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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 22.10.2018

+ O.M.P.(I) (COMM.) 371/2018

M/S EPTISA SERVICIOS DE INGENIERA S.L

..... Petitioner

Through: Ms.Bina Madhavan,
Ms.Akanksha Mehra, Advs.

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LIMITED

..... Respondent

Through: Ms.Geeta Luthra, Sr. Adv.
with Mr.Akhil Agarwal,
Mr.Anshul Duggal,
Mr.Altamish Siddiki, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner praying for an interim order staying the operation of the Letter/Communication No. NHIDCL/AE/Hunli-Anini/Km 21.50-Km 92.500/2016/500 dated 27.08.2018 issued by the respondent to the petitioner terminating its contract with the petitioner.

2. The disputes between the parties are in relation to the

Contract Agreement executed between the parties whereby the respondent had appointed the petitioner for rendering Consultancy Services for Authority Engineer for Project of (i) 2 Laning of existing Hunli-Anini road on EPC basis from Km 21.50 to Km 37.50 (ii) 2 laning of existing Hunli-Anini road on EPC basis from Km 37.50 to Km 53.50 and (iii) 2 laning of existing Hunli-Anini road on EPC basis from KM 53.50 to Km 92.500 in the state of Arunachal Pradesh under SARDP-NE.

3. The respondent alleging that the petitioner was not complying with the terms of the Agreement, issued a notice dated 03.05.2017 under Clause 2.8 of the General Conditions of Contract(GCC) suspending payment of the petitioner. On 19.07.2017, the respondent alleging that the petitioner had failed to cure the defects in spite of service of notice dated 03.05.2017, issued a termination notice to the petitioner in terms of Clause 2.9.1(a) of the GCC. Thereafter, on representation being made by the petitioner a meeting was held between the parties on 07.09.2017 wherein on an assurance being given by the petitioner, further time was granted to the petitioner to cure defects.

4. By the letter dated 12.09.2017, the respondent communicated its decision to extend the period of compliance for the petitioner in the following words:

“3. NHIDCL will review the status of the undertaking dated 04.09.2017 and 05.09.2017 for positioning of key personnel and setting up of office at Hunli every month till its complete compliance within 3 months. In case of

non-compliance, termination of the contract will be done without any further notice to M/s Eptisa Services DE Ingenieria, S.L.”

5. By an office order dated 27.09.2017, the respondent issued instructions to the Consultants, including the petitioner herein, to introduce the biometric system for marking the attendance of the authority engineers, consultants at site.

6. On 15.06.2018, the DGM(Projects) of the respondent addressed a communication to the petitioner complaining about the non-availability of the Team Leader and the Resident Engineer at the site and warning the petitioner as under:-

“So, in this regard, consider this letter as show cause notice and if proper action is not taken within the curing period, then action against consultant will be initiated as per clause 2.8 & 2.9 of contract agreement.”

7. Thereafter, a few correspondences were exchanged between the parties in relation to the non-implementation of the biometric attendance system by the petitioner and culminated in the impugned Termination Notice dated 27.08.2018 issued by the respondent.

8. Counsel for the petitioner submits that the Termination Notice dated 27.08.2018 is not in compliance with Clause 2.9.1 (a) of the GCC inasmuch as it does not give the mandatory cure period to the petitioner. She further submits that in terms of Clause 2.9.6 of the GCC, as the petitioner has invoked arbitration within the prescribed period of 45 days

from the receipt of the above notice, the termination cannot be given effect to during the pendency of such arbitration proceedings.

9. On the other hand, learned senior counsel for the respondent submits that notice under Clause 2.8 had been issued by the respondent to the petitioner on 03.05.2017, followed by the cure period notice in terms of Clause 2.9.1(a) of the GCC issued on 19.07.2017. The Impugned Termination notice dated 27.08.2018 has been issued after the expiry of the cure period and therefore, is in compliance with Clause 2.9.1 (a) of the GCC. She further submits that the petitioner, having not invoked the arbitration within 45 days of the notice dated 19.07.2017, cannot seek the benefit of Clause 2.9.6 of the GCC. Further, relying upon the order dated 03.11.2017 passed by this Court in OMP(I)(Comm.) No.436/2017 titled ***Era Infra Engineering Ltd. vs. Steel Authority of India***, she submits that even if the termination is challenged by way of an arbitration proceeding, no interim injunction can be granted in favour of the petitioner as the contract by its very nature is determinable and also remedy of the petitioner would be in damages.

10. I have considered the submissions made by the counsels for the parties.

11. Clause 2.8, 2.9.1, 2.9.1(a) and 2.9.6 of the GCC are reproduced hereinunder:

“2.8 Suspension

The Client may, by written notice of suspension to the Consultants, suspend all payments to the Consultants hereunder if the Consultants fail to perform any of their obligations under this Contract, including the carrying out of the Services, provided that such notice of suspension (i) shall specify the nature of the failure, and (ii) shall request the Consultants to remedy such failure within a period not exceeding thirty (30) days after receipt by the Consultants of such notice of suspension.

2.9 Termination

2.9.1 by the client

The Client may, by not less than thirty (30) days written notice of termination to the Consultants (except in the event listed in paragraph(f) below, for which there shall be A written notice of not less than sixty(60)days),such notice to be given after the occurrence of any of the events specified in paragraphs(a) through(h)of this Clause GC 2.9.1, terminate this Contract.

(a) if the Consultants fail to remedy a failure in the performance of their obligations hereunder, as specified in a notice of suspension pursuant to Clause GC 2.8 herein above, within thirty (30) days of receipt of such notice of suspension or within such further period as the Client may have subsequently approved in writing;

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2.9.6. Disputes about Events of Termination

If either Party disputes whether an event specified in paragraphs (a) through (e) of Clause GC 2.9.1 or in Clause GC 2.9.2 here of has occurred, such Party may, within forty-five(45)days after receipt of notice of termination from the other Party, refer the matter to arbitration pursuant to Clause GC8 hereof and this Contract shall not be terminated on account of such event except in accordance with the terms of any resulting arbitral award.”

12. A reading of the above clauses would show that in case the Consultant, the petitioner herein, fails to perform any of its obligations under the contract, the respondent, as a client, can by a written notice suspend all payments to the consultant giving it 30 days to remedy such failure. In case, the Consultant fails to remedy such breach within 30 days, the respondent can by a notice of 30 days terminate the Agreement. This procedure had been followed by the respondent by giving notices dated 03.05.2017 and 19.07.2017. However, the question would then arise whether by the subsequent action of the respondent, while granting an extension vide letter dated 12.09.2017 and/or releasing payment to the petitioner for the period upto June, 2018 vide letters dated 27.07.2018 and 01.08.2018, has waived such notices. The effect of notice dated 15.06.2018 shall also have to be considered and adjudicated.

13. I may note that the learned counsel for the petitioner has also drawn my reference to a communication dated 28.06.2018 addressed by the GM(Projects) to Executive Director-I of the respondent contending that the notice dated 15.06.2018 is a notice under Clause 2.8 of the GCC and advising that a notice under Clause 2.9.1(a) be issued to the petitioner after 16.07.2018, that is the period prescribed in that clause.

14. Therefore, *prima facie*, the petitioner has been able to make out a dispute as to whether the conditions prescribed in

Clause 2.9.1 (a) of the GCC had been complied with by the respondent while issuing Termination Notice dated 27.08.2018.

15. The petitioner has sought reference of such dispute to arbitration vide its notice dated 24.09.2018 that is, within the prescribed period of 45 days as mentioned in Clause 2.9.6 of the GCC. I cannot agree with the submissions of the learned senior counsel for the respondent that such 45 days period should be counted from the notice dated 19.07.2017 inasmuch as much water has flown after the said notice, with the respondent making further payments to the petitioner, including release of mobilization advance. The respondent having extended the period, the cause of action for challenging the notices did not arise to the petitioner at that stage.

16. As far as the submission of the learned senior counsel for the respondent relying upon the Judgment of this Court in ***Era Infra Engineering Ltd.*** (supra) is concerned, Clause 2.9.6 of the GCC contains a negative covenant between the parties and restricts the termination from taking effect during the pendency of the arbitration proceedings. In view of Section 42 of the Specific Relief Act, 1963 such a negative covenant can be enforced by way of an injunction.

17. In view of the above, in my opinion, the petitioner has been able to make out a *prima facie* case in its favour and accordingly the respondent is restrained from giving effect to the Impugned Termination Notice dated 27.08.2018 during the

pendency of the arbitration proceedings initiated by the petitioner by its above-mentioned notice.

18. I may only hasten to add that all observations made by me hereinabove are only *prima facie* in nature and are not binding on the Arbitrator or either party in such arbitration proceeding.

19. The petition is allowed in the above terms with no order as to costs.

Dasti.

NAVIN CHAWLA, J

**OCTOBER 22, 2018
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