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

Date of Decision: 6th January, 2023

+ **W.P.(C) 17482/2022 and CM APPL. 55775/2022, 55776/2022**

AMIT BROTHERS

..... Petitioner

Through: Mr Ankit Gupta, Advocate (M-9999568812)

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Rakesh Kumar, CGSC with Mr. Sunil, Advocate (M-9811549455)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by the Petitioner - M/s Amit Brothers challenging the impugned letter dated 18th November, 2022 issued by the Commander Works Engineer, Air Force Tughlakabad - Respondent No. 2.
3. The background of this petition is that a work order dated 5th April, 2021 was awarded to the Petitioner for repair of certain road, road furniture, kerb stone, paths and culvert in the area of 13 BRD, 16 BRD, 27 ED and 31 MCU AT AF STN Palam under GE(P) AF GURGAON (*hereinafter 'the Works'*).
4. The total value of the work order was Rs.54,29,840.00/-. The conditions of the contract were attached with the work order. The work order had to be executed by 6th October, 2021. However, the Petitioner did not commence the work and raised various grievances including non-

allocation of godown etc., by the Respondents. Finally vide letter dated 18th November 2022, the performance guarantees to the tune of Rs. 1,63,000/- have been forfeited and further sum of 2% to the tune of Rs.1,08,597/- has been demanded from the Petitioner. Until then, even the participation of the Petitioner in the bids of the Respondent has been withheld. The said letter is challenged in this writ petition.

5. Ld. counsel for the Petitioner Mr. Gupta submits that there were various justifiable causes including the Covid-19 pandemic, ban by the NGT, monsoons and escalation in prices, etc. due to which the work could not be commenced. He further submits that the debarring is illegal and contrary to law.

6. On the other hand, Id. Counsel for the Respondent, Mr. Rakesh Kumar, CGSC submits that the Petitioner has been consistently in default. The work has not even started despite almost two years having passed. He further submits that the Petitioner has also invoked the arbitration clause by seeking appointment of an arbitrator.

7. Heard. The Court has perused the correspondence on record and it is clear that after the initial work order was given on 5th April, 2021 which was to conclude by 6th October, 2021, the Petitioner kept raising one excuse or the other to even commence the work. Initially the COVID-19 pandemic was cited as the reason for non-commencement of work. In July, 2021, a grievance was raised by the Petitioner that there was a ban on running diesel generator, hot mix plant in Delhi NCR and due to the start of rainy season, it is not possible for the Petitioner to complete the work by 6th October, 2021. The letter dated 27th July, 2021 addressed by the Petitioner, reads as under:-

“1. Ref. show Cause notice given by you, dated 20

July 2021. (which we have not Received till date but detailed reply on getting information)

2. It is requested that the contract for the above work was done by you with our Firm on 26 February 2021. Unfortunately at the time of the contract, there was a ban on running diesel generator /hot mix plant in Delhi NCR as per the order of Environmental Protection and Pollution Control Authority. Due to which the work could not be start at present the rainy season is going on in Delhi and around Delhi, due to which the work is not possible at present because the completion time of the work is 06th October 2021. We assure you that the work will be completed on time is decided by you.”

8. The Respondents vide letter dated 15th December, 2021 notified the Petitioner that even as of December, the work had not started and the same is not satisfactory. The Petitioner was asked to show cause as to why further issuance of tenders to the Petitioner should not be banned till completion of the subject work. In response to the same, vide letter dated 20th December, 2021, the Petitioner sought additional time to complete the work by 30th June, 2022 and continued to blame various factors such as monsoons, hot plants being closed due to NGT orders, etc.

9. The Respondents, finally vide communication dated 22nd January, 2022 rebutted all the issues raised by the Petitioner and served a final notice to commence the work by 7th February, 2022 failing which action for cancellation would be taken. It is an admitted position that even then the Petitioner did not commence the work.

10. On 10th March, 2022, the Respondent again informed the Petitioner that it is clear that the Petitioner is not in a position to execute the work on ground and that action in accordance with the contract would be taken. The

said letter dated 10th March, 2022 reads as under:-

“1. Reference the following :-

- (a) Your letter No Nil dated 27 Feb 2022.*
- (b) This office letter No 85129/33/E8 dt 22 Jan 2022.*
- (c) This office letter No 85129/36/E8 dt 03 Feb 2022.*
- (d) Your letter No Nil dated 20 Jan 2022.*

2. It is stated that as per your letter ref at Para 1 (a), you had promise the dept to start the work by last week of Feb or 1st week of Mar 2022. However, till date your firm have not commence the work on ground. The user is pressing very much difficulties for non-execution of work by your firm.

Further, your firm vide letter ref Para 1(a) again put forth another lame excuse for not commencing the work, which is not tenable and acceptable at all and denied in toto. Also, your contention of heavy rainfall is not agreed as from past 02 to 03 months there is no rain in near by area(s). The decision of matter of price escalation had already been conveyed vide this office letter ref at Para 1 (b).

3. In view of above, it is felt that your firm is not in position to execute the work on ground. The time given as well as promised by you had also expired. Therefore, the accepting officer had not left with any choice except to take action as per expressed and agreed conditions of contract.

4. Kind ack the receipt.”

11. Subsequent to these communications having been issued by the Respondents, the Petitioner vide communication letter dated 25th April, 2022, sought for closure of the contract under condition 59 of IAFW -2249. This was rejected by the Respondents vide letter dated 9th may, 2022.

12. On 18th November, 2022, the Respondents terminated the contract and forfeited the performance guarantee for a sum of Rs.1,63,000/-. In addition, 2% amount of the contract i.e., Rs.1,08,597/- was also demanded and in the

meantime, the Respondents barred the Petitioner for consideration for any bids.

13. It is clear from the correspondence that the Respondents have been reasonable and gave repeated opportunities to the Petitioner to commence the work and to conclude the same. However, it appears that the Petitioner never intended to commence the work inasmuch as the reasons for non-commencement kept varying from letter to letter. The excuses began with non-allocation of a godown, thereafter monsoon rains, NGT ban of diesel generators, escalation of prices, etc. Each of these issues has been adverted to by the Respondents in the letter dated 22nd January, 2022 which reads as under:-

*“1. Ref. your letter No Nil dated 20 Dec. 2021.
2. As per Work Order 1 that the work was supposed to be commenced on 07 Apr. 2021 and scheduled to be completed on 06 Oct. 2021. The parawise reply of your contention is as under:-*

h) NGT Ban of Hot mix plant in the month of March-Apr-21: The work was supposed to be commenced on 07 Apr 2021. Therefore the reason pointed out is before the conclusion of contract, thus not agreed to.

i) Ban due to Covid-19 Pandemic: It is fact that the situation became worse during the month of Apr. to Jun. 21. However, even after receding of corona cases, your firm had not commenced the work on the ground till date.

j) Heavy monsoon Seasons: It is known fact that this area prone to receive rainfall during its monsoon seasons. Therefore, as per contract conditions your firm should have plan your resources accordingly to execute the work on ground.

k) NGT ban on construction activities: Even though the ban was lifted on 20 Dec. 2021 even after,

your firm has not bothered to commence the work till date. This indicates the lackadaisical behavior towards execution of work.

l) Non-availability of stores and water connection: you claimed that material could not brought from Hot mix plant due to ban on its functioning, the reason for non-availability of stores and connection of water is only to divert attention of department.

m) Non-payment by other MES Offices Also, the reason for non-payment by other MES establishment will not admissible and rejected in toto

n) Reimbursement of price escalation: There is no provision of re-imburement of Price escalation in the contract agreement, the reimbursement for price escalation is out of questions and rejected in toto

Further to above, It is intimated that till date you have not submitted the sample of materials to be used in the work for approval of GE as per contract conditions, shows your intent towards work.

3. In view of above, it is established that none of the reason(s) provided by your firm is logical, thus denied in toto. However a final notice is hereby served to commence the work by 07 Feb 2022 failing which necessary action condition 54 of IAFW-2249 for cancellation of contract shall be initiated against your firm.”

(Para numbering is incorrect in the letter being extracted)

14. Even thereafter, time was given for commencement of the work by February 2022, which the Petitioner did not avail of. The said communication dated 3rd February 2022, is set out below:

- “1. Ref your letter No Nil dated 20 Jan 2022.*
- 2. As the reply fwd to you vide this office letter No 85129/33/E8 dt 22 Jan 2022, it is once again directed to commence the work by 07 Feb 2022 the action as per condition 54 shall be initiated without further notice to your firm.”*

15. The work order is admittedly governed by the general conditions of contract prescribed by the Military Engineer Service, 2019. The same includes an Arbitration Clause which reads as under:-

“70. Arbitration- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of a [Serving Officer having degree in Engineering or equivalent or having passed final/ direct final Examination of sub-Division II of Institution of Surveyor (India) recognised by the Govt. of India] to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the Contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the

parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, ex parte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual, item of dispute. [The arbitrator shall give reason for the award in each and every case irrespective of the value of claims or counter claims].

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract.

16. The Petitioner issued letter dated 6th December, 2022 seeking appointment of an Arbitrator. The relevant portion of the letter reads as under:-

“3. Kindly cancel your cancellation and allow us to work as per the current government gazette. Give your consent on the price increase in the price and you should also give the extensions of time otherwise appoint an independent arbitrator. You should compensate our loss and return the FDR of our performance security Rs. 163000”

17. It is submitted by the Id. Counsel for the Respondents that the request for appointment of the Arbitrator is under process.

18. Under such circumstances and the facts of this case, where the Petitioner has clearly not even commenced the work for about a period of

more than two years, considerable damage has been caused to the Respondents as the work has been delayed and the opportunity cost also exists considering that these are public roads. The stand of the Respondent seeking demand of 2% balance of Rs.1,08,597/- cannot be faulted and the communications dated 18th November 2022 and 6th December 2022 are not liable to be interfered with. However, if the Petitioner wishes to make the said payment and seek lifting of the ban imposed, it is free to do so. Upon the Petitioner making the said payment of Rs.1,08,597/- to the Respondent, there shall be no impediment, under the subject contract, for the Petitioner to participate in other bids.

19. The petition is, accordingly, dismissed. All pending applications are also disposed of.

20. Parties are relegated to the Arbitral Tribunal which may be constituted in accordance with law. The deposit shall also be subject to the outcome of the arbitral proceedings. The present order shall not be considered as the opinion on the merits of the matter.

PRATHIBA M. SINGH
JUDGE

JANUARY 6, 2023
MR/hh