

2019 C L C 1128

[Lahore]

Before Muhammad Sajid Mehmood Sethi, J

Messrs NEW ERA TECHNOLOGIES (PRIVATE) LIMITED through Chief Executive Officer, Lahore----Petitioner

Versus

PROVINCE OF PUNJAB through Chief Secretary, Lahore and others---- Respondents

Writ Petition No.255111 of 2018, heard on 2nd April, 2019.

(a) Punjab Procurement Rules, 2014 ---

----Rr. 25, 27 & 31(2)---Tender---Re-advertisement of tender---Second bidding document---Change in evaluation criteria---Mis-procurement---In terms of R. 25 of the Punjab Procurement Rules, 2014 ('the Rules'), it was incumbent upon the procuring agency to provide a specific qualification and bid evaluation criteria, which was further supplemented by R. 31(2) of the said Rules which categorically provided that failure to provide unambiguous evaluation criteria in the bidding documents would amount to mis-procurement---Further as per R. 27 of the Rules, the procuring agency may require the bidders to furnish a bid security not exceeding five percent of the estimated price i.e. the price of procurement estimated by the procuring agency before initiation of the process of procurement, but the same had not been done in the present case---Factual controversy was involved in the present case as to whether compliance of R. 27 had been treated as mandatory by the relevant Government department on previous occasions---In the first instance, such controversy was required to be dilated upon by the relevant Secretary of the concerned Government department---High Court transmitted a copy of present petition along with its annexures to the relevant Secretary, with the direction to treat it as further representation and decide the same afresh strictly in accordance with law, after hearing petitioner and all concerned, through a well-reasoned speaking order, and not to disturb the contract already awarded to one of the respondents, fate of which shall be subject to the final decision of the Secretary --- Constitutional petition was allowed accordingly.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of the High Court---Scope---Factual controversy---Such controversy could not be resolved in exercise of constitutional jurisdiction.

(c) Punjab Procurement Rules, 2014---

----Rr. 25, 27 & 31(2)---General Clauses Act (X of 1897), S. 24-A---Objections raised in an application not properly appreciated, considered and addressed by the competent authority---Effect---Non-speaking order---Objections raised by petitioner regarding violation of the Punjab Procurement Rules, 2014; bidding process lacking due process; violation of principles of natural justice, and non-consideration of its contentions had not been properly appreciated, considered and addressed by the relevant Secretary of the concerned Government department, while passing the impugned order ---Impugned order

was therefore a non-speaking order in terms of S. 24-A of the General Clauses Act, 1897--Constitutional petition was allowed accordingly.

Barrister Haris Azmat, Muhammad Bilal Ramzan, Barrister Maryam Hayat and Muhammad Faizan Azhar for Petitioner.

Barrister Zargham Lakhesar, Assistant Advocate-General, Mirza Nasar Ahmad and M. Asad Buttar along with M. Tariq Hanif, Law Officer for Respondents.

Date of hearing: 2nd April, 2019.

JUDGMENT

MUHAMMAD SAJID MEHMOOD SETHI, J.---Through this constitutional petition, petitioner has assailed letter dated 04.12.2018, issued by respondent No.2 / Secretary, Specialized Healthcare and Medical Education Department, Govt. of the Punjab, Lahore, whereby petitioner's presentation against the award of tender "Management and Operations of Hospital Waste Services Tender in DHQ and GHAQ Teaching Hospitals, Sahiwal", was filed and respondent-procuring agency was advised to proceed for completion of procurement process, with the following prayer:--

- i. The impugned order dated 04.12.2018 be set aside;
- ii. Tender for Management and Operations of Hospital Waste Services Tender in DHQ and GHAQ Teaching Hospitals, Sahiwal dated 07.08.2018 be declared null and void;
- iii. The respondent No.3 be restrained from awarding the contract to the respondent No.4;
- iv. Proceedings under Public Interest Disclosures Act, 2017 be ordered to be initiated against respondent No.3 and Mr. Luqman Tabish, a Biomedical Engineer at respondent No.3 (Procuring Agency);
- v. Blacklisting proceedings be ordered to be initiated against respondent No.4 for corrupt practices; and
- vi. Second Technical Evaluation Report dated 12.09.2018 be declared null and void."

2. Brief facts of the case are that respondent No.3 invited bids for outsourcing the Management and Operation of Hospital Waste Services in DHQ and GHQ Teaching Hospitals, Sahiwal. Pursuant to publication of First Bidding Document, petitioner furnished Technical Proposal, which was qualified after receipt of technical bid evaluation report. However, the Purchase Committee suspended the Bidding Document on the ground that quoted price was higher. Respondent No.3 re-advertised the tender without mentioning the estimated price and changed the evaluation criteria. Petitioner furnished Technical and Financial Proposal but bid was finalized in favour of respondent No.4. Petitioner agitated the matter before respondent No.3 as well as the Minister, Specialized Health Care and Medical Education Department, but its grievance was not redressed. Finally, petitioner's representation was rejected vide impugned order dated 04.12.2018, passed by respondent No.2. Hence, instant petition.

3. Learned counsel for petitioner submit that evaluation criteria has been changed in second bidding document and bidding process has been conducted and finalized in contravention of the provisions of Rules 25, 27 and 31(2) of the Punjab Procurement Rules,

2014 ("the Rules of 2014") and Rules 37 and 35(A) of the Rules of 2014, which amounts to mis-procurement. In the end, they submit that impugned actions are not sustainable in the eye of law. In support of their submissions, they have relied upon Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others (1998 SCMR 2268), Collector of Customs, Customs House, Lahore and 3 others v. Messrs S.M. Ahmad and Company (Pvt.) Limited, Islamabad (1999 SCMR 138), Gatron (Industries) Limited v. Government of Pakistan and others (1999 SCMR 1072), Messrs Ramna Pipe and General Mills (Pvt.) Limited v. Messrs Sui Northern Gas Pipelines (Pvt.) and others (2004 SCMR 1274), Suo Motu Case No. 5 of 2010 (PLD 2010 Supreme Court 731), Raja Mujahid Muzaffar and others v. Federation of Pakistan and others (2012 SCMR 1651), Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 CLD 520), Azad Jammu and Kashmir Government and others v. Ch. Abdul Majeed and others (2004 MLD 844), Muhammad Irshad and another v. Tehsil Municipal Administration through Tehsil Nazim, Lodhran and 3 others (2006 CLC 1902), Chohan Brothers through Sole Proprietor v. National Telecommunications Corporation through Chairman and 2 others (2006 YLR 2332), Louise Anne Fairley v. Sajjad Ahmed Rana (PLD 2007 Lahore 300), Messrs Shams and Brothers v. Government of Pakistan and others (2007 CLD 125), Adam Sugar Mills Limited v. Federation of Pakistan through Secretary Ministry of Commerce and 2 others (2012 CLC 1780), Hafiz Muhammad Aleem v. Lahore Development Authority through Director-General, LDA and 4 others (2012 CLD 1128), Messrs MIA Corporation (Pvt.) Ltd. v. Pakistan PWD and others (PLD 2017 Islamabad 29), Messrs S.I.S. Corporation (Pvt.) Ltd. v. Federation of Pakistan through Secretary, Ministry of Interior and others (PLD 2018 Islamabad 150), Abdul Latif v. Election Commission of Pakistan and another (2018 CLC 227) and Shaikh Atif Zia v. Province of Sindh through Chief Secretary Government of Sindh and 3 others (2018 MLD 181). Conversely, learned Law Officers as well as learned counsel / Legal Advisors for respondents defend the impugned letter and submit that petitioner has failed to point out any illegality or legal infirmity therein, thus, same is liable to be upheld.

4. Arguments heard. Available record perused.

5. The evaluation criteria of services is defined in the bidding documents of Management and Operations of Hospital Waste Services in DHQ and GHQA Teaching Hospital, Sahiwal, which is reproduced hereunder:-

"Evaluation Criteria of Services

KNOCK DOWN CRITERIA

(All evaluation parameters defined below are mandatory for compliance)

1. Legal and valid Registration of firm/Joint Venture (IV)
2. A Certificate that the provision of services will be conducted in conformity with the system requirements and Terms of References (TORs) by following the professional approach under supervision of nominated Key Expert(s).
3. Valid NTN
4. Valid GST Registration
5. Experience of managing the services related projects in Health Department may be considered.
6. Experience of managing a fleet of vehicles may be considered.

7. The HR should be trained regarding infectious waste handling and disposal.
8. Satisfactory past performance may be considered.
9. Quality certificates ISO 9001:2015, ISO 27001:2013 and OHSAS 18001:2007.
10. Approach and Methodology for operational management (Methodology including Operational Model).

Note: Representatives of the Principal Sahiwal Medical College / Medical Superintendent DHQ Teaching Hospital Sahiwal may visit the office of the firm for verification of submitted documents and its capability to perform."

6. In terms of Rule 25 of the Rules of 2014, it is incumbent upon the procuring agency to provide a specific qualification and bid evaluation criteria, which is further supplemented by Rule 31(2) of the Rules *ibid*, which categorically provides that failure to provide unambiguous evaluation criteria in the bidding documents will amount to mis-procurement.

Rule 25 of the Rules of 2014 is as follows:-

"25. Bidding documents.---(1) A procuring agency shall formulate precise and unambiguous bidding documents that shall be made available to the bidders immediately after the publication of the invitation to bid.

(2) For competitive bidding, whether open or limited, the bidding documents shall include the following:

- (a) invitation to bid;
- (b) instructions to bidders;
- (c) form of bid;
- (d) form of contract;
- (e) general or special conditions of contract;
- (f) specifications and drawings or performance criteria (where applicable);
- (g) list of goods or bill of quantities (where applicable);
- (h) delivery time or completion schedule;
- (i) qualification criteria (where applicable);
- (j) bid evaluation criteria;
- (k) format of all securities required (where applicable);
- (i) details of standards (if any) that are to be used in assessing the quality of goods, works or services specified; and
- (m) any other detail not inconsistent with these rules that the procuring agency may deem necessary."

(3) Any information that becomes necessary for bidding or for bid evaluation, after the invitation to bid or issue of the bidding documents to the prospective bidders, shall be provided in a timely manner and on equal opportunity basis.

(4) Where any change becomes essential in the procurement process, such change shall be made in a manner similar to that of the original advertisement.

(5) A procuring agency shall use standard bidding documents as and when notified under the regulations.

(6) Until the standard bidding documents are specified under the regulations, a procuring agency may use bidding documents already in use of the procuring agency to the extent they are not inconsistent with these rules.

(7) The procuring agency shall, on payment of such fee as the procuring agency may determine keeping in view the cost of printing and provision of the documents, provide a set of bidding documents to the prospective bidders."

Likewise, Rule 31 is also reproduced as follows:-

"31. Evaluation criteria.- (1) A procuring agency shall formulate an appropriate evaluation criterion listing all the relevant information against which a bid is to be evaluated and such evaluation criteria shall form an integral part of the bidding documents.

(2) Failure to provide for an unambiguous evaluation criteria in the bidding documents shall amount to mis-procurement.

(3) In simple or standard procurement process like open competitive bidding or procurement through direct request for tender, the procuring agency may use the amount of the bid price as the sole evaluation criteria for the bids."

7. As per Rule 27 of the Rules of 2014, the procuring agency may require the bidders to furnish a bid security not exceeding five percent of the estimated price i.e. the price of procurement estimated by the procuring agency before initiation of the process of procurement, but same has not been done. Rule 27 is reproduced hereunder:-

"27. Bid security.-The procuring agency may require the bidders to furnish a bid security not exceeding five per cent of the estimated price.

Explanation.-In this rule, the words 'estimated price' mean the price of procurement estimated by the procuring agency before initiation of the process of procurement."

8. In response to the plea specifically taken by the petitioner, respondents Nos.3, 5, 6, 7 and 8, in para 24(A)(iii) of the parawise comments, have responded as under:-

"Denied. The detail answer has already been given in the report. Rule 27 and Rule 31(2) of the said Rules have not been violated."

The above para shows an evasive denial on the part of respondents Nos.3, 5, 6, 7 and 8 as no specific reply has been given. To further strengthen its case, petitioner has claimed that in 28 cases, respondent-department itself has treated the provision of Rule 27 of the Rules of 2014 as mandatory, however, said documents have not been brought on record through an application, which have even never been confronted to the other side, therefore, factual controversy is involved in the matter, which cannot be resolved at this stage in the exercise of writ jurisdiction.

9. When confronted with the above, it has been argued by learned Legal Advisor for respondent as well as learned counsel for respondent No.4 that Rule 27 of the Rules of 2014 is not mandatory. It is also contended by them that petitioner duly applied and participated in the bidding process, thus, is estopped from challenging the said criteria afterwards, as petitioner did not approach this Court at relevant point of time, when impugned publication was floated by respondents; that after having consciously participated in the tender bidding

process and being unsuccessful, petitioner cannot say that the conditions are void and mala fide and is estopped from seeking any relief to the contrary; and that as per Rule 32 of the Rules of 2014, it is mandatory that all bids have to be evaluated in accordance with the bidding document. Petitioner is not eligible as per the laid down criteria and even there are mis-statements qua the acquittal of the Principal Officer / Chief Executive of the company.

10. Needless to say that when the dispute is brought before a Court of law qua the violations of the Public Procurement Regulatory Authority Ordinance, 2002 and the Rules of 2014, it becomes the duty of the Court to ensure that rules are strictly adhered to in order to exhibit transparency. Since there is factual controversy whether compliance of Rule 27 is being treated as mandatory by the department on previous occasions and regarding other violations as highlighted supra, the Court is of the opinion that in the first instance, these objections are required to be dilated upon by respondent No.2. Petitioner alleges that in its earlier representation, it raised all the above questions / objections qua violations of the Rules *ibid*, but same were not dilated upon and dealt with in the impugned letter / order dated 04.12.2018, issued by respondent No.2, which is reproduced hereunder:-

"Subject: IRREGULARITIES AND ILLEGAL PROCEEDINGS IN AWARDING TENDER: "MANAGEMENT AND OPERATIONS OF HOSPITAL WASTE SERVICES TENDER IN DHQ AND GHAQ TEACHING HOSPITAL, SAHIWAL."

Reference your letter No.NET/2018/10/183, <<http://No.NET/2018/10/183>> dated 01.10.2018 on the subject cited above.

2. I am directed to convey that the case was examined in detail and deliberated upon. The contentions of both the petitioner and the procuring agency have been attended to in the light of record, produced by the Principal SMC / Medical Superintendent, DHQ Teaching Hospital Sahiwal.

3. Under the circumstances, no case for interference was made out and the presentation by Messrs New Era Technologies (Pvt.) Limited has been filed. The Procuring Agency is accordingly advised to proceed for the completion of the procurement process under strict adherence to all codal formalities under Punjab Procurement Rules, 2014."

11. Ex facie, the objections raised by petitioner regarding violation of the Rules of 2014, impugned bidding process lacking due process, violation of principle of natural justice and non-consideration of its contentions have not been properly appreciated, considered and addressed by respondent No.2 while passing the impugned order, which renders the same non-speaking in terms of Section 24-A of the General Clauses Act, 1897.

12. In view of the above, instant petition is allowed to the extent that impugned order is declared to be illegal and without lawful authority. Consequently, I am inclined to transmit a copy of this petition along with its annexures to respondent No.2, with the direction to treat it as further representation and decide the same afresh strictly in accordance with law, after hearing petitioner and all concerned, through a well-reasoned speaking order, preferably within a period of thirty days from the date of receipt of certified copy of this order. Till then, the contract already awarded to respondent No.4 shall not be disturbed, however, its fate shall be subject to the final decision of respondent No.2.