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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 27.7.2018

Judgment pronounced on: 26.10.2018

+ ARB.P. 278/2018

BSCPL INFRASTRUCTURE LTD

..... Petitioner

Through: Ms. Kiran Suri, Sr. Adv. with Mr.
Abhay N.Das and Ms. Debolina,
Adv.

versus

NATIONAL HIGHWAYS & INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD.

..... Respondent

Through: Mr. Debal Banerji, Sr. Adv. with
Mr. Manu Beri, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

Backdrop

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short "1996 Act"). The substantive prayer made in the petition is as under:

*"...A) This Hon'ble Court is pleased to appoint the
bitrator with reference to Clause 11(6)(A) of the Arbitration
and Conciliation Act, 1996 (Amended), with mandate to
appoint presiding arbitrator and enter into reference and
proceed with adjudication;..."*

2. The record shows that this matter came up for hearing before my predecessor on 2.5.2018 for a substantive hearing. At this hearing, both

the parties were represented by counsel. The Court, it appears, adjourned the matter, *albeit*, after some arguments, at the request of Mr. Debal Banerji, learned Senior Counsel, who, appeared for the respondent i.e., National Highways & Infrastructure Development Corporation Ltd. (hereafter referred to as 'NHIDCL'). While acceding to the request of the counsel, the Court directed counsel for parties to file their written synopsis along with relevant authorities. The matter was posted for further hearing on 26.7.2018. On 26.7.2018, the matter was placed before me, when arguments were heard in the matter. Mr. Banerji, on that date, sought time to return with instructions as to whether or not the respondent would be averse to the appointment of an arbitrator by the Court. The idea being that if the parties were in agreement, a sole arbitrator could be appointed in the matter. For this purpose, the matter was listed on 27.7.2018. Since, the respondent declined to consent to appointment of a Sole Arbitrator by the Court, on that date, arguments were heard on merits and judgment was reserved in the matter.

3. As would be evident upon a bare perusal of the prayer made in the petition, which has been extracted hereinabove by me, the petitioner has appointed its nominee arbitrator and via this petition seeks a direction for appointing an arbitrator on behalf of the respondent, the successor-in-interest of the Ministry of Road Transport and Highways (in short "MORTH"). This request was made in consonance with Clause 26.3¹ of the Draft Agreement (D.A.).

¹**26.3 Arbitration**

26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 26.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "**Rules**"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be [New Delhi], and the language of arbitration proceedings shall be English.

3.1 While I would be referring to Clause 26.3 in some detail in the later part of my judgment, suffice it to say, for the moment, that sub-clause 26.3.1 of the said clause provides that where parties are not able to resolve their disputes amicably by resorting to conciliation in terms of Clause 26.2, then the dispute would be referred to a Board of Arbitrators appointed in accordance with Clause 26.3.2. Furthermore, the said sub-clause goes on to state that such arbitration shall be held in accordance with the Rules of Arbitration framed by the International Centre for Alternate Dispute Resolution, New Delhi (in short “ICADR”) or such other rules as may be mutually agreed to by the parties. The overarching limitation which is prescribed is that the constitution of the Board of Arbitrators, i.e. the Arbitral Tribunal, would be subject to the provisions of Arbitration Act, which, I gather would be the 1996 Act.

3.2 Clause 26.3.2 gives autonomy to each of the two parties to appoint their nominee arbitrators, while the third arbitrator in turn is required to be appointed with consensus of the nominee arbitrators. The Clause factors in disagreement on the appointment of the third arbitrator by

26.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

26.3.3 The arbitrators shall make a reasoned award (the "**Award**"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.

26.3.4 The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority, as the case may be, and their respective assets wherever situated.

26.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

26.3.6 In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee of a sum equal to 120% (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance.

providing that his/ her appointment in such eventuality would be made in accordance with the Rules framed by ICADR.

4. It is in this context that the petitioner has made a prayer for appointment of an arbitrator on behalf of the NHIDCL in view of the purported failure of ICADR to appoint an arbitrator in consonance with its Rules within the stipulated period of 30 days.

4.1 The petitioner, it appears, vide its communication dated 22.1.2015, had called upon ICADR to appoint an arbitrator on behalf of the NHIDCL in consonance with the provisions of Rule 5(2)(a)² of the ICADR Arbitration Rules, 1996 (in short “ICADR Rules”).

4.2 The reason why NHIDCL did not act on the petitioner’s request that it should appoint its nominee arbitrator will get known as I get along with my narrative. In order to reach that point, in my view, the following broad facts need to be noticed.

5. In and about April, 2014, MORTH invited Request for Proposal (in short “RFP”) for engineering, procurement and construction of works, which are described as:

“Rehabilitation and upgradation of two lane with earthen shoulder of Nongstion-Domiasiat-Mawthabah road section (Design chainage Km. 0.00 to Km. 61.574) in the State of Meghalaya under SARDP....” (hereafter referred to as 'Project').

² Rule 5 - Appointment of arbitrators

(2) Where the arbitration agreement provides that each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the presiding arbitrator, and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party;

(b) the appointed arbitrators fail to agree on the presiding arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the ICADR.

5.1 Pertinently, the RFP was accompanied by a copy of the D.A.

6. The petitioner in response thereto, on 19.8.2014, submitted its bid. Since the petitioner's bid was found responsive, on 31.10.2014, a Letter of Award (LOA) was issued in its favour. In the LOA, the value of the Project was pegged at Rs.350.11 Crores.

6.1 The LOA, evidently, had a counterpart, which, the petitioner was requested to sign and send back to MORTH within a period of seven (07) days of its receipt. In addition thereto, the petitioner was asked to submit a legal opinion of its counsel which was required to state two things: first that it had the necessary authority to enter into the "contract agreement", and the second, with regard to "enforceability of the provisions" contained therein. A time limit of ten (10) days was set commencing from the date of issuance of the LOA.

6.2 This apart, MORTH also fixed a tenure for construction. Under the LOA, the petitioner was given 910 days for construction, which would kick off from the "Appointed Date". As to why I chose to advert to this aspect of the LOA will become evident once I touch upon the stand taken by NHIDCL in resisting this petition.

7. Moving further with my narration, as required, the petitioner signed the counter part of the LOA on 5.11.2014 and, had it delivered on the same date to MORTH. In its communication of even date, the petitioner highlighted the fact that it had not received the original LOA, which according to NHIDCL had been dispatched by post.

7.1 On the same date, *albeit*, under the cover of a separate letter, that is, letter dated 5.11.2014, the petitioner also submitted its counsel's legal opinion to MORTH on lines indicated in the LOA.

8. The record shows that thereafter the petitioner vide communication dated 8.11.2014, informed the concerned officer of MORTH that its representative will attend his office on 13.11.2014 to execute the "Contract Agreement". Accordingly, the concerned officer was called upon to convey the suitability of the date suggested on behalf of the petitioner for execution of the Contract Agreement.

8.1 It appears that the matter with regard to the execution of the Contract Agreement did not move further and that instead on 4.3.2015, MORTH wrote to the petitioner that since its bid security in the sum of Rs.2.93 crores, which was given in the form of the bank guarantee, was valid only till 31.3.2015, the same would have to be extended upto June, 2015.

8.2 As desired, the petitioner complied with the request made on behalf of MORTH and extended the bank guarantee, which was issued towards Earnest Money Deposit (EMD), till 30.6.2015. This fact was communicated by the petitioner to MORTH vide letter dated 10.3.2015.

9. Evidently, MORTH was unable to take a call with regard to the execution of the Contract Agreement even by the second week of June 2015. Consequently, on 15.6.2015, MORTH, once again, wrote to the petitioner that it should extend the validity period of the bank guarantee till December, 2015. The petitioner, once again, complied with the request made on behalf of MORTH.

9.1 Accordingly, by a return communication dated 27.6.2015, the petitioner informed MORTH that it had extended the validity period of the bank guarantee till 31.12.2015.

10. The record shows that on 2.12.2015, MORTH wrote to NHIDCL to collect the original bank guarantee available with it and to have the validity period of the same extended beyond 31.12.2015 to factor in the time required for signing the Contract Agreement, in order to avoid a possible litigation qua the issue at hand. It appears that this letter was sent by MORTH in context of an earlier letter dated 17.07.2015 whereby the petitioner was advised to take necessary action at its end as the project had been entrusted to it.

10.1 Consequently, the respondent vide communication dated 10.12.2015, called upon the petitioner to extend the validity period of the bank guarantee by a period of at least three months. The petitioner, as requested, had the validity period of bank guarantee extended till 31.3.2016.

11. The record also shows that this business of extending the validity of the bank guarantee went on and the petitioner, it appears, who had no choice in the matter, got the same extended till 30.9.2016. The last request in this behalf was made by NHIDCL vide communication dated 22.6.2016.

12. The petitioner, however, was in for a surprise – inasmuch as it received a communication dated 4.8.2016 from NHIDCL whereby it was informed that a decision had been taken to withdraw the LOA issued by MORTH in view of its failure to obtain a No Objection Certificate (NOC) from the Khasi Hill Autonomous District Council (in short ‘Council’).

12.1 The Council, it appears, was required to give its NOC as the parcel of land on which the Project had to be executed was under its sway.

13. Being aggrieved, the petitioner served a notice of default dated 26.9.2016, on NHIDCL in consonance with the provisions of Clause 23.2.2 of the D.A.

13.1 This was followed by another communication dated 19.11.2016. Via this communication, the petitioner elaborated on the issue that because of the withdrawal of the LOA, *albeit*, after it had been duly accepted and it had morphed into a formal contract, it had suffered losses. The petitioner set out, broadly, the heads under which it had suffered losses and pegged the same at Rs.41.951 Crores. NHIDCL, as expected, vide a return communication dated 23.12.2016 rejected the petitioner's claims and labeled them as not only being untenable but also legally unenforceable, in view of the fact that no Contract Agreement had been entered into between the parties.

14. The petitioner, on its part, scrupulously followed the terms of the agreement by serving NHIDCL with a notice of conciliation dated 29.12.2016, in consonance with the terms of Clause 26.2 of the D.A., even while disputing the stand taken by NHIDCL that there was no legally enforceable agreement in place.

15. Since, NHIDCL had taken a position that there was no legally enforceable agreement in place, vide communication dated 15.3.2017, it rejected the request made by the petitioner for having the disputes referred to conciliation.

16. The petitioner thereafter took the next logical step, which was to trigger the arbitration clause, that is, Clause 26.3. A request in this behalf was, thus, made to NHIDCL vide communication dated 7.4.2017.

16.1 Noticeably in this communication while the petitioner called upon NHIDCL to refer the disputes to arbitration, it did not make any reference to its nominee arbitrator.

16.2 The respondent, once again, took the very same stand, which it did vide communication dated 23.12.2016. In consonance with the same, NHIDCL conveyed to the petitioner that since there was no binding contract in place, the request made to have the disputes referred to arbitration was not tenable.

17. It is in this context that the petitioner, (as adverted to by me right at outset) wrote to ICADR on 22.1.2018 that it should appoint an arbitrator on behalf of NHIDCL.

17.1 ICADR, in turn, on 24.1.2018, wrote to NHIDCL that since the petitioner had named its nominee arbitrator, NHIDCL should furnish information to it as to the progress that it had made in appointing an arbitrator, before it would proceed further in the matter of appointment of an arbitrator on its behalf. For this purpose, time was granted to NHIDCL till 2.2.2018. Furthermore, it was also indicated that in case NHIDCL failed to inform as to the progress made by it with regard to the appointment of its nominee arbitrator, ICADR in exercise of power vested in it under Rule 5(2)(a) read with Rule 35³ of ICADR Rules would appoint an arbitrator on its behalf.

³ Rule 35 - Services as appointing authority

(1) On receipt of a request to appoint an arbitrator in pursuance of rule 5(2) or 5(3), the ICADR will follow the following procedure--

18. Evidently, upon receipt of the aforementioned communication NHIDCL vide communication dated 2.2.2018 informed ICADR that the disputes could not be referred to arbitration as there was no “express agreement” obtaining between the parties. Consequently, ICADR vide its letter dated 5.2.2018 also communicated this fact to the petitioner.

19. The petitioner, however, did not allow the matter to rest there and by a return communication dated 15.2.2018, wrote to ICADR as to what it envisaged was the position in law. In a nutshell, the petitioner called upon ICADR to exercise its power under Rule 5 of its Rules and proceed to appoint an arbitrator on behalf of NHIDCL.

20. It appears that thereafter, there was no further communication between the petitioner and ICADR or NHIDCL. The petitioner, having been left with no choice, approached this Court for requisite relief by way of the instant petition.

21. Given this backdrop, the only issue which, to my mind, arises for consideration is: as to whether the arbitration clause, that it, Clause 26.3 which finds mention in the D.A. would bind down NHIDCL to have the disputes adjudicated upon via the arbitration route?

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- (i) the ICADR will communicate to each party a list containing the names, addresses, nationalities and a description of qualifications and experience of at least three individuals from the panel of arbitrators;
- (ii) within thirty days following the receipt of the list, a party may delete any name to which he objects and after re-numbering the names in the order of his preference, return the list to the ICADR;
- (iii) on receipt of the list returned by the party, the ICADR will appoint the arbitrator from the list taking into account the order of preference indicated by the parties;
- (iv) if for any reason the appointment cannot be made according to the procedure specified in clauses (i) to (iii), the ICADR may appoint the arbitrator from the panel of arbitrators.
- (2) In appointing an arbitrator the ICADR will have regard to the matters referred to in rule 5(5)(c) and will carefully consider the nature of the dispute in order to include in the list, persons having appropriate professional or business experience, language ability and nationality.
- (3) All appointments on behalf of the ICADR will be made by the Secretary-General and in his absence by such member of the Governing Council as is designated by the Chairperson:
- Provided that where the Secretary-General is to be appointed as the arbitrator, the appointment will be made by the Chairperson.

Submission of Counsel

22. Arguments in support of the petitioner's stand were advanced by Ms. Kiran Suri, Senior Advocate instructed by Mr. Abhay N. Das, Advocate, while on behalf of NHIDCL, which chose to resist the petition, submissions were made by Mr. Debal Banerji, Senior Advocate, instructed by Mr. Manu Beri, Advocate.

23. The submissions made by Ms. Suri can be, broadly, paraphrased as follows:

23.1 The arbitration clause which finds place in the D.A. by reference stands incorporated in the RFP. Therefore, having regard to the provisions of Clause 7(5) of the 1996 Act, the arbitration clause would be binding on the parties, which would include NHIDCL.

23.2 The petitioner was required to submit the bid in terms of Clause 2, Instructions to Bidders (ITB). The prescribed format for the bid is contained in Appendix-1. Clause 18 clearly provides that the "selected bidder" would have to enter into an agreement provided prior to the bid due date. No changes whatsoever could be sought by a selected bidder qua the D.A. Clause 1.1.7⁴ read with Clause 1.2.3⁵ of the RFP, which set down a brief description of the bidding process stipulates that the bidding documents, *inter alia*, would include the D.A. Furthermore, in terms of Clause 1.3⁶ of the RFP which sets out the schedule of the bidding process

⁴ 1.1.7 The Authority shall receive BIDs pursuant to this RFP in accordance with the terms set forth in this RFP and other documents to be provided by the Authority pursuant to this RFP (collectively the "**Bidding Documents**"), and all BIDs shall be prepared and submitted in accordance with such terms on or before the BID due date specified in Clause 1.3 for submission of BIDs (the "**BID Due Date**").

⁵ 1.2.3 The Bidding Documents include the draft Agreement for the Project which is enclosed. The Feasibility Report prepared by the Authority/ consultants of the Authority (the "**Feasibility Report**") will also be provided to the Bidders on [or near about ***]. Subject to the provisions of Clause 2.1.3, the aforesaid documents and any addenda issued subsequent to this RFP Document, will be deemed to form part of the Bidding Documents.

⁶ **1.3 Schedule of Bidding Process**

The Authority shall endeavour to adhere to the following schedule

provides against Sl. no. 9 that the Contract Agreement would have to be executed between the parties within 15 days of the award of LOA.

23.3 The fact that the bidding documents included the D.A. was sought to be brought to fore by adverting to Clause 1.1.7 and 1.3 of the RFP.

23.4 Furthermore, it was contended that when the bid was filed along with accompanying documents (which are compendiously labeled as bid documents), each page was initialed as required under Clause 2.10.2⁷ of the RFP.

23.5 Emphasis was laid on the fact that the authorized representative of the petitioner had amongst other bid documents also initialed the D.A. Therefore, the submission was that when the LOA was issued on 31.10.2014, which was thereafter accepted by the petitioner by signing the counterpart, brought into existence an enforceable contract between the parties.

23.6 Reliance was also placed upon Clause 2.7.2⁸ of the RFP which, *inter alia*, alludes to the fact that the D.A. provided by NHIDCL would be deemed to be a part of RFP. Besides this, reference was made to

Sl. No.	Event Description	Date
1.	Last date for receiving queries	09.06.2014
2.	Pre-BID meeting	16.06.2014.
3.	Authority response to queries latest by	04.07.2014
4.	Last date of sale of BID Document	25.07.2014
5.	BID Due Date	28.07.2014 upto 1100 Hrs
6.	Opening of BIDs	28.07.2014 upto 1130 Hrs
7.	Letter of Award (LOA)	Within 3 days of BID Due Date
8.	Validity of BID	120 days of BID Due Date
9.	Signing of Agreement	Within 15 days of award of LOA

⁷ **2.10.2** The BID and its copy shall be typed or written in indelible ink and signed by the authorised signatory of the Bidder who shall also initial each page, in blue ink. All the alterations, omissions, additions or any other amendments made to the BID shall be initialled by the person(s) signing the BID.

⁸ **2.7.2** The draft Agreement and the Feasibility Report provided by the Authority as part of the BID Documents shall be deemed to be part of this RFP.

Clause 2.1.4⁹ of the RFP as well which adverts to the fact that notwithstanding anything to the contrary contained in the RFP, the detailed terms specified in the D.A. shall have an overriding effect. In other words, in case of conflict between the provisions of RFP and the D.A., the latter would prevail.

23.7 Furthermore, emphasis was also laid on Clause 2.20.7¹⁰ [sub-clause (d)] and Clauses 3.3.5¹¹ and 3.3.6¹² of the RFP which, *inter alia*, provides that in case the selected bidder failed to sign and return the duplicate copy (i.e. the counterpart) of the LOA in the specified time limit, then, apart from any other remedy that would be available to MORTH/ NHIDCL, it would have the right to forfeit the bid security. It was pointed out that though Clause 3.3.5 stipulates a seven (07) days time limit for the bidder to return a signed duplicate copy of the LOA, it also gave leeway to MORTH/ NHIDCL to extend the time frame. Stress was laid on the fact that the consequences of not returning the signed duplicate copy of the LOA by a selected bidder was that MORTH/ NHIDCL could appropriate the bid security towards damages, apart from its rights to cancel the bid and invite a fresh bid.

⁹ 2.1.4 Notwithstanding anything to the contrary contained in this RFP, the detailed terms specified in the draft Agreement shall have overriding effect; provided, however, that any conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the Agreement.

¹⁰ 2.20.7 The BID Security shall be forfeited and appropriated by the Authority as damages payable to the Authority for, inter-alia, time cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority under the bidding documents and I or under the Agreement, or otherwise, under the following conditions:

(d) In the case of Selected Bidder, if it fails within the specified time limit -

(i) to sign and return the duplicate copy of LOA;

(ii) to sign the Agreement; or

¹¹ 3.3.5 After selection, a Letter of Award (the "LOA") shall be issued, in duplicate, by the Authority to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Authority may, unless it consents to extension of time for submission thereof, appropriate the BID Security of such Bidder as damages on account of failure of the Selected Bidder to acknowledge the LOA, and the NOI-inconformity with 3.3.3.

¹² 3.3.6 After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the bidder to execute the Agreement within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the Agreement.

23.8 In this context reference was made to Clause 3.3.6 which, *inter alia*, provided that after the acknowledgement of LOA, MORTH/NHIDCL could cause the selected bidder to execute the agreement within the period prescribed under Clause 1.3. Under Clause 1.3 of RFP, MORTH/NHIDCL was required to have the contract agreement executed within 15 days of the award of the LOA.

23.9 More importantly, emphasis was laid down on the fact that Clause 3.3.6 of the RFP did not allow the selected bidder to seek any deviation, modification or amendment in the D.A.

23.10 Thus, in other words, the submission was that with the acceptance of the LOA, a binding contract came into existence, the fact that MORTH/NHIDCL failed to execute a formal Contract Agreement constituted a breach for which the petitioner was not responsible. The fact that NHIDCL had committed a breach, did not obliterate the arbitration clause, which finds mention in the D.A. since via by reference it stood incorporated in the RFP.

24. As, it was a single contract, a general reference in the RFP to the Contract Agreement would have the arbitration clause incorporated in it. The D.A. being a standard form contract, a general reference to the same in the RFP would have the arbitration clause incorporated in the RFP.

24.1 The fact that the tendered documents were Model EPC Documents was sought to be demonstrated by drawing my attention to a screenshot taken from the website of MORTH.

24.2 The notification of the LOA brought into existence a binding contract and that the terms and conditions stipulated in the bid documents constituted conditions of the contract obtaining between the parties.

24.3 Furthermore, the conduct of the parties post acceptance of the LOA, which included the extension of the bank guarantee on six occasions, would only demonstrate that a subsisting contract had been concluded between the parties.

24.4 Lastly, it was submitted, (which appeared to be a submission in the alternative) that in case it was not clear on the face of the record that the concluded contract had come into existence, the Arbitral Tribunal once constituted by the Court would enquire into this objection, which is the sought to be raised by the respondent and, then, rule upon the existence of an arbitration agreement between the parties.

24.5 In support of her submissions, Ms. Suri relied upon the following judgments:

- (i) *M. R. Engineers and Contractors Private Limited vs. SomDatt Builders Limited*, 2009 (7) SCC 696.
- (ii) *Nehru Port Trust vs. M/s. PSA Mumbai Investments Pte. Limited & Anr.*, (Arbitration Petition No.1227/2016 dated 1.3.2018).
- (iii) *Inox Wind Limited vs. Thermocables Limited*, 2018 (2) SCC 519.
- (iv) *Enercon (India) Ltd. & Ors. Vs. Enercon GMBH & Anr.*, 2014 (5) SCC 1.
- (v) *Oil and Natural Gas Corporation Petro Additions Limited vs. Daelim Industrial Company Limited, Korea* 2015 (13) SCC 176.
- (vi) *Angang Group Intl. Trade Corporation vs. Pipavav Railway Corporation Ltd.*, 2003 (10) SCC 51.

(vii) *National Highways Authority of India vs. RSB Project Ltd.*
(OMP No.300/2005).

25. On the other hand, Mr. Banerjee, on behalf of NHIDCL made the following submissions:

25.1 First, the parties had not executed a Contract Agreement. The RFP did not contain an arbitration clause. In view of the above, the petitioner cannot invoke the arbitration clause i.e. Clause 26.3, which finds mention in the D.A. In sum, the contention is that since there was no concluded contract between the parties, this petition for appointment of an Arbitrator would not be maintainable.

25.2 Second, one would have to bear in mind the fact that the capacity of the person/ entity which enters the bidding process undergoes a change at different stages of the process, which commences from floating of tender and ends with the execution of a contract, in case, the bidder is declared successful. In the first stage, the person/ entity who responds to a tender, does so in the capacity of a bidder. If the bid is found to be responsive and held to be the best bid amongst those submitted, the person/entity concerned is declared as the selected bidder. In the final stage, after all the formalities are completed, which includes the execution of the contract, the person/entity concerned transcends to the status of a contractor.

25.3 In the instant case, though the petitioner reached the second stage i.e. that of a selected bidder, it did not transcend to the stage where it could have held the status of a contractor. This submission was sought to

be buttressed by Mr. Banerjee by referring to Clause 2.20.1¹³ and Clause 2.20.5¹⁴ of the RFP. Based on these clauses, it was submitted that the petitioner was required to keep the bank guarantee furnished in lieu of the bid security alive during the period when the bid was valid or during such extended period as may be determined with the mutual consent of the parties and, once, the person/ entity reached the stage of a selected bidder, the bid security was to be returned, *albeit*, without interest, upon the bidder signing the contract agreement and furnishing a performance security. In effect the submission was, that in the instant case, the bid security given in the form of a bank guarantee was returned which was accepted by the petitioner without protest, despite the next steps not being taken. This conduct of the petitioner established according to Mr. Banerjee that there was no intent to enter into a final agreement.

25.4 Since, the RFP did not contain an arbitration clause, it provided in Clause 6.1¹⁵ that the bidding process would be governed by the laws of India and the Courts at Delhi shall have exclusive jurisdiction qua the disputes arising under, pursuant to and/or in connection with the bidding process. In other words, if a party was aggrieved by the infraction of the bidding process, it could take recourse to a remedy other than a remedy

¹³ 2.20.1 The Bidder shall furnish as part of its BID, a BID Security referred to in Clauses 2.1.6 and 2.1.7 hereinabove in the form of a bank guarantee issued by nationalised bank, or a Scheduled Bank in India having a net worth of at least Rs. 1,000 crore (Rs. one thousand crore), in favour of the Authority in the format at Appendix-II (the "Bank Guarantee") and having a validity period of not less than 180 (one hundred eighty) days from the BID Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. In case the Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by any nationalised bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934.

¹⁴ 2.20.5 The Selected Bidder's BID Security will be returned, without any interest, upon the bidder signing the Contract Agreement and furnishing the Performance Security in accordance with the provisions thereof. The Authority may, at the Selected Bidder's option, adjust the amount of BID Security in the amount of Performance Security to be provided by him in accordance with the provisions of the Agreement.

¹⁵ 6.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the Courts at Delhi shall have exclusive jurisdiction over all disputes arising under, pursuant to and/ or in connection with the Bidding Process.

under the 1996 Act and for that purpose, the parties could approach the Courts at Delhi.

25.5 As per the D.A., an 'Appointed Date' had to be fixed for performance of obligations under the contract. Since, the D.A. was not executed, it did not transcend into an agreement, which was enforceable in law. In other words, since, the Contract Agreement was not signed and sealed by the parties, the Appointed Date for performance of the contract was not fixed and the other stipulation, which required furnishing of a performance security was not taken forward.

25.6 The RFP, on the other hand, gave information to the bidders to enable them to be acquainted with what the Project was all about and their current and future obligations under the Contract Agreement. For this purpose, the disclaimer given in the RFP was adverted to, which provided that it was neither an agreement nor an offer or an invitation to offer qua the prospective bidders or any other person.

25.7 The contention was that the particular conditions of the contract would have got triggered only upon the execution of the D.A. The issue as to whether or not the parties had entered into an arbitration agreement was examined by ICADR's consultant Mr. Justice I.P. Vasishth (Retd.), who, correctly, came to the conclusion that there was no arbitration agreement obtaining between the parties. Consequently, ICADR rejected the petitioner's request for appointment of an Arbitrator on behalf of the NHIDCL.

25.8 In support of his submission, reliance was placed by the learned counsel on the following judgments: *Duro Felguera, S.A. vs. Ganga Varma Port Limited*, (2017) 9 SCC 729; *Dresser Rand S.A. vs. Bindal*

Agro Chem Ltd. K.G. Khosla Compressors Ltd., (2006) 1 SCC 751; *M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited*, (2009) 7 SCC 696; *ABW Infrastructure Ltd. & Anr. vs. Rail Land Development Authority*, 2018 SCC Online Del 7183; *Fill and Company Pvt. Ltd. Mumbai vs. Patodia Ginning Factory, Malegaon*, (2016) (3) *MH.L.J. Bombay High Court*, *U.P. Rajkiya Nirman Nigam Ltd. vs. Indure Pvt. Ltd and Ors.*, (1996) 2 SCC 667; and judgment dated 05.04.2018, passed by this Court in Arb. A. (COMM.) 11/2017, in the matter of *Benara Bearing & Pistons Ltd. vs. Mahle Engine Components India Pvt. Ltd.*

Analysis and Reasons

26. Having heard the learned counsel for the parties and perused the record, the following facts emerge, qua which there can be no dispute:

- (i) That against the tender being floated by MORTH in respect of the subject Project, the petitioner filed bid on 19.08.2014.
- (ii) The bid filed by the petitioner, as required, as per the terms and conditions of the RFP, included an initialed copy of the D.A.
- (iii) The petitioner's bid was found not only to be responsive but also, perhaps, the best bid, which propelled MORTH to issue a LOA dated 31.10.2014 in its favour.
- (iv) The petitioner received a counterpart of the LOA, *albeit*, without the original, which, evidently, has been sent by post. Upon receipt of the counterpart, the petitioner's authorized officer appended its signatures on the same, and thereby, tendered its acceptance of the terms and conditions contained in the LOA. As required, in terms of the LOA, a legal opinion was also tendered by

petitioner's counsel on aspects pertaining to its authority to enter into a Contract Agreement and qua the enforceability of the provisions contained therein. Both, the legal opinion, which is dated 03.11.2014 and the acceptance of the LOA was dispatched to MORTH under the cover of two separate letters of even date i.e. 05.11.2014.

(v) Since, clause 1.3 of the RFP required the Contract Agreement to be executed within 15 days of the issuance of award of the LOA, the petitioner vide communication dated 08.11.2014 indicated to MORTH to fix 13.11.2014 as the date for executing the Contract Agreement, if it was, otherwise, convenient.

(vi) MORTH delayed execution of the Contract Agreement and instead, called upon the petitioner on at least six occasions to extend the bank guarantee, which had been given as security at the time of tendering the bid. The last extension, in this behalf, was obtained by the petitioner on 30.06.2016. Resultantly, the validity period of the bank guarantee stood extended till 30.09.2016.

(vii) Pertinently, the last three extensions were obtained by the petitioner at the behest of NHIDCL, since, by then, the Project had been entrusted by MORTH to NHIDCL. The extension letters dated 17.12.2015, 28.03.2016 and 22.06.2016 bear this fact out.

(viii) About seven weeks prior to the expiry of the validity period of the bank guarantee i.e. in and about 04.08.2016, NHIDCL took a decision to withdraw the LOA. Via a letter of even date i.e. 04.08.2016, NHIDCL indicated to the petitioner that it was

withdrawing the LOA as it had not received an NOC from the Council.

(ix) This set the petitioner on a course to take recourse to remedies to ventilate its grievance.

(x) The petitioner, in the first instance, sought an amicable resolution of the dispute by seeking conciliation and when this attempt failed, it triggered the arbitration agreement, which stands incorporated in Clause 26.3 of the D.A.

(xi) NHIDCL, on its part, rejected both requests as it took a stand that there was no concluded contract obtaining between the parties. Thus, despite the fact that the petitioner, in terms of Clause 26.3 of the D.A. had taken steps to appoint its nominee Arbitrator, NHIDCL refused to follow suit.

(xii) The petitioner's request made in that behalf to ICADR, once again, in terms of Clause 26.3 of the D.A., was also turned down. As it transpires, ICADR, it appears, took into account its consultant's view in declining the petitioner's request to appoint an Arbitrator on behalf of the respondent.

27. Given the aforesaid facts, what requires to be examined, as indicated hereinabove, is: whether the arbitration clause included in the D.A. stood incorporated by reference in the RFP.

27.1 In order to examine, this aspect of the matter, one would have to advert to the provisions of the Section 7 (5) of the 1996 Act. For the sake of convenience, the same is extracted herein:

“7(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all

or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

- (2)
- (3)
- (4)
 - (a)
 - (b)
 - (c)

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

27.2 A bare perusal of the provisions of Sub-section (5) of Section 7 would show that in order to incorporate in a contract via reference, an arbitration clause, which is contained in another document, the following ingredients should be satisfied. First, the contract in issue should be in writing. Second, the reference should be such as to make the arbitration clause which is contained in the separate document, a part of the contract.

28. On behalf of NHIDCL, the stand taken is that there is no contract in existence, since, the D.A. never metamorphosed into a final agreement. This argument is based on the premise that though the petitioner transcended from the status of a bidder to a selected bidder, it did not acquire the status of a contractor as a final contract was not executed between the parties. This argument is pivoted on the following facts:

- (i) First, that the LOA was withdrawn.
- (ii) Second, that the bank guarantee which constituted the bid security was returned and thereupon accepted without any demur or protest.

(iii) The contract agreement was not signed.

(iv) Lastly, the performance security was not furnished.

28.1 In my view, the submission advanced on behalf of the respondent that there was no contract in subsistence, even though the LOA had been issued and accepted by the petitioner, is completely misconceived. The reason I say so is this: No doubt, RFP in this case stated that it was neither an offer nor an invitation to offer which, in sum, would mean that all that MORTH/ NHDICL, at that stage, was seeking from interested parties was their proposals against the information supplied by it with regard to the Project, however, once the information was supplied, which included technical qualification of the petitioner as well as its initial bid, it was for MORTH to take a call as to whether or not the LOA ought to be issued to the petitioner.

28.2 At the highest, what can be said in favour of MORTH/ NHDICL is that, once, it was satisfied that the bid was responsive and was the best bid, it made an offer to the petitioner to execute the Project on the terms and conditions given in the RFP. It is because of this reason that the LOA called upon the petitioner to return the counterpart of the LOA with signatures signifying its acceptance of the terms contained therein. Since, the LOA is a short document and much of the arguments advanced on behalf of the parties rest on the import of the document, the relevant part of the LOA is set forth below:

“No.xxxxxxxxxx

Dated 31st October, 2014

To

M/s BSCPL Infrastrucure Ltd.

xxxxxxxxxxxxxx

(kind Attention: K Samvana Kumar, Vice President)

Sub: Upgradation to two lane of Nongstion-Domiasiat-Mawthabah road section (Design chainage km 0.00 to Km 61.574) in the State of Meghalaya under SARD-NE on EPC basis –Letter of Award- reg.

Ref: (i) Your Bid submitted on 19.08.2014 for the above work

Sir,

Kindly refer your bid dated 19.08.2014 for the above work. Ministry has accepted your bid for the quoted amount of Rs.350.11 Crore (Rupees Three Hundred Fifty Crore Eleven Lakh only) as included inproforma for quoting rates (i.e. Electronic bid) for the above work and declares you as the selected bidder in accordance with the Clause 3.3.1 of the RFP. Please note that the amount payable to you by Authority shall be in accordance with the provisions of RFP. The Construction Period is 910 days from the “Appointment Date”.

2. In accordance with Clause 3.3.5 of the RFP document, it is requested to return the signed copy of the duplicate LOA as your acknowledgement within 7 (seven) days of receipt of LOA. Thereafter, you are required to execute the Contract Agreement within 15 (fifteen) days from the date of issue of LOA as per Clause 1.3 of RFP (Volume-I). It is also requested to deliver a legal opinion from your legal counsel with respect to your authority to enter into Contract Agreement and the enforceability of the provision thereof, within 10 (Ten) days of issue of this LOA.

3. Further, as per RFP documents, the Contractor for due and faithful performance of its obligations during the Construction Period, as well as Defects Liability Period shall furnish a Performance Security by way of an irrevocable and unconditional Bank Guarantee of Rs.26,25,82,500/- (Rupees twenty six crore twenty five lakh eighty two thousand and five hundred only) within 10 day from the date of signing of the Contract Agreement. The Performance Security shall be valid until 60 (sixty)

days after the Defects Liability Period (refer clauses of Article-7 of RFP Volume-II- EPC Document).

4. You are requested to accord you acceptance to include aforesaid provisions as part of Contract Agreement, as this would be condition for accepting the LOA.

5. You are required to comply with the above and all the terms and conditions set forth in the RFQ and the RFP documents. In case of any default on your part, you shall be liable for action as stated in the RFP Document.

*Yours Faithfully,
S/d*

Encl: 1.Duplicate copy of LOA

xxxxxxx”

(emphasis is mine)

28.3 A perusal of the contents of the LOA would show that:

- (i) First of all, it indicated that the petitioner’s bid had been accepted for the quoted amount of Rs.350.11 crores.
- (ii) Secondly, the petitioner was declared as the selected bidder in accordance with Clause 3.3.1 of the RFP.
- (iii) The amount payable by the petitioner to MORTH/ NHIDCL would be in accordance with the provisions of RFP.
- (iv) Construction period would span 910 days commencing from the appointed date.
- (v) The petitioner was required to return the duplicate i.e. the counterpart of the LOA, with its signatures and acknowledgement

of the terms containing therein within a period of 7 days of receipt of the LOA in consonance with the Clause 3.3.5 of the RFP.

(vi) The petitioner was required to execute the Contract Agreement, within 15 days of the issuance of the LOA as per Clause 1.3 of the RFP. Furthermore, the petitioner was also required to submit an opinion of its counsel with regard to its authority to enter into a contract agreement and enforceability of the provisions contained therein. This exercise was required to be completed within 10 days from the issuance of the LOA.

(vii) The petitioner was required to furnish within 10 days of the execution of the Contract Agreement, a performance security by way of an irrevocable and unconditional bank guarantee as per the terms of the RFP to ensure due and full performance of its obligations during the construction and, thereafter, while the Defects Liability Period was in operation.

(viii) Lastly, the acceptance of the LOA, which the petitioner was required to send to MORTH had to include the provisions mentioned therein which were to form part of the Contract Agreement. In other words, the petitioner was required to comply not only the terms and conditions set forth in the LOA but also those which were included in the RFP and Request for Qualification (RFQ) documents. It was made clear that if there was a default by the petitioner, then, it would be held liable for action as indicated in the RFP.

29. Clearly, once acceptance of the LOA was accorded by the petitioner, a binding contract emerged and a legally enforceable

instrument obtained between the parties. The LOA contains all the ingredients of an agreement which is enforceable in law which, *inter alia*, included the consideration, the description of the works which had to be executed in the Project, the time span within which the Project works had to be executed and the obligations which the selected bidders had to discharge.

30. Therefore, the submission advanced on behalf of the respondent that there was no agreement in existence as the petitioner had only qualified as a selected bidder, in my view, is a contention which cannot be sustained.

31. While, I am on this aspect of the matter, I may also deal with the contention advanced on behalf of the respondent that since, it had, on 04.08.2016, withdrawn the LOA, there was no contract in existence. In my view, this submission is completely misconceived as the petitioner, as noted above, had sent, admittedly, its acceptance of the LOA within the stipulated period of 7 days after receiving the counterpart of the same. Therefore, a withdrawal of the LOA, after its acceptance, cannot change the position that a firm contract had been formed between the parties. It is sought to be argued on behalf of the respondent that there is a difference between the status of a selected bidder and a contractor. To my mind, in law, there is no such distinction. Once, an offer is made and the same is accepted, relationship of a contractor-employer comes into play. This relationship, as in the instant case, can be, further fine-tuned by executing, as it often happens, via a formal contract. Thus, in the facts of the instant case, I have no doubt that the acceptance of a LOA gave rise to a firm contract. This is, especially so, as the petitioner had no

choice of deviating from or negotiating afresh the terms contained in the D.A. The provisions of the RFP made that clear.

31.1 In order to appreciate this aspect of the matter, one would have to advert to some of the clauses of the RFP. Clause 1.2¹⁶ of the RFP sets out

¹⁶ **1.2 Brief description of Bidding Process**

1.2.1 The Authority has initially adopted a two-stage process (collectively referred to as the "**Bidding Process**") for selection of the Bidder for award of the Project. The first stage (the "**Qualification Stage**") of the process involved pre-qualification (the qualifications) of interested parties in accordance with the provisions of the RFQ. (The "Bidder", which expression shall, unless repugnant to the context, include the members of the Joint Venture) At the end of the Qualification Stage, the short-listed Bidders or the eligible Bidders w.r.t. their eligibility limit and the eligible score at the RFQ/RFAQ stage, are eligible for participation in this second stage of the Bidding Process (the "**BID Stage**") comprising Request for Proposals. Now Authority has adopted single stage two cover system bidding process and all the pre-qualified bidders in first stage and fresh bidders (who have not participated in Ist stage) are allowed to participate in this bidding process.

GOI has issued guidelines (see Appendix-V of RFP) for qualification of bidders seeking to acquire stakes in any public sector enterprise through the process of disinvestment. These guidelines shall apply *mutatis mutandis* to this Bidding Process. The Authority shall be entitled to disqualify a Bidder in accordance with the aforesaid guidelines at any stage of the Bidding Process. Bidders must satisfy themselves that they are qualified to bid, and should give an undertaking to this effect in the form at Appendix-I

1.2.2 In the BID Stage, the aforesaid short-listed Bidders, including their successors, as well as fresh bidders are being called upon to submit their Financial offers (the "**BIDS**") in accordance with the terms specified in the Bidding Documents. The fresh bidders are required to submit RFQ Application for Qualification and Financial offers in separate envelopes The Bid shall be valid for a period of not less than 120 days from the date specified in Clause 1.3 for submission of BIDs (the "**Bid Due Date**").

1.2.3 The Bidding Documents include the draft Agreement for the Project which is enclosed. The Feasibility Report prepared by the Authority/ consultants of the Authority (the "**Feasibility Report**") will also be provided to the Bidders on [or near about ***]. Subject to the provisions of Clause 2.1.3, the aforesaid documents and any addenda issued subsequent to this RFP Document, will be deemed to form part of the Bidding Documents.

1.2.4 A Bidder is required to deposit, along with its BID, a BID security of [**1% of the estimated project cost**] (the "**BID Security**"), refundable not later than 60 (sixty) days from the BID Due Date, except in the case of the Selected Bidder whose BID Security shall be retained till it has provided a Performance Security under the Agreement. The Bidders will have an option to provide BID Security in the form of bank guarantee acceptable to the Authority, and in such event, the validity period of the bank guarantee, shall not be less than 180 (one hundred and eighty) days from the BID Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. The BID shall be summarily rejected if it is not accompanied by the BID Security.

1.2.5 During the BID Stage, Bidders are advised to examine the Project in greater detail, and to carry out, at their cost, such studies as may be required for submitting their respective BIDs for award of the contract including implementation of the Project.

1.2.6 BIDs will be invited for the Project on the basis of the lowest cost required by a Bidder for implementing the Project (the "**BID Price**"). The total time allowed for completion of construction under the Agreement (the "**Construction Period**") and the period during which the Contractor shall be liable for maintenance and rectification of any defect or deficiency in the Project after completion of the Construction Period (the "**Defect Liability Period**") shall be pre-determined, and are specified in the draft Agreement forming part of the Bidding Documents.

In this RFP, the term "**Lowest Bidder**" shall mean the bidder who is quoting the lowest BID price.

1.2.7 Generally, the Lowest Bidder shall be the selected Bidder. In case such Lowest Bidder withdraws or is not selected for whatsoever reason, the Authority shall annul the Bidding Process and invite fresh BIDs.

1.2.8 Further and other details of the process to be followed at the BID Stage and the terms thereof are spelt out in this RFP.

1.2.9 Any queries or request for additional information concerning this RFP shall be submitted in writing or by fax and e-mail to the officer designated in Clause 2.11.5 below. The envelopes/communication shall clearly bear the following identification/ title: "**Queries/Request for Additional Information: "Rehabilitation and upgradation to two lane with earthen Shoulder of Nongstion-Domiasiat-Mawthabah road section (Design chainage km 0.00 to Km 61.574) in the State of Meghalaya Under SARDP on EPC Basis"**".

the brief description of bidding process. MORTH, as stipulated in the said clause of the RFP, adopted a two stage bidding process for selection of a suitable bidder qua the subject works. The first stage involved the qualification stage. The bidders were sorted in accordance with the provisions of the RFQ. At the end of the qualification stage, the short listed bidders or eligible bidders could proceed to the second stage which was the bid stage, based on the RFP. Interestingly, in this stage, two cover system was adopted whereby not only the pre-qualified bidders who had crossed the first stage but also fresh bidders who had not participated in the first stage were allowed to take part in the bidding process. Therefore, insofar as the fresh bidders were concerned, they were required to submit the RFQ along with their financial offer, *albeit*, in separate envelopes. The bid was to remain valid for a period of 120 days from the due date.

31.2 The bid due date, as per Clause 1.3, was indicated, in the instant case, as 28.07.2014.

31.3 Interestingly, Clause 1.2.3 indicated what bidding documents would consist of. Apart from the feasibility report, the bidding documents included the D.A. The said clause, *inter alia*, provided that the D.A. would form part of the bidding documents. This aspect is also emphasized in Clause 2.7.2 of the RFP. Furthermore, the petitioner, in terms of Clause 2.10.2, was required to submit its bid with each page initialed in blue ink by its authorized signatory. Any alternations, omissions, additions or other amendments were similarly required to be initialed by the authorized signatory. Furthermore, as to what were the consequences of bidder being selected and the failure to sign and return the duplicate (i.e. counterpart of the LOA) within the stipulated period of

7 days or the extended period was provided in Clause 3.3.5. In short, failure to return a signed duplicable copy/counterpart of the LOA would have the bidder (and in this case, the petitioner) being visited with the consequences of bid security being appropriated by NHIDCL and, furthermore, would have authorized NHIDCL to annul the bidding process and invite fresh bids.

31.4 Likewise, under the RFP, once, the bidder accepted the LOA by sending its acknowledgement, the bidder was necessarily required to execute the Contract Agreement within the period provided in Clause 1.3 of the RFP. Clause 1.3 of the RFP required the bidder to execute the Contract Agreement within 15 days of the LOA being awarded.

31.5 Importantly, the selected bidder (and, once again, in this case the petitioner) under Clause 3.3.6 was not entitled to seek any deviation, modification or amendment in the D.A., and if there was any doubt as to whether the petitioner could or could not avoid executing a final contract, that doubt is completely laid to rest if one were to peruse paragraphs 18 & 19 of the bid format (which is given in the form of a letter). The bid format is annexed as Appendix-I to the RFP. For the sake of convenience, paragraphs 18 & 19 are set forth hereafter:

“18 In the event of my/our being declared as the Selected Bidder, I/we agree to enter into an agreement in accordance with the draft that has been provided to me/us prior to the BID Due Date. We agree not to seek any changes in the aforesaid draft and agree to abide by the same.

19 I/We have studied all the Bidding Documents carefully and also surveyed the project highway and the traffic. We understand that except to the extent as expressly setforth in the Agreement, we shall have no claim, right or title arising out of any documents or information provided to us by the authority or in respect of any matter arising out of

or relating to the Bidding Process including the award of Agreement.”

(emphasis is mine)

31.6 The aforesaid would clearly show that bidding documents included the D.A. and that, once, the petitioner gave its acceptance to the LOA, it could not have deviated from the same or sought any modification and amendment of the same. As a matter of fact, even prior to that, upon MORTH selecting a bidder, the bidder was bound to send its acceptance, failing which, it had the right to appropriate the bid security towards the damages. The fact that the petitioner was required to file its bid document, which included, D.A. duly initialed by its authorized signatory would only fortify the submission put forth on behalf of the petitioner that it was bound, in a manner of speech, hand and foot with the standard terms and conditions contained in the D.A. As alluded to above, paragraph 18 of the bid letter clearly took away any right, whatsoever, that ordinarily a party would have while negotiating the final terms of the contract.

32. Given these circumstances, what has to be next addressed by me is: whether a general reference to the D.A. in the RFP would suffice in binding the parties to the arbitration agreement contained in the former i.e. the D.A.

32.1 The facts, as set out above, would show that the instant contract is a ‘single contract’ which is a standard form contract. The fact that it is the standard form contract is discernable from the downloaded documents appended as Annexure P-6 which, *inter alia*, adverts to Model EPC documents concerning construction of two lane national highways work. MORTH, while inviting bids and furnishing bid documents, thus,

included a model contract as part of its bidding document. This position has not been disputed on behalf of NHIDCL. Therefore, to my mind, the fact that there is no particular reference in the RFP to the arbitration agreement which is contained in Clause 26.3 of the D.A. would make no difference. In the facts of this case, a general reference to the D.A. in the RFP would, without doubt suffice.

32.2 Both sides have cited several authorities to buttress their point of view. In my view, the most apposite judgments are the two judgments of the Supreme Court in the matter of *M.R. Engineers and Contractors Private Limited* and *Inox Wind Limited* and the judgment of a Single Judge of the Bombay High Court in the matter of *The Board of Trustees of the Jawaharlal Nehru Port Trust*, which, in fact, is the closest to the facts obtaining in the instant case, and has taken into account the aforementioned judgments of the Supreme Court.

33. In *M.R. Engineers and Contractors Private Limited*, the Supreme Court was called upon to consider whether the arbitration clause contained in an independent document subsisting between the employer and the contractor will stand incorporated in a sub contract entered into between the main contractor and the sub contractor merely because the sub contract referred to an independent document. The Court examined the issue at length and thereupon, *inter alia*, made the following observations in the context of the provisions of Section 7 (5) of the 1996 Act:

“22 A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the

requirement of special reference is where the referred document is not another contract, but a Standard form of terms and conditions of a Trade Associations or Regulatory institutions which publish or circulate such standard terms & conditions for the benefit of the members or others who want to adopt the same.

24 The scope and intent of section 7(5) of the Act may therefore be summarized thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled :

(1) The contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) *Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such 14 standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.*

(v) *Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.”*

(emphasis is mine)

34. The Supreme Court in ***Inox Wind Limited***, while agreeing with the view taken by the bench in ***M.R. Engineers and Contractors Private Limited*** expanded its scope by adverting to the development of law regarding incorporation by reference after the pronouncement of judgment in ***M.R. Engineers and Contractors Private Limited***. The relevant observations made are set forth hereafter:

“17 This Court in *M.R. Engineers’* case, which is discussed in detail supra, held the rule to be that an arbitration clause in an earlier contract cannot be incorporated by a general reference. The exception to the rule is a reference to a standard form of contract by a trade association or a professional institution in which case a general reference would be sufficient for incorporation of an arbitration clause. Reliance was placed by this Court on Russell on Arbitration 23rd Edition (2007). The development of law regarding incorporation after the judgment in *M.R. Engineers* requires careful consideration.

It has been held in Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL [2010] EWHC 29 (Comm) that a standard form of one party is also recognized as a 'single contract' case. In the said case, it was also held that in single contract cases general reference is enough for incorporation of an arbitration clause from a standard form of contract. There is no distinction that is drawn between standard forms by recognized trade associations or professional institutions on one hand and standard terms of one party on the other. Russell on Arbitration 24th Edition (2015) also takes note of the Habas's case.

18. We are of the opinion that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause. In *M.R. Engineers* this Court restricted the exceptions to standard form of contract of trade associations and professional institutions. In view of the development of law after the judgment in *M.R. Engineers'* case, we are of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. A perusal of the passage from Russell on Arbitration 24th Edition (2015) would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition relied upon by this Court in *M.R. Engineers'* case. We are in agreement with the judgment in *M.R. Engineer's* case with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause."

(emphasis is mine)

35. Clearly, the Supreme Court moved further from the position taken in *M.R. Engineers'* case, which was, that general reference to another contract would not be sufficient to incorporate the arbitration clause from the referred contract into the subject contract, except where it was a

standard form contract of a trade association or of a regulatory institution. In *Inox Wind Limited's* case, the Court held that a general reference to a standard form contract of one party would suffice for the purpose of incorporation of the arbitration clause and that the parties which framed standard form contracts need not necessarily be a trade association or a regulatory/professional institution.

36. The Bombay High Court in *The Board of Trustees of the Jawaharlal Nehru Port Trust* appreciated the expansion of the principle of incorporation by reference in respect of a standard form contract as enunciated by Supreme Court in *Inox Wind Limited* and in almost an identical situation held in favour of the petitioner in that case by concluding that an arbitration agreement subsisted between the parties. Pertinently, in that case as well the draft concession agreement was not executed and the Letter of Award issued in favour of the petitioner stood withdrawn.

37. It is pertinent to note that *Duro Felguera* was a judgment which was delivered by the Supreme Court prior to its judgment in *Inox Wind Limited*. The Supreme Court, in that case, did notice its earlier judgment rendered in *M.R. Engineers'*. Therefore, the position on the law has to be appreciated in light of what is stated in its later judgment, which is its judgment in *Inox Wind Limited*. As indicated above, the Court has accepted the view in *M.R. Engineers'* and, thereafter, expanded upon the principle of incorporation by reference in case of Standard form Contracts.

38. The judgment in *Dresser Rand*, in my view, is distinguishable on facts as that was a case where the appellant before the Supreme Court asserted that the arbitration clause contained in the general condition of

purchase stipulated by the other party i.e. Bindal Agro Chemical Ltd., would bind the parties; a contention which was rejected by the Supreme Court on the ground that the appellant had, in fact, made modifications to the general conditions of purchase and, therefore, mere initialing of the document containing modifications to the general conditions of purchase only cleared deck for entering into a final/firm contract. The Supreme Court in paragraph 28, to my mind, drew a distinction between those general conditions of purchase where there is no leeway given as against cases where parties can modify the Contract.

38.1 As noted hereinabove, in the instant case, there was no room available to the petitioner to seek deviation, modification or amendment in the D.A. The petitioner was bound by the standard terms of the D.A.

39. The judgment of the Single Judge in *ABW Infrastructure Ltd.*'s case is also distinguishable on facts. A perusal of the judgment would show that a LOA had been issued in favour of the petitioners in that case and parties had yet to sign a development agreement. The petitioners had, in fact, filed a writ petition in which the petitioners appear to have taken the position that they wanted to renegotiate the terms of the agreement which was considered by the respondent in that case [i.e. the Railway Land Development Authority (in short 'RLDA')] and, accordingly, a draft agreement was circulated. The petitioners, thereafter, wanted a change in the draft agreement which was circulated, something which was not accepted by RLDA. It is in that context that the learned Judge appears to have ruled that there was no arbitration agreement obtaining between the parties, merely, because it is stood incorporated in an unsigned development agreement.

40. In ***Gill and Company Pvt. Ltd.***, the Court was dealing with an appeal filed under Section 37 of the 1996 Act. The Principal District Judge had set aside the award in a petition filed under Section 34 of the 1996 Act by holding that the Arbitrator had exceeded his jurisdiction as there was no arbitration agreement in existence. In that case, the Court found, as a matter of fact, that the parties before it had entered into an agreement which had not been signed either by the respondent before it or by the broker. Therefore, according to the Court, such an agreement would fall under sub-section 4 (a) and not under sub-section (5) of Section 7 of the 1996 Act. In other words, the Court took a view that if it was an arbitration agreement, which formed part of the contract for it to operate, it had to bear signatures of the parties. Clearly, to my mind, this case has no application to the facts obtaining in the instant matter.

41. ***U.P. Rajkiya Nirman Nigam Ltd.***'s case is also distinguishable on facts. This was a case where the contract was in number of parts. The Court found, as a matter of fact, that the respondent in that case had made material alterations in the draft agreement and that a counter proposal made by the respondent cannot be said to have been accepted by the appellant (which was a Government undertaking by conduct.)

41.1 It is, in this context, that the Court ruled that no arbitration agreement existed between the parties in view of the fact that there was no concluded contract arrived at between the parties in that case.

42. In ***Benara Bearing & Pistons Ltd.***, the Court was called upon to decide whether the view taken by the learned Arbitrator that no arbitration agreement obtained between the parties was correct.

43. The facts in this case were that the parties had on an earlier occasion entered into a distribution agreement. The said distribution agreement had expired. The terms of the fresh distribution agreement were sought to be finalized via exchange of correspondences. The arbitration agreement was incorporated in the draft distribution agreement which was signed only by the appellant before the Court. The Arbitrator, based on an application moved by the respondent under Section 16 of the 1996 Act, came to a *prima facie* view that there was no arbitration agreement in existence between the parties. This order of the learned Arbitrator was challenged in appeal, filed under Section 37 of the 1996 Act, before this Court. The challenge was premised on two grounds. First, that the learned Arbitrator had observed that non-existence of the arbitration agreement was his *prima facie* view. Second, that the correspondences, in any event, would show that there was no concluded agreement in existence. The learned Single Judge repelled both these contentions on the ground that the appellant before it, had itself taken a stand that the learned Arbitrator should return a *prima facie* view in the matter with regard to the existence of the arbitration agreement. The appellant, it appears, wanted to keep open the argument with regard to firming up of the distribution agreement as it would, have, perhaps, foreclosed opportunity of raising the issue in a regular civil suit. This aspect emerges upon a bare perusal of paragraph 4 of the judgment. Insofar as the other aspect is concerned, the Court came to the conclusion, on facts, that there was no consensus *ad idem* vis-à-vis the distribution agreement. To my mind, the facts obtaining in the ***Benara Bearing & Pistons Ltd.*** are clearly distinguishable from those which arise in the instant case.

44. Thus, for the foregoing reason, I am of the view that the prayers made in the petition would have to be allowed. Since, ICADR wrongly refused to exercise its power to appoint an Arbitrator on behalf of the respondent within the period stipulated under its own Rules, this Court, to my mind, would be empowered to appoint an Arbitrator. Consequently, Hon'ble Mr. Justice Shiavax Jal Vazifdar, former Chief Justice, Punjab and Haryana High Court (Mob. No.: 9820102088; residing at: 24, Masian Belvedere, N-107, Maharshi Karve Road, Mumbai-400020) is appointed as an Arbitrator in the matter. The learned Arbitrator will file a declaration in terms of Section 12 and the attendant provisions of the 1996 Act. In case the learned Arbitrator is unable to act in the matter, parties will have liberty to approach the Court for appointment of a substitute Arbitrator.

44.1 Furthermore, the two Arbitrators will for this purpose convene a meeting within the shortest possible time though not later than two weeks from the date of receipt of a copy judgment.

45. The petition is disposed of in the aforesaid terms. Costs will follow the result.

46. The Registry will dispatch a copy of this order to the learned Arbitrator referred to in paragraph 44 hereinabove.

**RAJIV SHAKDHER
(JUDGE)**

OCTOBER 26, 2018/pmc/a