ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT No. 555 of 2020

Date	Order With Signature Of Judge

1.For hg of CMA No.4338/20
2.For hg of CMA No.4393/20
3.For orders on CMA No.5494/20
4.For orders on CMA No.4595/20

04.06.2020

Mr. Mukesh Kumar G. Karara, advocate for plaintiff.
Mr. Abdul Qayoom Abbasi, advocate for defendants No. 2 & 3.
Mr. Amir Malik, advocate for defendant No. 7.

1) The case of the plaintiff is that it had been supplying medicines and allied medical instruments to the defendant No. 2 (Pakistan International Airlines) for the last 39 years through submitting its best-quoted tenders on yearly basis. Per business as usual, when in the year 2019 tenders were floated by PIA on 28.08.2019, the plaintiff having passed the pre-qualification criteria also participated therein through single stage two envelope mechanism. Tenders were opened as per Annexure C-5 (page 105) and applicant's technical as well as financial bids were accepted. For the reasons best known to PIA, the latter cancelled the entire tendering process and through notices dated 03.01.2020, new tenders were invited maintaining the earlier evaluation criteria of which the relevant was (page 205) that *the pharmacists/bidders must not be blacklisted by Pharmacy Council or Drug Regulatory Authority Pakistan, respectively*. Re-tendered financial bids were opened on 06.02.2020, where notwithstanding that the Applicant's rates were the best giving 11.52 percent discount, however it was disqualified on the ground that it had made *misrepresentation of fact*. The background with regard to the latter allegation is that the applicant (just like any other successful businessmen) had also made supplies of such products to various other entities including Pakistan

Navy's Shifa Hospital, where allegedly proceedings against it were instituted sometime in August 2010, nonetheless PN Shifa wrote a letter on 03.03.2020 (after the date of opening of bids) to the General Manager, Medical Services, PIA pointing out that it had blacklisted the plaintiff vide letter dated 30.08.2018 – unsigned). Solely relying on this letter, plaintiff's best quotes were rejected, as well as, it was disqualified. Not only so, after such disqualification, PIA entered into negotiations with second and third best bidder and prompted them to match their offers to that of the plaintiff, and thereafter awarded 50-50 supply contract to both of them, as claimed by the counsel.

2) The counsel for the plaintiff/applicant submits that, first of all under the evaluation criteria a bidder was not required to produce a clean bill of health from all the entities of Pakistan, as naturally during course of business dispute arises between a supplier and the procurer, and such disputes even reach up to litigation and seeking such a unblemished status was neither the requirement of bids, nor the evaluation criteria. Per learned counsel after opening of bids on 06.02.2020, through e-mail (page 163) dated 20.02.2020, the procuring agency (PIA) reached out to the bidders and gave them 72 hours to give details of any pending litigation, outstanding judgment or their blacklists which they might have had with any other Government Organization or Agency in the last 5 years. Per learned counsel for the applicant after having opened the bids on 06.02.2020 and the applicant having been seen successful, equity as well as Public Procurement Rules, 2004 ("PPR 2004") do not envisage any possibility of imposing any further requirement or conditions. Reference is made to Rule 38 where the only possibility of denying a successful bidder from the award of contract at this juncture is that his offer was in conflict with any other law, rules and regulation or government policy and admittedly applicant's bid did not attract any of these conditionalities. When the bids of the applicant

were not honored, as per Rule 48, the applicant approached the procuring agency by filing a Grievance Petition on 19.03.2020 and while the law provided fifteen days to pass any order on any such Grievance Petition, and when no order was forthcoming, the applicant moved to the Court on 27.04.2020, on which date notices were issued to all the defendants through first three modes. The learned counsel for the applicant points out that immediately upon issuance of such notices, a decision was announced by the Grievance Committee (page 277/II) on 29.04.2020, where solely relying upon the letter received from PNS Shifa, the applicant was disqualified. Learned counsel for the applicant submits that superimposition of the additional criteria through e-mail dated 20.02.2020 was an arbitrary, capricious, ill motivated and colorful exercise of power resulting in blatant and patent illegality, since after opening of bid (under Rule 36) the only possibility left with the procuring agency is to award the contract unless any inability envisaged by Rule 38 was attracted. Learned counsel further states that having set aside the bids of the Applicant, awarding of the contract to second and third bidders is also utter violation of the PPR 2004. Through the instant Application, prayer is made to suspend the operation of the evaluation Report dated 19.03.2020 (page 175) issued by the defendants No. 3 to 5 and to restrain the defendants from awarding the contract to any other party.

3) Learned counsel for the defendants No. 2 and 3 vehemently challenged the assertions of the Application on two grounds stating that the e-mail dated 20.02.2020 did not post any additional evaluation criteria rather was simply embodying the requirement of item 6 of the earlier evaluation mechanism. He particularly points out to an affidavit submitted by the applicant reproduced at page 257/II, where the applicant stated that it was never blacklisted by any government organization or any other agency during last five years. By referring to

Rule 18, the counsel contends that even if the contract was awarded to the applicant, mis-declaration that the plaintiff was not blacklisted by PNS Shifa would have resulted in rescinding of the contract at any stage. He also states that having cancelled bids of the Applicant, the procuring agency was fully competent to negotiate with the remaining bidders and it was only on account of such efforts that second and third bidders matched the bids quoted by the applicant and award was made to these bidders to supply goods half-n-half each. In support of his arguments, the learned counsel placed reliance on cases of Pakistan Gas Port Ltd. v/s. Messrs Sui Southern Gas Co. Ltd. and 2 others (PLD 2016 Sindh 207) and Petrosin Corporation (Pvt.) Ltd. Singapore & 2 others v/s. Oil and Gas Development Company Ltd. (2010 SCMR 306).

4) No representation has come forward from PPRA, defendant No. 1 or the Federation of Pakistan.

5) Heard the learned counsel for the parties and perused the material available on record.

6) As the controversy revolves around protection of the public money and ensuring transparency in public procurements, while keeping focus on the PPR 2004, one must read those rules with the background as to why such rules came into existence. Pakistan on 09.12.2003 signed the United Nations Convention against Corruption which is the only legally binding universal anti-corruption instrument signed at the UN level. It is claimed that Convention's far-reaching approach and the mandatory character of many of its provisions makes it a unique tool for developing a comprehensive response to the global corruption problem. The Convention arrests many different forms of corruption, such as bribery, abuse of functions, and various acts of corruption in the private sector, including corruption in public procurements. Article 9(1) of the Convention titled “Public procurement and management of public finances” provides as under:-

> *Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:*
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> *(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;*
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> *(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;*
>
> *(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;*
>
> *(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;*
>
> *(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.* [Emphasis supplied]

6) The danger of inculcation of corrupt practices in public procurements, which falls an average of 12% of a country's DGP and roughly 45% of a Government's spending, is so alarming that even at World Trade Organization (WTO) level agreement called "The Agreement on Government Procurement" (GPA) was reached in 1996 to regulate the procurement of goods and services by the public authorities, based on the principles of openness, transparency and non-discrimination. Pakistan has an Observer status in this GPA.

7) It is for these reasons, United Nations Commission on International Trade Law (UNCITRAL) in the year 1994 evolved a Model Law on Procurement of Goods, Construction and Services, which became foundation of the PPR 2004 and other provincial regulations. Adherence to international commitments in public procurements is so critical that PPR 2004 itself at its forefront through Rule 5 in probably most unique legislative way superimposes international and intergovernmental commitments over domestic law. It states that "*Whenever these rules*

are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State or States, or any international financial institution, the provisions of such international treaty or agreement shall prevail to the extent of such conflict". Rraison d'etre of these tightly regulated public procurement regime is to i) ensure balancing of interest of all stakeholders in a transparent manner; ii) provide level playing field to all competitors; iii) establish sustainable regulatory arrangements which carry credibility with investors and perceived as legitimate and fair in the eyes of the public, and deliver greater efficiency for the economy as a whole. Public Procurement Regulatory Authority created by the Ordinance of 2002 acts as a focal point and issues regular guidelines and publishes detailed code for such purposes. Latest code titled PPRA Procurement Code is available at https://www.ppra.org.pk/doc/code4.pdf in pdf format. Article 19(1)(b) of the Convention as stated earlier sets up corner stones of public procurement processes and mandates such procurements to set forth **in advance** conditions for participation, including selection and award criteria and tendering rules. That's why PPR 2004 through Rules 15 and 16 require that pre-qualification criteria be carved in stone **prior to floating of tenders** by imposing all just conditions with the objective that pre-qualification be based upon the ability of the interested parties to **perform that particular work** satisfactorily and if any supplier of contractor is to be disqualified or blacklisted, the mechanism setup in Rules 18 and 19 be followed. Language of Rule 18 is important as it provides that "the procuring agency shall disqualify a supplier or contractor if it finds, at any time, that the information submitted by him **concerning his qualification** as supplier or contractor was false and materially inaccurate or incomplete". The said Rule is couched in strict language, however disqualification is incumbent upon making any inaccurate or incomplete

information in respect of qualification, which as required by Rule15 has to be completed prior to floating of tenders, and in the case at hand condition with regards blacklisting as made part of the pre-qualification (page 205) were only that *the pharmacists/bidders must not be blacklisted by Pharmacy Council or Drug Regulatory Authority Pakistan*. With regards adding a "post-requisite" after opening of tenders, PPR 2004 do not envisage any such possibility as it requires that all conditions of bid have to be embodied in the pre-qualification documents. While PPR 2004 does not define the term "pre-qualification" but UNCITRAL law hasn't failed in taking such a basic but essential step. Its Article 2(f) defines "*pre-qualification to mean the procedure set out in article 18 of this law to identify, **prior to solicitation**, suppliers or contractors that are qualified*". Article 9(5) accordingly requires the procuring entity to evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set out in the pre-qualification or pre-selection documents. Article 10(2) restricts imposition of any other criterion, requirement or procedure to be imposed by the procuring entity other than in accordance with Article 8 which states that "*Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article 8 of this law, no description of the subject matter of a procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction based on nationality, shall be included or used in the pre-qualification or pre-selection documents, if any, or in the solicitation documents*". Once passed through the pre-qualification stage, Article 18(8) seals fate of the bidders and states that "*Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings*".

8) With regards PIA's counsel's contentions that the plaintiff could have been disqualified any time (even after award of the contract) under Rule 18, it is to be noted that the said rule is based on clause (b) of Article 9(8) which provides "A procuring entity **may** disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete", whereas word "shall" has been used in Rule 18 making it violative of the scheme laid down by Rule 5 that international conventions shall prevail over the local laws. Be that as it may, clauses (a), (c) and (d) of Article 9(8) are reproduced hereunder which show the true mechanism of UNCITRAL governing law to deal matters pertaining to disqualification, which have been chosen to be kept away from PPR 2004 for the reasons best known to the executive authorities which framed these rules.

> *(a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false or constituted a misrepresentation;*
>
> *(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;*
>
> *(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;*

(d) The procuring entity may require a supplier or contractor that was pre-qualified in accordance with article 18 of this Law to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate its qualifications again if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate its qualifications again as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

9) A comparison of Rule 18 with above reproduced international convention's obligations show that Rule 18 in its present form is violative of Article 9, thus cannot be relied upon the force of Rule 5.

10) Now coming to the claim of the defendant that they tried to match prices of the plaintiff and after attaining the match, gave away 50-50 contract to two bidders, UNCITRAL governing law strictly prohibits any such price matching initiatives. Article 35 of the law requires that "No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender presented by the supplier or contractor". Rule 40 itself limits negotiations and states that "Save as otherwise provided there shall be no negotiations with the bidder having submitted the lowest evaluated bids or with any other bidder: Provided that the extent of negotiation permissible shall be subject to the regulations issued by the Authority".

10) With regards "blacklisting", such a discretion, in the interest of certainty and transparency in procurement procedures, is not left to the whims of the procuring agencies. Rule 19 provides as to how an agency can blacklist suppliers and contractors in the following terms.

> "19. **Blacklisting of suppliers and contractors.-** The procuring agencies shall specify a mechanism and manner to permanently or temporarily bar, from participating in their respective

> procurement proceedings, suppliers and contractors who either consistently fail to provide satisfactory performances or are found to be indulging in corrupt or fraudulent practices. Such barring action shall be duly publicized and communicated to the Authority:
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> Provided that any supplier or contractor who is to be blacklisted shall be accorded adequate opportunity of being heard."

11) It is shocking to observe that UNCITRAL governing law does not have any concept of "blacklisting" of suppliers and contractors and this word fails to appear anywhere in the said 2004 law. However it only discusses reasons for "disqualification" as reproduced in the foregoing paragraphs. Thus on the touchstone of Rule 5, Rule 19 has no force. Be that as it may, even if one halfheartedly reads the said Rule, following becomes evident:

(a) The procuring Agency can only blacklist those who fail to provide satisfactory performance or found indulging in corrupt or fraudulent practices.

(b) There procuring agency cannot borrow blacklisting from any other agency and enforce it through its own procurements.

12) For these reasons where it's not alleged that the applicant performed un-satisfactorily or indulged into corrupt or fraudulent practices with the procuring agency itself during the last 39 years of their relationship, the adoption of blacklisting from another procuring agency by the defendant in declaring the plaintiff blacklisted, even on this account is faulty and not maintainable.

13) The case law relied upon by the learned counsel for the defendant, as pointed out to him during the course of arguments does not relate to controversy at hand with regards (a) superimposition of a new criteria after the opening of bids; (b) price fixing and negotiations with un-successful bidders and (c) adoption of blacklisting from another procuring agency; being point of contention in the case at hand.

14) Based on the foregoing, in the given circumstances, the decision to oust the plaintiff after opening of bids, notwithstanding that its bids were the best, and by imposing additional conditions in access of the pre-qualification criteria, deterring the award of contract to it, appears to be not only blatantly illegal, capricious and colorful exercise of power, rather oppressive, inasmuch it was only on this account plaintiff was ousted, the application is allowed. Blacklisting of the applicant is set aside, so are the negotiated awarding of the contract to second/third (or any other) bidders.

JUDGE

HANIF