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

Pronounced on: 04.03.2024

+ **ARB.P. 723/2022**

ENERGY EFFICIENCY SERVICES LTD.

..... Petitioner

Through: Mr. Samdarshi Sanjay, Ms. Monika
Sharma and Mr. Ashish Kumar
Sharma, Advs.

versus

M/S ITECH MASS PRIVATE LIMITED

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the 'A&C Act') has been filed seeking appointment of an arbitrator to adjudicate the disputes between the parties.
2. The disputes between the parties have arisen in the context of tender processes initiated by the petitioner for distribution of energy efficient LED Bulbs, Tube Lights and Fans. The respondent is stated to have participated in the said tenders. On being declared as the successful bidder, seven Letter of Awards have been issued in favour of the respondent viz. (i) LOA dated 03.08.2016 for State of Uttarakhand, (ii) LOA dated 01.08.2016 for Delhi, (iii) LOA dated 11.11.2016 for State of Tripura, (iv) LOA dated 11.07.2017 for State of Uttar Pradesh, (v) LOA dated 15.11.2016 for State of Sikkim, (vi) LOA dated 17.11.2016 for Chandigarh, (vii) LOA dated 28.09.2017 for



States on PAN India basis.

3. The General Conditions of Contract contains an arbitration clause as under:

“6.2 Arbitration

6.2.1 If either the EESL or the Implementing Partner is dissatisfied with the Adjudicator’s decision, or if the Adjudicator fails to give a decision within twenty-eight (28) days of a dispute being referred to it, then either the EESL, or the Implementing Partner may, within fifty-six (56) days of such reference, give notice to the other party, with a copy for information to the Adjudicator of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given.

6.2.2 Any dispute in respect of which an notice of intention to commence arbitration has been given in accordance with GCC Sub-Clause 6.2.1, shall be finally settled by arbitration. Arbitration may be commenced prior to or after completion of the Facilities.

In case the Contractor is a Public Sector Enterprise or a Government Department

6.2.3 In case the Contractor is a Public Sector Enterprise or a Government Department, the dispute shall be referred for resolution in Permanent Machinery for Arbitration (PMA) of the Department of Public Enterprise, Government of India. Such dispute or difference shall be referred by either party for Arbitration to the Sole Arbitrator in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in-charge of the Department of Public Enterprises. The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary when so authorized by the Law Secretary, whose decision shall bind the Parties finally and conclusively. The Parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator.

In case the Contractor is not a Public Sector Enterprise or a Government Department



6.2.4 In all other cases, any dispute submitted by a party to arbitration shall be heard by an arbitration panel composed of three arbitrators, in accordance with the provisions set forth below.

6.2.5 The Employer and the Contractor shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the two arbitrators do not succeed in appointing a third arbitrator within twenty-eight (28) days after the latter of the two arbitrators has been appointed, the third arbitrator shall at the request of either party be appointed by the Appointing Authority for arbitrator designated in the SCC.

6.2.6 If one party fails to appoint its arbitrator within forty-two (42) days after the other party has named its arbitrator, the party which has named an arbitrator may request the Appointing Authority to appoint the second arbitrator.

6.2.7 If for any reason an arbitrator is unable to perform its function, the mandate of the Arbitrator shall terminate in accordance with the provisions of applicable laws as mentioned in GCC Clause 5 (Governing Law) and a substitute shall be appointed in the same manner as the original arbitrator.

6.2.8 Arbitration proceedings shall be conducted in accordance with The Arbitration and Conciliation Act, 1996 and its subsequent thereof. The venue of arbitration shall be New Delhi.

6.2.9 The decision of a majority of the arbitrators (or of the third arbitrator chairing the arbitration panel, if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction as decree of the court. The parties thereby waive any objections to or claims of immunity from such enforcement."

6.2.10 The arbitrator(s) shall give reasoned award.

Notwithstanding any reference to the Adjudicator or arbitration herein,

the parties shall continue to perform their respective obligations under the Contract unless they otherwise agree

the Employer shall pay the Contractor any monies due to the Contractor."

4. The Instructions to Bidders also contains an arbitration clause, which contemplates a three member arbitral tribunal.



5. The LOAs also contain an arbitration clause in the following terms:

“9. Arbitration:

Arbitration shall be carried out as per Arbitration Act 1996 and its subsequent amendment. The Contract shall be governed by and interpreted in accordance with the laws in force in India. The courts of DELHI shall have exclusive jurisdiction in all matters arising under the contract.”

6. In terms of the contractual arrangement between the parties, certain payments are stated to be due to the petitioner from the respondent. Disputes having arisen between the parties, the petitioner has invoked the arbitration vide notice dated 29.12.2021 and has nominated Mr. N. P. Kaushik. ADJ, (Retd). B-705. Gitanjali Apartments. Delhi- 110092. E-mail: naturalkaushik@gmail.com (Ph: 9910384663) as its nominee arbitrator. It called upon the respondent to appoint its nominee arbitrator. No reply to the said notice has been sent by the respondent.

7. Despite due service by way of publication, the respondent had neither appeared nor had it filed any response in the present proceedings.

8. *Vide* order dated 01.08.2023, this court noticed as under:

“1. Learned counsel for the petitioner has produced a copy of the original Contract Agreement dated 06.10.2016, in respect of LoA No. 1617142 for Uttarakhand, Contract Agreement dated 09.08.2016 in respect of LoA No. 1617105 for Delhi as also Contract Agreement dated 28.12.2016 in respect of LOA Nos. 1617204 & 1617206 for State of Tripura & Sikkim.

2. However, he submits that the Contract Agreement dated 11.07.2017 in respect of LOA No.1718090 for Uttar Pradesh; Contract Agreement dated 17.11.2016 in respect of LOA No.1617217 for Chandigarh and Contract Agreement dated 28.09.2017 in respect of LOA No.1718233 for Pan India, were not signed by the respondent.

3. He seeks some time to take instructions as to whether the requirement of Section 7 (4) of the Arbitration and Conciliation Act, 1996 stands satisfied in respect of the aforesaid contract agreements which never came to be signed by the respondent.



4. List on 08.08.2023.”

9. Learned counsel for the petitioner submitted that it would not be correct to say that there is no arbitration agreement in terms of Section 7 of the A&C Act in respect of three of the Contract Agreements mentioned in para 2 of the order dated 01.08.2023. It is submitted that the bids submitted by the respondent were accepted by the petitioner and a concluded contract came into existence on issuance of the LOA. It is submitted that the existence of the arbitration clause in the LOA is self-evident.

10. There is merit in this submission of the petitioner. Once the bid submitted by the respondent was accepted by the petitioner, a binding contractual relationship came into existence between the parties. The absence of the signing of a formal contract pursuant to three LOAs would not detract from that position¹. Further, in ***Govind Rubber Ltd. v. Louids Dreyfus Commodities Asia (P) Ltd.***², it has been held as under:

“16. Reading the provisions it can safely be concluded that an arbitration agreement even though in writing need not be signed by the parties if the record of agreement is provided by exchange of letters, telex, telegrams or other means of telecommunication. Section 7(4)(c) provides there can be an arbitration agreement in the exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other. If it can be prima facie shown that the parties are at ad idem, then mere fact of one party not signing the agreement cannot absolve himself from the liability under the agreement. In the present day of E-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the identity of the parties is established, and there is a record of agreement it becomes an arbitration agreement if there is an arbitration clause showing ad idem between the parties. Therefore, signature is not a formal requirement

¹ See: ***Jhar Mining Infra (P) Ltd. v. Managing Coalfields Ltd.***, 2022 SCC OnLine Ori 3027 and ***National Highways Authority of India v. R.S.B. Projects Ltd.*** 2012 SCC OnLine Del 965

² (2015) 13 SCC 477



under Section 7(4)(b) or 7(4)(c) or under 7(5) of the Act. ”

11. In view of the aforesaid, there is no impediment in appointing an independent nominee arbitrator on behalf of the respondent.
12. Accordingly, Mr. Justice (Retd.) Shantanu Kemkar, Former Judge, Bombay High Court (Mob. No.: 7678080789) is appointed as the nominee arbitrator of the respondent.
13. Both the nominee arbitrators shall appoint the presiding arbitrator as mandated in terms of the arbitration clause in GCC.
14. It is made clear that the reference in each of the LOAs/Contracts shall be independent even though the Arbitrator shall be entitled to hold common hearing/s for the sake of convenience.
15. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the Arbitral Tribunal, in accordance with law.
16. The learned Arbitral Tribunal may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.
17. The learned Arbitral Tribunal shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Arbitral Tribunal.
18. The parties shall share the arbitrators' fee and arbitral costs, equally.
19. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the Arbitral Tribunal on their merits, in accordance with law.
20. Needless to say, nothing in this order shall be construed as an



expression of this court on the merits of the case.

21. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

MARCH 04, 2024/hg