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

+ **ARB.P. 227/2017**

M/S EAST WEST ENGINEERING CO

..... Petitioner

Through Mr Achin Mittal, Mr Joseph K. Antony,
Advocates.

versus

UNION OF INDIA

..... Respondent

Through Mr Praveen Kumar Jain, Advocate with
Mr Saju C.C. Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **11.04.2017**

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to the agreement dated 14.08.2012 (hereafter 'the Agreement').

2. The Agreement contains an arbitration clause, which reads as under:-

“3. **Arbitration.** All disputes or differences arising out of or in connection with the Contract shall be settled by bilateral discussions. Any dispute, disagreement or question arising out of or relating to the Contract or relating to construction or performance, which cannot be settled amicably, may be resolved through arbitration. The standard Clause of arbitration is as per Form DPM-7, DPM-8 and DPM-9 (Available in MoD website and can be provided on

request.)”

3. The learned counsel for the respondent does not dispute the existence of the arbitration clause.
4. In terms of the arbitration clause, the standard clause of arbitration - form DPM-7 - is incorporated by reference. Form DPM-7 provides for a format of arbitration clause and is reproduced below:-

“Form DPM-7

Format of Arbitration Clause - Indigenous Private bidders

- (i) All disputes or differences arising out of or in connection with the present contract including the one connected with the validity of the present contract or any part thereof, should be settled by bilateral discussions.
- (ii) Any dispute, disagreement or question arising out of or relating to this contract or relating to construction or performance (except as to any matter the decision or determination whereof is provided for by these conditions), which cannot be settled amicably, shall within sixty (60) days or such longer period as may be mutually agreed upon, from the date on which either party informs the other in writing by a notice that such dispute, disagreement or question exists, will be referred to a sole Arbitrator.
- (iii) Within sixty (60) days of the receipt of the said notice, an arbitrator shall be nominated in writing by the authority agreed upon by the parties.
- (iv) The sole Arbitrator shall have its seat in New Delhi or such other place in India as may be mutually agreed to between the parties.
- (v) The arbitration proceedings shall be conducted under

the Indian Arbitration and Conciliation Act, 1996 and the award of such Arbitration Tribunal shall be enforceable in Indian Courts only.

(vi) Each party shall bear its own cost of preparing and presenting its case. The cost of arbitration including the fees and expenses shall be shared equally by the parties, unless otherwise awarded by the sole arbitrator.

(vii) The parties shall continue to perform their respective obligations under this contract during the pendency of the arbitration proceedings except in so far as such obligations are the subject matter of the said arbitration proceedings.

(Note - In the event of the parties deciding to refer the dispute/s for adjudication to an Arbitral Tribunal then one arbitrator each will be appointed by each party and the case will be referred to the Indian Council of Arbitration (ICADR) for nomination of the third arbitrator. The fees of the arbitrator appointed by the parties shall be borne by each party and the fees of the third arbitrator, if appointed, shall be equally shared by the buyer and seller)."

5. In terms of the aforesaid clause, the arbitrator is to be nominated in writing by the authority agreed upon by the parties within a period of 60 days. The learned counsel for the petitioner contends that there is no agreement between the parties as to which is the authority who would appoint the arbitrator.

6. This is disputed by the learned counsel for the respondent. He submits that in terms of the Defence Procurement Manual-2009 (DPM), the authority to appoint the arbitrator would be the Defence Secretary/CFAs and the arbitrator would be required to be appointed from the panel approved by the Ministry of Defence (MoD) or Competent Financial Authority (CFA). He referred to clause 7.11 of the DPM in support of the aforesaid contention. He

contends that since clause 7.11 of the DPM also refers to the standard Form clauses DPM 7, 8 & 9, thus, the said clause (7.11) should also be read as a part of the Agreement between the parties.

7. This Court is unable to accept the aforesaid contention. The learned counsel for the respondent was pointedly asked whether there is any clause in the Agreement between the parties or in the tender conditions which specifically require the petitioner to accept or conform to the terms of the DPM; however, the counsel was unable to point out any such clause. He concedes that there is no such clause except clause 7.11 of the DPM. In view of the aforesaid, this Court is not persuaded to accept that any of the clauses of DPM have been incorporated in the Agreement between the parties.

8. The integrity of the Agreement cannot be diluted by reading in clauses from other documents, which have not been specifically incorporated by reference or expressly agreed to by the parties. It is seen that only the standard form clauses as specified in Forms DPM-7, DPM-8 and DPM -9 have been incorporated by reference. Admittedly only DPM- 7 is applicable in this case; therefore, the clauses as set out in DPM-7 must be read as part of the Agreement. No further clauses can be deemed to have been imported in the Agreement between the parties. Clause 7.11 of DPM is neither expressly agreed to between the parties nor can any reference to the said clause be found in the Agreement. There is, therefore, no scope to infer that any other clause of DPM has been specifically incorporated by reference in the Agreement between the parties.

9. The petitioner had invoked the arbitration clause by its letter dated 24.01.2017 proposing the names of three persons, one of whom could have been appointed as a sole arbitrator if the respondent agreed. However, the respondent has declined to accept any of the names as suggested by the petitioner to appointed as an arbitrator. In the absence of any consensus between the parties as to appointment of an arbitrator, an arbitrator is required to be appointed by this Court.

10. The learned counsel for the respondent is not willing for the parties to be referred to Delhi International Arbitration Centre and requests for ad hoc arbitration. Accordingly, Mr Prem Kumar, ADJ (Retired) (Mobile No. 9873176030) is appointed as a sole arbitrator to adjudicate the disputes between the parties arising out of the Agreement. This is subject to the Arbitrator making the necessary disclosure under Section 12 of the Act and not being ineligible under Section 12(5) of the Act. The Arbitrator's fee shall be fixed having regard to schedule IV to the Act. The parties are at liberty to approach the Arbitrator for eliciting the necessary disclosure and for further proceedings.

11. The petition is disposed of.

VIBHU BAKHRU, J

APRIL 11, 2017

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