
(2017) 05 DEL CK 0062

In the Delhi High Court

Case No : 283 of 2016

AHLUWALIA CONTRACTS (INDIA) LTD.

APPELLANT

Vs

THE UNION OF INDIA

RESPONDENT

Date of Decision : 08-05-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 34](#) - Application for setting aside arbitral award

Citation : (2017) 05 DEL CK 0062

Hon'ble Judges : Vibhu Bakhru

Bench : SINGLE BENCH

Advocate : S. K. Maniktala, Swetab Kumar, Vinod Kumar, Anil Panwar, Nimesh Thakur

Final Decision : Disposed off

Judgement

1. The petitioner (hereafter "ACIL") has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") to partially set aside the arbitral award dated 08.04.2016 (hereafter "the impugned award") made by the sole arbitrator. The impugned award was rendered in respect of the disputes that had arisen in connection with an Agreement dated 11.08.2011.

2. Briefly stated, the relevant facts necessary to address the controversy involved in the present petition are as under:- 2.1 ACIL was awarded the contract for "Package III, Electrical Services at AIIMS, Raipur" dated 11.08.2011 (hereafter "the Agreement") pursuant to a tender floated by the respondent, through the Ministry of Health and Family Welfare. The scope of works under the Agreement comprised of supply, installation, testing and commissioning of electrical equipments. The total contract value was Rs. 41,20,09,326/-. The completion period of the Agreement was 16 months commencing from 19.08.2011.

2.2 It is ACIL's case that the respondent failed to handover the entire site even till December 2015. In the meanwhile, the Agreement was extended eleven

times. According to ACIL, the delays in performance of the Agreement - which were all attributable to the respondent - have resulted in ACIL suffering losses and it is entitled to receive compensation for the same. The respondent disputes the same and holds ACIL responsible for the delays. The respondent further asserts that in terms of the General Conditions of Contract (hereafter "GCC"), no compensation is payable for any delay in handing over of the site.

2.3 In view of the disputes, ACIL invoked the arbitration clause by letter dated 26.05.2014, pursuant to which the sole arbitrator was appointed.

3. ACIL filed its statement of claims, raising the following claims:-

Claim No. Particulars Amount (Rs.)

1 Repeated Shifting of Equipment's at Site 7,29,491/-

2 Expense towards repeated re-charging of Batteries for UPS 3,63,731/-

3 Running Cost of the Site Office (for the prolonged/extended period and upto 30.06.2014) 10,75,068/-

4 Expense on account of pay and allowances of the Staff (for the prolonged/ extended period and upto 30.06.2014) 1,01,60,020/-

5 Expense incurred on telephone, staff welfare, conveyance, tour & travel, and vehicle to site staff (for the prolonged/ extended period and upto 30.06.2014) 10,49,407/-

6 Expenditure towards watch & ward of Equipment's (for the prolonged/ extended period and upto 30.06.2014) 2,62,828/-

7 Expense on labor welfare during extended period (for the prolonged/ extended period and upto 30.06.2014) 1,41,670/-

8 Bank Charges and Commission paid to the Bank issuing BGs (for the prolonged/ extended period and upto 30.06.2014) 6,63,839/-

9 Expense on account of renewal of Insurance Policies (WC Policy and EAR Policy etc.) (for the prolonged/extended period and upto 30.06.2014) 4,18,325/-

10 Expense on account of providing vehicle with driver and fuel for AIIMS Project Cell (for the prolonged/extended period and upto 30.06.2014) 6,63,289/-

11 Claim on account of increase in minimum wages due to subsequent statutory orders (upto 16th RA Bill) as per Clause 10C/GCC 20,88,995/-

12 Loss of profit suffered during the prolonged/ extended period (up to 30.06.2014) 4,88,20,960/-

13 Bonus as per Clause 2A/GCC at 30.06.2014 2,06,00,466/-

14 Tour and travel expense of the respondent's officials for carrying out Factory Acceptance Tests 1,35,480/-

15 Claim on account for increase in excise duty under clause 10C/GCC. 22,58,942/-

16 Claim for pre-suit, pendente-lite as well as future interest Simple Interest claimed at the rate of 18% per annum (to be assessed)

17 Cost of proceedings (to be assessed)

3.1 On considering the material available on record, the arbitrator accepted Claim nos.1, 2, 6, 8, 9, 10, 11, 15 and 16 but the other claims were rejected.

4. Claim nos.3, 4, 5 & 7 were all related to expenses alleged to have been incurred by ACIL during the extended period of the Agreement upto 30.06.2014. Claim no.3 pertains to the running cost of the site office; Claim no.4 pertains to expenses incurred on account of pay and allowances of the staff; Claim no.5 pertains to expenses incurred on telephone, staff welfare, conveyance, tour and travel and vehicle provided to site staff; and Claim no.7 pertains to expenses incurred on labour welfare during the extended period. 4.1 The arbitrator rejected Claim nos.3, 4, 5 and 7 on the ground that the Agreement did not provide for such expenses separately and these claims would be covered within the mark-up of 15% on cost of materials and labour provided to cover all overheads and profits.

4.2 Claim no.12 - for loss of profit suffered during the extended period of the Agreement - also stood rejected for being based on hypothetical assumptions. Claim no.13 for bonus as per clause 2A of GCC was also not accepted. Although the arbitrator found the respondent responsible for the delays, he nonetheless held that ACIL would have been entitled to bonus as per clause 2A of GCC only on completion of the work before the due date, which was admittedly not done.

4.3 Insofar as Claim no.14 - towards expenses incurred on tour and travel of the respondent's officials for carrying out factory acceptance tests - was concerned, on a joint reading of clauses 16(a) and 16(c) of the Special Conditions of Contract (hereafter "SCC"), it was held that expenditure incurred for tests and on visits of the officials of the respondent for such work, would be borne by the contractor; hence, the claim was not accepted. Similarly, Claim no.17 for costs was also dismissed.

5. Mr Maniktala, learned counsel appearing for ACIL had pointed out that the arbitrator's reference to mark-up of 15% on cost of materials and labour as being provided for overheads and profits can be traced to the definition of "market rate" under the GCC. He submitted that the question of referring to market rate would arise only in cases of deviation and additional items of work.

6. Mr Panwar, learned counsel appearing for the respondent did not dispute the above contentions. He, however, submitted that in terms of clause 40(h) of the SCC, no compensation was payable on account of any delay caused in commencement of the works on account of acquisition of land, etc. and, therefore, the claims made by ACIL, which were premised on the basis of delay

in handing over of site, were liable to be rejected.

7. The first controversy to be examined is whether the decision of the arbitrator to reject ACIL's Claim nos.3, 4, 5 and 7 is sustainable.

8. Insofar as ACIL's claim for the running cost of the site office (Claim no.3) is concerned, ACIL had claimed that it was required to deploy staff at the site beyond the contractual period because of the delays caused by failure on the part of the respondent to make available the site for execution of the works. Therefore, ACIL was entitled to recover the cost incurred for running the site office during the extended period of the Agreement. The arbitrator rejected the aforesaid claim on the ground that such expenditure was covered within the mark-up of 15% provided to cover overheads and profits on the cost of materials and labour. The relevant extract of the award reads as under:- "There is no provision in the contract which provides for such expenses separately. It is envisaged that such expenditure to run the site office is covered within contractor's 15% overhead and profits on cost of material and labour. In such circumstance, I am inclined to hold that such claim towards expenditure during the prolonged period cannot be accepted."

9. Claim nos.4, 5 and 7 were also rejected in a similar manner and for identical reasons.

10. Clause 12.2 of GCC provides that in case of extra item(s), the contractor may within 15 days of receipt of order for the extra item or occurrence of the same, claim rates supported by proper analysis. It is further provided that the Engineer-in-charge shall on receipt of such claims, determine the rates of additional items on the basis of "market rates". In clause 2(x) of Section 1, market rate is defined as under:- "2(x) Market rate shall be the rate as decided by Engineer-in-charge on the basis of the cost of materials and labour at the site where the work is to be executed plus the percentage mentioned in Schedule "F" to cover, all overheads and profits."

11. Schedule F of the SCC inter alia provides for overheads and profits to be computed at 15% on the cost of materials and labour. The relevant clause of the SCC reads as under: "2(x) Percentage on cost of materials and labour 15% To cover all overheads and profits"

12. In the aforesaid circumstances, it is difficult to accept as to how a mark-up of 15% on the cost of materials and labour used to determine the market rates of additional items or items of deviation would have any relevance to ACIL's claim for expenditure in running site office or expenses incurred on staff and labour during the extended period of the Agreement. Even assuming that the item rates for executing the works included an element of overheads and profits worked out on the basis of 15% on cost of materials and labour, the same would have no bearing on the additional expenditure and cost incurred by a contractor on account of presence on the site for the extended period. In the event, the contractor is required to be present on site for extended period, the overheads or

profits included in the value of the works would plainly be no compensation for the extra expenditure incurred on overheads during the extended period.

13. It is also relevant to observe that Mr Panwar also did not seek to sustain the rejection of ACIL's claims (Claim nos.3, 4, 5 & 7) for the reasons as stated by the arbitrator. It was not his contention that ACIL's claims in question could be rejected for the reason that an element of profit and overheads was included in the rate fixed; he contended that in terms of clause 40(h) of the SCC, compensation on account of delay was expressly prohibited. The relevant part of the said clause reads as under:- "Delay in starting the work No compensation shall be allowed for any delay caused in the starting of work on account of acquisition of land, encroachment or in case of clearance of works, on account of any delay in according sanction to estimates in issue of drawings, decisions etc. However, the extension of time shall be granted as per relevant conditions of contract."

14. Mr Maniktala had earnestly contended that the above clause was not applicable as it applied only in cases of delay caused in starting of the works and not delays that were occasioned after the works had commenced. This court is not inclined to examine the aforesaid contentions as ACIL's claims in question were not rejected on account of clause 40(h) of SCC and, it is not apposite to decide the same in these proceedings. As indicated above, the arbitrator had rejected ACIL's claims only on the ground that 15% mark-up on cost of materials and labour had been provided for overheads and profits and as stated earlier, the said reasoning has no relevance to ACIL's contentions.

15. In the circumstances, the impugned award to the extent that ACIL's Claim nos.3, 4, 5 & 7 are rejected cannot be sustained and is liable to be set aside.

16. The arbitrator had also rejected ACIL's Claim no.12 for loss of profits during the extended period. The arbitrator found such claim to be hypothetical and this court is unable to accept the contention that the aforesaid view is not a plausible one. It is well settled that the claim for loss of profits is in the nature of damages and it would be incumbent on any party claiming such damages to establish the same with reasonable certainty.

17. In *Bharat Coking Coal Ltd. v. L K Ahuja*: (2004) 5 SCC 109, the Supreme Court had observed as under:- "It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted."

18. It is obvious that in the facts of the present case, the arbitrator was not convinced of the opportunity costs and/or loss of profits claimed by ACIL. This court is mindful of the limited scope of judicial review in these proceedings. It is not open for the court to supplant its view over that of the arbitrator by re-

appreciating the evidence and material placed on record. Thus, no interference with the decision of the arbitrator to reject ACIL's claim for loss of profits during the extended period, is warranted.

19. The arbitrator has also rejected ACIL's Claim no.13 for bonus under clause 2A of GCC. In terms of clause 2A of GCC, ACIL would be entitled to bonus, if it completed the contract within the specified time. The said clause is in the nature of an incentive provided to contractors to complete the work in time. In the present case, the contract is not complete as yet. The arbitrator is also of the view that the claim was speculative as admittedly, the Agreement has not been performed. Clearly, it is difficult to guess whether ACIL would have performed the Agreement in time had there been no delays on the part of the respondent.

20. Mr Maniktala had pointed out that the works under the Agreement are yet incomplete and, therefore, it is not possible to ascertain as yet whether ACIL would have completed the works within the prescribed time. This court, therefore, does not find that the decision of the arbitrator in rejecting ACIL's claim for bonus, warrants any interference.

21. ACIL's Claim no.14 relates to expenses incurred on tour and travel of respondent's officials for carrying out factory acceptance tests. Mr Maniktala contended that although it is ACIL's responsibility to bear the costs incurred for conducting tests, he submitted that ACIL would not be responsible for incurring the expenditure for tour and travel of respondent's officials for carrying out the said tests. The arbitrator had considered the above and had interpreted clauses 16(a) and 16(c) of SCC to also include expenditure on the visits of the officials of the respondent in connection with factory acceptance tests. It is well settled that the question as to interpretation of the contract falls squarely within the jurisdiction of the arbitrator and this court does not find the aforesaid interpretation to be perverse or patently illegal so as to warrant any interference in these proceedings.

22. In view of the above, the impugned award to the extent that it rejects ACIL's Claim nos.3, 4, 5 and 7 is set aside. The petition is disposed of. The parties are left to bear their own costs.