

ASSISTED BY:

K.NANCY B.COM, B.L. (HONS.),

VINUPRIYA MUTHURAMALINGAM, B.A., L.L.B. (HONS.)

CONSULTANTS:

GST, CUSTOMS, FOREIGN TRADE LAWS,
FOREIGN EXCHANGE MANAGEMENT ACT.

OPINION

1. **Queriest :**

M/s.Fichtner Consulting Engineers (India) Pvt. Ltd.,
9th Floor, Menon Eternity,
165, St. Mary's Road, Alwarpet,
Chennai – 600 018.

2. **Facts :**

- 2.1 Maharashtra State Power Generation Co. Ltd. (hereinafter referred to as “Mahagenco”) has appointed the queriest for providing Consultancy & Engineering Services for the works of review of DPR, technical specification in Tender documents and to carry out post engineering activities such as tender scrutiny, finalization of EPC contractor etc. for the works of installation, erection, commissioning of FGD for Koradi Units-8,9 &10 .
- 2.2 Based on a tender floated and the successful bidding by the queriest, a Letter of Award was issued under reference CE/P&P/BTG/KRD-Unit No.10/660 MW / FGD /Consultancy /No.0067 dated 10th January 2017. Subsequently based on increase in the scope of the work, two amendments under reference CE/P&P/FI/FGD/KRD/No.0249 dated 25th February 2019 & CE/P&P/FI/KRD/ FGD /Consultancy /No.00617 dated 7th October 2020 were issued. After the amendment the total cost of the project is Rs.1,14,90,000/-.
- 2.3 It is seen that Mahagenco had initially issued a work order No.CE/P&P/BTG/KRD-Unit No.10/660 MW/ FGD /Consultancy /No.0067 dated 10th January 2017 with an intention to commission the Unit 10 FGD by 6th December 2017. However, due to various reasons, not attributable to the queriest, there have been changes in the strategy of Mahagenco's tendering and placement of orders for FGDs for Koradi Units 8, 9 & 10 and hence the project got delayed to considerable amount of time beyond the originally envisaged schedule. Even after four years from the time of placement of order for consultancy services, still the project is in tendering stage only.
- 2.4 In view of the reasons mentioned above, the queriest has asked for an additional fees as follows:

...2



Sl.No	Description	Fees in INR
1.	Additional fee for attending pre-bid meetings, reply to queries, evaluation of bids and attending post bid meetings	14,40,000.00
2.	Escalation in fees for the period till 31 May 2023 from the date of Award (original) on the queriest	25,50,000.00
3.	Total additional fees (Sl.No.1 +2)	39,90,000.00
4.	Existing Order Value	1,14,90,000.00
5.	Amended Order Value (Sl.No.3 +4)	1,54,80,000.00

2.5 In response Mahagenco replied that, as a Public Sector Utility they have to comply with the statutory notifications which resulted in re-tendering process and further due to the pandemic situation in 2020 the implementation got further delayed. It was further pointed out that the reasons for delay were beyond the control of Mahagenco and in this background and based on the tender conditions the additional fee requested by the queriest is not acceptable to them. However considering the prior relationship with the queriest, Mahagenco has proposed an escalation in the payment by 5% of per contractual year on the balance part of the work after February 2022. The queriest is yet to respond to the alternate proposal given by Mahagenco.

3. Query :

It is reported that the escalation in payment to the queriest by 5% from February 2022 is not acceptable to the queriest as it would not compensate for their cost escalation in full. In this context the queriest wants to know the legal position if the queriest sticks to their original additional claim.

4. Opinion :

4.1 The Letter of Award dated 10.01.2017 while referring to the contract price in clause 1.0 specifically states in 1.0 (iii) that the bid price shall be firm for the entire tenure of the contract including any extensions thereto and no variation as stipulated under Clause No.3, Section - II of tender document is permitted.

4.2 It is noticed that because of increase in the scope of the work, amendments were issued for providing increase in the contract price. Clause 8.0 of the letter of award refers to warranty and liability on the part of the queriest in terms of clause 14 of Section II of the General Terms and Conditions of Contract mentioned in the tender document.

4.3 Further, clause 9.0 refers to liquidated damages that can be claimed from the queriest in terms of clause 16 of Section II of General Terms and Conditions of Contract as mentioned in the tender document.

4.4 Clause 11.2 provides that the laws in force in India will be applicable to the subject contract and the Courts in Mumbai will have exclusive jurisdiction in all matters arising out of the subject contract. Apart from that, clause 13.0 provides that all other terms shall be as per the Tender document dated 28.11.2016.

...3



- 4.5 Clause 3.0 of Section II of General Terms and Conditions of Contract in the tender document specifically states that no deviations will be accepted. Bid with any technical or commercial deviation shall be summarily rejected. This provision is referred to in clause 1.0 (iii) of the Letter of Award. Thus, there is no scope whatsoever for demanding any escalation in the contract price as per the provisions contained in the contract read with the tender document. Therefore Mahagenco is entitled to reject, outright, any request for escalation.
- 4.6 However, it appears that they have come forward for considering 5% increase per contract year after February 2022. The queriest can try to negotiate further and obtain the best possible increase if they want to continue with the contract and try to complete the same.
- 4.7 In case, the queriest wants to come out of the contract, there is no clear provision provided in the said contract. Clause 21.0 of Section II of the General Terms and Conditions of the tender document refers to termination of the contract by the owner (Mahagenco) and is silent with regard to the options available to the queriest / successful bidder.
- 4.8 It is to be noted that clause 15.0 of the General Terms and Conditions mentioned above provide for the following:

“The Parties hereto agree that the Bidder shall indemnify and defend the Owner and its representatives and employees, and hold the Owner, its representatives, employees harmless from:

- (i) Damages and losses caused by its negligent or intentional act or omission or any damages and losses caused by the negligent act of any third party or sub-contractor or agency engaged by Consultant;
- (ii) Damages and losses resulting from the non-compliance with the obligations established hereunder;
- (iii)
- (iv)
- (v) From any and all claims, actions, suits, proceedings, taxes, duties, levies, costs, expenses, damages and liabilities, including attorneys' fees, arising out of, connected with, or resulting from or arising in relation to this bid specification due to neglect, omission or intentional act of Consultant.”

- 4.9 Therefore in case, the queriest decides to withdraw midway, Mahagenco has to go through the process once more and engage others for completion of the work. It is quite possible that the additional cost and other losses suffered by them can be claimed by them in terms of clause 15.0 (ii) as arising out of non-




compliance with the obligations imposed under the Letter of Award given by the queriest. Thus, the queriest will expose themselves for the above risk, in case of stoppage of work and withdrawal from the execution of the contract.

- 4.10 Clause 19.0 of the tender documents provides for Mutual Discussions and clause 20.1 provides for Arbitration at Mumbai by a panel of 3 arbitrators. These clauses read as follows:

“19.0 In the event of a dispute or difference of any kind whatsoever shall arise between the Parties in connection with or arising out of this Agreement or the breach, termination or validity hereof, the Parties shall endeavour to resolve such dispute in good faith in the first instance within 30 (thirty) days of the notice of such a dispute by mutual discussions between the Parties.

20.1 If the dispute cannot be resolved within the said 30 (thirty) days by the mutual discussions, an arbitral tribunal comprising of 3 arbitrators shall decide the same in accordance with the Arbitration & Conciliation Act 1996 as in force. Each Party shall appoint one arbitrator and the arbitrators so appointed shall appoint the third arbitrator who will act as the presiding arbitrator.”

- 4.11 As such, another option available will be to go for arbitration with regard to escalation request. But, however, the chances are that as the contract does not provide for any escalation because of delay or for any other reason, the arbitration award may not ultimately be favourable the queriest.
- 4.12 The Indian Contract Act will be applicable to the present contract and it also will be open to Mahagenco to approach the Court in Mumbai seeking court's intervention to make the queriest execute the contract i.e. specific performance of the contract by filing a suit in terms of Indian Contract Act.
- 4.13 In the light of all the above, the queriest can take into account the implications provided for in the Letter of Award and the tender terms and conditions enumerated in the tender document and accordingly, decide the issue.


For, S. MURUGAPPAN
sm/ss

Disclaimer:- The above opinion is provided based on the information and documents made available to us by the queriest and further based on the laws and rules prevalent as on date and the understanding of such provisions by the author and is meant for the private use of the person to whom it is provided without assuming any liability for any consequential action taken based on the views expressed here.