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

+ O.M.P. (COMM) 385/2023

UNION OF INDIA

..... Petitioner

Through: Mr. Vineet Dhanda, CGSC with
Ms. Gurleen Kaur & Mr. Archit
Aggarwal, Advocates.

versus

AIMCO KCM ROYALINFRA (JV)

..... Respondent

Through: Mr. Amit Dubey & Mr. Sarthak
Dubey, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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22.02.2024

I.A. 18347/2023 (Exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

I.A. 18348/2023 (Condonation of delay in refiling)

This is an application of condonation of three days' delay in refiling of the petition. For the reasons stated in the application, the delay in refiling is condoned.

The application stands disposed of.

O.M.P. (COMM) 385/2023 & I.A. 18346/2023 (stay)

1. The petitioner-Railways assails an arbitral award dated 22.05.2023 by which the learned Arbitrator has adjudicated disputes between the parties under a contract dated 01.05.2018 for “Design,



Manufacture, Supply, Installation and Commissioning of Centralized Heating System on Turnkey Basis in the Light Repair Bay at DEMU Car Shed, Budgam, Srinagar (J& K)”.

2. The learned Arbitrator has awarded a sum of ₹1,98,77,498/- plus post award simple interest at the rate of 9.5% per year in favour of the respondent against a claim of ₹2,89,81,575/-.

3. The respondent's claims have been summarised in the award as follows:

“7. *The Claimant has filed the following claims before the Arbitral Tribunal*

<i>Sr. No.</i>	<i>Claim No.</i>	<i>Description of the Claim</i>	<i>Amount Claimed (in Rs.)</i>
<i>1</i>	<i>A</i>	<i>Claim on the Enhanced Quantities supplied under the Contract together with the GST paid by the Claimant on the Items</i>	<i>1,89,97,307</i>
<i>2</i>	<i>B</i>	<i>Claimant claims an amount of Rs. 99,84,268/- towards damages and loss of profit</i>	<i>99,84,268/-</i>
<i>3</i>	<i>C</i>	<i>Claim of Post Award Interest</i>	<i>Not Quantified</i>
		<i>Total</i>	<i>2,89,81,575/- + Post Award Interest”</i>

4. The learned Arbitrator has awarded a sum of ₹ 1,82,48,195/- against claim A and a sum of ₹ 16,29,303/- against claim B.

5. The principal ground of challenge urged by Ms. Gurleen Kaur, learned counsel for the petitioner, is that the grant of the petitioner's claim for enhanced quantities supplied under the contract, is not in



accordance with Clause 4.8, which reads as follows:

“ The tenderers are advised to visit the site of work and investigate the actual conditions and quantum of works. The scope of work should also be examined before formulating the rates for complete items of work. The quantities given in the detailed scope of work are approximate. No extra charges shall be paid by Railways for any item under the scope whatsoever....”

6. Ms. Kaur submits that the contract was admittedly a “turnkey contract”, where the bill of quantities was contained in the tender document and no enhancement on account of additional material was permissible. She submits that the finding of the learned Arbitrator to the contrary has the effect of granting a claim which goes beyond the terms of the contract.

7. Having heard learned counsel for the parties, I do not find the aforesaid conclusions to be capable of interference in exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996. At the outset, it is well settled that Section 34 jurisdiction is to be exercised, with regard to interpretation of contractual terms and evidence, on very specific grounds, and in exceptional cases. On both these aspects, the Tribunal is the decision-making authority and its findings are liable to be disturbed only if they are found to be manifestly illegal, for example, if factual findings are based on no evidence, material evidence is excluded from consideration, or the evidentiary and interpretative conclusions are so unreasonable, that they can be characterised as perverse, irrational and arbitrary.

8. In the present case, the learned Arbitrator has noticed that, in the contract agreement, a schedule of items and rates was included. The schedule listed 10 items, including the quantities of each item for which



the unit rate and amount was specified. On this basis, the learned Arbitrator has come to the conclusion that the contract was, in fact, an item rate contract, rather than a lump sum contract, despite the reference to “turnkey basis” in the title of the document.

9. The learned Arbitrator has interpreted this to be an item rate contract, particularly keeping in view subsequent communications between the parties by which revised drawings were submitted by the respondent along with a revised bill of quantities. A communication dated 07.06.2018 from the respondent to the petitioner, referred to in the arbitral award, reads as follows:

“REF: AIMCO-JV-CHS-NR-08-2018 DATE: 07th JUNE 2018

To.

The Divisional Mechanical Engineer,

DEMU Car Shed.

Budgam, Srinagar (J&K)

SUB: Re-submission of G.A. Drawings & revised BOQ for Approval.

REF: IOA NO. 143-M/1/2/M&P/CHS/Detailed Estlmate/Pt-II DT 25.04.18 FOR CENTRALIZED HEATING SYSTEM FOR BUDGAM, SRINAGAR (J&K).

Dear Sir.

With reference to the above and joint meeting in Baroda House on 28.05.2018 and subsequent joint visit to Budgam, Srinagar, we now submit our revised GA drawings with revised BOQ for your approval.

The variation in quantities of the items occurred because of the following reasons:

1. Insulated Panels: The size of Shed is 202 meters in Length as compared to 190 meters (as mentioned in Tender). The Fall Ceilings are generally straight / plain from inside but due to your EOT Crane, we have to give slope in certain area in order to carry out maintenance of EOT Crane, resulting in increase of number of Panels. Accordingly, the quantities are increased as per the revised BOQ attached.

2. Glass Windows: The quantities for DG insulated Glass Windows are exorbitant high and we have calculated to maximum as per the requirement in Shed and accordingly it has been reduced as per the



revised BOQ attached.

3. **T Beam:** The quantities of T Beam mentioned in Tender is not sufficient as per the changes required in the Fall Ceilings and we have to make the structure in slope which can take the load of Panels in slant way. The Panels are quite heavy in weight. Accordingly, the quantities are increased as per the revised BOQ attached

4. **Flashing & Bottom:** The quantities of Flashing & Bottom Channels depends on the Panels and accordingly, it has been increased as per the revised BOQ attached.

5. **Motorised Shutters:** 4 Motorised Shutter of 5m x 5m were required as per the tender but during our joint visit to Budgam, it was decided jointly that 4 more Motorised Shutters of 5m x 5m in will be required in order to control the Heating in Shed. Accordingly, the quantities as per the revised BOQ attached.

6. **Heating Units:** The Heating Units designed initially at Pit Level was 10 Nos and for Ground Level - 20 Nos but it was discussed and agreed in joint meeting that since the temperature in Pit Level is less in Winters comparatively to Ground Level and majority of work is being done at Pit Level for under body repairs and the Ceiling is also in slant, so the effect of Heating at Pit Level will be less. Accordingly, it has been increased as per the revised BOQ attached.

7. **Control Panels:** The Control Panels are designed for 10 Heating Units per Panel. For 30 Heating Units - 3 Control Panels but since Heating Units are increased, 1 more Control Panels needs to be added and fixed.

This is to inform you that we have to order the required quantities with the respective OEM's at one time as the colour of sheets may differ as it is made in a lot and if some quantities are ordered separately, the colour of sheets differs. **Therefore, the revised BOQ may be approved at the earliest** keeping in mind the deadline for completion the project before November 2018. The erection / commissioning will take 3-4 months after the material is delivered at site.

The GA Drawings attached with revised BOQ is in line with the joint visit to Budgam and it is requested to kindly approve the same to enable us to proceed further.

It is also informed that the colour scheme for Walls from outside would be nearest to RAL 3016 (similar to Brick Red) and from inside, it would be nearest to RAL 7035 (similar to Gull Grey). For Fall Ceilings from inside, it would be same as Walls (RAL 7035). For Heating Units, it would be nearest to RAL 3000 (similar to Fire Red).

In any case, our final payment may be released on the basis of actual



quantities delivered and installed after the joint measurement before the release of PTC.

It is further requested that the delivery period mentioned in LOA i.e., 180 days from LOA date may be amended to 180 days from the date of approval of GA drawings and revised BOQ whichever is later as we cannot proceed for execution of the project unless we get approvals from your side.

Thanking you and we look forward for your confirmation at the earliest.

Yours faithfully,

For AIIMCO KCM ROYALINFRA (JV),

Sd/-

DEEPAK AGGARWAL

(AUTHORISED MEMBER)

MOB: 9810018900

CC: The CME/IT 4 EnHM/HQ, Northern Railway Headquarters, Baroda House, New Delhi.”

[Emphasis Supplied.]

10. Before the learned Arbitrator, the petitioner took an additional ground that the revised bills were not approved by the competent authorities of the Railways which had entered into the contract. The learned Arbitrator found that these drawings and revised bill of quantities were approved by the concerned officer of the Railways, that the work was executed in accordance with these drawings, and that additional payment on account of some of the items were, in fact, granted.

11. As far as these aspects are concerned, the findings of the learned Arbitrator are contained in paragraphs 8.1(c)(vii), (viii), (ix) of the award which reads as follows:¹

“(vii) A drawing no. A 101-2018 was prepared by the Claimant and submitted to the Respondent on 07.06.2018 for approval. This

¹ In the award, the petitioner is referred to as “Respondent” and the Respondent herein as “Claimant”.



drawing was approved by DME/Northern Railway Budgam. Division Mechanical Engineer (DME)/Budgam is the representative of the Respondent and the senior most officer of the Northern Railway at Budgam. DME/Budgam was supervising the execution of the Contract.

The drawing No. A 101-2018 was approved by DME/Budgam on 12.06.2018. **This drawing had the quantities of the items, which are required to be executed for the successful completion of the work.**

The Respondent in its Affidavit dated 11.05.2023 has submitted that the drawings were never approved/communicated by the authority who executed the original contract and further amended the contract on 22.07.2019. The Respondent contended that the contentions/averments of the Claimant that tentative approval of drawing by consignee [DME] is not sustainable as it was not approved by the competent authority. The competent authority in this contract was clearly mentioned in the tender document.

The Arbitral Tribunal has examined the above plea of the Respondent. **During the arbitral proceedings, the Respondent has not produced any drawing other than drawing No. A 101-2018.** Does it mean that the competent authority has not approved any drawing? If the drawing approved by DME was not final as DME/Budgam was not competent authority then why did DME/Budgam signed the drawing and issued to the Contractor? There was no answer to this question from the Respondent.

Further, in this case, CME (IT & EnHm)/Northern Railway of the Respondent's organisation was the authority who signed the Contract Agreement. Thus, the contention of the Respondent is that the said drawing was not approved by CME (IT & EnHM). But no drawing has been ever approved by CME (IT & EnHM) in this contract. Then, how was the work allowed to be executed without the approved drawing? If the work was executed without approved drawing then how were payments to the Contract passed and paid? There is no answers to these questions.

Further, if the Contractor is being allowed to execute the work without any approved drawing, then whether the field engineers, who supervised the execution of work, have been held responsible? Answer is no.

Thus, I find the argument of the Respondent, that the drawing has not been approved by CME (IT & EnHM) and the Claimant is



entitled for the payment of enhanced quantities of some items executed, hollow and hence unacceptable.

The Drawing No. A 101-2018 has been filed by the Claimant before the Arbitral Tribunal. This drawing has the signature of SSE/DEMU/Budgam, AME/DEMU/Budgam and DME/DEMU/Budgam. Since the Respondent has not issued any other drawing and the Respondent has allowed the Claimant to execute the work as per this drawing, hence **the plea of the Respondent that the approval to the said drawing was tentative, is not acceptable.**

(viii) **The Drawing has clearly stipulated the provision of total 40 Nos. of heating units.** The drawing stipulates that 20 Nos. heating units will be provided at the PIT LEVEL and 20 Nos. of heating units to be provided at the GROUND LEVEL.

Further, it is mentioned that total of four Control Panels will be provided. It is mentioned that One Control Panel to be provided for TEN AHU. The drawing shows the location of T-BEAMS. It is mentioned that 408 pieces of 3 M long T-Beam are to be provided to execute the contract work. Thus, as per the drawing the requirement of 1224 RMT of T-Beam is there.

(ix) **The Claimant, during the arbitral hearing, submitted that the contract work has been executed as per the drawing the same has not been denied by the Respondent. Execution of the work as per the drawing has resulted in the execution of the quantities more than envisaged originally in the contract agreement.”**

[Emphasis Supplied.]

12. The learned Arbitrator has also noticed that the Mechanical Department of the respondent moved a proposal to increase the quantities of heating units [from 30 to 40] and control panel [from 3 to 4], which failed due to lack of concurrence from the Financial Department of the respondent.

13. It may also be mentioned that a further question arose, during a site visit, as to whether the additional materials upon which the respondent based its claims were in fact supplied. This contention has also been negated by the learned Arbitrator after hearing the parties.



14. It is on this basis of these findings that the learned Arbitrator has awarded the additional amount on account of the revised bill of quantities approved by the Railway Authorities, with some deduction on account of certain tests which he considers were not performed.

15. As far as claim B is concerned, the learned Arbitrator has awarded compensation for non-payment of the additional amount at the rate of 5% per year. The final claim of ₹16,29,303/- has been computed on the basis that the petitioner could have been granted a period of one year to prepare and approve the final variation statement, final bill and make the payment as the additional payment was delayed for a further period of two years, compensation was awarded at this rate. Interest has been awarded on this amount from the date of the award at the rate of 9.5% per annum.

16. The learned Arbitrator's analysis of the contractual terms as providing for a item rate contract, rather than lump sum or turnkey contract is based upon the fact that the tender itself required parties to bid rates for each item, separately. This position is fortified, to a large extent, by undisputed factual evidence that a revised bill of quantities was in fact submitted by the respondent, and payment on account of some of reserved quantities was approved thereunder. In such a case, the conclusion of the learned Arbitrator cannot be said to irrational, arbitrary or perverse.

17. The findings in the award with regard to approval of the revised drawings are also based on evidence. The learned Arbitrator has noticed that, other than the revised drawings submitted under cover of the letter dated 07.06.2018, there were no other drawings upon which the work



could have been executed. He has undertaken a site visit in which the work is found to have been executed in accordance with the revised contract, and the materials installed.

18. The objections on claim A are, therefore, rejected.

19. Claims B and C are virtually consequential upon claim A, and no separate arguments have been addressed on those claims.

20. For these reasons, I find no ground for interference in the facts of the present case. The petition alongwith the pending application is, therefore, dismissed.

PRATEEK JALAN, J

FEBRUARY 22, 2024

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