

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 22.05.2018

+ **O.M.P. (COMM) 247/2017**

ARVIND TECHNO ENGINEERS PVT LTD Petitioner

Versus

DELHI METRO RAIL CORPORATION Respondent

Advocates who appeared in this case:

For the Petitioner :Ms Ananya De, Advocate for Mr A.K. De.

For the Respondent :Mr Puneet Garg, DGM (Legal) for DMRC.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 18.01.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of three arbitrators, namely, Sh Jagdish Kumar (Presiding), Sh R. K. Yadav and Sh Ajay Sharma (hereafter 'the Arbitral Tribunal').

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to the contract for execution of the work of Design and Construction of main viaduct, Ramp on both sides, Mukundpur Elevated station including

Architectural Finishing Works, Auto Coach Washing Plant Platform and Entry/Exist line to Mukundpur Depot (Scope of work starts from Ch.334.65 M) on Mukundpur-Yamuna Vihar Corridor (Line-7) of Phase-III, Delhi. By the impugned award, the Arbitral Tribunal has rejected all claims made by the petitioner for additional costs incurred on account of variation in soil strata as indicated in tender documents as encountered by the petitioner. The petitioner had claimed that it had incurred additional costs, *inter alia*, on the ground that subsequent soil investigation indicated that the first ten meter of the soil was much weaker than as indicated in the report forming part of the tender documents and, therefore, the petitioner had to incur additional expenditure for reinforcement of concrete and for taking other measures. The Arbitral Tribunal rejected the same on the ground that the contract between the parties expressly provided that the contractor would carry out an independent investigation of the soil and no claim whatsoever on account of discrepancy between the sub surface condition, as actually encountered and as provided in the tender documents, would be entertained.

Factual Background

3. On 02.01.2013, the respondent (hereafter ‘DMRC’) awarded the work of “*Design and Construction of main viaduct, Ramp on both sides, Mukundpur Elevated station including Architectural Finishing Works, Auto Coach Washing Plant Platform and Entry/Exit line to Mukundpur Depot (Scope of work starts from Ch.334.65M) on Mukundpur-Yamuna Vihar Corridor (Line-7) of Phase-III Delhi*”

(hereafter 'the works'). The value of the works was estimated at ₹125 crores and it was awarded to the petitioner at a contract value of ₹123,40,44,611/-. The works were commenced on 07.01.2013 and the stipulated date of completion was fixed to be 31.05.2016.

4. The parties entered into an agreement for the aforesaid contract on 12.02.2013 (Contract no.CC-14) (hereafter 'the Agreement').

5. Tender documents were available till 16.08.2012 and the tender for the work was to be submitted by 15.09.2012 (subsequently revised to 17.09.2013). The tender documents also included a geo technical report as to the soil conditions.

6. On 11.12.2013, the petitioner sent a letter to DMRC stating that the soil data provided in the tender documents did not match the soil investigation report received by the petitioner, which showed that the first ten meters of the soil was much weaker than what was indicated in the soil report forming a part of the tender documents.

7. DMRC responded on 23.12.2013 refuting the claims made by the petitioner in its letter dated 11.12.2013 and further referring to Clause no. 2.1.5(n) and 2.3 of the Agreement. Thereafter, the petitioner invoked the arbitration clause and the Arbitral Tribunal was constituted. The Arbitral Tribunal held a preliminary hearing on 03.09.2015. At the hearing, the parties agreed that the oral evidence was not required and the arbitration be conducted on the basis of documentary evidence provided by the parties.

8. The arbitral proceedings culminated in the impugned award.

9. The petitioner had set up a case that the time period provided for carrying out soil investigation was a month and this did not afford any of the bidders an opportunity to carry out the soil investigation independently. Therefore, the petitioner was constrained to rely on the soil data provided by DMRC. The petitioner also claimed that DMRC being an experienced agency was expected to have compiled the correct soil data and, therefore, the petitioner could not be faulted for relying upon the same.

10. Before the Arbitral Tribunal, the petitioner filed a statement of claims, *inter alia*, claiming (i) ₹1,43,17,009.56/- as additional cost incurred towards ground improvement of ramps; (ii) ₹6,82,85,475/- as additional costs incurred at the station due to variation in the soil strata; (iii) ₹5,61,43,164.20/- as additional costs incurred in viaduct due to variation in soil data; (iv) ₹71,15,226.55/- as additional costs incurred in viaduct due to variation in the ground levels; (v) ₹39,97,497.91/- as additional costs incurred for using extra cement in piling concrete of M-35 grade; (vi) pre-suit, *pendente lite* and future interest at the rate of 15% per annum and; (vii) ₹5,00,000/- as cost of proceedings.

11. Admittedly, apart from the claim of ₹39,97,497.91/-, the remaining claims pertained to additional expenditure incurred due to soil conditions, which the petitioner found was in variance with the data provided by DMRC. The petitioner's claim for ₹39,97,497.91/-

related to use of additional cement (440 kg) for M-35 Grade of concrete in pile foundation. The petitioner claimed that the contract provided for use of 400 kg cement but it was directed to use additional cement. This claim was allowed and the Arbitral Tribunal awarded a sum of ₹39,97,497.91/- for use of extra cement on account of additional cement used in piling work.

12. However, the Arbitral Tribunal rejected the remaining claims for additional expenditure on the ground that DMRC had made it amply clear to the prospective bidders that they were required to obtain the details of sub soil conditions independently. Further, the Agreement provided that no claim on account of any discrepancy between the sub-surface condition that may be actually encountered at the time of execution of the works and those given in the tender documents would be admissible.

13. Similarly, the Arbitral Tribunal also rejected the claim for additional expenditure on account of variation in ground level, as the tender conditions expressly provided that the bidder should verify the levels and measurements concerning the existing site independently and no allowance on that account would be entertained.

14. Before proceeding further, it would be relevant to refer to the relevant clauses of the Agreement on the basis of which the Arbitral Tribunal had rejected the claims made by the petitioner. Clause 2.1.5(n) of the Agreement reads as under:-

“2.1.5(n). Results of sub-surface investigations

conducted at project site are enclosed with the tender document. This information about the soil and sub-soil water conditions is being made available to the contractor in good faith and the contractor shall have to obtain the details of sub soil investigation independently. No claim whatsoever on account of any discrepancy between the sub surface conditions that may be actually encountered at the time of execution of the work and those given in these tender documents shall be admissible to the contractor under any circumstances.”

15. Clauses 2.3 and 2.5.2 of the Agreement reads as under:-

“2.3 Design Criteria

Design criteria shall be as per design basis report enclosed as volume-4

Results of the sub surface investigations conducted at the project site are enclosed with the tender document. The information about the soil and sub soil water conditions is being made available to the contractor in good faith and the contractor is advised to obtain results independently as may be considered necessary by him before quoting rates in the tender.

No claims whatsoever on account of any discrepancy between the sub surface conditions that may be actually encountered at the time of execution of work and those given in these tender documents shall be admissible to the contractor under any circumstances whatsoever.”

Clause 2.5.2

“The levels, measurements and other information concerning the existing site as shown on the conceptual/layout drawings are believed to be correct. But the contractor should verify them for

himself and also examine the nature of the ground as no claim or allowance whatsoever will be entertained on account of any errors or omissions in the levels or strata turning out different from what is shown on the drawings. Thus as per the conditions of the contract, Respondent had made it amply clear that contractor should verify them for himself and also examine the nature of the ground as no claim or allowance whatsoever will be entertained on account of any errors or omissions in the levels or strata turning out different from what is shown on the drawings.”

16. It is apparent from the above that the parties had expressly agreed that no claim for additional payment would be permissible on account of the difference in the sub soil strata actually encountered while execution of the works and those that were indicated in the tender documents. Further, DMRC had made it clear that the data was provided in good faith and the bidders were required to carry out independent investigation. Clearly, the claims made by the petitioner for additional expenditure are contrary to the express terms of the Agreement. Similarly, the petitioner’s claim for additional expenditure on account of variation in the ground level was also not maintainable, as the Agreement clearly specified that no claim or allowance would be entertained *on account of any error or omission in the levels turning out different from what was shown in the drawings.*

17. In view of the above, this Court finds no infirmity in the impugned award.

18. The petition, is accordingly, dismissed. The parties are left to bear their own costs.

VIBHU BAKHRU, J

MAY 22, 2018

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