
(2023) 08 UK CK 0021

In the Uttarakhand High Court

Case No : Arbitration Application No. 36 Of 2023

Hillways Construction Company Pvt. Ltd.

APPELLANT

Vs

Union Of India & Another

RESPONDENT

Date of Decision : 04-08-2023

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 7, 7(2), 9, 11(6), 37

Citation : (2023) 08 UK CK 0021

Hon'ble Judges : Vipin Sanghi, CJ

Bench : Single Bench

Advocate : Siddhartha Singh, Kshitij Sah, Aazmeen Sheikh

Final Decision : Disposed Of

Judgement

Vipin Sanghi, CJ

1. This application has been preferred by the applicant under Section 11(6) of the Arbitration and Conciliation Act, 1996, to seek appointment of the sole Arbitrator to decide the disputes which have arisen between the parties under their agreement.

2. The case of the applicant is that the respondents invited bids on 31.01.2022, by issuing notice inviting tender for execution of permanent works and surfacing works from KM 18 to 32.70 (Net length 14.70 KM) on road Gunji- Kutti-Jolingkong in AOR of HQ 765 BRTF under project STF Hirak in Uttarakhand State.

3. The applicant participated in the said tender, and was declared to be technically responsive/ qualified.

Thereafter, upon opening of the financial bids on 10.02.2022, the applicant's bid was found to be the lowest. Consequently, the respondents issued the Letter of Acceptance on 21.03.2022, which reads as follows:-

"M/s Hillways Construction Company Pvt. Ltd.

34, Adarsh Gram, Dehradun road, Rishikesh,

PIN- 249001

(E-mail :hillwaysconstruction@gmail.com)

LETTER OF ACCEPTANCE (LoA)

EXECUTION OF PERMANENT WORKS AND SURFACING WORKS (CL-9 SPECIFICATION) FROM KM 18.00 TO KM 32.70 (NET LENGTH 14.70 KM) ON ROAD GUNJI-

KUTTI- JOLINGKONG IN AOR OF HQ 765 BRTF UNDER PROJECT STF HIRAK IN UTTARAKHAND STATE (TENDER ID : 2022_BRO_504600_1)

Dear Sir,

1. References:-

(a) Opening of technical bids on 24 Feb 2022.

(b) Evaluation of technical bids on 05 Mar 2022.

(c) Opening of financial bids on 10 Mar 2022.

2. With reference to e-tender opening and evaluation under reference and your bid submitted for above mentioned work, it is informed that Competent Authority has accepted the offer given by you for an amount of Rs.34,92,74,216.00 (Rupees Thirty Four crore Ninety two lakh Seventy four thousand Two hundred Sixteen only) for the subject work.

3. Accordingly, you are requested to ensure the following, within stipulated time.

(i) To sign and return the duplicate copy of the LoA in acknowledgement thereof, within 7 (seven) days of the receipt of LoA.

(ii) Within 15 days of receipt of the Letter of Acceptance, you shall deliver to the Accepting Officer a Performance Security in the form of bank guarantee for an amount equal to Rs.1,04,78,227.00 (Rupees One crore Four lakh Seventy eight thousand Two hundred and Twenty seven only) equivalent to 3% of the quoted sum. A Bank Guarantee in the prescribed form is enclosed with this letter. The period of validity of the Bank Guarantee Bond against Performance Security shall be upto and including the scheduled date of expiry of Defects Liability Period.

4. Any delay in submission of relevant documents/ submissions/ actions as mentioned in Para 3 above may invite suitable action as per relevant clauses of tender documents.

5. The contract will be governed by the conditions of contract as noted in the tender documents/ bid documents.

Yours sincerely,

(A.S. Rathore)

Chief Engineer

Project STF Hirak”.

(underlining supplied)

4. The case of the applicant is that the applicant acted in terms of the said Letter of Acceptance, and furnished the performance security in the form of bank guarantee for an amount of Rs.1,04,78,230/-, being Performance Bank Guarantee No.306901GL0001122, dated 28.03.2022, issued by the Union Bank of India.

5. The further case of the applicant is that the respondents terminated the said agreement on 23.07.2022, on the ground that the offer made by the applicant was not found to be so competitive during re-examination and scrutiny of market rate analysis.

6. The applicant was aggrieved by the said termination of the applicant's contract, and, challenged the same by filing Writ Petition (M/S) No.1980 of 2022 before this Court. However, this Court did not interfere with the said termination, on the ground that the applicant was virtually seeking specific performance of a construction contract, which the Court was not inclined to grant in writ proceedings.

7. The applicant, thereafter, file an application under Section 9 of the Arbitration and Conciliation Act. However, the Commercial Court did not grant interim relief sought by the applicant in those proceedings.

8. The applicant also preferred an appeal under Section 37 of the Act against the order passed by the Commercial Court. However, in the meantime, the respondents awarded the contract to a third party, and consequently, the applicant withdrew the said appeal, and has preferred the present arbitration application, after issuing the notice invoking arbitration on 22.04.2023.

9. The arbitration clause is contained in Clause 70 of the General Conditions of Contracts (GCC), which provides that all disputes between the parties to the contract shall be referred to the sole arbitrator, who is a serving officer having degree in Engineering or equivalent.

10. Mr. Singh submits that after the amendment in the Arbitration and Conciliation Act, vide Act No.3 of 2016, whereby the Fifth Schedule to the Arbitration and Conciliation Act was introduced, the Arbitrator who is an employee, consultant, advisor or have any other past or present business relationship with one of the parties, cannot act as an Arbitrator, since that would give rise to justifiable doubts as to the independence or impartiality of arbitrators.

11. The applicant, therefore, submits that this Court should appoint the sole arbitrator under the agreement of the parties.

12. The respondents have filed their counter-affidavit to oppose the present application. The primary objection of the respondents is to the effect, that no agreement has come into being between the parties, as no agreement was executed in pursuance of the Letter of Acceptance. It is, therefore, argued that there is no arbitration agreement between the parties, which can be invoked.

13. I have considered the aforesaid submission of learned counsel for the respondents.

14. Section 7 of the Arbitration and Conciliation Act states that in Part (1), 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

15. Section 7(2) of the Act states that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration agreement has to be in writing, and it is in writing if it is contained in, inter alia, an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means, which provide a record of the agreement.

16. In the present case, the respondents issued the notice inviting tender. The applicant submitted its tender/ bid in pursuance of the said NIT. The tender/ bid submitted by the applicant was its offer. The respondents issued the Letter of Acceptance on 21.03.2022, thereby accepting the offer of the applicant. The same has been extracted hereinabove, and it clearly states that the contract will be governed by the conditions of contract, as noted in the tender documents/ bid documents.

17. With the issuance of the Letter of Acceptance, a binding contract came into being between the parties, which is evident from the exchange of correspondence between them, namely, the submission of its bid/ tender by the applicant- which was its offer, and its acceptance by the respondents on 21.03.2022. The terms and conditions arrived at between the parties are in writing, which, inter alia, contains an arbitration clause as well.

18. Therefore, I do not find any merit in the submission of learned counsel for the respondents that there is no binding arbitration agreement entered into between the parties in writing. The other issues raised by the respondents, in their counter-affidavit, relate to the merits of the disputes, with which, I am not concerned in these proceedings.

19. Accordingly, this application is allowed, and I appoint Mr. Justice Pradeep Nandrajog, Retired Chief Justice, High Court of Bombay (Mobile No.9818000130), to act as the sole Arbitrator to adjudicate the disputes between the parties, under the aforesaid Agreement/ Contract.

20. The present application stands disposed of in the aforesaid terms.

21. Pending application, if any, also stands disposed of.