,33,757.76 is wholly inadequate. The AT appears to have overlooked the fact that in relation to the owner supplied equipment, any shortfall in the insurance claim can at best be on account of DTL. Title to the said equipment was never passed on Techno. Consistent with the view that Techno was acting as an agent of DTL, balance amount of Rs. 6,33,757.76 arising out of the shortfall of the insurance claims settled could not go to the account of Techno. Consequently, this Court has no hesitation in setting aside the Award which directed the payment by DTL to Techno of the sum of Rs. 6,33,757.76 together with simple interest @ 12% per annum from 25th April 2000 till the date of payment.

17. As regards the salvage value in the sum of Rs. 17,51,035.72 this Court is not inclined to interfere with the impugned Award as it is consistent with the clauses of the contract.

18. As a result, the impugned Award to the extent of the award of a sum of Rs. 6,33,757.76 together with interest @ 12% per annum in favour of Techno is set aside. The remaining Award is upheld. The petition is disposed of in the above terms.

S. MURALIDHAR, J

DECEMBER 07, 2012

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