



\$~2

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

ARB.P. 364/2023

M/S KAMLADITYYA CONSTRUCTIONS PVT. LTD.

..... Petitioner

Through: Mr. Naresh Markanda, Sr. Adv. with
Mr. Rohan Markanda, Mr. Virendra Kumar, Ms.
Vartika Johri, Advs.

versus

GNCTD & ANR.

..... Respondent

Through: Ms. Mehak Nakra, ASC with Ms.
Disha Chaudhary, Mr. Abhishek Khari, Advs.
Ms. Shobhana Takiar, SC with Mr. Kuljeet Singh,
Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

19.01.2024

%

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.
2. The brief facts are that the respondent No.1 invited bids for the work of “Construction of Integrated Campus of GB Pant Engineering College and Polytechnic” at Okhla, Delhi.
3. The petitioner participated and the bid of the petitioner was approved *vide* letter dated 09.07.2020. It was mentioned that the award letter would be issued to the petitioner after receiving all permissions and statutory compliances. The letter dated 09.07.2020 in this regard reads as under:-



PUBLIC WORKS DEPARTMENT

OFFICE OF THE EXECUTIVE ENGINEER (C)
EDUCATION PROJECT DIVISION-I, PWD
GNCTD, GURU GOBIND SINGH INDRAPRASTHA
UNIVERSITY CAMPUS, SURAJMAL VIHAR,
CBD GROUND SHAHDARA, DELHI-110032
E-mail I.D. eepwddelhiedu1@gmail.com



Tel:
011-22301480

लोक निर्माण विभाग

कार्यालय-कार्यपालक अभियंता (सि०),
शिक्षा परियोजना मंडल-1, लो० नि० वि०,
रा.रा.क्षे.दि.त. गुरु गोविन्द सिंह इन्द्रप्रस्थ
विश्वविद्यालय परिसर, सूरजमल विहार,
सी०बी०डी० ग्राउंड शाहदरा, दिल्ली-110032
ई-मेल: eepwddelhiedu1@gmail.com

सं०: 54(6)/का०अ०/शिक्षा परि०मं०-1/लो.नि.वि./2020-21/234 दिनांक: 09/07/2020
सेवा में,

M/s Kamladityya Construction Private limited,
B-104, Manisha Tower, Plot No. 7B,
Sector-2, Dwarka, New Delhi-110077

विषय-Construction of Integrated Campus of GB Pant Engineering College and Polytechnic at
Okhla, Delhi. (SH: C/o Administration Block, Academic Building, Auditorium Building,
Activity Centre, Workshop Building, Hostel, Residential Block including External
Development works, Internal Electrical Installation, External Lighting, lifts, fire fighting
system, fire alarm with PA System, D.G. Sets, Electric Sub-Station & allied works, HVAC
works) {Regarding Extension of validity of BG}

संदर्भ- Bank Guarantee No. 003GT02193530005 dated: 19.12.2019

नहोदय,

The above said work was accepted by the competent authority and will be awarded
after statutory clearance is obtained. In this regards, you are informed that the above said
Bank Guarantee No. 003GT02193530005 dated: 19.12.2019 issued by HDFC Bank
amounting to Rs. 3,65,52,288/- is valid till 31.07.2020. You are requested to get the validity
of BG extended up to 31.10.2020.

This is for your information and further necessary action please.

भवदीय

(रमेश कुमार)

कार्यपालक अभियंता
शिक्षा परियोजना मंडल-1, लो० नि० वि०



4. In terms of the acceptance letter dated 09.07.2020, the petitioner *vide* letter dated 15.07.2020 extended the bank guarantee upto 31.10.2020.
5. Thereafter, the respondent No.1 repeatedly asked the petitioner to continue extending the bank guarantee, and the bank guarantee was extended by the petitioner till 30.09.2022.
6. However on 29.09.2022, in a total turnaround of events, the respondents informed the petitioner that the tender has been cancelled due to deletion of auditorium, hostel and residential building and changes in the facade of the remaining buildings. Hence, the petitioner was told not to renew the bank guarantee any further.
7. The petitioner contends that this unilateral action on the part of the respondent constitutes a dispute. In terms of the General Conditions of the contract along with the tender document, there is a dispute redressal mechanism, more particularly, Clause 25 which reads as under:-

“CLAUSE 25

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:

(i) 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 the



Engineer-in-Charge or if the Engineer in Charge considers any act or decision of the contractor on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable and is disputed, such party shall promptly within 15 days of the arising of the disputes request the Chief Engineer or where there is no Chief Engineer, the Additional Director General (CE/ADG) who shall refer the disputes to Dispute Redressal Committee (DRC) within 15 days along with a list of disputes with amounts claimed if any in respect of each such dispute. The Dispute Redressal Committee (DRC) shall give the opposing party two weeks for a written response, and, give its decision within a period of 60 days extendable by 30 days by consent of both the parties from the receipt of reference from CE/ADG. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. Provided that no party shall be represented before the Dispute Redressal Committee by an advocate/legal counsel etc.

If the Dispute Redressal Committee (DRC) fails to give its decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC) or expiry of time limit given above, then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General, CPWD(CE/ADG/DG) for appointment of arbitrator on prescribed proforma as per Appendix XV under intimation to the other party.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

The CE/ADG/DG shall in such case appoint the sole arbitrator or one of the three arbitrators as the case may be within 30 days of receipt of such a request and refer such disputes to



arbitration. Wherever the Arbitral Tribunal consists of three Arbitrators, the contractor shall appoint one arbitrator within 30 days of making request for arbitration or of receipt of request by Engineer-in-charge to CE/ADG/DG for appointment of arbitrator, as the case may be, and two appointed arbitrators shall appoint the third arbitrator who shall act as the Presiding Arbitrator. In the event of

a. A party fails to appoint the second Arbitrator, or

b. The two appointed Arbitrators fail to appoint the Presiding Arbitrator, then

The Director General, CPWD shall appoint the second or Presiding Arbitrator as the case may be.

(ii) Disputes or difference shall be referred for adjudication through arbitration by a Tribunal having sole arbitrator where Tendered amount is Rs. 100 Crore or less. Where Tendered Value is more than Rs. 100 Crore, Tribunal shall consist of three Arbitrators as above. The requirements of the Arbitration and Conciliation Act, 1996 (26 of 1996) and any further statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall be applicable.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed, if any, in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the decision of the DRC.

It is also a term of this contract that any member of the Arbitration Tribunal shall be a Graduate Engineer with experience in handling public works engineering contracts at a level not lower than Chief Engineer (Joint Secretary level of Government of India). This shall be treated as a mandatory qualification to be appointed as arbitrator.

Parties, before or at the time of appointment of Arbitral



Tribunal may agree in writing for fast track arbitration as per the Arbitration and Conciliation Act, 1996 (26 of 1996) as amended in 2015.

Subject to provision in the Arbitration and Conciliation Act, 1996 (26 of 1996) as amended in 2015 whereby the counter claims if any can be directly filed before the arbitrator without any requirement of reference by the appointing authority, 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 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 as per the Act.

The place of arbitration shall be as mentioned in Schedule F. In case there is no mention of place of arbitration, the arbitral tribunal shall determine the place of arbitration.

The venue of the arbitration shall be such place as may be fixed by the Arbitral Tribunal in consultation with both the parties. Failing any such agreement, then the Arbitral Tribunal shall decide the venue.”

8. In accordance with the said Clause, the petitioner was to approach the Dispute Redressal Committee.
9. The petitioner approached the respondents on 17.12.2022 for constitution of the Dispute Redressal Committee in terms of Clause 25(i) of the General Conditions of the Contract.
10. The petitioner on 09.01.2023 nominated an Arbitrator in terms of the contract.
11. However, the respondent *vide* letter dated 14.02.2023, informed the petitioner that the provisions of Clause 25(i) is not applicable because



there was no agreement.

12. Ms. Nakra, learned ASC appearing for the respondent draws my attention to the reply filed stating that there was no contract awarded to the petitioner and the tender was cancelled prior to awarding it to the petitioner and hence, there is no dispute which can be referred to arbitration in terms of Clause 25 of the General Conditions of the Contract.
13. I have heard learned counsels for the parties.
14. In the present case, admittedly, the letter dated 09.07.2020 shows that the bid of the petitioner has been accepted and the competent authority assured the petitioner that work will be awarded to the petitioner after statutory clearance is obtained.
15. Thereafter, for over 2 years, the petitioner was required to keep his bank guarantee alive with which the petitioner duly complied.
16. From a *prima facie* view of the narration of the above facts, it seems that there was a concluded contract between the parties and hence, the general conditions of the contract along with the tender will apply.
17. The reliance placed by the respondent on paragraph 54 of the judgment of the Hon'ble Supreme Court in "***Padia Timber Co. (P) Ltd. v. Board of Trustees, Visakhapatnam Port Trust***" (2021) 3 SCC 24 is not applicable to the facts of the case and is misconceived. Paragraph 54 of the said judgment reads as under:-

"54. *It is a cardinal principle of the law of contract that the offer and acceptance of an offer must be absolute. It can give no room for doubt. The offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication. However, when the acceptor*



puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition, as held by this Court in Haridwar Singh v. Bagun Sumbrui [(1973) 3 SCC 889] . An acceptance with a variation is no acceptance. It is, in effect and substance, simply a counter-proposal which must be accepted fully by the original proposer, before a contract is made.”

18. In the present case, it appears that the bid, which is an offer of the petitioner, was accepted by the respondent, even though there was no award in favour of the petitioner and hence, a concluded contract came into existence.
19. For the said reasons, the petition is allowed.
20. Mr. Markanda, learned senior counsel on instructions states that even though the Arbitration Clause provides for referral for arbitration to 3 Arbitrators, he has no objection if a Sole Arbitrator is appointed by this Court.
21. Without prejudice to the rights and contentions, Ms. Nakra, learned ASC also has no objection to the appointment of the Sole Arbitrator.
22. For the said reasons, since the parties are still having disputes between them, the following directions are issued:-
 - i) Justice Vipin Sanghi (Retd. Chief Justice of Uttarakhand High Court) (Mob. No. 9871300037) appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
 - ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the ‘DIAC’). The remuneration of the learned Arbitrator shall



- be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
 - iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
 - v) The parties shall approach the learned Arbitrator within two weeks from today.
23. The respondent is at liberty to challenge the competence of the Arbitral Tribunal in accordance with Section 60 of the Arbitration and Conciliation Act, 1996 which as and when filed will be considered on its own merits uninfluenced by the observations made in the order passed today.
24. The reply of the respondent was not on record. A copy of the same has been handed over in Court today, the same is taken on record.
25. The petition is disposed of in the aforesaid terms.

JASMEET SINGH, J

JANUARY 19, 2024 / (MS)

Click here to check corrigendum, if any