Arb.Appln. No.78 of 2022

SENTHILKUMAR RAMAMOORTHY,J

This application under Section 9 of the Arbitration and Conciliation Act 1996 is presented at the pre-arbitration stage. At the admission hearing on 17.03.2022, notice was issued to the respondent. At the hearing on 24.03.2022, Mr.M.Vijay Anand, learned standing counsel, entered appearance and took time to obtain instructions. At least two adjournments were granted thereafter for obtaining instructions and for filing counter. At the hearing on 07.07.2022, Ms.Hema Murali Krishnan, learned counsel appeared on behalf of the respondents and took time to obtain instructions with regard to the provision of a bank guarantee as security for release of a sum of about Rs.2.72 crore. At the next hearing on 28.07.2022, there was no representation for the respondent. Therefore, the Registry was directed to verify whether vakalat was filed and, if not, print the name of the respondent in the cause list. At the hearing today, in spite of the name of the learned counsel being printed, once again, there is no representation. Therefore, the application is taken up for hearing.

2. Learned counsel for the applicant points out that the application pertains to the variation in the rate of Goods and Services

Tax (GST) on items supplied by the applicant to the respondent. In specific, it is submitted that GST was originally imposed at the rate of 5% on these items, which fall under HSN 86 and, subsequently, the GST rate was enhanced to 12% with effect from 01.10.2019. Therefore, the applicant called upon the respondent to make payment at the enhanced GST rate. Learned counsel points out that the contract between the parties provides for the payment of differential tax or new taxes by the respondent. It is further submitted that the applicant is ready and willing to provide a bank guarantee for Rs.2,72,58,292/- and keep such bank guarantee alive until conclusion of arbitration proceedings. Consequently, he contends that the respondent would be fully secured.

3. The applicant has placed the relevant tender document on record. The said tender document contains the following statutory variation clause:

Statutory Variation Clause

S.No.	***Description***
1	Statutory Variation in taxes and duties, or fresh imposition of taxes and duties by State/Central Governments in respect of the items stipulated in the contract (and not the raw materials thereof), within the original delivery periods stipulated in the contract, or last unconditionally extended delivery period hall be to Railways' account. Only such variation shall be admissible which takes place

S.No.	Description
	after the submission of bid. No claim on account of statutory variation in respect of existing tax/duty will be accepted unless the tenderer has clearly indicated in his offer the rate of tax/duty considered in his quoted rate. No claim on account of statutory variation shall be admissible on account of misclassification by the supplier/contractor.

4. On perusal, *prima facie,* this clause provides for any statutory variation in taxes and duties or new taxes to be borne by the employer provided such variation or new taxes were introduced after the date of submission of bid. In this case, the purchase order was issued on 14.08.2019, whereas the variation in GST rate is with effect from 01.10.2019. As such, *prima facie* it is subsequent to the date of submission of the bid. The applicant has demonstrated manifest intent to arbitrate by issuing a notice under Section 21 of the Arbitration and Conciliation Act 1996 and following up by filing a petition under Section 11 thereof.

5. The applicant has also offered to provide a bank guarantee for a sum of Rs.2,72,58,292/- and keep such bank guarantee alive until conclusion of arbitral proceedings. In the above facts and circumstances, this application is liable to be allowed on the following terms:

(1) The applicant shall provide a bank guarantee for a sum of Rs.2,72,58,292/- from a nationalized bank in favour of the respondent.

(2) Such bank guarantee shall be procured by the applicant within a week from the date of receipt of a copy of this order and submitted to the respondent within two days thereafter.

(3) The bank guarantee shall be for an initial term of one year subject to the condition that such bank guarantee shall be extended at least two months prior to the expiry thereof for further periods until conclusion of the arbitral proceedings. In the event of default by the applicant in extending the bank guarantee, the bank guarantee shall provide for the right of the respondent to call on the guarantee and for payment without demur or protest by the bank in such event.

(4) The respondent is directed to release the sum of Rs.2,72,58,292/- to the applicant within a period of two weeks from the date of receipt of the bank guarantee from the applicant.

(5) The bank guarantee shall be subject to the arbitral award.

04.08.2022

kal

SENTHILKUMAR RAMAMOORTHY, J

kal

Arb.Appln. No.78 of 2022

04.08.2022