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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 05th December, 2017
Pronounced on: 08th December, 2017

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O.M.P.(I) (COMM.) 510/2017

UNIQUE HYDROGRAPHIC SYSTEMS PVT LTD

..... Petitioner

Through : Mr.Dayan Krishnan, Senior
Advocate with Mr.Ranjan Kr.
Pandey, Mr.Sandeep Bisht,
Mr.Anshumaan Bahadur,
Mr.Aakashi Lodha, Advocates.

versus

GAIL INDIA LTD & ORS.

..... Respondents

Through : Ms.Purnima Maheshwari,
Advocate for respondent no.1.
Mr.Ateev Mathur, Advocate for
respondent no.3.
Mr.Navin Kumar, Ms.Rashmeet
Kaur, Ms.Arpana Majumdar,
Advocates for respondent no.2.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is under section 9 of the Arbitration and Conciliation Act of 1996 wherein the petitioner has made the following prayers:

“a) Pass an order directing the Respondent No.3 not to release any amount in respect of the bank guarantee No.171020506929-LP dated 08.12.2016 of amount INR 55,03,400/- pending the hearing and final disposal of the arbitration proceedings to be initiated, and

b) Pass an order directing the Respondent 1 & 2 to maintain the status quo of the GAIL E- Tender No. 8000011590 pending the hearing and final disposal of the arbitration proceedings to be initiated, and

c) Pass an order directing the Respondent No. 1 & 2 not to put the Petitioner under holiday period pending the hearing and final disposal of the arbitration proceedings to be initiated, and

d) Pass an order for ad-interim reliefs in terms of prayers a) to c)”

2. The learned counsel for the respondent says the bank guarantee has already been released in favour of the respondent and hence petition qua prayer **a** has become infructuous.

3. However the learned senior counsel for the petitioner seeks relief qua prayers **b** and **c** of on the following facts.

a) that between the years 2009-2016 the petitioner has been awarded various work orders by the respondent and it has successfully completed all such work orders;

b) in the year 2016 the respondent published a public notice inviting tenders/e-bids from bidders for "hot tapping and

stopple plugging works" for increasing operation efficiency and flexibility of operation in HVJ/DVPL pipeline system project;

- c) on 23.11.2016 respondent no.3 herein accepted the offer of the petitioner against the tender and intimate its acceptance via fax to the petitioner. The petitioner was invited at the Delhi office of the respondent no.1 on 07.12.2017 for further action. The petitioner provided a letter of guarantee bearing no. 171020506929-LP dated 08.12.2016 of amount of Rs.55,03,400/- valid upto 04.12.2017. It is alleged by the petitioner that he has been sending general arrangement drawings and split tee design calculations but the respondent has been delaying the project for one reason or the other and ultimately has suspended the contract and has awarded it to some other person without terminating the work order of this petitioner.

4. I have heard the learned senior counsels.

5. The following clauses of the tender documents are most relevant:

"A. Technical Criteria

1. xxxxx

2. Qualification Criteria for supply of Split Tees

2.1 Bidder shall have manufactured and supplied at least one (01) no. of Split Tee with Run Size NPS 24" or higher and

material grade ASTM A 516 Gr. 70 equivalent or higher, in the last seven (07) years reckoned from the bid due date.

2.2 In case the bidder is not a manufacturer of the Split Tees or does not meet the qualification criteria specified in the clause no. 2.1 above, he shall source the Split Tees from manufacturer(s) of Split Tees. The manufacturer(s) of Split Tees shall meet the qualification criteria as stated in the clause no. 2.1 above. Bidder shall submit commitment letter from the manufacturer(s) of Split Tees for the manufacturing and supply of the Split Tees for the subject tender."

6. It is alleged by the learned senior counsel for the petitioner that a fax dated 23.11.2016 was issued by the respondent no.3 to the petitioner intimating its acceptance. The completion period of the contract was six months from the date of acceptance. It is argued that the time was never an essence of the agreement as the drawings and documents submitted by the petitioner to the respondents were never approved in time and were resubmitted on various occasions with the respondents after incorporating their suggestions. The learned counsel for the petitioner referred to letters dated 16.01.2017, 03.02.2017, 27.02.2017, 29.03.2017 and 03.04.2017 to bring home his contention.

7. It was argued on 03.04.2017 the respondent wrote to the petitioner approving its Code-1 drawings and instructed the petitioner to submit balance documents such as LOR or equivalent

flange drawings, welding procedures for review. The documents were allegedly sent on the same day.

8. It is also alleged that one of the condition of technical bid was in case the bidder was not a manufacturer of Split Tees he was at liberty to procure it from other manufacturer and his address shall be the same as reflected in the documents for qualification submitted earlier.

9. This in fact is the bone of contention between the parties as the petitioner though submitted documents of M/s Vision Engineers as a manufacturer of split tees but the said company was not found at the said location.

10. The learned counsel for the petitioner strongly placed reliance upon a certificate issued on the letter head of M/s Friends Industries stating *inter alia*;

“This is to certify that M/s Vision Engineers have registered address, 2, Jinwala Estate, Sardar Industrial Estate, Ajwa Road, Vadodara (earlier manufacturing facility 1997-2006) and office address, 12-Atul Society, B/h. Prabhat Society, Waghodia Road, Vadodara. We further certify that Vision Engineers utilizes manufacturing facilities at 58-GIDC Estate, Makarpura, Vadodara - 390010”

11. It is argued by the learned senior counsel for the petitioner that the prime reason for issuance of the show cause notice was the address of M/s Vision Engineers was different than the one

submitted but the respondent completely ignored the certificate issued by M/s Friends Industries who certified M/s Vision Engineers uses its facility for manufacturing split tees. Further it was argued the issues raised now qua location of M/s Vision Engineers were rather verified at the initial stage when the bid was accepted and the tender was granted to the petitioner herein. Further it is argued the show cause, primarily, was issued for suspension of the work but despite that the tender was issued to someone else without even terminating the agreement. It is alleged the procedure for suspension of the agreement is different than the procedure of termination which basically relate to poor performance/rating of the petitioner as per the terms of the tender documents.

12. Let me now refer to the show cause notice dated 14.07.2017. The relevant portion of it is as under:

“CCD has already expired on 22.5.2017 and in spite of regular & repeated follow up, it is assessed that no progress has been made on this contract except submission and approval of drawings. No raw materials/bought out items are available with M/s Unique Hydrographic Systems Pvt. Ltd, at any place as on date. Sub orders with technical specifications and other terms were placed after expiry of CCD. No progress reports were received from M/s Unique Hydrographic Systems Pvt. Ltd. before expiry of CCD. The documentary evidences submitted on 16.06.2017 are not substantiating the

claim that M/s Vision Engineers is a manufacturer for you as submitted in the bidding documents. As per submitted documents along with the bid address of manufacturing facility of M/s Vision Engineers in IRN dated 20.11.2010 was 40, Jinwala Estate, Sardar Estate, Vadodara-390019, Gujarat whereas the address shown during visit as well as in joint letter made available from Vision & Friend's Industry, dated 16.06.2017 is 158-GIDC Estate, Makarpura, Vadodara-390010. Further it is also claimed that they are operating since year 2007 from this location which is again contradicting the documents as submitted with Bid. Therefore it appears that you misrepresented the facts and submitted the false/fabricated documents to influence the selection process in the subject bid. "

13. The reply of the petitioner herein to the show cause notice is as under:

"Dear Mr, RK Medhavi DGM (P)

In reply to the approved Show Cause Notice received on the 04-07-2017 in relation to the afore mentioned contract Ref EIL/GAIL/C&P/A-645-999-MP-TN-9520/1019/009 Dated 23-11-2016 please see our response below.

We sincerely request that EIL/GAIL retract the letter of Show Cause Notice on the below grounds that late approvals and compliance to code 1 approval was not received by M/S Unique Hydrographic System Pvt Ltd until the 05-04-2017 and to which made compliance to the delivery

*schedule stated within the LOI 23-11-2016 impossible to meet due to long lead delivery items of raw materials and manufacturing processes as well as restriction of material suppliers in line with EIL/GAIL approved suppliers lists, In relation to claims M/S Unique Hydrographic System Pvt ltd have made false or misleading representation of a M/S Unique Hydrographic System Pvt ltd suppliers namely Vision Engineers this is also strenuously rejected on the grounds that all documents relating to Vision were submitted to EIL/GAIL at the tender stage and formal approval was given to Vision Engineers by EIL/GAIL and that Vision Engineers were an **approved supplier**. The question of ownership of Vision Engineers property was neither made claim by M/S Unique Hydrographic System Pvt ltd or questioned by EIL/GAIL at tender submission stage. Additional documents submitted to support the Vision Engineers locations has been supplied to EIL/GAIL for review after the meeting 16-06-2017 and should have been requested on tender submission when EIL/GAIL undertook the initial approval of Vision engineers as all documents submitted remain the same. M/S Unique Hydrographic System Pvt. Ltd does confirm Vision Engineers is a **supplier** of fittings/ products and services to M/s Unique Hydrographic System Pvt. ltd and if further documented proof is required by EIL/GAIL we can supply this as we are not making any misleading claims or false representation. In response to the claims made we have responded to the points*

below with detail and sincerely request that EIL/GAIL reverse your decision to allow M/s Unique Hydrographic System Pvt. Ltd. to complete this contract in open and honest manner of intent as it was tendered and awarded. In response to progress to date we have been working extensively on this contract by means of several site surveys I material procurement and financial commitments to suppliers as well as extensive engineering support time to develop designs and job execution plans on this project to a safe and successful completion on behalf of EIL/GAIL.”

14. In its reply the petitioner rather defines M/s Vision Engineers as a *supplier* and not a *manufacturer* of split tees which in fact was the concern of the respondent as it hits the technical criteria, per clause 2.1 above.

15. Admittedly there is a delay in performance of the agreement since per fax dated 23.11.2016 the work order was though given to the petitioner, its completion period was fixed at six months from the date of acceptance. Admittedly the petitioner failed to submit proper drawings till April 2017. Moreso on a spot inspection, the respondents found the petitioner has misrepresented qua its technical qualifications per clause 2.1 and 2.2 (supra). The petitioner herein either should have been a manufacturer of Split Tees or in case he was not a manufacturer of the Split Tees he was to source the Split Tees from the manufacturers of Split Tees and such manufacturer was to meet the qualification criteria as stated in

clause 2.1 above viz. it ought to be a manufacturer and supplier of Split Tees in the manner stated therein.

16. Admittedly there was much delay in supply of the goods and since the petitioner had done practically nothing so the officials of the respondent were forced to inspect the site of manufacturer but they did not find any company by the name of M/s Vision Engineers. Some another company namely M/s Friends Industry was located at the spot, manufacturing some other product and not the split tees. When asked to explain, the petitioner filed a certificate of M/s Friends Industries which simply said M/s Vision Engineers were using the facility. No commitment certificate of M/s Vision Engineers was filed and since the documents supplied by the petitioner were found to be false, the petitioner being misrepresenting about the manufacturing ability of M/s Vision Engineers, the work order was thus suspended.

17. The minutes of meeting dated 08.06.2017 between the petitioner, respondent no.1 and 2 are also relevant:

“3. A visit of the fabrication shop of Friends Industry was made and it was informed & observed also that No materials for this Project is available so far and it was informed that fabrication shall start after receipt of materials which is expected by 24.06.17.

4. M/s Unique failed to produce the signed and accepted sub order copies with terms and conditions, technical specifications etc.

6. The FOA was placed on 23.11.2016 on M/s Unique and contractual delivery date was 22.05.2017 however no physical progress has been made even after expiry of CDD.

7. It was also informed to Unique that No progress reports as per contract are received from them for this project. M/s Unique Hydrographics Pvt. Ltd. has been advised to submit the same henceforth.

9. In spite of advance intimation, no Vision Engineers representative was available at works though it was claimed to be Vision Engineers works. ”

18. Thus in view of **a)** the poor progress of the work; **b)** misrepresentation qua the manufacturing ability of M/s Vision Engineers; and **c)** on finding the response of the petitioner to show cause notice non-satisfactory; the respondents suspended and ultimately terminated the contract. Admittedly the bank guarantees stood encashed and the contract having been awarded to some other supplier, hence even prayer **b** cannot be granted. However in case the respondent intend to black-list the petitioner it shall do so only on complying with the procedure, after giving an opportunity to the petitioner to represent and shall be subject to the right to the petitioner to challenge such proceedings in the Court of law.

19. In view of the above, the petition stands disposed of. No order as to costs.

YOGESH KHANNA, J

DECEMBER 08, 2017/DU