



GOVERNMENT OF KERALA

Abstract

Public Works Department- Judgment dated 09/10/2023 in WP(C) 33056/2023 filed by Mr. MANAF M - Complied with - Orders issued.

PUBLIC WORKS (G) DEPARTMENT

G.O.(Rt)No.543/2024/PWD Dated, Thiruvananthapuram, 31-05-2024

Read 1 G.O (Rt) No. 5502/2020/FIN dated 25.09.2020

2 Letter No.CEPWD/9889/2021-C4(W)-RD dated 24/3/2022 from the Chief Engineer (Roads), PWD

3 Representation dated 23/08/2023 submitted by the Petitioner before the Government

4 Judgment of the Hon'ble High Court of Kerala dated 09/10/2023 in WP(C) 33056/2023

5 Letter No.CEPWD/19365/2023-C3(W)-RD dated 27.03.2024 from the Chief Engineer(Roads), PWD.

ORDER

The Hon'ble High Court of Kerala, as per judgment read 4th paper cited,directed Govt. being the 1st Respondent to take up the representation, read 3rd paper above, of the petitioner and dispose of the same, adverting to the letter read as 2nd paper above & the Government order read as 1st paper above, after affording him an opportunity of being heard and thus culminating in an appropriate order and necessary action thereon, as expeditiously as possible, but not later than three months from the date of receipt of a copy of the judgment. It is also further direct that it through the above exercise, any amount are found due to the petitioner, same shall be disbursed to him with in a period of 2 months thereafter. As directed by the Court, the petitioner was heard by the Under Secretary ,Public Works(G)Department on 04.05.2024.

As per the representation read as 3rd paper above, the petitioner contented that, he was awarded the execution of Sabarimala Improvements to Nedumangadu Ariyanadu Road. During the progress of work he has to face acute shortage of scheduled items such as

NRMB Bitumen.(Natural Rubber Modified Bitumen). Thus, in order to complete the work within the stipulated time, the respondent permitted him to use VG 30(VISCOSITY GRADE-30) Bitumen for BC instead of NRMB as extra item. Consequently, the petitioner undertook the extra item of work incurring excess expenditure including price difference of Bitumen. He is entitled to get the prevailing local market rate for the extra item used in the work and price difference of cost Bitumen. Thus the total additional bill amount comes to Rs. 2,13,80,712/-. In this circumstance he has requested to disburse an amount of Rs. 2,13,80,712/- towards the additional and extra expenditure incurred by him for completing the work of Sabarimala Improvements to Nedumangadu Ariyanadu Road, on account of using item VG-30. During the time of hearing, he has produced a representation dated 04.05.2024 and reiterated the contentions raised in the Ext. P6.Representation.

Based on his contentions, the CE has reported the following facts:-

Administrative sanction of the work Improvements to Nedumangad Ariyanad road was accorded for Rs.1100 lakhs and Technical sanction was accorded from the O/o the Chief Engineer for the same amount. The work was tendered from the Office of SE,SC TVM and the work was awarded to Sri. Manaf and agreement was executed.

As per the terms of the agreement the contractor was obligated to use NRMB for executing BC work. But during the progress of work, since there was non-availability of NRMB, the contractor was permitted to use VG30. Thus the BC work was done using VG 30. Since BC using VG 30 was not there in agreement schedule, it had to be considered as extra item as per SBD condition and the contractor is bound to obey the agreement condition. After that the revised estimate was submitted to the Office Of Chief Engineer for approval in PRICE 3 (RD/2020/3420/RE 1]) incorporating BC using VG 30 as extra item. Accordingly, the extra item-BC using VG 30 was approved at the rate of 8817.81 /cum, considering as a similar item as that of BC using NRMB in the original schedule, as per clause 39.5.1 of SBD condition.

In the representation dated 23.08.2023 from Shri. A Manaf, had claimed additional amount of Rs. 21380712 /- and the detailed calculation is as follows:

Detailed split up of claim amount of Rs.15949934:

Already passed rate of BC in RE =8817/cum
 LMR rate from PRICE for BC=13250/cum
 Difference in rate=13250-8817=4433
 BC Qty Executed = 3598cum
 The amount to be obtained $3598 \times 4433 =$ Rs. 15949934

The Petitioner had also claims that he purchased the bitumen at a higher rate and price difference of Rs.5430788/- should also be paid and on such an additional amount of Rs. 21380712+18% GST(15949934+5430788).

The rate of Extra item of BC using VG 30 is fixed as per SBD clause 39.5.1. "In the case of extra items whether additional, altered or substituted, for which similar items exists in the contract, the rates shall be derived from the original item by appropriate adjustment of cost of affected components. The percentage excess or deduction of the contract rate of the original item with reference to the departmental estimated rate shall be applied in deriving the rates for such items. The Engineer's interpretation as to what is a similar class of work shall be final and binding on the Contractor" The condition is agreed by the contractor. Also clause 39.5.5 of SBD, states that In all the above cases, the approved rates for extra, additional, altered or substituted items shall not exceed the rate which is arrived on the basis of the prevailing local market rates of the Department (published as per Government guidelines) at the time of ordering or executing the extra item whichever is earlier.

Thus, when the Revised Estimate was submitted by the Superintending Engineer, the rates were compared in Price software which is developed by taking into account SBD clauses and GO for the finalization of Extra item rates as per the above conditions which is clear from table below.

Sl No	Specification	Qty in cum	Modified rate applying Tender excess of 9.95% similar item as per SBD clause 39.5.1	LMR rate	Lowest rate approved by CE

<p>1 EI 1</p>	<p>Providing and laying bituminous concrete with 80-100 TPH hot mix plant producing an average output of 75 tonnes per hour using crushed aggregates of specified grading, premixed with a bituminous binder(VG 30) @ 5.4 percent of mix and filler, transporting the hot mix to work site, laying with a hydrostatic paver finisher with sensor control to the required grade, level, and alignment, rolling with smooth wheeled, vibratory and tandem rollers to achieve the desired compaction as per MORTH specification clause No. 507 complete in all respects For Grading - II (13.2 mm Nominal Size)</p>	<p>2692.95</p>	<p>8817.81</p>	<p>Rs: 13984.950</p>	<p>8817.81</p>
	<p>Providing and laying bituminous concrete with 80-100 TPH hot mix plant producing an average out put of</p>				

EI2	75 tonnes per hour using crushed aggregates of specified grading, premixed with bituminous binder (VG 30) @ 5.4 percent of mix and filler, transporting the hot mix to work site, laying with a hydrostatic paver finisher with sensor control to the required grade, level and alignment, rolling with smooth wheeled, vibratory and tandem rollers to achieve the desired compaction as per MORTH specification clause NO. 507 complete in all respects (using 7% shredded plastic) Grading - II (13.2 mm nominal size)	905.945	Rs: 8746.18/cum	14536.820/cum	Rs: 8746.18/cum
	Total	3598.89			

Here, the above rates was compared and the lowest was considered as per the SBD condition which was agreed by the contractor himself while executing the agreement As per 39.7 of SBD for percentage rate contracts the rate of extra item shall be derived by applying the percentage tender excess/tender deduction to the departmental data rate excluding the cost of departmental materials and market rate items as per the original schedule on which the tender is invited. Since Bitumen is a market rate item, tender variation cannot be applied.

As per clause 39.8 Wherever, the term “Market rate ” appears in the clause 39, it shall mean all rates other than departmental schedule of rates currently CPWD Delhi SoR.

On the basis of these clauses the rate should not exceed the rate of prevailing local market rates published by the department. Since Bitumen is a market rate item as specified in cl 39.8, tender variation could not be applied. Hence the petitioner's claim to grant Market rate (his purchase price) and quoted above rate cannot be granted which is against the clauses of SBD. The PRICE software is developed by taking into account all these SBD Clauses and Government orders for finalization rate of Extra items and hence the rate of bituminous concrete (EI -1 & 2) granted to the petitioner is legal and binding on him .

The Comptroller and Auditor General has noted that as the contractors are bound to quote their rates after proper study of fluctuations in Market rates of bitumen, allowing the price difference subsequently does not seem advisable.

The payment/recovery of price difference of Bitumen to/from the contractors was on the basis of G.O.(Rt)No.9386/2018/Fin. dated 13.11.2018 & other Government orders issued by the Government in continuation and in clarification there of viz. G.O(Rt)No2816/2020/fin dated 17.04.2020, G.O(Rt)No.5502/2020/fin dated 25.09.2020 (Exbt P5) and G.O(Rt)No.3815/2021/fin dated 30.04.2021.

Currently, GO (P) 63/2023/Fin dated 26/06/2023 made it clear that the above orders are applicable only for works which were on going as on 01/11/2018 only. Moreover the above practice has been discontinued by the Govt. by issuing G.O.(P) No. 96/2022/Fin dated 26.08.2022 with prospective effect. The disputed work is not found ongoing on 01.11.2018 and hence there is no question of paying the Price Difference of Bitumen arises in the present case.

The Exb. P 4 submitted by contractor is letter No CEPWD/9889/2021-C4 (W)RD dated: 24.03.2022 from CE to Government where in , it was requested to treat the rate of bitumen at the time of TS as a departmental data rate considering the same as similar item. But the proposal has been rejected by Government stating that since the basic estimate rates for Bitumen are published every six months by the Chief Engineer as per Market rates of Public Sector Oil Companies, the proposal for treating the same at par with departmental data rate (DSR) item) and apply tender variation is not justifiable . It may also be noted that a similar court case was filed by Sri . Thajudeen

(WP(c)No.33194/2023) and the claim was rejected by Government and judgement complied with.

In the circumstances, On the basis of these clauses, the rate should not exceed the rate of prevailing local market rates published by the department. Since Bitumen is a market rate item as specified in cl 39.8, tender variation could not be applied. Hence the petitioner's claim to grant Market rate (his purchase price) and quoted above rate cannot be granted which is against the clauses of SBD. The PRICE software is developed by taking into account all these SBD Clauses and the claim of Rs.2,13,80,712/- put forward by the petitioner finds untenable and hence rejected. Ext. P6 representation produced by the Petitioner disposed as stated above and the Judgement 09/10/2023 in WP(C)No. 330562023 is complied with accordingly.

(By order of the Governor)
RADHAMANI AMMA O
UNDER SECRETARY

To:

The Chief Engineer, Roads , Public Works
Department, Thiruvananthapuram.

The Superintending Engineer (Roads), Public Works Department, South
Circle, Thiruvananthapuram.

The Executive Engineer, PWD Roads Division, Thiruvananthapuram

The Accountant General, (A & E /Audit), Kerala, Thiruvananthapuram.

The Finance Department

Stock File/Website.

Forwarded /By order

Section Officer