

(2009) 11 DEL CK 0266
In the Delhi High Court
Case No : O.M.P. No. 258 of 2005

Backbone Tarmat-NG (JV)	Vs	APPELLANT
National Highways Authority of India and Another		RESPONDENT

Date of Decision : 13-11-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2009) 11 DEL CK 0266

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : S.K. Chandwani, for the Appellant; Chetan Sharma Tarun Dua and Abhishek Kumar, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan, J.—The present objection petition has been filed u/s 34 of the Arbitration and Conciliation Act, 1996 challenging the arbitral Award dated 18th March, 2005.

2. Mr. S.K. Chandwani, learned Counsel for the petitioner-contractor submitted that the arbitral tribunal had erroneously disallowed petitioner's claim for cost of reinforcement with regard to work executed against item Nos. 10.14 and 11.09 of the Bill of Quantities (hereinafter referred to as "BOQ"). He submitted that the said cost had not been specifically included in the said two items. The items 10.14 and 11.09 read as under:

Item No. Description

10.14 Providing M-20 Grade reinforced cement concrete Utility duct complete as per drawing and Technical Specifications Section 1700.

11.09 -do-

3. Mr. Chandwani submitted that description of the items 10.14 & 11.09 did not specifically include the cost of reinforcement, unlike other items such as 6A.21,

6B.18 and 6B.14 where it was specifically mentioned that the item was "inclusive of reinforcement" and/or Technical Specifications Clause 1600 as referred to. Items 6A.21, 6B.18 and 6B.14 of BOQ read as under:

Item No. Description of item

6A.21 Structural Concrete Grade M-25 in reinforced Cement Concrete in approach slabs including reinforcement complete as per drawing and Technical Specification Clause 1500, 1600, 1700 & 2700.

6B.18 Reinforced Cement Concrete M-25 in approach slab including reinforcement complete as per drawing and Technical Specification Clause 1500, 1600, 1700 2700.

6B.14 RCC railing/crash Barrier in concrete grade M-30 as per drawing and Technical Specification Clause 1500, 1600, 1700 2700.

4. Before I deal with the submissions of learned Counsel for the petitioner-contractor, I may refer to the finding and conclusion of the arbitral tribunal on the said aspect, which is reproduced herein below:

5.1 The basic issue is the interpretation of the description of items 10.14 and 11.09 in BOQ read along with the relevant Specifications, Drawings etc. whether cost of reinforcement is covered in the scope of these items.

5.2 Main argument of the Claimants is that reference to Technical Specifications Section 1600 pertaining to Steel Reinforcement and the words, "including reinforcement" is not made in the description of item. Since reference is made to only Technical Specifications 1700, which is for Structural Concrete, the scope of work covers only Structural Concrete and not the reinforcement. Unlike in other items where it has been made clear that the item is "including reinforcement", and/or Section 1600 of the Technical Specifications is referred to, no such mention is made in item Nos. 10.14 and 11.09.

As such absence of the phrase "including reinforcement" and/or "clause 1600" in the description of item makes it clear that the cost of reinforcement is not covered in the scope of these items.

5.3 On the other hand, main argument of the Respondents is that the item is for a composite work of "Utility Duct complete per drawing and Technical Specification Section 1700" for which drawing indicating the details of reinforcement was attached with the bid documents. Unlike in other Bills of BOQ where reinforcement is payable separately and it is measure and paid for under a separate item, no such item of reinforcement exists in Bills 10 & 11 ? meaning thereby that cost of reinforcement is included in items 10.14 and 11.09.

5.4 For proper interpretation of BOQ item Nos. 10.14 and 11.09 and the scope of work covered by these items, totality of the case needs to be considered i.e. description of the items, relevant Specifications, drawings and relevant contract provision, and not merely the literal meaning due to the absence of the phrase

"including reinforcement" and/or "clause 1600" in the description of the item. It would also be necessary to examine the intention/understanding of the parties while inviting tenders and at the time of submission of bids.

5.5 It is important to understand that these items are for "R.C.C. Utility Duct complete as per drawing and Technical Specifications Section 1700" and not merely for Structural Concrete in Utility Ducts. It has been observed from the rate analysis prepared by the D.P.R. Consultant that the intention was to cover the cost of reinforcement in the time of Utility Duct.

5.6 The drawing showing details of reinforcement was attached with the tender documents clearly with the intention that the bidder would be able to quote for item Nos. 10.14 and 11.09 after taking into account the cost of reinforcement as per drawing. If the understanding of the bidder was that the cost of reinforcement was not covered by the item Nos. 10.14 and 11.09, a clarification should have been sought during the pre-bid meeting as there was no item for reinforcement in the Bills 10 and 11 to regulate the payment of reinforcement separately. Since no such clarification was sought during the pre-bid meeting and the drawing attached with the tender documents provided details of reinforcement, obvious inference would be that the bidder understood the scope of the item covering the cost of reinforcement also.

5.7 During the hearings, the Claimants were asked to file copy of the analysis of rate of Rs. 2300/- per lin.-m for item Nos. 10.14/11.09 quoted by them at the time of tendering. They could not do so and stated that the file of rate analysis was not traceable at this stage. As such the statement of the Claimants that the cost of reinforcement has not been considered while quoting rates in the BOQ for these items cannot be accepted at its face value.

5.8 The intention/understanding of the Claimants while quoting rates for item Nos. 10.14 and 11.09 can best be judged on the basis of the rates quoted by them against these items. The argument of the Claimants that the quoted rate has no relevance to arrive at what is intended in the contract is not always true but by way of exception, and does not stand to reason in the present case. The cost of concrete as per Contractor's BOQ rate is only Rs. 1188/- per lin.-m which is only about 50% of the rate of Rs. 2300/- quoted by him. Item No. 10.14 is a major item Constituting more than 5% of the work. Contractor cannot afford to quote an unreasonably higher (nearly double) rate for such a major item. The obvious conclusion, therefore, would be that the Contractor had included the cost of reinforcement while quoting rates for these items.

On careful consideration of the arguments advanced by both the parties and in view of what is stated in the sub-para 5.1 to 5.8, particularly the following aspects:

? drawing attached with the bid documents indicates details of reinforcement in RCC Utility Ducts,

? no clarification was sought during pre-bid meeting, particularly, when there was no item to regulate payment of reinforcement separately in the Bills 10 and 11.

? the rate quoted for item No. 10.14/11.09 covers the cost of reinforcement when evaluated on the basis of relevant BOQ rates; the AT has come to the conclusion that the scope of work of item Nos. 10.14 and 11.09 of the BOQ covers the cost of reinforcement as well.

5. In my opinion, the description of items 10.14 and 11.09 is extremely wide and all encompassing inasmuch as it specifically stated that "Utility Duct complete" would be provided by the contractor. In my view, because of the "composite work" and all encompassing expression "Utility Duct complete", the question of the petitioner-contractor asking for an additional amount on account of reinforcement of steel does not arise.

6. In any event, it is well settled that construction of a contract is within the jurisdiction of the Arbitrator and interpretation of a contract inclusive of BOQ items is a matter for the Arbitrator to determine even if it amounts to determination of a question of law refer to McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, , Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission, and D.D. Sharma Vs. Union of India (UOI), . In fact, the interpretation of BOQ items in the present case by the Arbitrator cannot certainly be said to be one that is perverse or contrary to the terms of the contract.

7. Consequently, the present objection petition being devoid of merits is dismissed and the Award is made rule of the Court. Registry is directed to prepare a decree in terms thereof. With the aforesaid observations, present petition stands disposed of.