

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

WEDNESDAY, THE 17TH DAY OF JUNE 2015/27TH JYAISHTA, 1937

WP(C).No. 15181 of 2015 (W)

PETITIONERS :

- 1. SIRLY JOSE, PWD CONTRACTOR,
VALAIPARAMBIL HOUSE, THACHAMPARA
PALAKKAD-678593.**
- 2. M.SULAIMAN, PWD CONTRACTOR,
KARAKADAVATH HOUSE, KANHIRAPUZHA.P.O.,
MANNARKKAD, MALAPPURAM.**

**BY ADVS.SRI.K.L.VARGHESE (SR.)
SMT.SANTHA VARGHESE
SRI.RAHUL VARGHESE
SRI.RANJITH VARGHESE**

RESPONDENTS :

- 1. STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
PWD(IRRI GATIOIN DEPARTMENT), GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM.**
- 2. THE CHIEF ENGINEER,
IRRIGATION & ADMINISTRATION, THIRUVANANTHAPURAM.**
- 3. THE SUPERINTENDING ENGINEER,
MINOR IRRIGATION CENTRAL CIRCLE, ERNAKULAM
CIVIL STATION, KAKKANAD.**
- 4. THE SUPERINTENDING ENGINEER,
MINOR IRRIGATION CIRCLE, CAUVERY HOUSE, WEST HILL
KOZHIKODE-673005.**

BY GOVERNMENT PLEADER SRI. ABDUL SALAM

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 17-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1: TRUE COPY OF SELECTION NOTICE DT.24.4.2015 IN RESPECT OF E-TENDER NO.56/ET/EMICC/2015-16/S DT.21.4.2015 ISSUED BY THE 3RD RESPONDENT.
- EXT.P2: TRUE COPY OF SELECTION NOTICE DT.24.4.2015 IN RESPECT OF E-TENDER NO.7/ET/SEMICC/2015-16/S DT.21.4.2015 ISSUED BY THE 3RD RESPONDENT.
- EXT.P3: TRUE COPY OF SELECTION NOTICE DT.23.4.2015 IN RESPECT OF E-TENDER NO.SEMI/ET/53/2014-15 DT.30.3.2015 ISSUED BY THE 4TH RESPONDENT.
- EXT.P4: TRUE COPY OF PAGE 28 OF THE REVISED EDITION OF 2012 PWD MANUAL PART-II CONTAINING PARA 2009.7
- EXT.P5: TRUE COPY OF THE GOVERNMENT ORDER DT.20.9.2012.
- EXT.P6: TRUE COPY OF THE GOVERNMENT ORDER DT.05.01.2015.
- EXT.P7: TRUE COPY OF THE SELECTION NOTICE DT.06.05.2015 ISSUED BY THE SUPERINTENDING ENGINEER,MECHANICAL IRRIGATION,CIVIL STATION,KAKKANAD.
- ADDL. P8: COPY OF THE APPLICATION DT 6/5/2015 SUBMITTED BY SRI N. ABDUL KASIM UNDER THE RIGHT TO INFORMATION ACT.
- ADDL. P9: COPY OF THE REPLY DT 22/5/2015 ISSUED BY THE PUBLIC INFORMATION OFFICER OF THE CHIEF ENGINEER, PWD, THIRUVANANTHAPURAM

RESPONDENT(S)' EXHIBITS : NIL.

//TRUE COPY//

P.A. TO JUDGE

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K. VINOD CHANDRAN, J.

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Dated this the 17th day of June, 2015

J U D G M E N T

The petitioner is aggrieved with the fact that the petitioner has been directed to pay the unbalanced amount, which is the difference between the Probable Amount of Contract (PAC) and the reduced rate at which the petitioner has quoted in his bid, for grant of the award. The specific contention raised is that, the Government had amended the clause relating to "Performance Security Deposit" as revealed in 2009.7 in Ext.P4 by Ext.P6 Government Order and hence the Additional Performance Guarantee by way of the unbalanced amount would no more be a necessity. By Ext.P6, the specification for performance guarantee stood modified and the percentage earlier insisted being 10% was reduced to 5% as per the

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amended conditions. There is no stipulation for any deposit of unbalanced amount, is the argument.

2. The issue has already been considered by this Court in W.P.(C) No.9067 of 2015 by judgment dated 12.06.2015. However, the learned Senior Counsel, Sri. KL. Varghese urges that the entire facts were not placed in the proper perspective and seeks a re-consideration of the same. What essentially arises for consideration is whether there is an amendment brought in as per Ext.P6, which leads to the substitution of the earlier provision for 'Performance Security Deposit' or the same is only a modification thereon. The clause in the Kerala Public Works Department Manual Revised Edition 2012 Part II Work Methodology, the extract of which is produced in Ext.P4 specifically referring to "Performance Security Deposit" is extracted hereunder:-

2009.7 Performance Security Deposit

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The selected bidder shall produce a security deposit equal to 10% of the contract amount in the form of Bank guarantee from any nationalised or scheduled Bank which shall remain valid till 28 days from the completion of the defect liability period.

The performance security deposit less any amount due from the contractor shall be returned to him, on written application in the form given in Appendix 2000D, after 28 days from the date of completion of the defect liability period

If the bid of the successful bidder is unbalanced in any item in the case of item rate contract or in total in the case of percentage rate contract, relation to the estimate, the difference in cost should be deposited as performance security deposit for unbalanced price in addition to the normal performance security deposit.

3. The amendment made as per Ext.P6 Circular is also

extracted hereunder:-

3. Performance Security Deposit

Government have gone through the CPWD system where Performance Guarantee and Security Deposits are collected in different modes and at different time intervals. After reviewing the pros and cons of the system it was decided to modify the Government Order read 4th cited to the following extent.

i. Performance Guarantee will be 5% of the contract value.

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ii. At least fifty percent of the Performance Guarantee will be in the form of Treasury Fixed Deposit and the rest in the form of bank guarantee or any other forms prescribed in the revised PWD Manual.

iii. In addition to Performance guarantee, Security Deposit for a work shall be collected by deduction from the running/final bill of the contractors @ 2.5% of the gross amount of each running and/or final claims till expiry of defect liability period.

iv. Security Deposit can be released against bank guarantee on its accumulation to minimum amount of Rs.5 lakh. The minimum amount of Bank Guarantee shall not be less than Rs.5 lakhs at time.

4. What the petitioner would urge is that, the clause as introduced in Ext.P6 is in super-cession of the earlier clause and there could be no Additional Performance Guarantee demanded by way of the unbalanced amount. The specific words employed in Ext.P6 is modification and not substitution. True the Performance Guarantee was reduced to 5% of the contract amount from the earlier stipulated 10% and there were also some additional specifications brought in as clause (ii) to

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(iv). However, the same cannot be said to have deleted the clause for unbalanced amounts as found in Ext.P4.

5. The learned Senior Counsel would in fact urge that the NIT being the Notice Inviting Tenders as provided in the PWD Manual does not contain such a specification. The specific tender notification inviting the tenders; published for the subject work, being the work of construction of Check Dam at Palappotta in Mathur Panchayath in Palakkad District is produced by the learned Government Pleader across the bar. Clause 13b reads as under:

13(b) Additional Performance Guarantee (for below estimate rates)

The Contractors who quote very low rates will remit, performance guarantee, with a view to curb the tendency to quote low rate and execute work unsatisfactorily.

(I) If the bid of the successful bidder is unbalanced in any item in the case of item rate contract or in total in the case of percentage rate contract, relation to the estimate, the difference in cost should be deposited as additional performance

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security deposit for unbalance price in addition to the normal performance guarantee. The deposit will be released after completion of work.

(II) Tender/quotation with quoted PAC less than 75% of the estimate PAC will be rejected.

6. The modifications made by Ext.P6 were also incorporated in the tender notification. In such circumstance, in addition to the fact that Ext.P6 order did not substitute the clause as such, it has to be found that the petitioner had with open eyes applied under a notification, wherein the deposit of unbalanced amount was a condition precedent for execution of the agreement on a successful bid being made. The petitioner had never at the time of the bid or earlier, challenged the said clause and had bid under the terms and conditions as notified therein. On award of the contract the petitioner has challenged the said award raising the contention that there is a modification and the condition for unbalanced amount cannot be a stipulation in the tender. The fact remains that the notification

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contained a stipulation as to deposit of unbalanced amount.

7. For reason also of the petitioner having submitted a tender on the basis of the specific terms and condition as mentioned above, this Court finds that the writ petition is devoid of merit and the same is dismissed. Since the petitioner had, immediately on the award, approached this Court the petitioner shall be granted 14 days from 22.06.2015 on the same terms as in Ext.P1 to conclude the contract by offering the amounts demanded and executing the agreement, without imposition of any penalty.

The writ petition is dismissed with the above directions.

**Sd/-
K. VINOD CHANDRAN,
JUDGE**

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P.A to Judge.