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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(I) (COMM.) 164/2019

HINDUSTAN CONSTRUCTION COMPANY LIMITED..... Petitioner

Through: Mr. Sandeep Sethi, Sr.Adv. with Mr.Jayant Mehta, Mr. Rishi Agrawala, Ms.Shruti Arora and Ms.Dvishti, Advs.

versus

PUBLIC WORKS DEPARTMENT, GOVT. OF DELHI ..... Respondent

Through: Mr. Ramesh Singh, Standing Counsel with Mr.Chirayu Jain,Adv.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 29.05.2019

I.A. 7952/2019 (exemption)

1. Exemption allowed, subject to all just exceptions.

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2. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 seeks status quo and an interim restraint on the demands made through Letters dated 21.05.2019 and 22.05.2019 (hereinafter referred as 'impugned letters') issued by the "Office of the Executive Engineer" (the "EE"), of the Public Works Department ("PWD") of the Government of National Capital Territory of Delhi ("NCT of Delhi").

3. The brief facts of the case are that "the contract agreement" dated 05.11.2014 was executed between the parties for the Munirka Elevated

Corridor Project ("Project"). The Petitioner's bid was accepted by the Respondent -Public Works Department, Govt. of NCT *vide* LoA dated 05.11.2014. The date for commencement of works was 27.11.2014 and the completion date of the project was 26.11.2016. However, during the course of execution of Works, there was a delay, which according to the Petitioner were not attributable to it and were due to reasons beyond its control. It is also stated in the petition that delays were on account of the Respondent which adversely affected the rate of progress thereby resulting in delay in completion of work beyond the contractual date of completion and necessitated extension of time for competition of work.

4. The Contract Agreement stipulates that, in the event of delay, which could not have been foreseen at the time of the Tender and which were not attributable to the Contractor, the contract period would be extended and the additional cost consequent to such delay would required to be added to the Contract price.

5. The Petitioner made applications for extension of time owing to delays. The Respondent granted extension till 03.07.2018 without levy of liquidated damages. The summary of the applications granted to the Petitioner is illustrated by the following table:

EOT Application No.	EOT for delays accrued upto	EOT sought by the Contractor	EOT granted by the Employer
1	10.05.2015	22.06.2017	26.09.2017

2	20.01.2016	12.05.2018	
3	15.03.2016	04.07.2018	
4	15.04.2017	31.12.2018	06.06.2018
5	05.07.2017	07.10.2019	
6	30.04.2018	30.01.2020	03.07.2018
7	31.03.2019	03.03.2021	Yet to be determine

6. The Engineer of the Respondent, vide letter dated 19.05.2018 considered the contractual provisions and granted extra time. The Engineer-in-Charge recommended that the Respondent must be granted the third interim extension of· time without levy of compensation till 13.07.2018.

7. Vide letter dated 04.06.2018, the Respondent, referring to the aforesaid letter of Engineer-in-Charge, extended the date of completion till 03.07.2018 without levy of liquidated damages. Petitioner contends that the updated stipulated date of 03.07.2018 was accepted under protest.

8. On 08.08.2018 and 18.09.2018, the Respondent made payments to the Petitioner of the variated amount after adjusting the de-escalation sums on the same basis. The price adjustments were made under Clauses 10CA and 10CC of the Contract Agreement on the basis of the prevailing indices for the entire contractual period including the extended period.

9. The Respondent has now vide the impugned letters sought refund of the aforesaid amounts, alleging that the payments were made erroneously.

10. The Court has heard the learned senior counsels for the Petitioner, Mr. Sandeep Sethi and Mr. Jayant Mehta and Mr. Ramesh Singh, learned Standing counsel for the Respondent.

11. Mr. Sethi has argued that the Respondents have misinterpreted the conditions of the contract and the demands now sought to be raised are illegal and the threat to invoke the bank guarantee on the basis of the said letters is contrary to the conditions of the Contract. The Respondents granted extension of time without imposition of liquidated damages till 03.07.2018 (though the same was accepted by the Petitioner under the Protest). It is argued that the Respondent is bound by the terms of the Contract and the Petitioner is entitled to payment of the price escalation in the extended duration at the prevailing indices. It is further argued that the Respondents have ignored the word "updated" in the Contract and wrong interpretation was given to the said words in the conditions of the Contract. The Respondents have made payments to the Petitioner with reference to price adjustments under Clauses 10CA and 10CC which provides for escalation calculation due to increase/decrease in prices of materials like Cement, Reinforcement Steel, Structural Steel, Labour and other materials. The said Clauses read as under:

> • <u>Clause 10CA of Contract</u> –
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> *"If after submission of the tender the price of materials specified in Schedule F increases/ decreases beyond [GCC, Pg.no.525] the base price(s) as indicated in Schedule F for*

the work, then the amount of the contract shall accordingly be varied and provided further that any such variations shall be effected for stipulated period of Contract including the justified period extended under the provisions of Clause 5 of the Contract without any action under Clause 2 [DG/CON/260 dt. 27.02.2012]

However, for work done/during the justified period extended as above, it will be limited to the indices prevailing at the time of updated stipulated date of completion considering the effect of extra work (to be calculated on pro-rata basis as cost of extra works x stipulated period I tendered cost) [DG/CON/272 dt.21.08.2013]

The increase I decrease in prices of cement, steel reinforcement, structural steel and POL shall be determined by the Price indices issued by the Director General CPWD. For other items provided in the Schedule 'F' this shall be determined by the All India Wholesale Price Indices of materials as published by Economic Advisor to Government of India, Ministry of Commerce and Industry. Base price for cement, steel reinforcement and structural steel and POL shall be as issued under the authority of Director General CPWD applicable for Delhi including Naida, Gurgaon, Faridabad & Ghaziabad and for other places as issued under the authority of Zonal

Chief Engineer, CPWD [DG/CON/280 dt. 25.06.2014] and base price of other materials issued by concerned Zonal Chief Engineer and as indicated in Schedule F. In case price index of a particular material is not issued by

Ministry of Commerce and industry then the price index of nearest similar material as indicated in Schedule 'F' [DG/CON/260 dt.27.02.2012] shall be followed.

Note (I) In respect of justified period extended under the provisions of Clause 5 of the Contract without any action under Clause 2, the index prevailing at the time of updated stipulated date of completion considering the effect of extra *work (extra time to be calculated on pro-rata basis only as cost of extra work x stipulated period / tendered cost)" [DGW/CON/280 dt.25. 06.2014} ".*

<u>• Clause 10CC of Contract </u>-

"If the prices of materials (not being materials supplied or services rendered at fixed prices by the department in accordance with clause 10 & 34 thereof) and/ or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to the condition that such compensation for escalation in prices and wages shall be available only for the work done during the stipulated period of the contract including the justified period extended under the provisions of clause 5 of the contract without any action under clause 2. However, for

the work done during the justified period extended as above, the compensation as detailed below will be limited to prices/ wages prevailing at the time of updated stipulated date of completion considering the effect of

extra work (to be calculated on pro-rata basis as cost of extra work X stipulated period/ tendered cost). No such compensation shall be payable for a work for which the stipulated period of completion is equal to or less than the time as specified in Schedule F. [DG/CON/272 dt.21.08.2013}"

(In respect of justified period extended under provisions of clause 5 of the contract without any action under clause 2, the index prevailing at the time of updated stipulated date of completion considering the effect of extra work

(extra time to be calculated on pro-rata basis as cost of extra works x stipulated period I tendered cost) [DGW/CON/280 dt.25.06.2014].

Note: Updated stipulated date of completion jar compensation under clause 10C, 10CA & 10CC.

The factor of 1.25 taken into account for calculating the extra time under the clause 12.1 for extra work shall not be considered while calculating the updated stipulated date of completion for this purpose in clause 10C, Clause 10CA and Clause 10CC dt.25.06.2014]."

12. The payments made to the Petitioner after adjusting the de-escalation amounts have been done on the same interpretation. It is contended that the impugned letters are an afterthought. The Respondents threat to invoke the bank guarantees, is beyond the terms of Contract and the guarantees. The nature of the recovery demanded by the Respondents is retrospective and inequitable.

13. Mr. Ramesh Singh, learned standing counsel for GNCTD on the other hand has contended that price escalation paid to the Petitioner on 08.08.2018 and 18.08.2018 was erroneous as upto date indices were used for calculation of price escalation in extended period, whereas as per the GCC, the indices that were to be used for calculation of the price escalation in the extended period should have been frozen at the stipulated date of completion after considering the effect of extra work. He argued that the impugned letters, have rightly reworked the amounts and evidently an excess payment has been made to the Petitioner which the Respondents have a right to recover by invoking the bank guarantee in question.

14. It is further argued that the Petitioner's interpretation of Clauses 10CA and 10CC is erroneous, as a bare reading of the said clauses indicate that the same are applicable with respect to the extra work done by Respondent. It is

further argued that under the terms of Contract, the Respondent also has the right to recover the amount by way of adjustments against the security deposits or against the future payments. Mr. Ramesh Singh also argued that, the despite the afore-noted contractual right, the Respondents have refrained from doing the same, as it would have been a drastic measure impacting the completion of the project. The Respondents have at this stage only called upon the Petitioner to refund the excess payments made to them, failing which Respondents are entitled to recover the same by way of invoking the bank guarantees. In support of this submissions learned counsel has referred to Clause 29 which read as under;

> "CLAUSE29
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> (i) Whenever any claim or claims for payment of a sum of money arises out of or under the in respect of sums contract or against the contractor, the Engineer-in-Charge or the Government shall be , due from contractor entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any deposited by the contractor and tor the purpose aforesaid, the Engineer-in-Charge or the Government shall be entitled to withhold the security deposit, if any, furnished as the case may. be and also have a lien over the same pending finalisation or adjudication of any such claim.
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> In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the Engineer-in-Charge or the Government shall be entitled to withhold and have a lien to retain to the extent of such claimed amount or amounts referred to above, from any sum or sums found payable or which may at any time thereafter become payable to the contractor under the same contract or any other contract with the En Engineer-In-Charge in charge of the Government or any contracting person through the Engineer-In-Charge pending finalisation of adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above by the Engineer-in-Charge or Government will be kept withheld or retained as such by the Engineer-In-Charge or Government till the claim arising out of or under the contract is determined by the arbitrator (if the contract is governed by the arbitration clause) by the competent court, as the case may be and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to above and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the Engineer-in-Charge or the Government shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company as the case may be, whether in his individual capacity or otherwise.

(ii) Government shall have the right to cause an audit and technical examination of the works and the final bills of the contractor including all supporting vouchers, abstract, etc., to be made after payment of the final bill and if as a result of such audit and technical examination any sum is found to have been overpaid in respect of any work done by the contractor under the contract or any work claimed to have been done by him under the contract and found not to have been executed, the contractor shall be liable to refund the amount of over-payment and it shall be lawful for Government to recover the same from him in the manner prescribed in sub-clause (i) of this clause or in any other manner legally permissible; and if it is found that the contractor was paid less than what was due to him under the contract in respect of any work executed by him under it, the amount of such under payment shall be duly paid by Government to the contractor, without any interest thereon whatsoever.

Provided that the Government shall not be entitled to recover any sum overpaid nor the contractor shall be entitled to pay merit of any sum paid short where such payment has been agreed upon between the Superintending Engineer or E:xecutive Engineer on the one hand and the contractor on the other under any term of the contract permitting payment for work after assessment by the Superintending Engineer or the Executive Engineer.”

15. Additionally, Mr. Ramesh Singh, argues that if the Court is inclined to grant a stay of the invocation of the bank guarantee, then the equities should be balanced and the Petitioner should be called upon to furnish bank guarantees to secure the amounts in question. Mr. Ramesh Singh also relied upon the decision of Co-ordinate Bench of this Court in ***MBL Infrastructures Ltd. V. Union Of India***, OMP(I)(Comm) 493/2017 dated 28.11.2017.

16. The Court has given a thoughtful consideration to the the facts of the present case. The construction of the contractual terms and whether the payment was made correctly or erroneously would have to be examined in detail in the arbitration which is likely to ensue shortly between the parties. Having regard to the fact, that disputes have arisen between the parties, at this stage, the equities are required to be balanced. Mr. Sethi, on instructions volunteers to furnish a bank guarantee in favour of the Respondent to secure the amount in question though he argues that there are sufficient bank guarantees available to protect the interest of the Respondent. Thus keeping in mind the contractual terms reproduced above, it is directed that Petitioner shall within 45 days from today furnish an unconditional bank guarantees for an amount of Rs.9.73 Crore in favour of the Respondent. The bank guarantee shall be initially for a period of one year, and shall thereafter be renewed as and when directed by the arbitral tribunal. Subject to above, the Respondent shall not take further steps for encashment of the bank

guarantees or recovery of the amount from the Petitioner, as demanded in the impugned letters till the adjudication of the disputes before the Arbitral Tribunal.

17. In the event, the Petitioner does not succeed in the arbitration proceedings, the Respondent shall be entitled to invoke the bank guarantee in question. The court is informed that presently the decision is pending before the Engineer In-charge. The said decision is subject to further challenge in terms of the arbitration clause. As the petitioner is yet to invoke the arbitration agreement between the parties, it is directed that the present order shall remain in operation for a period of 90 days from today within which the Petitioner must invoke the Arbitration agreement. Both the parties shall be entitled to modification or vacation of the present order before the arbitral tribunal.

18. The observations and findings made hereinabove would not be binding on the arbitral tribunal and/or influence the adjudication of the disputes between the parties by such arbitral tribunal as and when constituted.

19. The present petition is disposed of in the above terms.

SANJEEV NARULA, J

MAY 29, 2019
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