

**GOVERNMENT OF KERALA****Abstract**

PWD - Judgment of Hon'ble High Court of Kerala dated 06.06.2024 in WP(C)No.16780/2023, filed by Irikkur Construction Company- Complied With - Orders issued.

PUBLIC WORKS (H) DEPARTMENT

G.O.(Rt)No.880/2024/PWD Dated,Thiruvananthapuram, 30-08-2024

- Read: 1. Judgment of Division Bench of Hon'ble High Court of Kerala dated 11.04.2024 in WP(c)No.23696 of 2023 and in Connected Cases.
2. Judgment of Hon'ble High Court of Kerala dated 06.06.2024 in WP(C)No.16780/2023 filed by Irikkur Construction Company.
3. Letter No. PDKRFB-KNR/16/2022-PE5 dated 09.07.2024 of the Project Director, PMU-KRFB
4. Argument Note dated 17.07.2024, submitted by Uralungal Labour Contract Co-operative Society Ltd.
5. Argument Note dated 18.07.2024, submitted by Irikkur Construction Company.

ORDER

M/s. Irikkur Construction Company had participated in a tender process in connection with awarding of work namely 'KIIFB - Improvements and providing DBM and BC to ETC- Poomangalam - Mazhoor - Panniyoor-Kalikkadavu-Padappengadu - Madakkadu Road (Km 0/000213/551) first reach in Kannur District' and became the L1 Bidder. By virtue of the preference available to Labour Contract Co-operative Societies, the bid submitted by ULCCS was proposed to be accepted. M/s. Irikkur Construction Company filed WP(C)No.16780/2023 before the Hon'ble High Court and Orders were issued stopping further steps.

2) The contention of the Petitioner is that even though the right of the Labour Contract Co-operative Society to get preference has been upheld by the Division

Bench of the Court as per Judgment read 1st paper above, the 2nd respondent (ie,ULCCS) is not entitled to participate in the bid itself since that would be violation of the CVC guidelines. The Hon'ble High Court as per the Order read as 2nd paper above, disposed of the Case by directing the 3rd respondent (State Govt.) to consider whether the 2nd respondent is disqualified under the Circular Nos.01/01/17 dated 23.01.2017 and 08/06/11 dated 24.06.2011 and the Manual of Procurement and thereafter decide on whether or not to grant preference to the 2nd respondent over the petitioner who is the L1 bidder after affording an opportunity to raise their contentions before the 3rd respondent. The Court also directed to consider the effect of the judgment in Haffkine Bio-Pharmaceutical Corporation Ltd., a Govt. of Maharashtra Undertaking through Manager and Others V. M/s.Nirlac Chemicals through its Manager and Others reported in (2017 KHC 6504), wherein the Hon.Supreme Court has held that the violation of CVC guidelines itself is sufficient to vitiate the entire tender process. The Court has allotted a time limit of six weeks from the date of receipt of a copy of the judgment to complete the action.

3) In compliance of the Court's direction, the Secretary, PWD heard the Petitioner and the Respondents concerned on 18.07.2024. The Petitioner, Irikkur Construction Company & the Respondents, the Project Director, PMU-KRFB and the Managing Director, ULCCS Ltd. attended the hearing.

4) The Arguments submitted by the Petitioner, Irikkur Construction Company read as 5th paper above are as follows:

- The Project Director, Kerala Road Fund Board invited a tender for the work, namely, 'KIIFB - Improvements and providing DBM and BC to ETC-Poomangalam - Mazhooor - Panniyoor- Kalikkadavu- Padappengadu - Madakkadu Road(Km 0/ 000213/551 first reach) in Kannur District'. As per the notice inviting tender dated 03.03.2023, the estimated cost was Rs.55,90,56,693/-. As per the tender summary dated 03.05.2023, Irikkur Construction Company became the lowest tenderer with Rs.52,77,81,713.30/-. ULCCS became the third lowest tenderer with Rs.56,96,78,762.27/-. The difference between the lowest tenderer and the ULCCS was Rs.4,18,97,048.97/-

- On understanding that the steps have been taken to award the tender to ULCCS based on the various Government Orders, giving price preference to Labour Contract Societies, the Irikkur Construction Company approached the Hon'ble High Court of Kerala by filing W.P(c)No.16780/2023, challenging the Government Orders, giving price preference to Labour Contract Societies.
- Later, the writ petition was amended with a prayer that the direction declaring that the work covered by the NIT cannot be awarded to ULCCS because they were one of the consultants who submitted a Detailed Project Report, concerning the physical properties of soil, inventory details and many other aspects of the project in question.
- The ULCCS participated partially in conducting the DPR as entrusted by the KRFB. In fact, the ULCCS conducted the design and feasibility study of the work mentioned in the notice inviting tender.
- It is a well-settled principle in the realm of contract awarding that the consultant cannot be allowed to participate in the tender process as they are better than all the other participants at knowing the details of the tender project. Therefore, KRFB should have prevented the ULCCS from participating in the tender process.
- During the pendency of the writ petition, the question of price preference was upheld by the Division Bench of the Hon'ble High Court of Kerala; thereby, the Irikkur Construction Company's challenge on that aspect came to an end.
- However, the High Court of Kerala has to decide whether the ULCCS is entitled to participate in the bid itself as they participate in the preparation of DPR itself, as it is against the CVC guidelines. Thereby, the High Court of Kerala, as per the judgment dated 06/06/2024, directed your goodself to consider whether the ULCC is disqualified under the circulars mentioned above and the manual of procurement, based upon the CVC guidelines and the judgment of the Hon'ble Supreme Court in that question.
- It is further submitted that since ULCCS participates in preparing Detailed Project Reports, they should be considered consultants and, therefore, should not be allowed to participate in the tender. The Ministry of Finance and Government of India's Manual for Procurement of Consultancy and Other Services specifies and restricts the awarding of works to consultant firms that participated in the direct project report study. This practice is also followed by the Kerala Infrastructure Investment Fund Board (KIIFB). Since the project in question is funded by KIIFB, the same procedure should also be followed for this matter.
- The Central Vigilance Commission as per a Circular dated 23.01.2017, directs

the organizations under the Central and State Governments to refrain from engaging consultant firms to procure the work for the same project.

- In the counter affidavit, submitted by KRFB it is stated that the ULCCS needed to prepare a detailed Project Report. The investigation carried out by the ULCCS led to modifications in the DPR. Based on this, the report of the ULCCS resulting in changes to the DPR is ground for disqualification from participating in the tender process for the same work.
- It has been acknowledged that the ULCCS was assigned to conduct a partial investigation of the previous report prepared by the KRFB, which was not acceptable to the KIIFB. As a result, the Kerala Road Fund Board (KRFB) had to conduct a new study to address the issue. KRFB awarded the contract to ULCCS after inviting tenders for the DPR study. Later, when the main tender was invited, ultimately decided to award them the tender, despite their quote being less than Rs.4.75 Crores, which was lower than the lowest bidder. This decision was made in accordance with the provisions of the Government orders that provide price preferences for Labour contract societies.
- As per the Manual for Procurement of Works, 2019, the consultancy services include providing expert or strategic advice, example, management consultants, policy consultants or communication consultant, advisory and project-related consultancy services and include feasibility studies, project management, engineering services, architectural services, etc. Participation by a bidding firm or any of its affiliates that are involved in the consultancy contract of which the procurement is linked is to be treated as conflict of interest. In chapter VII of the Manual of Procurement it is specifically stated that the tendering authority as well as the bidders, contractors and the consultants are obliged under the code of integrity for the public procurement to suo motu proactively declare any conflict of interest in any procurement process or execution of the contract. Since ULCCS had actively participated in the DPR preparation they are to be treated as a consultant within the Manual of Procurement of Works and hence allowing of ULCCS to participate in the tendering process was against the Manual for Procurement of Works.
- The Hon'ble Supreme Court in Haffkine Bio-Pharmaceutical Corporation Ltd. Vs. Nirlac Chemicals (2017 KHC 6504) held that violation of the CVC guidelines itself is sufficient to vitiate the entire tender process. Since the guidelines issued by the CVC has been violated, the KRFB should not consider the bid of the ULCCS as they have participated in the DPR preparation. It cannot be said that they did not participate in the DPR preparation, the KRFB itself admitted before the High Court that the DPR prepared earlier has been

modified based on the report submitted by the ULCCS.

5) The Arguments submitted by ULCCS read as 4th paper above are as follows:

- The Uralungal Labour Contract Co-operative Society (ULCCS) is a registered Labour Contract Co-operative Society as per the provisions of the Kerala Co-operative Societies Act 1969. Going by the mandates, containing in the G.O. (Ms)No.135/97/Co-op dated 13.11.1997, G.O. (Ms)No.44/01/PWD dated 19.03.2004, G.O.(Ms)No.181/08/Co-op dated 02.08.2008, GO(Ms)No.568/2020/Co-op dated 04.11.2020 and clause 5.6 of the tender documents pertaining the above work, a Labour Contract Co-operative Society participating in the above tender proceedings is entitled for the price preference.
- As per above mentioned Government orders and terms of the tender documents, if a Labour Contract Co-operative Society participates in a tender and quotes within 10% of the lowest bidder, the Labour Contract Co-operative Society would be eligible for awarding the contract applying the price preference.
- In the case on hand, while processing the tender proceedings, it has found that the bid quoted by the ULCCS falls within 10% of the bid quoted by the Irikkur Constructions, which is L1.
- The Govt.in Budget Speech 2017-18 had announced projects for Improvements to Poomangalam-Mazhooor-Panniyoor-Kalikadavu-Padappengad-Madakkadu Road in Kannur District. As per G.O(Rt)No.942/2017/PWD dated 10.07.2017 KRFB was appointed as the agency for executing the projects for Improvements to Poomangalam - Mazhooor - Panniyoor - Kalikadavu - Padappengad - Madakkadu Road in Kannur District. Thereafter, the Executive Engineer, PWD Roads Division, Kannur has entrusted M/s.RTF Infrastructure Pvt. Ltd. for conducting investigation for preparing the DPR. M/s RTF was the consultant appointed for preparation of the DPR. They have submitted a Detailed Project Report and the same was forwarded to M/s KIIFB for approval, through M/s KRFB. Thereafter, KIIFB, the funding agency, forwarded the Technical Appraisal Report on 13.12.2021 for producing reply to the queries raised. At this juncture, additional details were necessitated for furnishing reply to the queries raised by KIIFB. In order to furnish reply to the queries raised by the KIIFB in the Technical Appraisal Report, additional topographical survey was necessitated. On the occasion M/s.RTF was approached by the Kerala Road

Fund Board, there was no response from the agency earlier entrusted viz. M/s. RTF. Resultantly ULCCS was awarded the work of conducting additional investigation regarding the topographical survey by virtue of work order dated 28.04.2022, after adhering with due tender proceedings. The work executed by ULCCS conducting topographic survey, soil survey and inventory survey, pursuant to a tender proceedings. The work awarded to the ULCCS was for conducting additional survey for a total sum of Rs.6,83,950/- against the probable amount of contract (PAC) of 7,47,306/-. The work awarded to ULCCS was generally topography survey, inventorying survey and CBR. As per the schedule of works, there were 7 items included in the schedule. The item No.1 in the schedule was collection of sub-grade soil sample at 500m interval by excavating pit. The test is to be conducted for identifying the strength of the soil as well as the density. The second item included is soil classification test, modified proctor test and CBR test for getting the density of the soil as well as the layers. The third item is to study the nature as well as the layers of the soil. The 4th, 5th and 6th items related topographic survey and specification of constructions and its materials. The contractor is mandated to collect the inventory data including type of shoulder, width and location of approach road, details of existing drains, culverts and bridges, pavement conditions, potholes, fog seal, slurry seals, damages, road signs, hazard markets etc. The report was made available to KRFB and thereafter, KRFB replied to the technical appraisal report and DPR was approved by KIIFB. Based on the nature of the work ULCC was engaged as a contractor to do certain works so as to collect certain material and to furnish the DPR preparing agency and the funding agency, work cannot be termed as consultancy but purely work contract.

- The terms 'Consultant' and 'Contractor' are explained in detail in Central Vigilance Manual 2021, Illustrative Checkpoints for Various Stages of Public Procurement and Manual of Policies and Procedure of Employment of Consultants issued by the Central Vigilance Commission. Clause 9.91 Vigilance Manual and the Central Vigilance Manual 2021 and Illustrative Checkpoints for Various Stages Of Public Procurement and Manual of Policies and Procedure of Employment of Consultants issued by the Central Vigilance Commission clearly distinguishes the consultant from that of a contract and as per the said document a consultant is appointed for supervising the project which includes preparation

of DPR inviting competitive bids, awarding contracts and monetary stages of Public Works, while the contractor is a person who is engaged to carry out the works or services as per the directions of the consultant appointed by the employer. Going by the said documents, M/s. ULCCS cannot be termed as a Consultant in connection with the above work but only a Contractor appointed for conducting in basic investigation works.

- Circular Nos.08/06/11 dated 24.06.2011 and 01/17 dated 23.01.2017 deals with the selection of Consultants, combining the same and other Circulars, the Vigilance Manual has been issued by the Central Vigilance Commission. What was restricted in the Cir.No.08/06/11 dated 24.06.2011 is the conflict between consulting works and procurement works. In the Circular it has been categorically stated that a firm that has been engaged to provide goods, works or non-consulting services for a project shall be disqualified from providing consulting services in connection with the said work. Since ULCCS was not at any point selected as a Consultant with regard to the project and therefore the above Circular cannot act as a disqualification to ULCCS. Manual of Procurement of Works 2019 issued by the Ministry of Finance, GoI does not impose any kind of disqualification to ULCCS.
- It is concluded that above Circulars have no application in the case. The work done by M/s ULCCS is only topography survey, inventory survey and soil testing, pursuant to a tender proceeding.

6) The Report furnished by the Project Director, PMU-KRFB read as 3rd paper above is as follows:

- As per G.O(Rt)No.947/2017/PWD dated 10.07.2017 in-principal Administrative Sanction was accorded to for the Project- "Improvements to Poomangalam-Mazhooor-Panniyoor-Kalikadavu-Padeppengad-Madakkadu Road in Kannur District". Financial Sanction was obtained from KIIFB for Rs.63 Cr. and Technical Sanction was issued for Rs.69.52Cr.
- E-Tender was invited fixing the last date of bid submission. The technical bids were opened on the same day and six bidders have participated in the tender. The estimate PAC of the work was Rs.55,90,56,693/-. Based on the price preference applicable for Labour Contract Society, L1 bidder was ULCCS. The

investigation work was awarded to M/s.RTF Infra Pvt.Ltd. for an agreed PAC of Rs.9,19,188.75/- and the work was completed on 14.09.2018. DPR was submitted to KIIFB on 03.10.2019 for an amount of Rs.112Cr. and KIIFB has issued Technical Appraisal Report-1 on 30.11.2019 and reply for the same with revised estimate amounting to Rs.65 Cr. was submitted to KIIFB on 16.09.2021. On scrutiny, KIIFB has issued Technical Appraisal Report-2 on 13.12.2021. Additional details were required for attending the queries in Technical Appraisal Report. The Executive Engineer, PMU-KRFB, Kannur has enquired with M/s RTF Infra Pvt.Ltd. to provide the Additional documents for furnishing reply to KIIFB and the same was not received.

- The Executive Director, KIIFB visited the site on 11.02.2022 and convened a meeting to discuss the Technical Appraisal Report with CMD, KIIFB and KRFB. Topographic survey was proposed for finding a solution to Technical Appraisal Report observations. Based on the request of Executive Engineer, KRFB-PMU, CE, Design was requested to conduct a topographic survey, core details and CBR calculations of existing pavement for preparing reply to TAR, issued by KIIFB. The Regional Investigation Quality Control Lab, Kozhikode tendered the additional investigation work on 25.04.2022 and work was awarded to M/s. ULCCS. Based on the report received from ULCCS estimate was corrected by PWD Officers and reply to TAR along with revised estimate amounting to Rs.63.34 Cr. submitted to KIIFB and finally KIIFB approved the DPR with Technical as well as Financial sanction for Rs.69.52 Cr.
- ULCCS had executed the additional investigation work of the project as a contractor based on the tender published by RIQCL, KKD. The additional investigation work was arranged for preparing the reply to Technical Appraisal Report 2, issued by KIIFB after reviewing DPR. Based on the additional investigation report, the departmental officers prepared the revised estimate and reply to TAR-2 and submitted to KIIFB for financial sanction. As per the comments in Detailed Appraisal Report and Technical Committee, the estimate was again revised by departmental officers and revised financial sanction has been accorded.

7) The Government have examined the Case in detail. Here, the Writ Petition is disposed of by directing the 3rd respondent (State Government) to consider whether

the 2nd respondent(ULCCS) should be disqualified under the Circulars mentioned above and the Manual of Procurement and thereafter decide on whether or not to grant preference to ULCCS over the Petitioner who is the L1 bidder. Regarding the applicability of Circular No.01.01.2017 dated 23.01.2017 and Circular.No.08/06/11 dated 24.06.2011 issued by the Central Vigilance Commission, it is inferred that the subject matter of these Circulars pertain to engagement of consultants in Government contracts. In the instant case, based on the report of the Project Director, PMU-KRFB, read 3rd paper above, the investigation work was awarded to M/s RTF Infra Pvt.Ltd., as the 'consultant' for an agreed PAC of Rs.9,19,188.75/- and the work was completed by preparing the DPR, which was submitted to KIIFB. Subsequently, The Regional Investigation Quality Control Lab, Kozhikode was directed for conducting additional investigation work necessary for attending the queries in Technical Appraisal Report(TAR), which was in turn tendered and awarded to ULCCS. The additional investigation work consisting of 7 items in the work schedule including topographic survey, soil testing etc, which was carried out by ULCCS in the capacity of Contractor and not as Consultant. Based on the facts reported by the Project Director, PMU-KRFB, the status of ULCCS is treated as 'contractor' and not as 'consultant'. On verification of the Judgment of the Hon'ble Supreme Court in *Haffkine Bio-Pharmaceutical Corporation Ltd. a Govt. of Maharashtra Undertaking through Manager and Others V. M/s Nirlac Chemicals through its Manager and Others reported in (2017 KHC 6504)* it is seen that the dictum in the judgment is not similar to the facts of the instant case. As per the report of the 1st respondent, KRFB, ULCCS had not actively participated in the DPR preparation, it had only undertaken additional investigation works for the purpose of attending the queries in Technical Appraisal Report (TAR). If that be so, ULCCS had performed only work contract and hence cannot be disqualified under the provisions of the Manual of Procurement, 2019 of Government of India and cannot be held ineligible in participating in the tender. Besides, the Price Preferences given to Labour Contract Societies are already been upheld by the Division Bench of Hon.High Court, as per judgment read 1st paper

above.

8) In view of the facts Stated above, Government here by order that Uralungal Labour Contract Co-operative Society Limited cannot be held ineligible in having participated in the Tender process regarding the awarding of the work, 'KIIFB - Improvements and providing DBM and BC to ETC- Poomangalam - Mazhooor - Panniyoor- Kalikkadavu- Padappengadu - Madakkadu Road (Km 0/000213/551) first reach in Kannur District' and also the Price Preference can be granted to ULCCS over the Petitioner- Irikkur Construction Company, the L1 Bidder .

9) The Judgment read as 2nd paper above is complied with accordingly.

(By order of the Governor)
K BIJU I A S
SECRETARY

To:

The Advocate General, Kerala, Ernakulam.

The Managing Director, Irikkur Construction Company,IP/IX/

163, MH Tower, Irikkur(P.O), Kannur- 670593.

The Chairman, Uralungal Labour Contract Co-operative

Society Ltd. , Madappalli College (PO),

Vadakara,Kozhikkode-673102.

The Project Director, PMU- KRFB.

The Law Department

The I&PR(Web&New Media)Department

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Forwarded /By order,

Section Officer.

