
(2018) 02 PAT CK 0062

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2616 Of 2017

Ncc Ltd. Through Its Authorized

APPELLANT

Vs

State Of Bihar, Through Its Principal Secretary And Ors

RESPONDENT

Date of Decision : 23-02-2018

Acts Referred:

Citation : (2018) 2 PLJR 112

Hon'ble Judges : Vikash Jain, J

Bench : Single Bench

Advocate : Y.V. Giri, Fauzia Shakil, Balaji Verma, Lalit Kishore, Vikash Kumar, Harish Kumar

Final Decision : Allowed

Judgement

1. The present writ petition has been filed for the following reliefs -

(i) For issuance of a writ, order or direction in the nature of a declaration, declaring that the impugned circular dated 13.06.2011 is not applicable to the contract dated 06.08.2009 and cannot have the effect of overriding, novating or altering the terms of the said Contract; Or

(ii) For issuance of a writ, order or direction in the nature of certiorari quashing and setting aside the impugned circular dated 13.06.2011 issued by the Respondent no. 1; and

(iii) For issuance of a Writ, Order or direction in the nature of mandamus, directing the Respondents herein to pay strictly as per the terms of the contract; and

(iv) For issuance of a Writ, Order or direction in the nature of certiorari quashing and setting aside the impugned order dated 22.09.2015 whereby the respondent no. 1 has disposed of the petitioner's representations by non- application of mind, arbitrarily and illegally; and

(v) Ad-interim ex-parte direct the respondents herein to release the amounts due

and payable to the petitioner and withheld by the respondents by placing reliance on the impugned circular during the pendency of the present proceedings;

(vi) For any other alternative or consequential relief(s) for which the petitioner is entitled by this Hon'ble Court in the facts and circumstances of the present case.

2. The broad facts of the case according to the petitioner are that pursuant to an NIT issued by the respondent-State for execution of work relating to restoration of Eastern Gandak Canal System including Gandak Barrage under Rashtriya Sam Vikash Yojna, the petitioner offered to perform the work at 44.53% of the estimated tender value of Rs. 310.54 crores. The rates in the BOQ specifically included the applicable royalty and duties. The total amount of the petitioner's bid came to Rs. 448,83,67,313/- and for which a letter of acceptance dated 03.07.2009 was issued in favour of the petitioner. This was followed by an agreement dated 06.08.2009 entered into between the parties for a cost of Rs. 448,83,67,313/-. The tender documents included the Instructions to Bidders ("ITB" for short) which formed part of the agreement and clause 13.1.2 thereof stipulated, inter alia, that all duties, taxes and other levies payable by the Contractor should be included in the rates, prices and total bid price submitted by the bidder. The General Conditions of Contract forming part of the agreement also provided vide clause 4A as follows -

"4A. In case of Percentage Rate Tenders, tenderers shall fill up the usual printed form, stating at what percentage below/above (in figures as well as in words) the total estimated cost given in Schedule of Quantities at Schedule-A, he will be willing to execute the work. Tenders, which propose any alteration in the work specified in the said form of invitation tender, or in the time allowed for carrying out the work, or which contain any other conditions of any sort, will be liable to rejection. No single tender shall include more than one work but contractors who wish to tender for two or more works shall submit separate tender for each. Tender shall have the name and number of the works to which they refer, written on the envelope.

If for any special reasons, the contract provides for the payments for work done to be made at a specified percentage below or above the rates entered in the sanctioned estimate of the work (or the Scheduled of Rates) it should be stated in clear terms in the contract that the deductions or additions, as the case may be of the percentage, will be calculated on the gross, and not the net amounts of the bills for work done and in fixing the percentage it should be borne in mind that the calculations will be made."

On this basis and pursuant to the contract, a notice to proceed with the work dated 06.08.2009 was issued to the petitioner at a bid price of Rs. 448,83,67,313/-. The petitioner accordingly commenced the work.

3. It appears that subsequently, however, the impugned letter No. 948 dated 13.06.2011 came to be issued by the Principal Secretary, Water Resources Department, Government of Bihar, Patna, according to which royalty would first

have to be deducted from the estimated cost, i.e. the Schedule of Rates shown in the Bill of Quantities, and the declared percentage over the Schedule of Rates was to be applied only on the amount remaining after such deduction. Based on such circular, the impugned order dated 22.09.2015 was passed, in effect holding that the quoted 44.53% above the Schedule of Rates would be applicable after deduction of the royalty payable by the petitioner from the estimated tender value of Rs. 310.54 crores.

4. Mr. Y.V. Giri, learned senior counsel appearing on behalf of the petitioner submits that the impugned circular dated 13.06.2011 and consequently the impugned order dated 22.09.2015 are wholly arbitrary and liable to be quashed. It is submitted that the letter of acceptance dated 03.07.2009, agreement dated 06.08.2009 as well as the notice to proceed with the work dated 06.08.2009 all proceed on the basis that the contract work had to be completed at a cost of Rs. 448,83,67,313/-. Reference is made to Clause 13 of the ITB which deals with the bid as follows -

"13. Bid Prices

13.1 The contractor shall bid for the whole work as described in Sub-Clause 1.1 based on the priced Bill of Quantities submitted by the Bidder.

13.1.1 The bidder shall adopt the percentage rate method as specified in the appendix to ITB; only the same option is allowed to all the bidders. Percentage rate method requires the bidder to quote a percentage above/below/at par of the Schedule of Rates specified in the appendix to ITB.

Corrections, if any needed, shall be made by crossing out, initialing, dating and rewriting.

13.1.2 All duties, taxes and other levies payable by the contractor under the contract or for any other cause shall be included in the rates, prices and total Bid Price submitted by the Bidder.

13.2 The rates and prices quoted by the bidder are subject to adjustment during the performance of the Contract in accordance with the provisions of Clause 10CC Clause Conditions of Contract.

13.3 The rate should include the cost of all seen and unseen expenditure. No claim, whatsoever, will be entertained due to non-inclusion of any such event necessary for the completion of the item of work."

It is submitted that the petitioner had duly submitted his tender on the basis of percentage rate method by quoting 44.53% above the Schedule of Rates specified in the Appendix of the ITB, which vide Clause 15 of the Appendix, was referable to the Schedule of Rates as mentioned in the Bill of Quantities. It was further demonstrated from the Bill of Quantities relating to package no. 7 that vide item no. 10, royalty and other taxes were included in the Schedule of Rates. It is therefore, submitted that indisputably the respondents have agreed and

entered into a contract for a fixed amount of Rs. 448,83,67,313/- and they cannot now be permitted by their subsequent letter dated 13.06.2011 to modify the terms of the contract unilaterally, which amounts to novation of the contract without the consent of the petitioner and is completely impermissible in law. Once the contract has been entered into and work has been commenced on the basis of a fixed contract price of Rs. 448,83,67,313/-, the respondents cannot make new stipulations with reference to the amount on which the percentage of 44.53% as quoted by the petitioner would be applicable as that would amount to rewriting of the contract itself. It is further pointed out that even otherwise, there is contradiction in the stand of the respondents themselves in seeking to reduce the amount of royalty from the scheduled rates before applying the 44.53% increase, as no such treatment has been insisted upon in respect of other taxes which are also included as evident from item no. 10 of the Bill of Quantities relating to package no. 7 as aforesaid.

5. Mr. Lalit Kishore, learned Advocate General appearing on behalf of the State, vehemently opposes the contention of the petitioner, submitting that the respondents have acted in accordance with law and no fault can be found in their action. It is submitted that the circular dated 13.06.2011 is merely clarificatory in nature, making explicit what was already implicit. This clarification became necessary in view of incorrect calculations being made by some of the field officers. It is submitted that the said circular does not introduce anything new and hence the question of novation or rewriting of the contract does not arise. The view expressed in the circular is sought to be supported on the ground that 44.53% enhancement over the Schedule of Rates in the Bill of Quantities was attributable to the contractor's margin of profit etc., and therefore applicable only to such items as were relatable to the cost of construction and labour involved in the execution of the contract. The question of any profit margin in respect of royalty cannot arise as this would amount to granting a windfall and unjust enrichment to the petitioner, constituting financial irregularity.

Reference is invited to item 2 "Payment of Royalties" of the General and Special Conditions of Contract which reads as follows -

"2. PAYMENT OF ROYALTIES :

The bills of the contractors will be cleared only after the submission of the clearance certificate for payment of royalties for mineral like earth obtained from borrow pits in public lands, Clay, Bricks, Sand, Boulders, Stone metals, Stone chips etc. from the District. Mining Officer or the Assistant Mining Officer of the concerned District, or any other competent authority as the case may be, failing which the same will be deducted from the contractor's bills at the current rates approved by the Mining Department, or royalties added in BOQ rate including contractor profit and overhead charges added if any in rates, whichever is more. For example, Rs. 16.50 (with C.P.) per Cubic meter is added in rate of earth work in filling where earth is to be obtained from borrow pits.

The Contractor will submit details about supply & use of mining materials by them in Performa M&N as per letter no. 19/pa-03/2005-1813 dated 29.10.2005 of Water Resources Department, Government of Bihar."

It is submitted that payment of royalty is a liability to be discharged by the petitioner. The contract therefore contemplates that once the payment of royalty is made, the same is to be reimbursed by way of inclusion in the Bill of Quantities but that is not to say that the petitioner is entitled to add profit and overhead charges in respect of such royalty.

6. Having heard the parties and on careful consideration of the materials available on record, this Court finds merit in the writ petition. It is a matter of record that the agreement entered into between the parties was for a fixed amount of Rs. 448,83,67,313/- and the respondents have not been able to point out any reference therein to the overall percentage rate basis of 44.53% above the Schedule of Rates mentioned in the Bill of Quantities. In this view of the matter, the petitioner would be entitled to the amount agreed to upon successful performance of the contract. The plea of the respondents that the impugned circular no. 948 dated 13.06.2011 is merely clarificatory making explicit what was already implicit in the agreement, is not acceptable, as the interpretation sought to be placed on the said circular directly impacts the terms of the agreement retrospectively, and is therefore impermissible. If the respondents were of the view that the amount of royalty had to be deducted from the Schedule of Rates and the percentage rate method had to be applied with reference to the remaining amount only, this should have been made clear to the bidders at the very outset, prior to the commencement of the bidding process. Clause 13 of the ITB refers to the bid price on percentage rate method, requiring the bidders to quote a percentage above/below/at par of the Schedule of Rates specified in the appendix to the ITB. Clause 13.1.2 clearly states that "All duties, taxes and other levies payable by the contractor under the contract or for any other cause shall be included in the rates, prices and total Bid Price submitted by the Bidder". Clause 15 of the said appendix to ITB clarifies the schedule of rate applicable for percentage rate method to be as mentioned in the BOQ. Item No. 10 of the BOQ relating to the illustrative Package No. 7 deals with providing coarse clean local sand for filling in foundation trenches and includes royalty and other taxes. On a cumulative reading of the above, therefore, there is nothing to show that royalty had to be given exclusive treatment by taking it out of the reckoning while applying the percentage rate method by the bidder. Significantly, the BOQ mentions other taxes along with royalty but no such stand has been taken by the respondents in respect of other taxes. In other words, the respondents are only objecting to percentage rate method by way of contractor's profit etc being applied with respect to royalty but have no such objection if the percentage rate is charged in respect of the other taxes. No satisfactory answer to such dichotomy was forthcoming from the respondents and such differential treatment between the different taxes and royalty could not be explained. The submission of the respondents that the rate of royalty is known to the bidder well

in advance as it is fixed in terms of cubic meters and is merely included in the Schedule of Rates with a view to its reimbursement to the bidder, cannot be accepted. Moreover, merely because the petitioner has applied the percentage rate method on the aggregate amount in the Schedule of Rates, there cannot be any presumption that the same percentage rate has been applied in respect of each and every item comprising the list including royalty. That may perhaps be an inference as sought to be drawn by the respondents but no material has been brought on record to show that the petitioner has de facto applied the percentage rate in respect of royalty specifically. The view expressed in the impugned letter no. 948 dated 13.06.2011 and consequently in the impugned order dated 22.09.2015 cannot be said to be tenable as this would have the effect of rewriting the contract unilaterally which is not permissible in law, more so after the agreement has been entered into and the work has already commenced.

7. In the above circumstances, the impugned Circular No. 948 dated 13.06.2011 (Annexure-5) as well as the impugned order dated 22.09.2015 (Annexure-13) are hereby quashed with consequential reliefs. The writ petition stands allowed.