

(2017) 08 DEL CK 0021

In the Delhi High Court

Case No : 50 of 2007

M/s OFFICE EQUIPMENT

APPELLANT

Vs

M/s POWER GRID CORPORATION OF INDIA LTD.

RESPONDENT

Date of Decision : 08-08-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 37](#), [Section 34](#) - Appealable orders - Application for setting aside arbitral award

Citation : (2017) 08 DEL CK 0021

Hon'ble Judges : Valmiki J.Mehta

Bench : SINGLE BENCH

Advocate : Sandeep Sharma, Bhriagu Dhami, Ramesh Kumar, Siddharth Pandey

Judgement

1. By this first appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act"), the appellant/tenderer impugns the judgment of the court below dated 16.12.2006 by which the court below has allowed the objections filed by the respondent herein and set aside the Award dated 28.1.2005 of the sole Arbitrator which had directed refund of Rs.11,10,000/- being the bid guarantee amount and which was with the respondent/objector on account of encashment of the bank guarantee given as bid guarantee.

2. The facts of the case are that the respondent had invited tenders for the purpose of interior and other allied works at its office complex. Tenderers were required to furnish a bid guarantee of Rs.11,10,000/- and which was to remain valid for a period of 30 days beyond the validity period of the bid. Appellant submitted its bid on 19.9.2001 along with the earnest money deposit in the form of bank guarantee for a sum of Rs.11,10,000/-. Bids were opened on the same date i.e 19.9.2001 and the appellant was found to be the successful bidder. Thereafter, negotiations took place between the parties, inasmuch as, as per the bid documents period of completion of the contract was 15 months but the respondent wanted to reduce this period to 12 months. Parties therefore entered

into a written Memorandum of Meeting dated 5.12.2001 reducing the completion period as per the bid documents of 15 months to 12 months. Appellant however on 13.12.2001 sent its letter again seeking 15 months time instead of 12 months. Appellant also put two other conditions of rates being firm only for a stipulated period of 15 months and that the electrical work would not be carried out by the agency of the respondent but by the agency of the appellant. This letter dated 13.12.2001 of the appellant reads as under:- "Chief Manager (Case taken up today-NR1)

M/s Power Grid Corporation of India Ltd.

B 9, Qutub Institutional Area,

Katwaria Sarai,

New Delhi 110016

Sub: Interior and other Allied works for proposed office Complex at Sector 29, Gurgaon,

Specification No:- Package-H (Part A) C-12204-C-902-3

Dear Sir,

Thanks for the discussion & negotiation held with you in the meeting on 05.12.2001 regarding the bid lastly in respect of the captured work, we wish to clarify certain points:

1. The period of completion 15 months is most suitable for the quantum of work assessed by us & also in line contemplated in the tender.
2. Rates will be firm only upto stipulated period of 15 months except statutory increase. The retention Money will be refunded on stipulated completion.
3. The electrician work will be executed by our agency as discussed for the better coordination as desired the particulars of the said agency are enclosed. If further clarification is required we can also submit the same immediately.

In these circumstances, we request you to arrange another meeting for further discussion & negotiation at early as possible.

Thanking you

Yours faithfully,

For Office Equipment

Sd/-

Managing Partner."

3. (i) The respondent issued its Letter of Award on 19.12.2001 accepting the appellant's bidding rate in conjunction with the agreement in terms of the

Minutes of Meeting dated 5.12.2001 of reducing the contract performance period from 15 months to 12 months. (ii) Appellant then wrote its letter dated 1.1.2002 stating that the Letter of the Award did not result in formation of a binding contract and the appellant placed reliance upon its modified offer dated 13.12.2001 that there cannot be a valid contract unless the contract is in accordance with the terms as stated by the appellant vide its letter dated 13.12.2001. This letter dated 1.1.2002 of the appellant to the respondent reads as under:-

"Chairman & Managing Director

M/s Power Grid Corporation of India Ltd.

B-9, Qutub Institutional Area

Katwaria Sarai

New Delhi-11006

Sub: Interior and other Allied works for proposed Office Complex at Sector 29, Gurgaon.

Specification No. Package-II (Part A) C 12204-C-902-3.

Dear Sir,

We are in receipt of the alleged Letter of Award dated 19.12.2001 received on 21.12.2001 and noted the contents. It is stated that in the alleged acceptance you have not considered the amended/modified offer dated 13/12/2001. Therefore, the alleged acceptance is not in conformity of the revised offer dated 13.12.2001 and therefore, no valid contract resulted. Then, therefore, alleged acceptance is counter offer and the said counter offer dated 19.12.2001 is neither binding nor acceptable.

It is therefore requested to accept the amended offer dated 13.12.2001 forthwith to make the agreement valid at the earliest possible.

Thanking you

Yours faithfully,

For Office Equipment

Sd/-

Managing Partner."

4. The respondent considered the letters of the appellant dated 13.12.2001 and 1.1.2002 and agreed to the scheduled completion to be increased to 15 months instead of 12 months as agreed in terms of the Minutes of Meeting dated 5.12.2001, however, the respondent stated that all other terms however would remain as per the bid documents. This letter of the respondent dated 4.1.2002

reads as under:- "M/s office Equipment

F-28 Hauz Khas Enclave

New Delhi-110016

Kind Atten: Mr. SPS Oberoi, Managing Partner

Sub: Interior and other Allied works for proposed Office Complex Sector- 29, Gurgaon

Dear Sir,

This has reference to your letter dated 13/12/2001 and 01/01/2002 in regard to the letter of award no. C-12204-C902-3/LOA 571 dated 19/12/2001 issued to you for the subject package.

We have examined your request and agree for a completion schedule of 15 months as provided in the bidding documents instead of 12 months period agreed by you earlier. All other terms and conditions as referred to in our above said Letter of Award shall remain unaltered.

Accordingly the completion schedule as indicated in the above said Letter of Award may be treated as 15 months instead of 12 months and the work against the subject LOA be carried out strictly in line with the provisions of the Bidding document.

You are requested to acknowledge the receipt of Letter of Award issued to you on 19.1.2.2001 by signing on each page of the duplicate copy of the LOA and commence the work without further delay on your part.

Thanking You

Yours Faithfully

Chief Manager (C.S.-NR-1)"

5. Respondent forfeited the bid earnest money bank guarantee vide its letter dated 8.1.2002 as the appellant did not enter into the written contract and did not furnish the performance guarantee, and which acts had to be done within 15 days of the Letter of Award dated 19.12.2001. Arbitration proceedings were invoked by the present appellant to seek refund of this bid earnest money bank guarantee amount of Rs.11,10,000/-. Arbitrator by his Award dated 28.1.2005 allowed the claim petition of the present appellant and directed refund of the amount of Rs.11,10,000/- with interest and the respondent herein therefore filed objections under Section 34 of the Act against the Award of the Arbitrator and which have been allowed by the impugned judgment.

6. I may note that there were certain judicial proceedings between the parties being CWP No. 7919/2001 filed in this Court by the appellant for return of the bid earnest money bank guarantee, and which was dismissed, and so was the Letter

Patent Appeal filed by the appellant before the Division Bench of this Court, but these proceedings have no bearing on the issues to be decided in the present appeal.

7. The following issues arise for determination in the present appeal:- (i) Whether the respondent was justified in invoking the earnest money bank guarantee vide its letter dated 8.1.2002 on the ground that the appellant had failed in terms of Clause 16.7 of the bid documents in failing to sign the contract and furnish a performance guarantee which had to be submitted within 15 days of the letter of award being issued by the respondent?

(ii) Whether the contract between the parties was concluded when the respondent issued its Letter of Award dated 19.12.2001 or whether the contract was concluded on 4.1.2002 as held by the Arbitrator in view of the respondent writing its letter dated 4.1.2002 accepting only part modification of the Letter of the Award/contract dated 19.12.2001 by increasing the contract performance period to 15 months instead of the period of 12 months as agreed to in the Memorandum of Meeting dated 5.12.2001?

OR

(iii) Whether respondent when it encashed bid earnest money bank guarantee by its letter dated 8.1.2002 did the same illegally because the appellant had a period of 15 days from 4.1.2002 to sign the contract and give the performance bank guarantee and that the period of 15 days did not commence from the Letter of Award dated 19.12.2001?

(iv) Whether the court below is justified in arriving at a finding that even if the contract was not entered into in terms of the Letter of the Award dated 19.12.2001 as also the letter of the respondent dated 4.1.2002, yet, the respondent was justified in invoking and encashing the bid earnest money bank guarantee in view of the Clause 17.1 of the contract and bid documents which required that the bid will remain valid and not be modified for a period of six months after opening of the same and which in this case was 19.9.2001 and that letter of the appellant dated 13.12.2001 amounted to modification of the bid/contract?

8. In sum and substance the aforesaid issues can be broken down in two parts. The first part is the entitlement of the respondent to encash the earnest money bank guarantee on account of the appellant failing to enter into the contract in spite of the Letter of the Award dated 19.12.2001 and also not submitting the performance bank guarantee required for performance under the contract. The second part is that even if contract is not entered into by the appellant earnest money bid bank guarantee had to be forfeited because appellant had illegally modified its bid after 19.9.2001 i.e the date of submission of the bid although the bid documents could not be modified after submission of the same. In order to appreciate the issues, reference will be required to Clauses 11, 16.7, 17.1, 23, 33 and 37 of the bid documents contract between the parties and these clauses

read as under:- " 11. Contract Performance Guarantee:

11.1 You shall furnish an unconditional and irrevocational bank guarantee from a Public Sector Indian Bank or from a reputed Commercial Bank acceptable to POWERGRID (all banks except Public Sector Indian Banks shall have rating not less than A() (A minus) from reputed credit agency) in favour of POWERGRID towards satisfactory performance of contract within 15 days from the date of issue of this LOA as per Clause 33.0 Section-INB, Vol. I of the Tender Document. The guarantee amount shall be Rs. 29,83,495 and it shall guarantee the faithful performance of the entire contract in accordance with the terms and conditions specified in the documents. The guarantee shall be initially valid upto 31.12.2003 (i.e Twelve months after issuance of taking over certificate). This guarantee shall be released to you without any interest at the end of Defect Liability Period.

You shall keep the Bank Guarantee submitted as Earnest Money Deposit valid till the contract Performance Guarantee to be submitted by you is accepted by us.

16.7 The Bid Guarantee may be forfeited:

- a) If a Bidder withdraws its Bid during the period of Bid validity.
- b) In the case of a successful bidder, if the Bidder fails :
 - i) to sign the contract; or
 - ii) to furnish the contract performance guarantee.

17.0 Period of Validity of Bids

17.1 Bid shall valid for six months (excluding the date of bid opening) after the date of Bid opening prescribed by the Employer. A Bid valid for a shorter period will be rejected by the Employer as non-responsive."

23 Modification and Withdrawal of Bids :

23.1 The Bidder may modify or withdraw its bid after the Bids's submissions provided that written notice of the modification or withdrawal is received by the Employer prior to the deadline prescribed for submission of Bids.

23.2 The Bidder's modification or withdrawal notice shall be prepared, sealed, marked and dispatched in accordance with the provisions of Clause 21.0.

23.3 No Bid may be modified subsequent to the deadline for submission of Bids.

23.4 No Bid may be withdrawn in the interval between the deadline for submission of Bids and the expiration of the period of Bid validity specified by the Bidder on the bid proposal. Withdrawal/modification of a Bid during this interval may result in the Bidder's forfeiture of its Bid Guarantee.

33. Contract Performance Guarantee

33.1 As a contract performance security, the successful bidder shall be required

to furnish a performance guarantee in the form of bank guarantee from a public sector Indian Bank or from a reputed commercial bank acceptable to POWERGRID (All banks except Public Sector Indian bank shall have rating not less than A(-) (A minus) from reputed credit agency) in the form attached as Annexure H in favour of the employer. The Contract Performance Guarantee amount shall be equal to Rs.5,00,000/- plus 5% of the balance contract price exceeding Rs.50,00,000/- (Rupees Fifty Lakhs) and it shall guarantee the faithful performance of the contract in accordance with the terms and conditions specified in these documents and specifications. The guarantee shall be valid upto 12 months after the taking over of interior decoration works.

33.2 The contract performance guarantee is intended to secure the performance of the entire contract.

33.3 The contract performance guarantee will be returned to the contractor without any interest at the end of defect liability period.

37.0 (GCC) Contract Performance Guarantee- The contractor shall furnish the contract performance guarantee (s) for the proper fulfillment of the contract in the prescribed form within fifteen (15) days of "Notice of Award of Contract". The contract performance guarantee(s) shall be as per terms prescribed in Section INB Conditions of Contract."

9. A reading of the aforesaid clauses of the contract makes it clear that once the contract is entered into then within 15 days of the same the contractor/appellant has to sign the contract documents as also give a performance bank guarantee. If the contractor fails to sign the contract and/or fails to give the performance bank guarantee then the earnest money bank guarantee can be forfeited by the respondent. This is provided in Clauses 11, 16.7 and 37 of the contract/bid documents. Also, in case, appellant/bidder withdraws his bid during the validity period of the bid or modifies the same amounting to withdrawal of the original bid, then the bid earnest money bank guarantee can be forfeited vide Clause 23.4.

10. In my opinion, the court below is completely justified in setting aside the Award because the Award is against the law of the land and the findings arrived at by the Arbitrator are completely perverse and illegal. The law in this country is well settled that on an absolute acceptance of an unconditional offer a contract results. Once a contract results, the same can only be modified as regards any of its terms by an agreed amendment. Therefore, there cannot be a unilateral amendment of the agreed terms of the contract. The court below has rightly arrived at a conclusion that by issuing of the Letter of Award on 19.12.2001 the contract was complete inasmuch as the bid documents and the tenders which were invited were the invitation to offer and the bid which was submitted by the appellant was an unconditional offer. The unconditional offer was mutually modified and hence the bid was modified by an agreement in terms of the Minutes of Meeting dated 5.12.2001 by changing the contract performance

period from 15 months to 12 months. Therefore, as on 5.12.2001 there was an unconditional offer by the appellant to the respondent for the work in question with the completion period being 12 months. Once a Letter of the Award was issued on 19.12.2001, there was hence absolute acceptance by the appellant and on acceptance a contract comes into existence. Clearly, therefore the Arbitrator erred in holding that the contract was not complete by the Letter of Award dated 19.12.2001 issued by the respondent.

11. The court below has also rightly held that the letter dated 1.1.2002 issued by the appellant and its partial acceptance by the respondent vide the respondent's letter dated 4.1.2002 will not result in a binding contract inasmuch as the respondent vide its letter dated 4.1.2002 only partially accepted the modification proposed by the appellant of increasing the contract performance period to 15 months however conditions 2 and 3 of the letter of the appellant dated 13.12.2001 were not agreed to by the respondent in terms of the respondent's letter dated 4.1.2002. As already stated above, the law of the land is that a contract once becomes final the same can only be modified by an agreed amendment i.e agreement with respect to all the amended aspects and once there is no agreed amendment because the respondent accepted only one out of the three aspects mentioned in the letter of the appellant dated 13.12.2001, there was hence no fresh contract entered into after the Letter of Award dated 19.12.2001 which was issued by the respondent.

12. It is therefore seen that appellant had a period of 15 days from 19.12.2001 to sign the contract and submit a performance bank guarantee, and which appellant failed to do and therefore, the court below was justified in holding that in view of the breach of the bid terms and contract between the parties the respondent was justified in encashing the bid earnest money of bank guarantee and the Award of the Arbitrator holding to the contrary had to be set aside.

13. The court below has also rightly examined the issue of invocation and encashment of the bid earnest money bank guarantee by observing that if at all contract cannot be said to have come into existence inspite of the Letter of Award dated 19.12.2001 issued by the respondent to the appellant, then, the letter of the appellant dated 13.12.2001 in effect amounted to withdrawal by the appellant of its bid by modifying the terms of the bid and which was not permissible in terms of Clause 23.4 of the contract and which does not permit a bidder such as the appellant to withdraw its bid during the period of the bid validity. As already stated above, by modifying the bid terms by the appellant in view of its letter dated 13.12.2001, Clause 16.7 immediately came into play, and the action of the respondent in encashing the bid earnest money bank guarantee is therefore lawful and in accordance with the contract.

14. Learned counsel for the appellant argued that the court below was not justified in interfering with the finding of fact arrived at by the Arbitrator that the contract was only completed on the letter dated 4.1.2002 issued by the respondent, however, the argument of the appellant is completely misconceived

because it is settled law that Arbitrator cannot go against the established law of this country. The finding of fact arrived at by the Arbitrator of the contract being completed on 4.1.2002 is completely against the settled law of this country and the various provisions of the Contract Act which provide that once there is absolute acceptance of an unqualified offer, a contract comes into being, and therefore, the contract between the parties came into being in terms of the Letter of the Award of the respondent dated 19.12.2001 and not on 4.1.2002. The finding and conclusions of the Arbitrator therefore of the contract being entered into on 4.1.2002 being completely illegal and perverse and the ratios of the judgments of the Supreme Court under Section 34 of the Act providing for setting aside of the Award on account of the existence of complete illegality and perversity in the Award, the court below was justified in setting aside the Award of the Arbitrator dated 28.1.2005.

15. I may note that the court below has in its impugned judgment dated 16.12.2006 referred to various judgments of the Supreme Court in support of its conclusions arrived at and which have not been reproduced by this Court and to avoid prolixity. The various judgments referred to by the court below includes the most important judgment of the Supreme Court in the case of National Highways Authority of India vs. Ganga Enterprises and Another (2003) 7 SCC 410 and which entitles the owner of the contract to encash the bank guarantee given if offer/bid is withdrawn before acceptance of the same. The ratio of the judgment of the Supreme Court in the case of Ganga Enterprises (supra) has been recently approved by the Supreme Court in the case of National Thermal Power Corporation Limited vs. Ashok Kumar Singh and Others (2015) 4 SCC 252.

16. There is no merit in the appeal. Dismissed.