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

+ ARB.P. 438/2021

FIVESTAR DEHYDRATION
PRIVATE LIMITED

..... Petitioner

Through Mr. Ashish Khorana, Adv.

versus

UNION OF INDIA

..... Respondent

Through Mr. Sandeep Bajaj, Sr. Panel
Counsel for Union of India

CORAM:

HON'BLE MR. JUSTICE C .HARI SHANKAR

O R D E R (ORAL)

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06.04.2021

C .HARI SHANKAR, J.

IA 4827/2021 (exemption)

1. Subject to petitioner filing legible copies of any dim documents, on which it may seek to place reliance within a period of four weeks from today, exemption is granted for the present.

2. The application stands disposed of.

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1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“1996 Act”), for appointment of an arbitrator.

2. With the consent of learned counsels, this petition is disposed of at this stage itself.

3. The dispute raised by the petitioner, emanates from a Request for Proposal (RFP) dated 26th December, 2018, whereby the respondent contracted the petitioner for supply of dehydrated potato cubes.

4. The stratum of the dispute is contained in paras 7(b) to 7(m) of the petition, without prejudice to the rights of the respondent, to dispute the averments contained therein, on facts as well as in law, may be reproduced thus:

“7b An enquiry was issued for purchase of 337 MT of Potato Dehydrated, dated 26.12.2018 in which the Petitioner participated and in the captioned RFP the specification was given in Specification No. 153 and also containing the clause that in case of any dispute the same will be referred for arbitration as per form DPM-7, DPM-8 and DPM-9 at clause 16 of Part-1 and clause 3 of Part -III.

- i. The offer of The Petitioner was accepted and out of one single RFP, the following three Acceptance of tenders (A/T's) were awarded to The Petitioner –A/T No.62601/10/19-20/Potato Dhd/APO dated 04.04.2019 for supply of 15MT Potato Cube Dehydrated
- ii. A/T No. 62601/11/19-20/Potato Dhd/APO dated 04.04.2019 for supply of 15MT Potato Cube Dehydrated.
- iii. A/T No. 62601/12/19-20/Potato Dhd/APO dated 04.04.2019 for supply of 17MT Potato Cube Dehydrated

7c The defence food specification -2016 No. 153 potato
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Dehydrated had terms for inspection.

"14(b) Sulphur dioxide, mg/kg - Not more than 1500 parts per million.

15(b). Potato Slices. Slices of potatoes having a thickness between 3 to 6 mm.

(c) Potato Cubes. Diced cuboids having all dimensions between 3 to 6 mm".

7d Based on these specifications, The Petitioner ordered special machines before entering into this contract by A/T awarded and was sure to supply the entire quantity as per specifications and therefore deposited performance guarantee as per following:-

AT	Qty. (in MT)	Delivery Period	Basic price	Value (in Rs.)	B.G.
First AT	15	16 Jul 2019 to 14 Aug 2019	1,36,500/-	20,47,500/-	2,04,750/-
Second AT	15	15 Aug 2019 to 13 Sep 2019	1,36,500/-	20,47,500/-	2,04,750/-
Third AT	17	01 Nov 2019 to 30 Nov 2019	1,36,500/-	23,20,500/-	2,32,050/-

7e These above terms, specifications clearly specifies that the potato cubes were supposed to be:-

- i. Having sulphur dioxide mg/kg.- Not more than 1500 parts per million
- ii. Sizes of cubes between 3 to 6MM; i.e. sizes could be

3mm to 6mm (all sizes), as therefore one piece could be maximum double of other, minimum 3mm and maximum 6mm.

7f The Petitioner in accordance with the terms had already furnished Bank Guarantee equal to 10% amount/value of order as security, details of which is already given above.

7g After receipt of the order and furnishing of security the Petitioner commenced the arrangement to procure, process and supply the goods in question as were agreed between the parties. However, at that stage on account of these being edible items and the Petitioner installed evidently, special machines, but Respondent acting illegally rejected the Potato Cubes as per Respondent's specification.

7h As the Respondent acting illegally rejected the lot, claiming that sizes of Potato Cubes are bigger in size than specification. The Petitioner though, showed that they were uniform and below 6mm, as per specification, as the size could be anyway between 3 to 6mm. For the first A/T, a quantity of two lots each of 7150 kgs was offered on dated 16.07.2019, but entire quantity was however rejected illegally and The Petitioner through not legally bound due to illegal rejection but to maintain good relation, keeping from past supplies, arranged another more expensive machinery, equipment to not break a large piece of Potato to a small size, but a machine to direct/break/cut an already cut less than 6mm piece (on less) to fines size of 3 to 6mm. The second reoffered lot for first A/T itself on 14.08.2019 of 2 lots of 7150 kgs each was however, not re-inspected.

7i The Petitioner had to re-offer in First A/T again for the third time on 13.09.2019, again with 2 lots of 7150 kgs each, which was this time rejected on two grounds, on 01.10.2019 and latter, which as per report status of follows:-

"VERDICT:- The sample does not conform to Defence Food Spn. No. 153 for Potatoes Dehydrated Cubes- 2016 vetted on 09 Jun 2017 and is not acceptable & rejected.

R/R: 1) Potato Dehydrated (cubes) not in the form of uniform size & shape.

2) Sulphur dioxide above Spn. limit."

7j The Petitioner also offered two lots of 7150 kgs for 2nd A/T as well on 04.09.2019 which too was rejected for aforesaid reasons by The Respondent, illegally and against terms. The Petitioner also filed an appeal to this rejected lot on 04.10.2019 for this 2nd A/T's rejected lot of 14300 kgs, which was again rejected illegally.

7k The Petitioner simultaneously got the goods tested at an independent laboratory, to test the Potato Cubes, which The Petitioner was sure were wrongly rejected, since they will still available and can be seen are in permissible specification of 3 to 6mm, as can be seen from naked eye also, besides test results of laboratory and the Respondent caused unnecessary losses to the Petitioner, who were first told that sized should not be all of 6mm, but mixed between 3 to 6mm and should be reduced in sizes and The Petitioner purchased/installed another machine/special machine, which could cut already chopped small pieces of around 6mm, to fines size of 3 to 6 mm, but was again rejected as sizes are now too small and for obvious reasons, the already cut small pieces, as per Respondent specification only, which are unsalable in outside market, cannot be increased in size again and therefore the Petitioner got the sulphur dioxide test done, which was Respondent's 2nd ground of rejection, and found from independent lab , at same time in August 2019, that the results were 608.69 Mg/Kg, which is well within prescribed specification No. 153, as mentioned in A/T and therefore, rejection on both reasons as per I-Note's is wrong and illegal.

7l For the Third A/T, since Respondent had cancelled the first offer and second offer in both the other A/T's for same reasons and the Petitioner had exactly same material ready to be inspected and dispatched, but was well aware that The Petitioner would only be spending for sending, packing, loading and unloading and result would be same, for reasons of year rejection, as the material was same under same RFP and therefore the Petitioner did not send lots in last /3rd A/T, since grounds for rejection from the Respondent end were to come as same and therefore the material/quantity/goods were pointless to be offered in 3rd A/T and so the Petitioner did not do so.

7m The Petitioner being big supplier of vegetable and dehydrated foods and is having one of the most sophisticated well equipped laboratory and machines and installed more, only for this RFP and had offered the entire quantity as stated above after fully testing it before supply and later tested through independent laboratory as well and also after the wrongful rejection of large quantity as offered by the Petitioner, but since was fully confident that the goods offered by The Petitioner were meeting the specification and offered only being fully satisfied for their quality, but office of the Respondent without adopting proper testing procedure by the Respondent, entire huge quantity offered was wrongfully rejected and the Petitioner had to lift on account of these illegal rejection. The Petitioner otherwise was threatened by purchaser by adopting coercive threats including in addition to above that the Respondent will be destroying at the risk and cost of Petitioner. Therefore the Petitioner without accepting illegal rejection being alleged lifted the same after spending heavy transportation charges due to aforesaid reasons which also have to be reimbursed now by the Respondent, besides the cost of entire contract, i.e. all 3 AT's mentioned above.”

5. In view of the aforesaid dispute, the petition asserts that the petitioner was attempting bilateral discussion with the respondent to resolve the controversies. However, this did not fructify. According to the petitioner, an amount of ₹ 88,07,050/- is due from the respondent to the petitioner along with the interest.

6. Mr. Sandeep Bajaj, learned Senior Panel Counsel for Union of India, does not object to the appointment of an arbitrator to arbitrate on the dispute. He, however, submitted that he was willing to suggest some names, out of which the Court could give any one as arbitrator to arbitrate on the dispute.

7. Once, the respondent has defaulted in complying with the arbitration clause, and the petitioner has approached this Court, the locus of the respondent to suggest any arbitrator stands foreclosed. This position is well-settled, *inter alia* in *Datar Switchgears Ltd. v. Tata Finance Ltd*¹, by the Supreme Court.

8. In view thereof, this Court appoints Ms. Saumya Tandon, Advocate (Mob. No. 9810907029) as arbitrator to arbitrate on the disputes between the parties.

9. The learned arbitrator would be entitled to charge fees as per the Fourth Schedule to 1996 Act or as otherwise fixed by her in consultation with the parties.

10. The learned arbitrator would furnish the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on the reference.

11. With the aforesaid observations, this petition is disposed of.

C.HARI SHANKAR, J

APRIL 6, 2021

r.bararia

¹ (2000) 8 SCC 151
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