

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.15173 of 2018

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Satyendra Kumar Construction Pvt. Ltd. having its registered Office at 202, Hira Enclave, New Dak Bunglpw Road, P.S. Kotwali, District Patna through its Director Satyendra Kumar, Son of Sri Bhawan Das, resident of 202, Hira Enclave, New Dak Bunglow Road, P.S. Kotwali, District Patna. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Water Resources Department, Government of Bihar, Patna.
2. The Engineer-in-Chief, Water Resources Department, Government of Bihar, Patna.
3. The Chief Engineer, Water Resources Department, Dehri On Sone, District Sasaram, Bihar.
4. The Superintending Engineer, Sone Barrage Circle, Dehri, District Sasaram, Bihar.
5. The Executive Engineer, Irrigation Division, Nawa Nagar, District Buxar, Bihar. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Prabhat Ranjan, Adv.
Mr. Chandan Kumar, Adv.
For the Respondent/s : Mr. Harish Kumar –G.P.-8

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CORAM: HONOURABLE JUSTICE SMT. NILU AGRAWAL

CAV JUDGMENT

Date: 23-08-2018

Heard Mr. Prabhat Ranjan along with Mr. Chandan Kumar, learned counsel for the petitioner and Mr. Harish Kumar, G.P.-8 for the respondent-State of Bihar.

2. Petitioner in the present writ application challenges the notice inviting tender dated 23.07.2018, which is Tender No. 1-SBD/2018-19, as contained in Annexure-10 by which a tender has



been floated for execution of residual work of Malai Barrage over Kao River by the respondent no. 5, the Executive Engineer, Irrigation Division, Nawa Nagar, District-Buxar, Bihar. Petitioner has filed I.A. No. 6336 of 2018 for amendment of paragraph-1 of the writ application by which he has challenged the Letter No. 1501 dated 09.08.2018 issued by the respondent no. 2, Engineer-in-Chief, Water Resources Department, Government of Bihar, Patna as contained in Annexure-11 by which the Agreement No. 1-SBD/2013-14 earlier allotted to the petitioner has been foreclosed and for completing the residual work 5.60% increase in the original agreement value has been enhanced and a post facto approval for re-advertisement of the remaining work has been also sought in the said letter dated 09.08.2018 from the Engineer-in-Chief, Irrigation Division, Water Resources Department, Dehri. Considering the nature of prayer made in the I.A. No. 6336 of 2018 the same is allowed.

3. The facts of the case is that the petitioner was allotted work for execution of Malai Barrage across Kao River NIT No. 02 of 2013-14 vide letter of acceptance dated 05.10.2013. During the course of said work, it was brought to light that the design prepared was defective as the water level depth on the river bed was not taken into consideration. The work was suspended on 30.05.2016 by the respondent no. 3, the Chief Engineer, Water Resources Department,



Dehri, District-Sasaram and information was given to the Superintending Engineer, Dehri, and the Engineer-In-Charge, Nawanganar i.e. the respondent no. 5, the Executive Engineer, Irrigation Division, Nawanganar, District-Buxar, Bihar vide Annexure-2 to the writ application. After the meeting convened by the Principal Secretary, Water Resources Department dated 29.05.2018, after fresh drawings, it was decided that the work could be re-started. The Superintending Engineer also found that since the petitioner was executing the work and because of faulty design, the work was suspended mid way, the petitioner be allowed to continue with the execution of remaining work vide letter dated 19.06.2018 as contained in Annexure-9 to the writ application written to the Chief Engineer, Water Resources Department, Dehri. The petitioner was asked his approval by the Project Engineer-in charge i.e. the Execution Engineer, Nawanganar on 08.06.2018 whether the petitioner was agreeable to continue with the execution of the said work as contained in Annexure-8. Petitioner immediately vide Annexure-9 dated 09.06.2018 agreed to execute the work as per revised drawings and quantity under the same terms and conditions of the contract. Thereafter, nothing happened. All of a sudden, notice inviting tender for construction of residual work of Malai Barrage over Kao River was floated by the respondent no. 5, the Executive Engineer,



Irrigation Division, Nawanagar which is Annexure-10 dated 23.07.2018, under challenge in the present writ application, without rejecting the acceptance or without informing the petitioner about any decision. During the pendency of the writ application, respondent, Engineer-in-Chief, Irrigation Division, Water Resources Department vide Letter No. 1501 dated 09.08.2018 has foreclosed the agreement as per Clause 13 of the SBD 01/2013-14 and has decided to carry out the residual work with increased administrative approval to the extent of 5.60% of the earlier estimate and also sought ex post facto approval for advertisement of the remaining work as contained in Annexure-11 which has also been challenged by the petitioner.

4. The contention of the learned counsel for the petitioner is that invocation of clause 13 of the standard bidding document for foreclosure of contract is misconceived as the order of foreclosure under Clause 13 of the SBD can be passed if the Government decides to abandon or refuse the scope of work for any reason whatsoever. Here the relevant paragraph-1 of Clause 13 is quoted hereinbelow:

“Clause 13: Foreclosure of contract due to abandonment or Reduction in Scope of work.

It at any time after acceptance of the Tender Government shall decide to abandon or reduce the scope of the works for any reason whatsoever and hence not require the whole or any part of the works to be carried out, the Engineer in



Charge shall give notice in writing to that effect to the contractor and the contractor shall act accordingly in the matter. The contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the works in full but which he did not derive in consequence of the foreclosure of the whole or part of the works. The contractor shall be paid at contract rates for works executed at site only.”

5. He submits that neither the project has been abandoned nor there is any reduction in the scope of work also a re-tender has been issued for the same work with increased administrative approval to the extent of 5.60% of the estimate. He submits that the foreclosure under Clause 13 of the SBD also speaks of the pre-requisite that if it is also found that the department does not require the whole or any part of the work to be carried out, the said Clause could have been invoked but in the present case, there was no necessity for invocation of Clause 13 as there was no decision at the level of the government to abandon or reduce the scope of work nor there was any decision with regard to non-requirement of carrying out of the whole or any part of the remaining work as a fresh tender has been issued for residual work earlier allotted to the petitioner by floating a fresh notice inviting tender. He submits that the decision to foreclose the agreement at the



level of the government has been taken without issuing of notice to the petitioner which is the requirement of clause 13 of the SBD. He further submits that the re-tender for the residual work has been floated on 23.07.2018 even before the foreclosure which is dated 09.08.2018 and has been passed just a day before the interim order of stay passed by this Court on 10.08.2018 when the Tender Notice No. 01-SBD/2018-19 has been stayed by this Court as an interim measure. He submits that without any fault of the petitioner, he had tendered his acceptance on being asked to complete the work as per the revised drawings which he had accepted on the same terms and conditions of work. He further submits that an adverse view had been taken by the department against the petitioner just because the petitioner had approached this Court in C.W.J.C. No. 13668 of 2018 against the notice for blacklisting which was quashed by this Court vide order dated 14.08.2018 passed in the said writ application.

6. Learned counsel for the State, however, has filed his counter affidavit stating therein that the technical Vigilance Wing of the cabinet Vigilance Department had found that due to faulty design by the department for which there was no direct involvement of the petitioner, the designs were re-designed but as per clause 33 of the General Condition of Contract of SBD agreement, the petitioner had an obligation under the contract for any anomaly at the level of



departmental officials. He further submits that as per Clause 5.5 of the General Condition of Contract the basic centerlines, reference points and benchmarks would be fixed by the department but the contractor also has to establish at his own cost at suitable points, additional reference lines and benchmarks as may be necessary. He further contends that NIT i.e. re-tender was issued in anticipation of foreclosure of the agreement in public interest and the petitioner has not claimed for allotment of the balance work which has been seriously disputed by the petitioner as the petitioner had submitted his willingness vide letter no. 02 dated 09.06.2018 as contained in Annexure-9 to complete the remaining work as per the revised drawings and quantity on the same terms and conditions of the contract. This has not been replied by the respondent-State and a bald statement at para-13 of the counter affidavit has been made that the petitioner did not claim for balance work which is not true.

7. After hearing the rival submissions of the parties, this Court is in agreement with the contention that as the petitioner was informed of the decision taken under the chairmanship of the Principal Secretary, Water Resources Department, Government of Bihar, Patna on 29.05.2018 wherein after re-designing of the project the petitioner was asked to give his consent for completion of the remaining work which was stopped by the respondents on 30.05.2016



which is Annexure-2 to the writ application, petitioner was asked his consent and had given his consent immediately on 09.06.2018 for completion of the said work as per the revised drawings and quantity under the same terms and conditions of the contract. The technical designs which were found faulty by the Technical Vigilance Wing of the department had not alleged the petitioner as responsible for such faulty designs but the regional officers were held responsible by the vigilance committee which the counsel for the State has also admitted in para- 11 of the counter affidavit. Hence, there was no occasion for the respondents to re-advertise and float a new tender on 23.07.2018 for the residual work. Major part had already been executed by the petitioner but because of faulty design, it had to be re-designed and as such, the work was stopped by the department itself on 30.05.2016. No notice before foreclosure was served on the petitioner and administrative approval over and above 5.60% of the earlier estimate was enhanced which is against public interest. There was no default on the part of the petitioner in completing the work in time, hence, the foreclosure of the agreement entered with the petitioner and re-tender will serve no useful purpose. The notice inviting tender for residual work dated 23.07.2018 as contained in Annexure-10 and the letter no. 1501 dated 09.08.2018 as contained in Annexure-11 are accordingly, quashed.



8. It is not the case of the department that re-tendering for the balance work any tender has been received as in pursuance to the interim order of stay by this Court in the present writ application, the respondent vide letter no. 388 dated 13.08.2018 has postponed the present Tender No. 01-SBD/2018-19 which has been annexed as Annexure-A to the counter affidavit. If the balance work is re-tendered the estimate cost is based on the cost fixed in the year 2013 and the foreclosure order dated 09.08.2018 specifies and enhancement of 5.60 % of the earlier estimate which would also serve no useful purpose. Thus, in view of the decision in the case of **M/s B.K. Enterprises Vs. The State of Bihar & Ors** since reported in 2008 (1) PLJR (HC) 473, the relevant portion at para-10 is quoted hereinbelow:

“10. To my mind this Court has not questioned either the authority or the right to cancel but the propriety to cancel and its financial consequence. If the petitioner is ready to do the same work at the cost at which he was doing earlier part of the work then the authority instead of cancelling ought to have extended the period rather than re-tendering at a substantial extra spend. That to my mind would have been prudent, fair, equitable and a business like approach rather than cause loss to the public exchequer by paying higher rate which now prevalent in the year 2007.”



9. The decision in the case of **Municipal Corporation, Ujjain & Anr. Vs. BVG India Limited & Ors.** since reported in **(2018) 5 SCC 462** at Para 15 has stated thus:

“15. It is well settled that the award of contract, whether it is by a private party or by a public body or by the State, is essentially a commercial transaction. In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation.”

10. Thus, keeping in view the financial aspect of the matter and that the work was stopped midway for which the Vigilance Wing has not faulted the petitioner and in order to save public money, the authority would reconsider the matter and consider the desirability of granting further time to complete the work and pass appropriate orders with regard to the letter of acceptance dated 09.06.2018 as contained in Annexure-9 submitted before the respondent, The



Executive Engineer, Irrigation Division, Nawanagar, Buxar.

11. With the above observation and direction, this writ application stands allowed.

(Nilu Agrawal, J)

Devendra/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	23.08.2018
Transmission Date	NA

