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

% *Date of Judgment: 2nd June, 2021*

+ **O.M.P.(I) (COMM.) 151/2021**

ANAND AND CO

..... Petitioner

Through Mr Ratan Kumar Singh, Senior
Advocate with Mr Kunwar
Chandresh, Mr Rajeev
Gurung and Ms Poonam Prasad,
Advocates.

versus

UNION OF INDIA

..... Respondent

Through Mr Vikram Jetly, CGSC with Mr
Akshat
Singh, GP and Mr P.P.Singh, EE
CPWD

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

02.06.2021

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[Hearing held through videoconferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'), *inter alia*, praying that the operation of the letter dated 22.04.2021,

whereby the respondent has rejected the petitioner's tender and blacklisted it for a period of one year from participating in any CPWD tenders, be stayed.

2. The disputes between the parties stem from the tender floated by the respondent for "*Comprehensive Maintenance Work at CGO Complex Lodhi Road, New Delhi 2020-23 (SH: Civil and Electric work)*". On 03.12.2020, the respondent (hereafter the 'CPWD') issued a Notice Inviting Tenders (NIT) for providing comprehensive maintenance of the CGO Complex, which houses offices of various organisations of the Central Government. The petitioner's bid was the lowest and by a Letter of Acceptance dated 30.12.2020 (hereafter the 'LoA'), CPWD accepted the petitioner's tender at a value of ₹18,31,33,102/-.

3. In terms of the NIT, the successful bidder was required to submit a Performance Guarantee within a period of seven days from the date of the LoA. The petitioner was also required to submit documents from the Associated Specialized Agencies/OEM/Authorized Service Provider of Specialised E&M Services along with the bid. The NIT also expressly provided that if the same were not furnished prior to or at the time of submission of the tender, the same could be submitted along with the Performance Guarantee after the tender was accepted. However, an undertaking to the aforesaid effect was required to be submitted along with the tender. An agreement/ understanding with the Specialised Agencies that they would continue to extend support and provide spares, was essential as the same was necessary for maintenance of equipment

sourced from them.

4. The relevant clause of the NIT requiring the petitioner to submit an undertaking is set out below:-

“An undertaking that if “I/We shall become the lowest tenderer then I/We shall submit the documents of Associated specialized Agencies/OEM/Authorised service provider of the specialized E&M services as per the eligibility criteria mentioned in the “special conditions of NIT for association of specialized agencies” after acceptance of tender alongwith Performance Guarantee otherwise department may reject my/our tender & may forfeit the deposited EMD absolutely & debar me/us from re-tendering for this work”

5. There is no dispute that the petitioner had submitted an undertaking in terms of the aforesaid clause of the NIT.

6. The controversy in the present case relates to the submission of the MoUs/Letters of Consent by the two OEMs – M/s Cummins Sales and Services Pvt. Ltd (hereafter referred to as ‘Cummins’) and M/s OTIS Elevator Company (India) Ltd. (hereafter referred to as “OTIS”)

7. In terms of the NIT, the Performance Guarantee was required to be furnished within a period of seven days of the LoA and therefore, the petitioner was also required to submit the MoUs/Letters of Consent from the OEMs – including OTIS in respect of elevators, and Cummins in respect of DG Sets – within a period of seven days from the LoA.

8. Undisputedly, the petitioner submitted the Performance Guarantee within the said period of seven days from the date of LoA. The allegation against the petitioner is that it did not submit the MoUs in respect of certain Specialised Agencies, in particular Cummins and OTIS within the stipulated time.

9. It is the petitioner's case that the MOUs with OTIS and Cummins could not be submitted within the specified period as the said OEMs claimed that a large sum was payable and outstanding against the maintenance work performed by them for a period, which accrued prior to the tender. Thus they were reluctant to enter into an MoU to provide maintenance services in respect of facilities for which payments due to them had not been cleared by CPWD.

10. The said issue was escalated with the concerned Executive Engineer, CPWD (hereafter the Executive Engineer) and he sent letters dated 28.01.2021 to the two OEMs, Cummins and OTIS, informing them that the award of work was held up on account of their failure to respond to the request made by the petitioner and requested them to provide a quotation and consent letter to the petitioner so that their existing agreements could be foreclosed and a new composite tender could be awarded in favour of the petitioner. The identically worded passage from the aforementioned letters dated 28.01.2021 is set out below:

“.....In this regard, M/s Anand & Co. has intimated to this office that your agency is not responding the request made for offer/quotation and consent letter through above referred email. Due to not responding by your office this office is unable to award the work

to M/s Anand & Co. Moreover, this office is facing difficulty to operate & maintain other Electric & Civil services due to not awarding the tender.

Keeping in view of above, it is requested to provide offer/quotation and consent letter to M/s Anand & Co. so that your existing agreement may be foreclosed under Clause-13 and new composite tender in favour of M/s Anand & Co may be awarded as soon as possible for smooth functioning of various Electrical & Civil installation at such a VVIP CGO Complex where various Hon'ble Ministers and Senior Government Dignitaries offices are situated.

11. Thereafter, Cummins sent a letter dated 15.02.2021 to the petitioner confirming that it would supply spare parts for the three DG Sets installed at the CGO Complex. This was furnished to CPWD. However, the impasse with OTIS remained unresolved.

12. On 31.03.2021, the Executive Engineer sent a letter to OTIS. The contents of the said letter are relevant and are reproduced below:

“With reference to above work, it is agreed that expected balance payment shall be made as per already conveyed schedule vide above letter No. 413 dated 12-02-2021. However it may differ some little as per budget allotment. During March, 2021 payment for Rs.24,95,891/- has been made. Balance payment of March, 2021 shall be made during April, 2021 and remaining payment shall be made as per expected schedule vide above letter No. 413 dated 12-02-2021.

Keeping in view as above, now it is requested to give your consent letter and draw MOU with M/s Anand & Co. at earliest positively by 10-04-2021.”

13. The said letter indicates that CPWD had made a payment of ₹24,95,891/- to OTIS during the month of March, 2021 and had assured OTIS that the remaining payment will be made as per the accepted schedule. Keeping in view of the aforesaid assurances, the concerned Executive Engineer once again requested OTIS to give its consent and draw an MoU with the petitioner at the earliest, and positively by 10.04.2021.

14. In view of the assurance set out by Executive Engineer to OTIS, OTIS also entered into an MOU with the petitioner and the same was furnished to CPWD on 10.04.2021, which was within the time period as provided by the Executive Engineer.

15. There is no dispute that the petitioner had complied with all the conditions as required, that is, by providing the necessary MOUs with the OEMs. The controversy revolves around the question of delay in doing so.

16. At this stage, it is relevant to refer to the reasons as stated in the impugned letter dated 22.04.2021 for terminating the contract/tender. The said reasons are set out below:

“(1) As the contractor has failed to submit the documents of associated specialized agency/OEM, which is a part of eligibility criteria in tender; they have not fulfilled the basic requirement per NIT.

(2) Giving additional time to the contractor will not be fair to others, who could not participate in tender due to non-fulfillment of their conditions.

(3) There is no provision in NIT as well as in manual for relaxing the conditions in contract after opening of tender in favor of particular tenderer.”

17. *Prima facie*, none of the grounds as set out in the said letter are sustainable. While it is correct that the petitioner had not submitted the documents of the associated Specialised Agencies, which were required to be submitted within the period of seven days of the LoA, but it appears that the reasons for the same are mainly attributable to the CPWD since it had not cleared the earlier outstanding payments of the concerned agencies and/or had apprised them of the fate of the extant contracts. The letters issued by the Executive Engineer clearly indicate that the problems faced by the petitioner were understood and, further time was provided to the petitioner to furnish the MOUs. The petitioner was given time to take the necessary steps to enter into the MOUs with the concerned agencies so that the work could be handed over to it. The petitioner was provided time till 10.04.2021 to enter into the last remaining MOU with OTIS as is evident from the letter dated 31.03.2021 sent to OTIS.

18. Mr Jetly has opposed the present petition on, essentially, three grounds. First, he submitted that there was no conclusive contract between the parties and therefore, there existed no agreement to refer the disputes to arbitration. He contended that in this view, the present petition was not maintainable. Second, he submitted that the petitioner

had concealed the letter dated 28.01.2021 addressed by the Executive Engineer to the petitioner pointing out certain deficiencies. He stated that apart from the MoUs with Cummins and OTIS, the petitioner had not submitted the Letter of Consents/MOUs in regard to the Addressable Fire Alarm System and with regard to the EPABX System of Coral make. Third, he contended that the Executive Engineer was not authorized to grant any time to the petitioner to comply with the conditions of the NIT as in terms of the NIT, the Accepting Authority is the Additional Director General, CPWD. He submitted that the competent authority was the Accepting Authority and he had found that the petitioner had not complied with the terms and conditions of the NIT and therefore, had taken the decision to terminate the petitioner's tender and to blacklist the it.

19. The contention that there is no agreement between the parties to refer the disputes to arbitration is unpersuasive. The NIT specified that the term of the contract be for a period of 36 months and work would commence from the 10th day of the Letter of Acceptance (LoA). The LoA also expressly states the same. Clause 19 of the NIT provided that the successful bidder/contractor would sign the contract within fifteen days from the stipulated date of the start of the work. Clearly, once the LoA communicating the acceptance of the petitioner's tender was communicated to the petitioner, the contract between the petitioner and the CPWD came into existence. The petitioner was obliged to sign the specified contract documents and it was not open for the petitioner to avoid the said obligation. It is important to note that the petitioner was required to sign the contract

documents within a period of fifteen days after the maintenance work had been handed over to the petitioner and the term of the contract in question had commenced. The agreement to arbitrate is a part of the terms and conditions of the contract accepted by the parties.

20. Mr Jetly's contention that the petitioner had not furnished two other MOUs/Letters of Consent apart from those from OTIS and Cummins, is seriously disputed by the petitioner. Mr Singh had contends that in terms of the NIT, the petitioner was required to furnish MOUs/Letters of Consent from either the OEMs or their authorized representative. He submitted that the petitioner had submitted the letter from the authorized representative in respect of the EPABX system. The condition relating to the fire alarm system was also duly complied with and the necessary clarifications in this regard had been accepted. He submitted that there was no default on the part of the petitioner in that regard.

21. The impugned letter does not disclose any specific MOU/Letter which was not furnished by the petitioner. It does not specify the condition that has not been met by the petitioner. The communications placed on record *prima facie* indicates that the controversy was finally reduced to the MOUs/Letter of consent from OTIS. As noticed above, the said issue was also addressed within the time provided by CPWD.

22. The communications on record clearly indicate that the Executive Engineer had, on more than one occasions, called upon the petitioner to furnish the MOUs/letters from various OEMs. The letter dated 28.01.2021 addressed by the Executive Engineer to the petitioner also request the petitioner to furnish the MOUs/Letters as

mentioned therein. Thus, even at that stage, CPWD was not contemplating terminating the contract on the ground that the petitioner had not met the conditions of the NIT.

23. Plainly, if the CPWD was of the view that the failure of the petitioner to furnish certain MOUs/Letters as required in terms of the NIT was incurable and fatal to the contract, there was no occasion for CPWD to pursue with the petitioner to furnish the same. *Prima facie*, it would not be open for CPWD to now completely change its stand and insist on taking a punitive action against the petitioner for not furnishing the MOUs/Letters of Consent.

24. As noticed above, by the letter dated 31.03.2021, the Executive Engineer had given time till 10.04.2021 for the petitioner to furnish the necessary MOU from OTIS. It had also cleared certain dues of OTIS, which was proving to be the stumbling block for the petitioner to enter into the MOU with OTIS. The Executive Engineer had also assured OTIS that the balance payments would be made. After the petitioner has complied with the demands of the Executive Engineer and has furnished the MOUs/Letters, *prima facie*, it would not be open for CPWD now to completely change its stand.

25. Mr Jetly's contention that the Executive Engineer was unauthorized to issue letters as he was not the competent authority and therefore his letters are of no relevance, is also unpersuasive. It is also noteworthy that the communications sent by the Executive Engineer to the petitioner as well as the OEMs were also marked to the Additional Director (General), CPWD and he is admittedly the Accepting Authority under the NIT. Thus, the Accepting Authority was fully

aware of the communications and of the further time being provided to the petitioner to enter into the MOUs with the concerned agencies.

26. The Executive Engineer was the authority that had issued the NIT. It is also seen that all communications were also issued by him including the impugned letter dated 22.04.2021. No disciplinary action has been taken against the Executive Engineer, CPWD as yet for writing letters in excess of his authority. Or against the ADG CPWD for ignoring thus being a party to lead the petitioner act on them. None of the relevant letters indicated that they were subject to further decision by any other authority.

27. Curiously, the contract is sought to be terminated after the petitioner had fully complied with all of the conditions within the time as provided by CPWD.

28. This Court is now informed that the order of blacklisting the petitioner has also been placed on the website of CPWD. Admittedly, no Show Cause Notice has been issued to the petitioner prior to blacklisting the petitioner and he was not afforded any opportunity of being heard, which is necessary (*Eurasian Equipment and Chemicals Ltd. v. State of W.B.: (1975) 1 SCC 70* and *Gorkha Security Services v. Govt. (NCT of Delhi): (2014) 9 SCC 105*)

29. Mr Jetley submits that the blacklisting of the petitioner would automatically follows on its failure to comply with the conditions of the tender. *Prima facie*, this contention is unmerited. The factors that must be weighed for blacklisting a contractor are materially different those to recognise non-performance of any obligation. The Supreme Court in the case of *Kulja Industries v. Chief General Manager*,

Western Telecom Project Bharat Sanchar Nigam Ltd.: (2014) 14 SCC 731 has listed certain factors (on a non-exhaustive basis) that are required to be considered before blacklisting a contractor. *Prima facie*, none of the same have been considered.

30. In view of the above, the present petition is allowed and the impugned order is stayed for a period of six months from today. The CPWD (respondent) is also directed to forthwith remove the order from its website blacklisting the petitioner.

31. It is clarified that the observations made in this order are solely for the purposes of considering grant of interim measures of protection under the A&C Act. The Arbitral Tribunal, as and when constituted, shall decide the disputes uninfluenced by any observation made in this order.

32. All rights and contentions of the parties are reserved.

33. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

JUNE 02, 2021

pkv/nn