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Arb.O.P.(Comm.Div.) No.366 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.11.2022

CORAM

THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

Arb.O.P.(Comm.Div.) No.366 of 2022

M/s.United Company
PWD & CPWD Contractors rep by its
Partner Tmt.D.Deepa
No.5, IInd Cross, Gandhi Nagar
Puducherry - 605 009.

... Petitioner

VS.

1.The Chief Engineer,
Public Works Department,
Government of Puducherry,
Puducherry.

2.The Superintending Engineer Circle-II,
Public Works Department,
Government of Puducherry,
Puducherry.

3.The Executive Engineer,
Special Building Division-II,
Public Works Department,
Puducherry.

... Respondents



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PRAYER: Arbitration Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, pleased to appointing an independent sole arbitrator to adjudicate upon the claims of the petitioner as per the Arbitration Application dated 10.06.2022 submitted by the petitioner to the first respondent herein viz., the Chief Engineer, Public Works Department, Government of Puducherry as per the Agreement No. 04/PWD/SBD-11/2019-20 dated 16.05.2019 and as per the Clause 25 of the General Conditions of the Contract for Public Works and as amended Act 2015.

For Petitioner : Mr.N.Thiagarajan

For Respondents : Mrs.G.Djearany
Government Advocate (Puducherry)

ORDER

The petitioner seeks the constitution of an arbitral tribunal to resolve disputes arising out of the contract for the construction of a swimming pool.



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2. The petitioner refers to clause 25 of the General Conditions of Contract which contains the dispute resolution clause. The said clause is set out below:

"Settlement of disputes & arbitration:

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter : ii) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by



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the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter. If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for



appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator. iii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Director, IGCAR / Secretary, DAE. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is a term of the contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal. It is also a term of this contract that no person other than a person appointed by such Director, IGCAR / Secretary, DAE, as aforesaid should act as GCC –



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June 08 43 arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all. It is also a terms of the contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-inCharge that the final bill is ready for payment the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996, (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause. It is also term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the



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claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award. It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties. It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid".

3. Upon disputes arising between the parties, in accordance with the said clause, it is stated that a notice dated 12.04.2022 was issued to the



Superintending Engineer. Since the said notice did not evoke a response, a notice dated 28.04.2022 was issued to the Chief Engineer. Thereafter, the petitioner applied for the appointment of a sole arbitrator in relation to 14 claims for an aggregate sum of about Rs.2.98 Crores. Since the respondent did not cooperate in the constitution of the arbitral tribunal, the present petition is filed.

4. The respondent is represented through counsel. Learned counsel for the respondent states that the contract envisages that the contractor should raise the dispute with the Superintending Engineer, in the first instance, if dissatisfied with the decision of the Engineer in-charge. Thereafter, the matter should be escalated to the Chief Engineer. Learned counsel also points out that the respondent does not have a panel of arbitrators at this juncture, and therefore the respondent could not provide such panel to the petitioner.

5. The dispute resolution clause provides for dispute resolution through multiple tiers. In accordance with the said clause, the petitioner addressed



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communications to the Superintending Engineer and Chief Engineer before seeking resolution of disputes by arbitration. The respondent did not enable dispute resolution as per the contractual mechanism. In these circumstances, the petitioner is entitled to succeed.

6. Accordingly, Arb.O.P.(Comm.Div.) No.366 of 2022 is allowed by appointing Mr.Yashod Vardhan, Senior Advocate, Mobile No.9841075397, as the sole arbitrator. The sole arbitrator is called upon to enter upon reference and adjudicate the dispute. It is open to the sole arbitrator to fix the fees and expenses for the arbitral proceedings in consultation with the parties.

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Internet : Yes / No



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