

IN THE HIGH COURT OF UTTARAKHAND AT
NAINITAL

Writ Petition No. 275 of 2018 (M/S)

M/S Dalip Singh Adhikari

.....Petitioner

Versus

State of Uttarakhand & Others

.....Respondents

Present:- Mr. D.S. Patni, Advocate for the petitioner.

Mr. P.C. Bisht, Standing Counsel for the State/respondents.

Hon'ble Sharad Kumar Sharma, J. (Oral)

The petitioner in this writ petition had sought the following reliefs:

(i) Issue a writ, order or direction in the nature of certiorari quashing and setting aside the impugned order dated 16.01.2018, (as contained in Annexure-1) of the present petition, whereby the name of the petitioner-firm has been removed from the approved list/register of Classified contractors.

(ii) To issue a writ or direction in the nature of mandamus directing the respondents herein not to treat the petitioner firm as an un-registered Classified contractor.

(iii) Issue any writ, order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(iv) Award the cost of the petition to the petitioner.

2. Ultimately as a consequence of the impugned order passed by respondent no. 5 by invoking Rule-15 of the Rules called as “**Classification and Enlistment of the Contracts in Public Works Department Rules**” he had been delisted by the respondents, and consequent thereto, he has been treated as to be an unregistered Classified contractor.

3. The brief facts of the present case are that the tenders were invited by the respondent by tender notice dated 06.9.2016 for a project called as “Two Lane Tanakpur Joljibi Motor Road along India Nepal Border in Uttarakhand State (km. 30.600 to 55.00), which reads as follows:

S. No.	Name of work	Earnest money (Rs. In Lac)	Validity of tender	Period of completion	Contractor's Category of registration
2.	2. Package-2 Construction of two lane Tanakpur-Joljibi motor road Along Indo-Nepal boarder in Uttarakhand state (Km. 30.600 to 55.00)	234.00	120 Days	18 Months	Category A/A+ for road work in any state Govt./Govt. of India/Govt. undertaking

4. In pursuance to the said invitation to bid the petitioner is said to have applied and ultimately the Tender Committee found the bid submitted by the petitioner as to be a responsive bid in accordance to the conditions contained under the General Conditions of Contract. Consequent to the declaration of the petitioner bid as to be responsive bid a contract was executed in favour of petitioner on 03.01.2017 and as per the bond, the work was to be completed by 02.7.2018.

5. The contention of the petitioner is that on execution to contract bond he has developed all the infrastructure deployed labour made heavy investment and has almost completed 35 percent of the work which was equivalent to a value of about Rs.45 crores out of the total valuation of the contract of Rs. 123 crores. While the work was being in progress, it is the case of the petitioner that the new member of the legislative assembly had been elected in the previous election. One of the returned candidate who won election was a candidate who was pitched against the real brother of the petitioner and contested the election, it from this stage that political enmity germinated.

6. It is the case of the petitioner that on 28.4.2017 due to political vengeance a complaint was lodged by the MLA Mr. Pooran Singh Phartiyal, Member Vidhan Sabha alleging thereof that the contract given to the petitioner on 03.01.2017 was on an exorbitant rates and requesting for conducting an enquiry. On the said complaint as submitted on 28.4.2017, it is said that the Hon'ble Chief Minister has made an endorsement to conduct the enquiry and has directed the Secretary, PWD to take an appropriate steps for conducting enquiry through specific officer i.e. Chief Engineer PMGSY Almora, an officer of different department.

7. Based on the said endorsement of the Chief Minister an enquiry was conducted and a report is said to have been submitted by the Chief Engineer of Prime Minister Gramin Sadak Yojana, Almora wherein it was held and observed that the bid submitted by the petitioner was non-responsive because a doubt has been expressed pertaining to the experience certificate submitted by the petitioner in support of his bidding document.

8. The petitioner contends that the enquiry report dated 15.6.2017 submitted against him was behind his back without notices to him and hence, no reliance can be placed on the same. The petitioner further contended that in accordance with clause 2-4-2, the experience certificate which was annexed with the bidding documents pertaining to the year 2014-2015 was scrutinized by the respondent and was held to be valid and petitioner bid was held responsive. The petitioner applied for the copy of the report dated 15.6.2017 under the R.T.I. by filing of an application, also asked for copy of the report dated 11.8.2017 and the copy of the report which was forwarded by Engineer-in-Chief PWD.

9. In the correspondence made by the Chief Engineer/PWD to Addl. Chief Secretary, PWD, it was observed that the contract was issued after due verification and if any action is taken it would result into delaying the project, the price of the project would be escalated and the petitioner was otherwise qualified. It was further observed that the experience as the petitioner carries is much more than what is contemplated under clause 2-4-2.

10. According to the report dated 11.8.2017 of Chief Engineer, it was observed that the total experience of the petitioner is that of having done the work of Rs. 7160.34 lakhs whereas in terms of the valuation of the project at hand, the work experience at the rate of 25% would amount to be only of Rs. 3281.25 lakhs and hence he was qualified.

11. Furthermore, the chief engineer while submitting his response to Chief Engineer level-1 had submitted:

(i) that no complaint was ever filed by the rival bidders who participated in the bid.

(ii) Technical and financial bid of the petitioner was as per norms.

(iii) The petitioner's bid was held out to be a responsive bid in terms of the Government order dated 15.6.2015.

(iv) The petitioner has slashed the rates to make the project viable.

12. Based on the aforesaid report, the Chief Engineer, PWD, Pithoragarh *vide* his correspondence dated 01.7.2017 to Engineer-in-Chief is said to have recommended to close the complaint as submitted by the MLA on 28.4.2017 on which the action is being taken in pursuance to the enquiry report dated 15.6.2017.

13. Ultimately, by the order dated 25.8.2017 the contract of the petitioner was cancelled by the Engineer-in-Chief. Challenging the order of cancellation dated 25.8.2017, the petitioner preferred a Writ Petition no. 2143/2017 against the orders dated 22.8.2017, 23.8.2017 and the cancellation order dated 25.8.2017.

14. The coordinate Bench of this court *vide* its judgment dated 20.9.2017 dismissed the writ petition with an observation that the petitioner has a remedy to approach to the Adjudicator by invoking the provisions of clause-23 of the General

Conditions of the Contract. Against the judgment of the learned Single Judge dated 20.9.2017, the petitioner preferred a Special Appeal No. 760/2017. It was later on withdrawn by them by an order dated 22.9.2017.

15. The proceedings which was drawn before the adjudicator in pursuance to the judgment of this court, the adjudicator *vide* its judgment dated 13.12.2017 has held that the action taken by the State of canceling the contract was illegal, held that report dated 15.6.2017 was maliciously oriented and experience certificate found valid.

15. The Adjudicator in the order dated 13.12.2017 held that the petitioner has not committed any breach as contemplated under clause 56.2 (a to h) dealing with Fundamental Breaches of Section-6 of General Conditions of Contract and after the contract the department had reconfirmed the petitioner's credibility pertaining to the experience and found him to be suitable.

16. On account of the fact that the respondents were proceeding to award the contract to another contractor. As a consequence of the order of cancellation dated 25.8.2017, the petitioner preferred an application under Section 9 before the learned District Judge which was registered as Case No. 71/2017 seeking a restraint order from awarding the contract to any other person.

17. The learned District Judge, Dehradun by its order dated 27.9.2017 restrained granting of award to any other person. While these proceedings before the Adjudicator and the District Judge was pending, on 11.09.2017, a show cause notice was issued under the Rules almost on the same ground based on

the report dated 15.06.2017, as to why the name of the petitioner may not be removed by invoking Rule 15 and be declared unlisted contractor and remove name from list from Register of enlisted contract of the rules mentioned aforesaid.

18. The petitioner submitted a reply to the show cause under the following backdrops:-

(i) that the show cause itself as a matter of fact is not an independent show cause, simplicitor because it reflects a positive bend of mind based on decision already taken by the respondent.

(ii) the show cause reflects that the respondent has already pre-determined to delist the petitioner from the Register of enlisted contractors of the Public Works Department.

(iii) the basis of the show cause dated 11.09.2017 was bad as it was based on the report dated 15.6.2017, which was otherwise held to be illegal by the Adjudicator in its judgment dated 13.12.2017.

(iv) it was further bad that the District Judge has already granted an order of status quo on 27.9.2017 in proceedings under Section 9 of Arbitration and Cancellation Act, 1996.

(v) the petitioner in the reply submitted that no action should have been taken because in pursuance to the decision of Adjudicator dated 13.12.2017, the petitioner has already invoked the arbitration clause and has nominated his

representative as an arbitrator on 08.01.2018.

(vi) since the veracity of the report dated 15.6.2017 based on the findings of the Adjudicator dated 13.12.2017 is the subject matter of arbitration, no action should be taken.

19. The petitioner submitted his reply to show cause on 27.9.2017, but no decision was taken on the reply submitted by the petitioner on 27.9.2017, yet the Chief Engineer issued a second show cause on 05.12.2017 almost on the same ground as the first show cause on 11.9.2017 the petitioner submitted the reply to it too on 05.12.2017. Reiterated reply dated 27.9.2017.

20. On 18.12.2017, the petitioner *vide* his communication to the Chief Secretary PWD had given an information about the adjudicator award dated 13.12.2017 and prayed for to revive the contract. He yet again submitted a reminder on 04.01.2018.

21. Yet again even after the second show cause no action was taken. Surprisingly, the third show cause notice under Rule-15 of the Rules was issued on 6.1.2018 by Senior Staff Officer yet again based on the report of 15.06.2017.

22. To this show cause notice, the petitioner submitted that in accordance with an Appendix-5 of the Rules the Authority responsible for enlisting a A-Class contractor is Engineer-in-Chief or the Chief Engineer. The Senior Staff Officer of the office of Engineer-in-Chief was not competent to issue the show cause notice dated 06.01.2018. Petitioner reiterated his earlier reply and yet again submitted a detailed reply on 12.01.2018.

23. The Contention of the petitioner is that the action of the respondent is arbitrary for the reason that the third show cause notice which was issued on 06.01.2018 had only provided 1 ½ days time to the petitioner to file his reply to the show cause.

24. Despite of the aforesaid circumstances, the contention of the petitioner is that by the impugned order dated 16.01.2018 the petitioner has been delisted under Rule-15 of the Rules. As a consequences of which, he would be deprived of his participation, upholdment and continuance of any contract in his favour.

25. Be that as it may, the Rules which were published on 08.10.1980 dealing with the Classification and Enlistment of the contractors in P.W.D. under which the impugned action has been taken. In its Rule-15 under which the action has been taken dealt with the circumstances under which the competent authority could enlist the contractor or delist the contractor from the Register of enlisted contractors. The competent authority has been defined under Appendix-G, though apparently there are bundle of facts which has been pleaded by the petitioner in the writ petition, which are only having a persuasive blend and not relevant for the case, but this Court slightly incapacitated to interfere at this stage on account of the fact that under the rules particularly Rule-16 which is quoted hereunder, the petitioner has got a remedy of preferring an appeal/review whichever is available to him before the competent authority which has been defined as to be next higher authority under the rules and further because taking into consideration the fact that Arbitration Proceedings and proceedings under Section 9 are pending and one yet to be decided finally, any finding would

not be possibly given by this Court after appreciation of facts as would have bearing on pending proceedings:

Rule-16 An applicant or enlisted contractor who feels aggrieved by any order passed under these rules, any file an appeal to the next higher authority within a period of one month or receipt of intimation of such order and the order passed by such authority after holding such enquiry as it may consider necessary, shall be final. Such appeals shall ordinarily be disposed of within a period of two months.

Provided that no appeal shall lie against an order passed by the engineer-on-chief/chief engineer. However, the person aggrieved by the said order may apply to the Engineer in Chief/Chief Engineer may pass any order considered suitable.

26. On account of fact that the petitioner has a statutory remedy, which is by way of filing of an appeal or review, this writ petition is dismissed as the petitioner has got a forum available for redressal of his grievance against impugned order passed under Rule-15, in the given circumstance unit jurisdiction is not available to the petitioner. It is left open for the petitioner to approach the Authority against the impugned order dated 16.01.2018, and in an event if the petitioner approaches the authority by way of filing an appeal/review alongwith the interim application within two weeks from today, the same would be considered by the competent authority and pass an appropriate order on the interim stay application within a period of two weeks from the date of filing of appeal/review, exclusively in accordance with law.

27. Subject to the above observations, the writ petition is dismissed.

28. No order as to costs.

(Sharad Kumar Sharma, J.)
Vacation Judge
31.01.2018

Pooja