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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Date of judgment : 08.12.2016.*

\+ W.P.(C) 10491/2015 & C.M. No.26442/2015
SURINDER NAYYAR & ORS.
..... Petitioners
Through Ms. Anusuya Salwan and Mr. Kunal Kohli, Advs.

versus

SOUTH DELHI MUNICIPAL CORPORATION
..... Respondent
Through Mr. Mukesh Gupta, Adv.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 There are five petitioners before this Court. They are aggrieved by the act of the respondent-Corporation vide which the respondent had issued a circular dated 31.07.2015. In terms of this circular, reimbursement made to third party on account of quality assurance charges were directed to be recovered under intimation to the Quality Control Cell. This is the grievance of the petitioners.

2 The petitioners are Class-I contractors working with the South Delhi Municipal Corporation (SDMC). On 25.10.2006, a circular had been issued

by the Superintendent Engineer, Quality Control Cell of the respondent Corporation giving information to the effect that Mayor has in anticipation accorded an approval that for third party quality assurance/audit and testing of material of different works of the Engineering Department, the third party quality testing will be carried out by the laboratories mentioned in the aforementioned circular i.e. CRRI, IIT, Delhi and NCCB, Ballabhgarh. This would be incorporated in all the NITs issued for different works in the Engineering Department. The designated labs were Sri Ram Institute for Industrial Research, RTC, Okhla and National Test House, Ghaziabad.

3 In continuation of this Circular dated 25.10.2006 (Annexure P-1), another circular dated 20.02.2007 (Annexure P-2) was circulated by the Superintending Engineer, Quality Control of the respondent Corporation. It specified the third party quality assurance/audit to be carried by the selected organizations; the names were given; the details of the consultancy fee for works up to Rs.150 lacs and works over and above Rs.150 lacs was detailed; para 4 of the Circular has been highlighted. This states that the charges for quality testing from an independent laboratory would be borne by the contractor for which due weightage would be considered while arriving at

the justification of rates and the same would be reflected in the NIT accordingly.

4 On the same date, another circular (Annexure P-3) was issued by the Department detailing the modalities which would be followed by the independent laboratories; the testing charges which had to be borne by the contractor were to be given a weightage of 1% which was to be added while working out the justification of rates.

5 Certain changes were made in the CPWD Manual (Annexure P-4). The overhead of the contractor's profit was increased from 2.5% to 7.5% on various factors which at item No. 4 included the cost of quality assurance set up for enhancing the test laboratories. Learned counsel for the petitioners submits that this quality assurance and testing of the articles in the laboratory was an in-house feature which would be a laboratory to be set up by the contractor at the site and thus these overhead charges were not in any manner connected with the independent testing of the items for the purposes of quality control from independent laboratories mentioned in the earlier circular.

6 On 03.03.2011 (Annexure P-5) followed by another communication dated 12.07.2012 (Annexure P-6) as also a subsequent letter dated

27.09.2013 (Annexure P-7), was written by the Superintending Engineer of the SDMC seeking a clarification from the Central Public Works Department qua the aforenoted enhancement in the overhead charges which had been increased from 2.5% to 7.5%; the clarification sought for was as to whether these overhead charges would include the third party quality assurance and external laboratory' charges and whether the same would be covered in these overhead charges or not.

7 The CPWD vide letter dated 09.10.2013 (Annexure P-8) clarified that the overhead charges would not include the expenditure for engaging third party quality assurance.

8 Learned counsel for the petitioners vehemently argues that these circulars are in her favour; they clearly stipulate that third party quality assurance laboratory charges would be borne by the contractor but he would be compensated either in the NIT itself or by a separate payment.

9 This Court notes the two later circulars dated 08.05.2014 which were thereafter issued by the Department. Both these circulars were issued on the same date.

10 Circular No. 3 (Annexure P-4) dated 08.05.2014 reads herein as under:-

"SOUTH DELHI MUNICIPAL CORPORATION
OFFICER OF THE ENGINEER-IN-CHIEF
20^{TH} FLOOR, DR. S.P.M. CIVIC CENTRE
J.L.N MARG, NEW DELHI-11002

No.03/EE(P)-I/SDMC/2014-15
Dated:08.5.2014

CIRCULAR

Subject:- Third Party Quality Assurance/Audit-Weightage

In partial modification to earlier instructions/orders regarding addition of weightage in justification on account of Third Party Quality Assurance/Audit of works in South Delhi Municipal Corporation, following weightage shall be added while working out justification of rates as under:

a) For works costing below Rs.25,00 lacs
1% on composite value of work
b) For works costing more than Rs.25,00 lacs
1.5% + Service Tax @12% + 3% cess
Total = 1.6854% on composite value of work.

Note :

1.The above percentage may be added for working out the justification of rates departmentally irrespective of Actual Third Party Testing Charges.
2. This circular is strictly for internal circulation of the department and not be made part of NIT/tender documents.
This issues with the approval of Competent Authority.

sd
Engineer-in-Chief

Distribution: All CEs/SEs/EEs:
Copy to:
1.Commissioner/SDMC for kind information;
2.Addl.Commissioner-II for kind information;
3.CA cum FA/SDMC"

11 Circular No. 4 (Annexure R-1 annexured with the counter affidavit of the respondent) of the same date reads herein as under:-

"SOUTH DELHI MUNICIPAL CORPORATION
OFFICER OF THE ENGINEER-IN-CHIEF
20TH FLOOR, DR. S.P.M. CIVIC CENTRE
J.L.N MARG, NEW DELHI-11002

No.04/EE(P)-I/SDMC/2014-15
Dated:08.5.2014

CIRCULAR

Subject:- Third Party Quality Assurance/Audit

In partial modification to all previous circulars/orders regarding Third Party Quality Assurance/Audit of works in Engineering Department of South Delhi Municipal Corporation, the following condition shall be incorporated in all the NITs/tender documents being issued for different works.

"The Third Party Quality Assurance/Auditing of works shall be carried out for all works in Engineering Department of SDMC as below:

Contractual Cost of Work	*Mandatory Sampling*	*Third Party Quality Audit*
More than Rs.25.00 lacs	*As specified in CPWD/IRC specification by the concerned division. Testing of samples will be in the Municipal Lab.*	*1.I.I.T. Delhi* *2.CRRI Delhi* *3.NCCB Balabh Garh* *4.EIL* *5.RITES* *Testing of samples will*

		be in the designated lab or in house lab of the party conducting quality audit.
Above Rs.5.00 lacs & upto Rs.25.0 Lacs	*As specified in CPWD/IRC specification by the concerned division. Testing of samples will be in the Municipal Lab.*	*a) 75% of the works by Quality Control Cell.* *Testing of samples will be in the assigned lab** *b) 25% of the works by the concerned Chief-Engineer.* *Testing of samples will be in the designated lab.*
Above Rs.2.0 lacs & upto Rs.5.0 lacs	*As specified in CPWD/IRC specification by the concerned division. Testing of samples will be in the Municipal lab.*	*25% of works by the concerned S.E.* *Testing of samples will be in the designed lab.*

**Designated Labs:*
1. Sri Ram Institute for Industrial Research.
2. R.T.C. Okhla.
3. National Test House, Ghaziabad
All the charges for Third Party Assurance/Auditing/Sample testing charges shall be borne by the contract and no claim whatsoever on this account shall be entertained by the Engineer-in-Charge.

This issues with the approval of Competent Authority.

sd
Engineer-in-Chief"

12 A reading of the aforenoted circulars shows that the circular No. 3 was strictly for the purpose of internal circulation. It stated that regarding weightage in justification on account of third party quality assurance, the percentage may be added for working out the justification of rates departmentally irrespective of actual third party testing charges. This circular was strictly for internal circulation for the Department and was not to be made a part of NIT/tender document.

13 Circular No.4 of a later date as is indicative from its seial number stated that all the charges for third party quality assurance testing would be borne by the contractor and no claim irrespective on this count shall be entertained by the Engineer-in Chief. The respondent has relied upon this circular to substantiate his submission that this circular which was in modification of all previous circulars/orders regarding third party quality assurance/audit work in the Engineering Department clearly specified that for a third party quality assurance charges would be borne by the contractor for which he would not be entitled to be reimbursed.

14 Per contra, learned counsel for the petitioner submits that reading of the aforenoted two circulars i.e. Circular No.3 and Circular No. 4 which have

to be read in conjunction with one another; not being disjunctive; and a reading of these circulars show that the contractors were to be reimbursed for the quality testing to be carried out by them and this weightage was to be considered at the time of justification of rates and this would be irrespective of actual third party testing charges. Learned counsel for the petitioner has also relied upon the internal notings which had been made by the Department inter-se which are of the year 2015 i.e. after the aforenoted circulars of 08.05.2014. Attention has been drawn to page 183 of the paper book. It is pointed out that even after the issuance of this circular in May, 2014, the Department was still considering payment of charges for third party quality testing which was initially to be borne by the contractors but thereafter he would be reimbursed. Attention has been drawn to this note which starts from page 183 up to page 185. The relevant extract of this note which has been highlighted is extracted herein and reads as under:-

> "*The clarification to the audit observation is as under:*
>
> *It is submitted that as per clarification received from CPWD letter No.CSQ/CM/18(2)2012/1311 dated 09.10.2013 and forwarded by the Planning Deptt/SDMC, it is quite evident that the overhead charges doesn't include expenditure for engaging third party quality assurance and the contents of the letter No.CSQ/CM/18(2)/2012/1311 dated 9.10.2013. It is further submitted that the charges of Third*

Party Quality Assurance and External Laboratories charges does not include in the 7.5% overhead charges."

15 This note is dated July, 2015. This note has been signed by the DCA, Engineering Department and has been forwarded to the Engineer-in-Chief. The Engineer-in-Chief has clearly while appending his signatures to this note noted that the audit para be dealt with as per Circular No.F.I/E-in-C/SDMC/16/151 dated 31.07.2015. This has been typed as also hand-written by the Engineer-in-Chief himself.

16 The circular dated 31.07.2015 had been circulated by the Engineer-in-Chief wherein it was strictly noted that all divisions who had made reimbursements on third party quality assurance charges to contractors were directed to be recovered immediately under intimation to the Quality Control Department.

17 It would be useful to extract this Circular dated 31.07.2015. It reads herein as under:-

"SOUTH DELHI MUNICIPAL CORPORATION
OFFICER OF THE ENGINEER-IN-CHIEF
20TH FLOOR, DR. S.P.M. CIVIC CENTRE
J.L.N MARG, NEW DELHI-11002

No.F.1/E-IN-C/SDMC/2016/15 Dated:31.07.2015

CIRCULAR

SUB: 3rd Party Quality Assurance charges for works above Rs.25.00 lacs

It has come to the notice of undersigned that some divisions have reimbursed the 3rd party quality assurance charges which was paid by the contractor to the external checking agency for works above Rs.15.00 lacs. This has been objected to by the audit and has been terms as irregular.

As such, all divisions who have made the reimbursement of 3rd party quality assurance charges to be the contractors are directed to recover the same immediately under intimation to the Quality Control Cell.

sd
Engineer-in-Chief"

18 It is this circular (dated 31.07.2015) which has been impugned.

19 This Court notes the submission of the petitioners. The submission vehemently being argued that the two circulars dated 08.05.2014 are actually in favour of the petitioners/contractors; they are entitled to be reimbursed for third party quality assurance charges; rates have in fact specified in circular No. 3; a reading of this Circular in conjunction with Circular No. 4 shows that the petitioners could either be compensated in the NIT itself directly or

they could be reimbursed later upon; the internal notings of April, 2015 having also been highlighted.

20 This Court is however not in agreement with this submission of the learned counsel for the petitioners. This Court notes that the two circulars dated 08.05.2014 bearing circular No. 3 and circular No. 4 are disjunctive; they cannot be read in conjunction with one another. Circular No. 4 which is later in point of time (clear from the serial number itself) notes that in partial modification of all other circulars operating on the issue of third party quality assurance charges to be paid to the contractors; it specified that these charges for third party quality testing are to be borne by the contractors for which they shall not be reimbursed. This circular read with circular No. 3 in fact persuades this Court to hold that circular No. 3 was for the purpose of an internal circulation; it specifically noted that the conditions contained in this circular would not be a part of the NIT conditions; meaning thereby that the tenderer/contractor who would tender would not be aware of any such reimbursement to be made to him. This was only for an internal consumption. This internal noting was superseded on the same date by circular No. 4 which specified that the contractor had to bear all charges for third party quality testing for which he would not be reimbursed. The

notings relied upon by the learned counsel for the petitioners (as pointed out by the learned counsel for the respondent) were only by a junior member of the Account Department and which had not been approved by the Engineer-in-Chief who in his note (pages 183 to 185) specified that the circular of 31.07.2015 has to be abided by. The circular dated 31.07.2015 had specified that all payments already made to the contractors under the head of third party quality assurance charges were to be recovered back.

21 This Court is thus of the view that the prayer made in the petition seeking a stay on the recovery sought to be made from the aforenoed contractors on this count is a prayer which cannot be acceded to. The submission of the learned counsel for the respondent that this is even otherwise a disputed question of fact and a writ petition on this count would not be maintainable may not be necessarily to be gone into in view of the findings arrived at by this Court which in the view of this Court appear to be based on the clear and unambiguous record and policy decision of the Department.

22 Petition is without any merit. Dismissed.

INDERMEET KAUR, J

DECEMBER 08, 2016
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