



GOVERNMENT OF KERALA

Abstract

LSGD- WP(c)No. 31851/2023 filed by Sri.Navas.P.S-judgment dated 30/10/2023-complied-orders issued

LOCAL SELF GOVERNMENT(PP)DEPARTMENT

G.O.(Ms)No.34/2024/LSGD Dated,Thiruvananthapuram, 07-03-2024

- Read 1 Proceedings No.A1-97/PMULSGD/20 dated 20/02/2023 of Project Director ,Project Management Unit RKI-LSGD.
- 2 Notice No. A1-104/2020/PMULSGD dated 07/08/2023 Project Director ,Project Management Unit RKI-LSGD.
3. Appeal dated 15.03.2023 of Sri.Navas.P.S b'fore Additional Chief Secretary ,LSGD
- 4 Judgment dated 20/07/2023 in WP(c)No. 9922/2023 filed by Sri.Navas.P.S
- 5 Judgment dated 30/10/2023 in WP(c)No. 31851/2023 filed by Sri.Navas.P.S

ORDER

WP(c)No. 31851/2023 was filed by Sri.Navas.PS, the contractor who was initially awarded the work “Rehabilitation of Paduvathil Police Station Road in Kodungallur Grama panchayat” by Project Management Unit RKI-LSGD. This work/contract was terminated as the contractor did not commence the work and thereafter Notice read as 2nd paper above was issued demanding payment of Rs.14,84,156/- (30% of cost of remaining works) as realization of loss on account of termination of contract.

The petitioner initially filed WP(c) 9922/2023 and later withdrew the same with permission of the Hon.High Court vide judgment read as 4th paper above . The case was filed again as WP(c) 31851/2023

challenging the Notice read as 2nd paper above issued for payment of liability amount.

Hon.High Court vide the Judgement read as 5th paper above has directed the Government to take up the said appeal (Ext.P14) of the petitioner read as 3rd paper above and dispose it within a period of three months from date of receipt of Judgement, after affording him an opportunity of being heard.

Chief Engineer LID&EW and Project Director, PMU submitted reports in this regard and in compliance to the judgment ,hearing was conducted on 23.01.2024. Advocate Sri.Abdul Kareem P.S. appeared on behalf of the Petitioner and put forward arguments defending the petitioner. In response to the arguments raised by the Counsel on behalf of the Petitioner , Project Director PMURKI also furnished statement challenging the arguments which was also shared with the Counsel and he submitted counter arguments. All the documents and arguments were considered duly to derive following conclusions and decisions.

The petitioner Contractor Sri.Navas.P.S had submitted the appeal read as third paper above to Additional Chief Secretary ,LSGD when the contract was terminated at risk and cost vide Proceedings dated 20/02/2023 read as Ist paper above. In the Proceedings the employer's additional cost for completing the work was estimated as 10% of contract value (ie Rs.4,94,685/-) by applying clause 15.6 of Standard Bid Document. Later he was served with the Notice dated 07/08/2023 to remit Rs.14,84,056/- which is 30% of the cost of the remaining work estimated by applying clause 2116.2.1 of Kerala P.W.D manual.

It is found that recovery of 30% of additional cost as stipulated in

KPWD manual 2116.2.1 initiated vide the Notice served to the Contractor is applicable in this case. The Counsel representing the Contractor raised following arguments challenging actions / inactions of PMU during the course of matter.

1. *Delay in handing over the work site.*- The concerned engineer did not handover the site to contractor or authorized agent within 10 days of the execution of agreement as stipulated in the PWD manual. It was delayed by 2 months. The contractor raises it as a lapse on the part of the authorities, citing that it is the responsibility of the Assistant Engineer as per 202.10 of PWD manual. But it is clear that the contractor is also equally responsible in the process of site handover as there are adequate provisions in the Manual which entitles the contractor with responsibility to take over the site within 10 days. As per SBD clause 14.6, even if contractor do not receive acknowledgement, the site is deemed to be taken on 10th day of execution of Agreement. Time of completion will be reckoned from the date of site of handover only. Moreover there is provision of extension of time of completion, if needed. The two month delay in site handing over should have been avoided. But this cannot be treated as a reason for not doing the work. The contractor has not even initiated any steps to start the work. Moreover Contractor has not cited this as reason for not commencing the work in any of the correspondence made during the period, prior to termination.

2. *Agreement is ab initio void due to delay in appointment of 2nd tier Quality Control Mechanism* - Contractor has cited that the GO dated 20/11/2020 approving the list of Engineering Colleges as 2nd tier Quality Control Mechanism as a reason for delay in entering agreement. As the 2nd tier quality control mechanism was not appointed prior to Agreement, the Agreement is ab initio void. But

there is no provision in Quality Assurance Handbook that the 2nd tier should be appointed before execution of Agreement. The enlistment of 2nd tier control mechanism for all road works under PMU has nothing to do with the agreement of this particular work. Quality Handbook has adequate stipulations regarding process of Quality check by Engineering Colleges. But raising these stipulations as reason to make the Agreement invalid is unacceptable.

3.Original estimate was not proper and there was delay in approving revised estimate and entering supplementary agreement. -- Construction of side berm was not included in the original estimate which resulted in need for estimate revision. Even though a culvert was part of estimate, it was dropped as the culvert was already constructed otherwise. Revised Estimate approval was delayed and this is cited by the contractor as a reason for not starting the work. The estimate revision was done on the basis of request from contractor. Side berm was to be constructed at the later part of the work. Hence, this revision does not absolve the contractor from starting the work or executing other items of the works as it is in item rate estimation.

Need of and delay in estimate revision cannot be treated a prima facie reason for not having started the work. However , PMU should have been more vigilant in preparing and approving revised estimate in time. If the contractor had the intention to do the work, remaining part could have been done. Project Director emphasizes that no preparation has done in the site to start the work. So the argument that the original contract could not be executed in case of a new contract is not justifiable. In this case supplementary agreement is needed in addition to the existing contract and not a new one. Other than the extra included item, no other agreement condition changes by way of supplementary agreement. PMU/PIU has given repeated

instructions to start the work. Hence the Contractor could have started the work without waiting for supplementary agreement.

4. The contractor/ Counsel raised few more such arguments like asking to execute work before Chief Technical Examiner taking initial level, instruction to start work without approving Revised Estimate, RE was not given to the contractor etc. Such arguments, can only be taken as fault findings of contractor post termination, in the attempt to justify the lapses and inactions from his part .

On perusal of documents it is evident that PMU/PIU has sent numerous communications to the contractor urging him to start the work. This requests/directions are found to be ignored by the contractor. Moreover the contractor has even given a written assurance to the Project Director that the work will be completed by 30/04/2022. Argument raised by contractor that the assurance was made 'due to coercive influence by the employer on matter of bill of another work' has to be rejected outrightly treating it is an evidence for lack of credibility of the contractor. The contractor vide letter dated 21/09/2022 states that the work cannot be executed after a delay of two years as the cost of materials have increased and that it will cause heavy loss to him. Non execution of work for many months and then withdrawing unilaterally from contractual liability shall be considered as a very serious offense from the side of the contractor.

The Counsel informed that the Contract license of Sri.Navas.P.S has not been renewed by the licensing authority on the basis of recommendation of Project Director PMU.

On the basis of above findings prayer of the contractor is finalized as follows:

Regarding setting aside Proceeding of terminations and Notice

served thereafter:- The act of termination of contract at risk and cost of the contractor cannot be treated as unjust or illegal. Hence the proceedings cannot be set aside . However, recovery of 10% additional cost mentioned in the proceedings by applying clause 15.6 of Standard Bid Document shall be set aside as it is not the clause applicable in the case. The contract shall be terminated under provisions mentioned in the Notice issued to the contractor.

In respect of issuance of order directing Superintending Engineer, PWD not to cancel the contract license – Recommendation has already been given by Project Director and the same is under process at the level of licensing authority. This is not under the purview of LSGD. The petitioner contractor is at the liberty to seek relief before the Superintending Engineer,PWD, the licensing authority.

The Appeal of the petitioner (Ext.P14) read as 3rd paper above is disposed of accordingly and thus the judgment of the Hon.High Court is complied herewith.

(By order of the Governor)
PREETHA K S
ADDITIONAL SECRETARY

To:

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