



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

% Reserved on : 10.08.2023
Pronounced on: 18.12.2023

+ **O.M.P. (COMM) 244/2023 & IA Nos.12655-58/2023**

IN THE MATTER OF:

NEC CORPORATION INDIA PRIVATE LIMITED (ERSTWHILE NEC
TECHNOLOGIES PRIVATE LIMITED) Petitioner

Through: Mr. Ramesh Singh, Sr. Advocate with
Mr. Aashish Gupta, Mr. Arjun Pall &
Ms. Chandni Ghatak, Advocates.

Versus

M/S PLUS91 SECURITY SOLUTIONS Respondents

Through: Mr. Rana Biswas, Mr. Achaintya
Dwivedi, Mr. Arvindam Ghosh, Ms.
Kaveri Rawal & Mr. Sunil Sharma,
Advocates.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. By way of present petition filed under Section 34 of the Arbitration and Conciliation Act (hereinafter, referred to as '*A&C Act*'), petitioner assails the Arbitral Award dated 17.03.2023 (hereinafter referred to as '*the Award*') passed by a three-member Arbitral Tribunal (hereinafter, referred to as '*AT*').

2. On 23.10.2018, the Airports Authority of India ('*AAI*') floated a 'Request for Proposal' ('*RFP*') inviting proposals for the purpose of



selection of Managed Service Providers ('MSP') for Designing, Development, Testing, Implementation and O&M of E-Boarding-Biometric Boarding System ('BBS'), to be established at four airports namely Pune, Kolkata, Varanasi and Vijaywada (hereinafter, '*the Project*'). Petitioner submitted its pre-bid queries to AAI in November, 2018 and was awarded the contract by AAI on 23.08.2019.

3. As per the pleadings, petitioner had requested the respondent, with whom it had been working since 2014, to help find certain Original Equipment Manufacturers ('OEM'), from whom the petitioner could purchase certain equipment in relation to the said BBS works. It is borne out from the pleadings that the petitioner had shared the pre-bid queries with the respondent and the respondent had shared quotations from certain OEM vendors with petitioner. In effect, petitioner had taken help from the respondent at the pre-bid stage for preparing its bid to be submitted to AAI.

4. As per the petitioner, it did not accept the quotations shared by the respondent and submitted its bid to the AAI on 06.02.2019 and 20.02.2019 with its own efforts. To emphasise the lack of any services provided by the respondent, the petitioner has argued that even in the final bid submitted in April 2019, the petitioner did not include any of the OEM vendors suggested by the respondent.

5. As per the petitioner, the respondent once again approached the petitioner in providing assistance in finding OEM vendors. Respondent requested the petitioner to execute an Memorandum of Understanding ('MoU'), so as to enable it to negotiate/secure better quotations/rates and since the petitioner was open to looking for OEM options in future which it might be able to propose to AAI, it entered into an MoU dated 16.05.2019



with the respondent, even though it had already submitted its bid to AAI.

6. Petitioner has further pleaded that in November 2019, it enquired from the respondent about the status of certain payments that were payable by the respondent in relation to another project. In response, the respondent through its email dated 21.11.2019 requested the petitioner to enter into project specific agreement w.r.t the AAI project. Later, a meeting took place between the parties on 27.11.2019 in which apparently, the petitioner indicated to the respondent that the scope of work and budget regarding its services would become clear in three weeks. There are no minutes of meeting recorded for the meeting dated 27.11.2019 however, the account of the meeting is contained in the email exchange that took place between the parties.

7. Petitioner's case is that the respondent was permitted to attend a presentation made by it to the AAI and on the said basis it would be incorrect for the respondent to claim that it was involved in the preparation of the AAI bid of the petitioner or that it assisted in any manner. Petitioner had outrightly denied that any of the OEM leads provided by the respondent were utilised by the petitioner.

8. According to the petitioner, the respondent issued a legal notice dated 14.05.2020 alleging breach of MoU dated 16.05.2019, by failing to issue purchase orders for the AAI project. Petitioner replied to the same vide its reply dated 03.06.2020 thereby denying the respondent's claim and disputing the binding nature of the MoU.

9. On the other hand, the respondent's (Claimant before the AT) case in the arbitral proceedings was that it had helped the petitioner answer the pre-bid queries raised by AAI. It further claimed that it helped the petitioner in



sourcing the OEMs including the sourcing, pricing, technical information etc. Respondent further claims to have assisted the petitioner at the Proof of Concept ('POC') stage and helped in preparing the presentation made by the petitioner to AAI.

10. According to the respondent, the collaboration between the parties was initially informal in nature and the same was formalised with the signing of the MoU dated 16.05.2019, the draft of which was circulated by the petitioner on 22.04.2019, wherein the value of work to be carried out by the respondent was Rs.54,30,79,040/-. Eventually, after some discussions between the parties, the MoU was finalised wherein the value of work was enhanced to Rs.84,30,79,040/-. This value was mentioned in an annexure to the MoU.

11. Respondent made an issue upon the fact that despite the MoU, it was not awarded any work by the petitioner, which resulted in it suffering damages, which it quantified at an aggregate value of Rs.1,32,60,00,000/-. This was claimed in the Statement of Claim (hereinafter, 'the SOC') before the AT, alongwith interest @18% p.a. The damages were claimed under five heads namely, loss of profit, loss of opportunity/business loss, damages for breach of contract, reputational damage and legal costs.

12. Respondent examined two witnesses in support of its claim and the petitioner only examined one witness.

13. The arbitral award was pronounced on 17.03.2023 awarding Rs.8.4 Crores to the respondent against its claim of Rs.132 Crores, alongwith costs.

14. The AT approached the points of determination by posing five questions, which it answered in the award. The five questions were: i) Who approached whom? ii) Whether the claimant (respondent herein) assisted the



respondent (petitioner herein) in answering the pre-bid queries? iii) Legal implication of MoU, iv) Breach of MoU and v) If the Claimant (respondent herein) was entitled to damages for breach of MOU and the quantum of such damages.

15. Petitioner has challenged the award on the ground of patent illegality, alleging various errors committed by the AT. It is contended that the AT has enforced an agreement (MoU) which is void under Section 25 of the Indian Contract Act (hereinafter, '*the ICA*'), for want of consideration. According to the petitioner, the MoU was executed only to facilitate the collection of quotes by the respondent from OEMs. Further, the AT contradicted its own findings by awarding sums in favour of the respondent despite holding that the respondent did not provide any assistance to the petitioner in the preparation of pre-bid queries or POC presentation. Petitioner has further challenged the finding returned by the AT that the respondent provided assistance in the submission of the bid, by contending that the finding is based upon an erroneous reading of the evidence. Petitioner has submitted that the said finding is inconsistent with the respondent's own case since it never claimed that it had offered any assistance in the submission of bid. It is further contended by the petitioner that in terms of Clause 10 of the MoU, the parties had specifically agreed that no claim for damages or losses could lie against each other and therefore by enforcing the MoU, the AT has passed an award contrary to the contractual terms which is a violation of Section 28(3) of the Act. The quantification of damages by the AT is also challenged by the petitioner. It is contended that the AT considered gross profit margin ('GPM') of 10% of the contract value, which was not a realistic and accurate assessment. Petitioner submits that EBIT should have



been a better measure for ascertainment of losses. Petitioner has also contended that the quantification of damages by AT was based upon the assumptions and conjectures made by the AT rather than upon any evidence produced by the respondent which makes the award vulnerable to challenge on the ground of patent illegality. Petitioner has pointed out that the AT ignored the fact that there was no evidence of mitigation efforts taken by the respondent. Petitioner has further contended that award of interest by the AT from 23.08.2019 is illegal and inconsistent with AT's own finding that the estimated profits would have been earned in 7-8 years. Petitioner has also questioned the legal costs of Rs 50,000/- awarded in favour of the petitioner alleging that the same is unjustified in view of the fact that out of the claim amount of Rs.132 Crores, only a fraction amounting to Rs 8,43,07,904/- was awarded.

16. AT decided the five points of determination in the following manner:
- i) AT concluded that it was respondent who had approached the petitioner and, in this regard, rejected the respondent's reliance on the petitioner's emails.
 - ii) On the aspect as to whether the respondent had provided any assistance to the petitioner while the latter had submitted its pre-bid queries, AT concluded that the emails put on record as well as the testimony of relevant witnesses indicate that respondent was actively involved in the process. On this aspect, AT also noted the presence of respondent's official namely, Mr. Ahmed in the confidential presentations and concluded that the same pointed to respondent's active involvement in the preparation of the bid documents. AT further concluded that the parties had intended to collaborate on the Project.



iii) The third aspect dealt was whether any valid MoU had come into existence between the parties. Petitioner had sent an email on 22.04.2019 to the respondent enclosing therewith an MoU alongwith an Annexure A containing the scope of work as well as its appropriate value which was determined to be Rs.84,30,79,040/-. AT concluded that the MoU was vetted at different levels and was thus a valid document. AT rejected petitioner's contention that MoU remained a draft, as the same was signed only by the petitioner.

iv) On the fourth aspect, AT concluded that the petitioner had breached the MoU by not awarding work to the respondent. Petitioner's contention that respondent was well aware of the award of Project and was not interested in working on the Project, was rejected. While observing that the respondent asked for purchase orders only upon the petitioner approaching it, the AT held that same could not be the basis for taking away the sanctity or rights provided by the MoU.

v) The next part dealt with respondent's entitlement to damages for breach of MoU. While the petitioner argued that Clause 10 of the MoU barred respondent from claiming any indirect special or consequential loss/damages, the respondent made reference to the decision in Simplex Concrete Piles (India) Ltd. v. Union of India¹ to argue that the said clause is void, as being against the public policy of India. Taking note of the said judgement, the AT held that respondent would be entitled to claim damages, even in the presence of Clause 10.

17. AT noted that the MoU valued respondent's work at

¹ 2010 SCC OnLine Del 821



Rs.84,30,79,040/-. It discarded the expert's report by observing that the expert is neither a fact witness nor an expert in the technology used in the Project. The profit margins of 38.28% claimed by the respondent were also found to be unrealistic. Taking note of Section 73 of the ICA as well as the GPM as discussed in the expert's report, AT held the respondent entitled to damages of Rs.8,43,07,904/- being 10% as "net profit".

18. AT awarded simple interest @6% p.a. on the awarded amount, payable w.e.f. 23.08.2019 till payment/deposit of entire amount.

19. As regards costs, respondent quantified its cost at Rs.1,43,96,410/- while the petitioner quantified its costs at Rs.2,01,47,187/-, while a total fee of Rs.1,54,61,250/- was paid to the AT in equal parts (Rs.77,30,625/- each). AT held that the respondent was entitled to cost of arbitration i.e., Rs.77,30,625/-. As regards the other costs, AT found respondent's claim to be an inflated one. Thus, the other legal expenses were quantified at Rs.50,00,000/-. Accordingly, an amount of Rs. 1,27,30,625/- was awarded in favour of the respondent.

20. In conclusion, the AT awarded a sum of Rs.8,43,07,904/- alongwith simple interest @6% p.a. w.e.f. 23.08.2019 till payment/deposit. Further, a sum of Rs.1,27,30,625/- was awarded as costs to the respondent.

21. The petitioner's challenge to the impugned award is primarily on ground of patent illegality. Petitioner further called into question AT's reliance on the decision in Simplex (Supra) as the decision pertained to loss on account of delay.

22. As noted above, the AT broke down the points of determination into five heads and dealt with the same while referring to the provisions of the MoU and the evidence on record. Petitioner had raised the fundamental



question about the non-binding nature of the MoU dated 16.05.2019 and further disputed that the same pertained to AAI project in question. Petitioner had contended that the MoU was void under Section 25 of the ICA, lacking in the aspect of consideration between the parties. More importantly, the maintainability of claim of damages was challenged in view of bar under Clause 10 of the MoU.

23. AT relied upon the evidence, which included the emails exchanged between the parties and oral testimony of the witnesses to conclude that the parties were collaborating with each other and the respondent was actively involved in the preparation of the bid documents. AT referred to emails dated 31.01.2019, 02.02.2019 and 05.02.2019 exchanged between the parties prior to the submission of technical bid by the petitioner to AAI on 06.02.2019 and financial bid submission on 20.02.2019, to conclude that the respondent was actively involved in the preparation of bid documents. In this restricted non-appellate jurisdiction, this court is forbidden from reappreciating evidence relied upon by the AT to reach its factual findings and even so the Court has not found any discrepancy, much less glaring discrepancy in the appreciation of evidence by the AT, to draw the conclusion it has on the respondent's role in the preparation of the bid documents.

24. Similarly, as far as the factum of execution of MoU is concerned, there is no reason to doubt the findings of the AT and the findings are in the realm of a plausible conclusion that could be reasonably derived from the evidence. Petitioner's intent to collaborate with the respondent is clearly established on facts as held by AT, however, the terms and conditions of the collaboration is an area of debate that the AT has erroneously settled in



favour of the respondent.

25. Nowhere in the MoU was it clearly committed by the petitioner to the respondent that it would award work to the respondent of the value mentioned in the Annexure. The Annexure is inchoate, and lists the jobs that the respondent could be assigned and an estimated value of the work. There is no commitment how and when the work would be awarded and how the same would be executed by the respondent. No usual details pertaining to the execution time-lines, payments terms etc. find mention in the Annexure. Rather, in Clause 1, the purpose of the MoU is described as “*sharing prospects on regular basis for maximising the business through this relationship*”. It further states that the parties shall meet at regular intervals to review the situation and initiate actions as needed for continued success of the association. In the same clause it is stated that the parties shall enter into a “*proper and specific Agreement project wise*”. This condition is reiterated in Clause 7(i) under the heading “General”.

This clearly indicates that the MoU was a statement of intent and agreement to enter into a definitive agreement on a case-to-case basis. What fortifies this conclusion further, are the remaining clauses in the MoU, that only cover topics such as Confidentiality (Clause 3), IP rights (Clause 5), Public Announcements (Clause 4) etc. There is no clause whereby any work is awarded to the respondent or any promise is made with an enforceable right accruing in favour of the respondent. It is not uncommon for a party to collaborate or associate with a project for gaining experience and future prospects rather than immediate monetary returns. AT has observed that respondent’s representative visited Bangalore for the POC meet perhaps in order to gain experience from a first of its kind project being undertaken in



the country rather than being associated with the AAI project as an execution partner.

26. It is in this context that Clause 10 of the MoU had to be seen and applied. Clause 10 of the MoU reads as under:-

“10. No Consequential Damages

Neither Party is liable for any, indirect, special or consequential loss or damage or any loss or damage due to loss of goodwill or loss of revenue or profit arising from or in connection with this MOU.”

27. Clause 10 manifests the same intent that the parties are collaborating with each other without any corresponding rights arising out of an unsuccessful association. Clause 10 puts the whole intent of the MoU beyond doubt that the parties had made no definitive commitments to each other, which they would have with the signing of definitive agreement on project-to-project basis.

28. According to this court, AT erred in applying the ratio laid down in Simplex (Supra), which pertained to a different context and clause in a contract, which forbade a contractor from making a claim for damages even if it was not responsible for the delays in the completion of work and the delay was completely attributable to the employer on whose behalf the contractor was executing the work. The court therefore found such clauses against the public policy and thus legally unenforceable.

29. Whereas in the present case, there is no parallel with the clause that came up for consideration in Simplex (Supra). Clause 10 of the MoU, as stated above, only reinforces the intent of the parties of no commitment with no corresponding claims against each other since their association was only



exploratory, as was defined in Clause 1 of the MoU which stated the purpose of the MoU.

30. AT fell in error in misapplying the ratio in Simplex (Supra), which led to drawing of conclusion which is contrary to the terms of the contract. If it was merely a case of two plausible diverse interpretations of the contract by the AT, then this court dealing with objections under Section 34, would have no ground to supplant its own interpretation on the AT's view. However, since the AT's interpretation of Clause 10 of the MoU is based on a misapplication of legal ratio to the facts of case, the conclusions drawn is patently illegal.

31. For the reasons above, the award is set aside. All pending applications are disposed of.

**MANOJ KUMAR OHRI
(JUDGE)**

DECEMBER 18, 2023