

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

MONDAY, THE 5TH DAY OF OCTOBER 2015/13TH ASWINA, 1937

WP(C).No. 8241 of 2015 (E)

PETITIONER:

**NAVEEN CONSTRUCTION CORPORATION,
NEAR EDAPALLY RAILWAY GATE, AIMS, PONEKKARA P.O.,
KOCHI - 682 041
REPRESENTED BY ITS MANAGING PARTNER N.SUGATHAN,
AGED 63 YEARS, S/O.NARAYANAN, ELLIKKAT HOUSE,
ELAMAKKARA P.O., KOCHI - 26.**

**BY ADVS.SRI.M.S.UNNIKRISHNAN
SMT.JAYASREE MANOJ
SRI.K.SUNIL
SRI.JITHIN PAUL VARGHESE
SMT.T.P.SHELNA
SMT.M.P.PRIYANKA**

RESPONDENT:

**KERALA WATER AUTHORITY,
REPRESENTED BY ITS SUPERINTENDING ENGINEER,
PUBLIC HEALTH CIRCLE, KOTTAYAM, PIN - 686 001.**

R1 BY ADV. SRI.GEORGE MATHEW, SC, KERALA WATER AUTHORITY

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05-10-2015,
ALONG WITH WPC. 13806/2015, WPC. 13809/2015, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS:

- EXHIBIT P1. TRUE COPY OF THE RELEVANT PAGES OF NOTICE INVITING TENDER.
- EXHIBIT P2. TRUE COPY OF THE FORM PRICE BID DATED 20.02.2014.
- EXHIBIT P3. TRUE COPY OF THE LETTER DATED 30.07.2014 ISSUED BY THE RESPONDENT.
- EXHIBIT P4. TRUE COPY OF THE LETTER SUBMITTED BY THE PETITIONER DATED 18.10.2014
- EXHIBIT P5. TRUE COPY OF THE LETTER ISSUED BY THE RESPONDENT TO THE PETITIONER DATED 05.09.2014..
- EXHIBIT P6. TRUE COPY OF THE LETTER DATED 20.01.2015 ISSUED BY THE RESPONDENT TO THE PETITIONER.
- EXHIBIT P7. TRUE COPY OF G.O.NO.95/2004/PWD DATED 01.10.2004 IN DEMANDING THE PERFORMANCE GUARANTEE.

RESPONDENT(S)' EXHIBITS:

NIL

/TRUE COPY/

P.A. TO JUDGE

AK

ANIL K.NARENDRA, J.

W.P.(C).Nos.8241, 13806 & 13809 of 2015

Dated this the 5th day of October, 2015

JUDGMENT

The common issue raised in these writ petitions relates to the demand made by the Kerala Water Authority requiring the successful tenderer to remit performance guarantee at the time of execution of the agreement for the works covered by tender sanction orders issued by the respondents.

W.P.(C)No.13806 of 2015:-

2. The petitioner is an 'A' Class contractor registered with the Kerala Water Authority, the 1st respondent herein. By Ext.P1 notification dated 30.10.2014, the Superintending Engineer, Kerala Water Authority, Public Health Circle, Alappuzha, the 2nd respondent herein, invited competitive e-tenders on lump sum basis for the work 'NABARD RIDF XIX-Supply and laying of additional distribution lines in various Panchayats in Cherthala Taluk-Package I to VIII'. Pursuant to Ext.P1 tender notice, the petitioner submitted tenders to execute 4 works enlisted therein as Serial Nos.1, 2, 3 & 5, being shown as Package I, Package II,

Package III and Package V. The said tenders submitted by the petitioner were accepted, based on the recommendation made by the Tender Committee. Ext.P2 tender sanction order was thereupon issued by the 1st respondent on 10.04.2015. Similar orders were issued in respect of the other three works, which is evident from Exts.P3, P4, P5 & P6 orders issued by the 1st respondent. Exts.P2 to P6 orders require the petitioner to remit performance guarantee in relation to the 4 works in question, for ₹92,44,659/-, ₹1,01,42,369/-, ₹1,16,85,131/- and ₹1,26,39,062/- respectively, totalling to ₹4,37,11,221/- .

3. The petitioner would contend that, going by sub-clause (I)(b) of Clause 7.1.2.1 of Ext.P1 tender conditions, performance guarantee is to be remitted by the contractor, only if the rate quoted by the contractor is between 25% below estimate amount and 50% below estimate amount. As regards the works in question, the petitioner's tenders were 9.23% below the estimate amount, which is evident from the estimate amount shown in the tender notice vis-a-vis the amounts quoted by the petitioner. Therefore, going by the aforesaid sub-clause, remittance of performance guarantee cannot be insisted upon. The petitioner

would also contend that sub-clause (II) of Clause 7.1.2.1 of the tender conditions governs only tenders with break up of rates/estimates as to working charges and cost of materials and the said clause has no application to the tenders in question tendered out on lump sum basis, without break up of rates as to working charges and cost of materials. Aggrieved by the arbitrary demand for remittance of performance guarantee, the petitioner submitted Exts.P8 to P11 representations before the 2nd respondent and thereafter, approached this Court in this writ petition seeking a writ of certiorari to quash Exts.P2 to P6 to the extent it insist and require remittance of performance guarantee from the side of the petitioner. The petitioner has also sought for other consequential reliefs, including a writ of mandamus prohibiting the respondents from insisting the aforesaid requirement of performance guarantee.

4. By order dated 22.05.2015, this Court has ordered that, the award of work in favour of the petitioner shall not be terminated.

5. A counter affidavit has been filed on behalf of the respondents contending that, the petitioner is bound to remit

performance guarantee in terms of clause 7.1.2.1 of Ext.P1 tender notice. The respondents have admitted that the tenders in question were floated on lump sum basis. The pre-qualification of the tenderers were done as per the conditions in the notice inviting tender. After pre-qualification, the price bid submitted by the petitioner was opened on 10.11.2014. The petitioner, who had successfully undertaken various works in the Kerala Water Authority and acquainted with the cost of materials as well as working charges involved in all types of works undertaken by it, however quoted working charges as 52.81% below for Tender No.I, 54.26% below for Tender No.II, 58.30% below for Tender No.III and 55.91% below for Tender No.V. Since, the rates quoted by the petitioner is below the estimate rate, he is liable to remit performance guarantee as laid down in Ext.P1 tender notice. Therefore, the decision taken by the Board of the Kerala Water Authority, after considering the entire aspects and also the rates quoted by the petitioner, is perfectly legal. If the petitioner was having any doubt in quoting the rates, he could have sought clarifications from the competent authority. The split up of working charges and cost of materials are mentioned in the

'details of lowest tender compared with PAC' provided in Ext.P2 tender sanction order dated 10.04.2015. The petitioner was pre-qualified since he has not made any special condition and since the tenders submitted by him were in agreement with the conditions in Ext.P1 tender notice. Otherwise, he would have been disqualified in the first level of tendering itself and the next lowest tenderer would have been given a chance. The petitioner has quoted very high rates for materials such as 53.74% above for Tender No.I, 46.94% above for Tender No.II, 64.22% above for Tender No.III and 60.24% above for Tender No.V, which is doubtful, and there is a chance of the petitioner abandoning the work after getting payment for the cost of materials. As per sub-clause (II) of Clause 7.1.2.1 of Ext.P1 tender notice the petitioner has to remit performance guarantee and accordingly, after evaluation of the tenders submitted by the petitioner at all levels, directions were issued to remit performance guarantee before execution of the agreement. The respondents would also point out that, Exts.P8 to P11 representations submitted by the petitioner were rightly rejected vide Exts.R1(a), R1(b), R1(c) and R1(d) orders.

6. I heard arguments of the learned counsel for the petitioner and also the learned Standing Counsel for the respondents.

7. The sole issue that arises for consideration in this writ petition is as to the legality or otherwise of the demand made by the respondents in Exts.P2 to P6 by which the petitioner is required to remit performance guarantee at the time of execution of the agreement for the works covered by the said tender sanction orders.

8. It was pursuant to Ext.P1 tender notice, the petitioner submitted tenders in respect of the works in question. The works tendered by the petitioner are Serial Nos.1, 2, 3 and 5 in Ext.P1 tender notice, in respect of which PAC mentioned therein is 520.24 lakhs, 499.17 lakhs 469.84 lakhs and 526.51 lakhs respectively. Clause 7.1.1 of Ext.P1 tender notice deals with pre-qualification of tenders, which makes it explicitly clear that, the Kerala Water Authority propose to arrange the works in question under lump sum/Turnkey contract basis. Clause 7.1.2.1 of Ext.P1, which deals with performance guarantee reads thus;

"7.1.2.1. Performance guarantee is to be remitted by the

contractor if required at the time of execution of agreement as per Order No. KWA/JB/TAW/79/2012 dated 01.10.2012 of the Technical Member, Kerala Water Authority, Thiruvananthapuram.

- (I) The provisions contained in the G.O.(P) No.84/97/PW & T dated 19.08.1997 and G.O.(P)No.95/2004/PWD dated 01.10.2004 in the matter of performance guarantee that
 - a) If the quoted rate for work is below 50% it will be rejected.
 - b) If the rate quoted by the contractor is between 25% below estimate amount and 50% below estimate amount (the quoted rate being $x\%$ below estimate amount), the contractor will remit performance guarantee for an amount equal to $(x-25)\%$ of the estimate amount.
- (II) Also that if the quoted working charge is between 25% and 50% below the estimated working charge of the tender, the contractor will have to remit performance guarantee for an amount equal to $(x-25)\%$ and in case the below rate is more than 50% of estimate amount for working charges of the tender, contractor has to remit performance guarantee for an amount equal to $[25\%+(x-50)\% \times 2]$.

9. As per sub-clause (I)(b) of Clause 7.1.2.1, a contractor has to remit performance guarantee only if the rate quoted by

him is between 25% below the estimate amount and 50% below the estimate amount. As regards the works in question, the petitioner's tenders were 9.23% below the estimate amount, which is evident from the estimate amount shown in the tender notice vis-a-vis the amounts quoted by the petitioner and as such the petitioner cannot be insisted to remit performance guarantee in terms of the aforesaid sub-clause. As per sub-clause (II) of Clause 7.1.2.1, if the quoted working charge is between 25% and 50% below the estimate working charges of the tender, the contractor will have to remit performance guarantee for the amount equal to $(x-25)\%$ and in case the below rate is more than 50% of the estimate amount for working charges of the tender, the contractor has to remit performance guarantee for an amount equal to $[25\% + (x-50)\% \times 2]$. From a plain reading of sub-clause (II) of Clause 7.1.2.1, it is evident that the said provision has no application to the tenders in question, which are floated on lump sum basis, without break up of the rates or estimates as to working charges and cost of materials.

10. The fact that the tenders in question were floated on lump sum basis has been admitted in the counter affidavit filed on

behalf of the respondents. The fact that, the split up of working charges and cost of materials were neither disclosed in Ext.P1 tender notice nor published in the official web site of the Water Authority is also not in dispute. As borne out from Ext.P2 tender sanction order dated 10.04.2015 issued by the 1st respondent, the Tender Committee which met on 12.01.2015 noticed that it was the first tender call and the single tenderer (the writ petitioner) quoted different rates in P1 and P2. He quoted ₹463,71,604/- in P1 and ₹471,90,450/- in P2, in which P1 is 9.23% below the tendered PAC of ₹510,85,808/-. The Tender Committee sought clarification from the Chief Engineer/Superintending Engineer, on the following aspect;

“The percentage excess for working charge quoted by the single tenderer is 52.81% below and as per NIT, necessary performance guarantee is to be remitted. It is to be clarified whether the cost of materials and working charges (PAC) of the tender is informed to the bidders, if not, the reason for the same is to be obtained.”

The Chief Engineer (CR), vide his letter dated 04.02.2015 has reported as follows;

“That, the tender was invited as LS (Lump Sum) tender and hence working charges and cost of materials were not

disclosed separately in the schedule.

The report submitted by the Chief Engineer (CR) referred to above, make it explicitly clear that the tenders in question were invited on lump sum basis, in which the working charges and cost of materials were neither disclosed separately in the schedule nor the bidders were informed about the same. In such circumstances, merely for the reason that, the split up of working charges and cost of materials are mentioned in the 'details of lowest tender compared with PAC' provided in Ext.P2 tender sanction order dated 10.04.2015, the respondents cannot now contend that the working charges and cost of materials were disclosed to the bidders.

11. The learned Standing Counsel for the respondents would then contend that, in terms of Ext.P1 tender notice, the bidders have an option to gather further information regarding the bidding document from the website of the Kerala Water Authority or from the office of the 2nd respondent. Therefore, the petitioner could have gathered information regarding the cost of materials and working charges of the tenders in question from the office of the 2nd respondent. When the tenders in question were

floated on lump sum basis, without disclosing separately the working charges and cost of materials, the question of the bidders gathering information regarding the cost of materials and working charges from the office of the 2nd respondent did not arise at all.

12. When the provisions under Clause 7.1.2.1 of Ext.P1 tender notice have no application to the tenders in question floated on lump sum basis, without break up of the rates or estimates as to working charges and cost of materials, the respondents have absolutely no authority to insist that the petitioner should remit performance guarantee at the time of execution of the agreement for the works covered by Exts.P2 to P6 tender sanction orders. In such circumstances, the provisions contained in Exts.P2 to P6 tender sanction orders to the extent it require and direct the petitioner to remit performance guarantee for a total sum of ₹437,11,221/- before execution of the agreement in respect of the works in question cannot be sustained.

13. In the result, this writ petition is disposed of setting aside Exts.P2 to P6 tender sanction orders to the extent it insist and require the petitioner to remit performance guarantee at the

time of execution of the agreement for the works covered by the said orders and the respondents are directed to permit the petitioner to execute agreement for the works covered Exts.P2 to P6 orders, without insisting him to remit any performance guarantee. No order as to costs.

W.P.(C)No.13809 of 2015:-

14. The petitioner is an 'A' Class contractor registered with the Kerala Water Authority, the 1st respondent herein. By Ext.P1 notification dated 30.10.2014 (same as Ext.P1 in W.P.(C) No.13806 of 2015) the Superintending Engineer, Kerala Water Authority, Public Health Circle, Alappuzha, the 2nd respondent herein, invited competitive e-tenders on lump sum basis for the work 'NABARD RIDF XIX-Supply and laying of additional distribution lines in various Panchayats in Cherthala Taluk- Package I to VIII'. Pursuant to Ext.P1 tender notice, the petitioner submitted tenders to execute 2 works enlisted therein as Serial Nos.7 and 8, being shown as Package VII and Package VIII. The said tenders submitted by the petitioner were accepted, based on the recommendation made by the Tender Committee. Exts.R1(a) and R1(b) tender sanction orders were thereupon issued by the

1st respondent on 10.4.2015 accepting the tenders submitted by the petitioner, based on which the petitioner was issued with Exts.P2 and P3 orders of the 2nd respondent dated 22.4.2015 requiring the petitioner to remit performance guarantee of ₹2,87,41,413/- and ₹1,44,89,738/- respectively, totalling to ₹4,32,31,151/-.

15. The petitioner would contend that, going by sub-clause (I)(b) of Clause 7.1.2.1 of Ext.P1 tender conditions, performance guarantee is to be remitted by the contractor, only if the rate quoted by the contractor is between 25% below estimate amount and 50% below estimate amount. As regards the works in question, the petitioner's tenders were 21% below the estimate amount. Therefore, going by the aforesaid sub-clause remittance of performance guarantee cannot be insisted upon. The petitioner would also contend that sub-clause (II) of Clause 7.1.2.1 of the tender conditions governs only tenders with break up of rates/ estimates as to working charges and cost of materials and the said clause has no application to the tenders in question tendered out on lump sum basis, without break up of rates as to working charges and cost of materials. Aggrieved by the arbitrary demand

for remittance of performance guarantee, the petitioner submitted Exts.P5 and P6 representations before the 2nd respondent and thereafter, approached this Court in this writ petition seeking a writ of certiorari to quash Exts.P2 and P3 to the extent it insist and require remittance of performance guarantee from the side of the petitioner. The petitioner has also sought for other consequential reliefs, including a writ of mandamus prohibiting the respondents from insisting the aforesaid requirement of performance guarantee.

16. By order dated 22.05.2015, this Court has ordered that, the award of work in favour of the petitioner shall not be terminated.

17. A counter affidavit has been filed on behalf of the respondents raising contentions similar to that in the counter affidavit filed in W.P.(C)No.13806 of 2015. The respondents would also point out that, Exts.P5 and P6 representations submitted by the petitioner were rightly rejected vide Exts.R1(c) and R1(d) orders.

18. In view of the findings already entered in W.P.(C) No.13806 of 2015, the petitioner in this writ petition is also

entitled to succeed. When the provisions under Clause 7.1.2.1 of Ext.P1 tender notice have no application to the tenders in question floated on lump sum basis, without break up of the rates or estimates as to working charges and cost of materials, the respondents have absolutely no authority to insist that the petitioner should remit performance guarantee at the time of execution of the agreement for the works covered by Exts.P2 and P3. In such circumstances, the provisions contained in Exts.P2 and P3 orders to the extent it require and direct the petitioner to remit performance guarantee for a total sum of ₹4,32,31,151/- before execution of the agreement in respect of the works in question cannot be sustained.

19. In the result, this writ petition is disposed of setting aside Exts.P2 and P3 orders to the extent it insist and require the petitioner to remit performance guarantee at the time of execution of the agreement for the works covered by the said orders and the respondents are directed to permit the petitioner to execute agreement for the works covered Exts.P2 and P3 orders, without insisting him to remit any performance guarantee. No order as to costs.

W.P.(C)No.8241 of 2015:-

20. The petitioner is an 'A' Class contractor registered with the Kerala Water Authority, the respondent herein. The petitioner submitted tenders pursuant to Exhibit P1, P8 and P9 tender notices in respect of (1) supplying and laying, joining, testing and commissioning of 400 mm D1 K-9 raw water pumping main from well at Kollamukkam to Treatment Plant at Nikirampuram (2) design, construction, testing and commissioning of 10 MLD Treatment Plant, 4.50 LL capacity GL sump and construction of compound wall etc. at Nikirampuram (3) supplying, laying, joining, testing and commissioning of 250 mm DI K-9 Clear water pumping main from sump at Nikirampuram to OH tank at Nikirampuram (4) Design, construction, testing and commissioning of 10 LL capacity OHSR at Treatment Plant site, Nikirampuram. The tenders submitted by the petitioner, was accepted by Exhibit Ext.R1(a) order dated 18.6.2014 and Ext.P3 communication dated 30.07.2014 issued by the Superintending Engineer of the Water Authority, by which the petitioner was asked to remit performance guarantee for a total sum of ₹29,92,874/-.

21. The petitioner would contend that, going by sub-clause (1)(b) of Clause 7.21.3 of the tender conditions (which is similar to sub-clause (I)(b) of Clause 7.1.2.1 of Ext.P1 tender notice in W.P.(C)No.13806/2015), performance guarantee is to be remitted by the contractor, only if the rate quoted by the contractor is between 25% below estimate amount and 50% below estimate amount. As regards the works in question, the petitioner's tenders were 3.67% below the estimate amount. Therefore, going by the aforesaid sub-clause remittance of performance guarantee cannot be insisted upon. The petitioner would also contend that sub-clause (II) of Clause 7.21.3 of the tender conditions (which is similar to sub-clause (II) of Clause 7.1.2.1 of Ext.P1 tender notice in W.P.(C)No.13806/2015) governs only tenders with break up of rates/estimates as to working charges and cost of materials and the said clause has no application to the tenders in question tendered out on lump sum basis, without break up of rates as to working charges and cost of materials. Similarly, the modified rates regarding performance guarantee contained in Ext.P7 Government order dated 1.0.2004 has application only if the rate quoted by the contractor is between 25% below estimate amount

and 50% below estimate amount. Aggrieved by the arbitrary demand for remittance of performance guarantee, the petitioner submitted Ext.P4 representation before the respondent and thereafter, approached this Court in this writ petition seeking a writ of certiorari to quash Ext.P3 to the extent it insist and require remittance of performance guarantee from the side of the petitioner. The petitioner has also sought for other consequential reliefs, including a writ of mandamus commanding the respondent to accept the tender and permit the petitioner to execute the agreement without insisting performance guarantee as claimed in Exts.P3, P5 and P6.

22. By order dated 10.4.2015, this Court has ordered that, the petitioner shall satisfy the performance guarantee in terms of the tender within two weeks. It was also ordered that the same shall be subject to the result of the writ petition.

23. A counter affidavit has been filed on behalf of the respondent raising contentions similar to that in the counter affidavit filed in W.P.(C)No.13806/2015.

24. In view of the findings already entered in W.P.(C) No.13806 of 2015, the petitioner in this writ petition is also

entitled to succeed. When the provisions under Clause 7.21.3 of the tender notice have no application to the tenders in question floated on lump sum basis, without break up of the rates or estimates as to working charges and cost of materials, the respondents have absolutely no authority to insist that the petitioner should remit performance guarantee at the time of execution of the agreement for the works covered by Ext.R1(a). In such circumstances, the provisions contained in Ext.R1(a) order to the extent it require and direct the petitioner to remit performance guarantee for a total sum of ₹29,92,874/- before execution of the agreement in respect of the works in question and the consequential demand made in Ext.P3 order cannot be sustained.

In the result, this writ petition is disposed of setting aside Ext.P3 order to the extent it insist and require the petitioner to remit performance guarantee at the time of execution of the agreement for the works covered by Ext.R1(a) order and the respondent is directed to release the performance guarantee already remitted by the petitioner in terms of the interim order dated 10.4.2015 in this Writ Petition, within a period of three

months from the date of receipt of a certified copy of this judgment. No order as to costs.

Sd/-
ANIL K.NARENDHAN, JUDGE

AK/dsn