

East Central Railway



Office of the
General Manger (Engg)
Hajipur

PCE's CIRCULAR No- 17/2007/Works **Sub- Appointment of out side Arbitrator**

In recent past it is being observed that the contractors are very frequently approaching the High Court for appointment of outside arbitrator, if Arbitration panel is not appointed within the stipulated time period by the Railway. It is also noted that in most of the cases High Courts are appointing outside arbitrators as the case is not contested properly by Railway at this stage. In most of the cases it is observed that appointment of arbitrator by Railway got delayed due to late submission of facts of the cases to the HQ.

A. ACTIONS TO BE TAKEN BY RAILWAY AFTER RECEIPT OF LETTER OF DEMAND OF ARBITRATION FROM THE CONTRACTORS.

- (i) In one of the recent judgment Hon'ble Supreme Court has given following remarks **"we may also observe that Railways and Public institutions are very slow in reacting to the request made by a contractor for appointment of the arbitrator. Therefore, in case appointment is not made in time on the request made by the contracting party then in that case the power of the High Court to appoint arbitrator under Section 11 of the Act will not be denuded. We cannot allow administrative authorities to sleep over the matter and leave the citizens without any remedy. Authorities shall be vigilant and their failure shall certainly give rise to cause to the affected party. In case, the General Manager, Railway does not appoint the arbitral tribunal after expiry of the notice of 30 days or before the party approaches the High Court, in that case, the High Court will be fully justified in appointing arbitrator under section 11 of the Act. It is the discretion of the High Court that they can appoint any railway officer or they can appoint any High Court Judge according to the given situation."**
- (ii) It is therefore required that as soon as demand of Arbitration is received, **all the formalities of appointing Railway arbitrators has to be completed within 30**

days from the date of receipt of the demand in the office of GM. Failure to this may leads to contractors approaching High court for appointment of outside arbitrator under section 11 of Arbitration & Conciliation Act-1996. Admissibility of claim should not be raised at the time of appointment of arbitrator. The bottem line should be that the appointment of arbitrator should be done within 30 days at all costs.

B. STEPS TO BE TAKEN WHEN CONTRACTOR APPROACHES HIGH COURT FOR APPOINTMENT OF ARBITRATOR.

In such cases application of appointment of arbitrator required proper defence in the High court so as to nullify any chances of appointment of outside arbitrator by the court. All such cases should be defended in court in the following manners.

- (i) Do not defend the Arbitration application on the merits or demerits of claims.
- (ii) If arbitration application is filed in the court under Section-8 of Arbitration & Conciliation Act-1996, it shall be contested on the ground that **there is a procedure to secure appointment of arbitrator under the contract.** Reference of Clauses 63 & 64 of the General condition of contract has to be brought to the notice of the High Court.
- (iii) Under section-11 (6) of Arbitration & Conciliation Act-1996 if contractor approaches Chief Justice of High Court for appointment of arbitrator, check up whether provisions of section 11(6) have been complied and defend the case accordingly.
- (iv) Draw attention of Chief Justice to Section 11(8) of Arbitration & Conciliation Act-1996, according to which **qualification of arbitrators have to be kept in mind while nominating the arbitrator.** If required submit **panel of arbitrators approved by GM** to the Chief Justice.

C. STEPS TO BE TAKEN AFTER APPOINTMENT OF OUTSIDE ARBITRATOR

(i) In case out side arbitrator is appointed by the High Court, decision should be taken on filing of Special Leave Petition (SLP) depending upon the merit of the case after obtaining legal opinion very promptly since SLP has to be filed within 90 days.

- (ii) Pending SLP in Supreme Court. **Arbitration proceedings should be attended with appointed arbitrators.**
- (iii) In such cases, before filing any written statement to the arbitrator, **if considered justified, his appointment should be challenged on the grounds of not possessing qualification as per agreement as indicated under Sec.12 (3) (b) of Arbitration & Conciliation Act-1996 within 15 days of his appointment**
- (iv) In some of the cases it is noticed that outside arbitrator appointed by High court are fixing **very abnormal arbitration fees**. In such cases **objection should be raised before the arbitrator tribunal to fix the reasonable cost as per Sec 32(8) (a) Of Arbitration & Conciliation Act-1996**. Reference of fees of Railway Arbitrator has to be given to arbitrator tribunal and accordingly request has to be made before arbitrator tribunal to fix the reasonable cost.
- (v) If in any case arbitrator tribunal refuses to revise the arbitration fees, an application has to be filed before the Court to fix the reasonable cost under Section 39(2) of Arbitration & Conciliation Act-1996.

(8)
21/08/07
(A.K.DUBEY)
Chief Engineer/Works

Docket No- W-2/118/09/Works Policy

Date-21.08.07

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21/08/07
Dy Chief Engineer/Works
For General Manager (Engg)