

GOVERNMENT OF INDIA
DIRECTORATE GENERAL OF WORKS
CENTRAL PUBLIC WORKS DEPARTMENT

No. DGW/CON/60

New Delhi, dated .7.93

M E M O R A N D U M

Subject:- Levy of compensation under Clause 2 of the contract
Form PWD 7 & 8-Decision of S.E. not open to arbitration.

Ref:- This Directorate Memo. No. DGW/CON/29 dated 27.11.89.

The judgement in the case of Vishwanath Sood Vs Union of India was circulated vide this Directorate Memo. quoted above.

In the said judgement, the Supreme Court had remarked that as per the clause in the agreement the time specified for the performance of the contract was of the essence and emphasised the need on the part of the contractor to scrupulously adhere to the time schedule approved by the Engineer-in-Charge. A kind of penalty on the contractor in the form of compensation to the Government for default was envisaged on the basis of number of days for which the work remained uncommenced or unfinished subject to the maximum compensation payable. Under the clause the discretion to reduce the rate of compensation was conferred on the S.E., whose decision on the rate and the amount of compensation payable under the clause was also made final. On the question whether the matter regarding quantum of compensation could be referred to the arbitrator, the Supreme Court held that the opening words of the arbitration clause i.e. "except where otherwise provided in the contract" place the question of awarding compensation outside the purview of arbitrator. The compensation, determined either by the Engineer-in-Charge or on further reference by the Superintending Engineer was not capable of being called into question before the arbitrator.

On a recent reference to the Ministry of Law & Justice, they have remarked "it would appear that the amount of compensation chargeable under clause 2 is a matter which has to be adjudicated in accordance with that clause and it cannot be referred to arbitration under clause 25."

The above judgement of the Supreme Court & the views of the Ministry of Law & Justice are brought to the notice of all concerned for guidance.

(S. SATAKOPAN)

F.O TO D.G (WORKS)
(DGW)

(Issued from file No.1/19/92-L&C

.....2/-

the Department has to take steps to file objections in the Court of appropriate jurisdiction within the statutory period of 30 days.

Para 36.45 of CPWD Manual Vol. II lays down that an award (if found acceptable by the Department) exceeding Rs. 50,000/- should be made a Rule of the Court before payment is made. The underlying principle for approaching the Court is to ensure enforceability of the award through the instrumentality of the Court.

The Ministry of Law are of the view that irrespective of the amount involved, the payment should be made to the contractor immediately without making a Rule of the Court after obtaining an undertaking from the contractor for acceptance of the award in full and final settlement. Immediate payment ensures that the Department is absolved of the liability of payment of interest on the amount awarded. The undertaking is to be obtained from the contractor on stamped paper, as per specimen form approved by Ministry of Law enclosed at Annexure-'A'. Before obtaining the said undertaking, the contractor will be addressed, as per specimen letter at Annexure 'B' formally informing him of the intention of the Department to accept the award. Thereafter the contractor will be called upon to sign the undertaking.

In case where the awards are in favour of the Department and recoveries to be made from the contractor who does not accept the award, then the Department should move an application immediately before the competent court to obtain a decree in terms of the award.

In cases where the awards are interest bearing and proposed to be challenged, the awarded amount may be deposited in the Court as provided under the provisions of Order 24 of C.P.C. in order to avoid the accrual of interest thereon.

ANNEXURE 'A'

Specimen Form of 'Undertaking' (to be obtained on stamped paper from the contractor where the arbitration award has been received and is found acceptable by the Department)

- (i) Whereas the Union of India, represented by
(Executive Engineer, operating the contract No. with
M/s..... (Name of contractor to be indicated)
for execution of the work (Detail of work to be
indicated i.e. Name of the work and Agreement No.)
Whereas certain disputes had arisen in the execution of the said contract :
Whereas the parties decided to go for arbitration, the demand for
arbitration have been made by
(indicate contractor/Government);
Whereas the DGW/CE (Delete whichever is not
applicable; in the case of CE indicate the Zone etc.) under his powers
vested in clause 25 of the Agreement had appointed Shri
as Arbitrator;
Whereas the said arbitrator had given his award dated
and had awarded a sum of Rs..... (in figures and words) in
favour of the contra tor in Arbitration case No.)
and
Whereas the U.O.I. have decided to accept the said award.
- (ii) It is hereby agreed upon and accepted by both the parties to the above-
mentioned contract that the said award in its entirety is final and binding

as regards to all the disputes referred to the arbitrator by them and an amount of Rs..... (in figures and words) given in the award in favour of the contractor will be paid by the Union of India in full and final settlement of the amounts due to the contractor under the said contract.

Signature of Contractor

Witness :

- 1.
- 2.
- 3.

Signature of the Ex. Eng.
(For and on behalf of the
President of India).

ANNEXURE 'B'

To

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Subject : Award dated made by Sh.
Arbitrator in regard to the disputes arising out of Agreement No.
and referred to arbitration Case No.

Dear Sirs,

With reference to the award mentioned above, I am to say that the Union of India has decided to accept the said award provided you accept the same as final and binding. Please intimate that you agree to accept payment of the sum as awarded in full and final settlement of all your claims forming the subject-matter of the reference to arbitration in the above case.

[DG(W)/CON/59 dated 18.6.1993]

36.46 In the case of award of Rs. 50,000/- and below there is no legal obligation to have the award made a rule of the court before making payment in terms of the award. However, the effect of not making the award a rule of the court would be that it may, in future, lead to further litigation although with very little chance of success. In view of this it is advisable that the award may be made rule of the court before making payments, in respect of smaller amounts the requirement may not be considered as administratively necessary because of smaller amounts involved.

36.47 Immediately on decision to accept the award by the Government of India (i.e., by CE/Ministry, as the case may be) or on receiving such intimation from the contractor, a communication as per Annexure 4 should be issued to the contractor intimating the fact of such acceptance and offer payment in terms of the award if the contractor communicates acceptance of the award within the specified time. Payment so made would bar the contractor from suing again in respect of the same dispute.