

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI
 Suit No.826 of 2020

| Date | Order with signature of Judge |
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| For hearing of CMA No.5348 of 2020. | |
| <u>28.07.2020.</u> | |
| <p style="margin-left: 40px;">M/s. Muneer A. Malik, Altamash Arab and Choudhry Atif Rafiq, Advocates for Plaintiff.</p> <p style="margin-left: 40px;">Mr. Bilal Aziz Khilji, Assistant Attorney General for Defendant No.3.</p> <p style="margin-left: 40px;">Mr. Jam Asif Mehmood, Advocate for Defendant No.1 along with M/s. Gohar Mehmood and Imran Khawaja, Advocates.</p> <p style="margin-left: 40px;">Mr. S. Jaffer Ali Rizvi, Advocate for Defendant No.5 along with Ziaullah Bhatti, G.M. Marking Askari Guards Pvt.</p> <p style="text-align: center;">****</p> <p style="margin-left: 40px;">Plaintiff has challenged rejection of its technical bid by Defendant No.1 (<i>National Bank of Pakistan</i>).</p> <p style="margin-left: 40px;">Defendant No.1 (NBP) has floated a tender to invite bids (<i>Request For Proposal-RFP</i>) from interested companies/organisations to provide cash transfer facility/services (<i>cash in transit services-CIT</i>) to Defendant No.1 [‘the procuring agency’ in terms of Section 2(j) of the Public Procurement Regulatory Authority Ordinance 2002-PPRA Law], for collection and delivery of currency notes / prize bonds from designated sources to different specified branches of Defendant No.1 in Pakistan, for which the latter has made cluster comprising of different zones. This service can be termed as the ‘<i>subject service</i>’. At this stage, those facts and documents are considered, which primarily relate to rejection of technical bid.</p> <p style="margin-left: 40px;">Messers Munir A. Malik along with Altamash Arab, Advocates have made submissions on the injunction application. Learned Advocates state</p> | |

that Plaintiff has participated in the bid and provided all requisite documents as instructed in the bid document, which starts from page-51 [of the Court File].

Contended that for *mala fide* reasons Defendant No.1 rejected the technical bid of Plaintiff and disqualified the latter because earlier Defendant No.1 by its correspondence of 27.03.2020 asked the Plaintiff about certain details, including those of vehicles, which were duly provided (to Defendant No1-NBP) vide correspondence dated 16.04.2020, yet the bid was rejected through letter dated 13.05.2020, without stating any reason; which was questioned through its (Plaintiff) Letter of 20.05.2020 (at page 267) and replied by Defendant No.1 vide correspondence dated 21.05.2020, in which this time a reason was mentioned that “*Your bid failed to comply with Technical Bid-Annexure A-Minimum Eligibility Criteria (Mandatory Requirements) of RFP serial # 11 and 14. (page 12&13)*”.

Legal Team of Plaintiff then referred to another correspondence of Defendant No.1 (NBP) dated 15.06.2020 wherein it is stated that Grievance Committee reviewed the case/Complaint of Plaintiff and found it not tenable on the ground that ‘*past performance of Plaintiff is unsatisfactory*’ ‘*existence of litigation violation of Clause 11 of Bidding Document*’ and ‘*vehicles of Plaintiff were not of required standard*’. Contended that Plaintiff was neither notified about the meeting of Grievance Committee which is a clear violation of Rule 48 of PPRA Rules 2004, nor, the said Grievance Committee is mentioned on the website of the Authority under the above PPRA Law, viz. the Public Procurement Regulatory Authority; besides, that in the above missive of 15.06.2020 once again a new ground is alleged by Defendant No.1, for disqualifying the Plaintiff at an earlier stage of Process instead of allowing the latter (Plaintiff) to participate in the

entire Bid Process. Further submitted that in the Counter-Affidavit, Defendant No.1 has taken yet another stand for rejection of technical bid of Plaintiff on the ground that since Plaintiff was involved in litigation with Defendant No.1 so also some of the staff members of Plaintiff was allegedly involved in misappropriation of Rs.6 million cash during its cash transit service in Multan, thus Plaintiff could not be considered for the *subject service*. Legal team of Plaintiff has cited a reported case of 7' CS Corporate Services versus Oil and Gas Development Company Ltd – PLD 2017 Islamabad 115, in support of their arguments that such Clause mentioned in a bid document which restricts a bidder from participating in a bid process on the ground that he/it was involved in previous litigation with the procurement agency (like the present Defendant No.1), is contrary to law. On a specific query, learned Advocates for Plaintiffs have referred to Sub-clause (v) of Clause-12 (Terms and Conditions) of the bid document, to show that Defendant No.1 (NBP) can inspect the armoured vehicles of Plaintiff at the latter's cost, to satisfy itself that all such vehicles are operational and fit for providing these services under the subject tender (CIT service). Submitted further that on 'extraneous factors' Plaintiff was disqualified.

Mr. Jam Asif Mehmood, Advocate for Defendant No.1 (NBP) [along with M/s. Gohar Mehmood and Imran Khawaja, Advocates], referred to different documents to rebut the plea of *mala fide*, as argued by Plaintiff's legal team. Contended that false Affidavit was submitted by Plaintiff about pendency of litigation. It is argued that the said Affidavit was not filed with the plaint in order to suppress this material fact but the same has been appended as Annexure 'D/10' with the Counter-Affidavit of Defendant No.1. It is stated that earlier a Writ Petition No.7584 of 2019 was filed by present Plaintiff against, amongst others, present Defendant No.1, filed with Counter-Affidavit as Annexure "D/12" (before the learned Lahore

High Court, Multan Bench), about the incident of misappropriation of rupees six million; still a Complaint before the Federal Investigation Agency (FIA) is pending, which should have been disclosed in the above Affidavit of Plaintiff, while submitting the bid documents but such vital information was held back. Legal team of Defendant No.1 contends that all these acts contravened Clause-11-B of the Minimum Eligibility Criteria (Mandatory Requirements), which is a part of Clause-26 relating to Technical Bid (at page-69 of the Court file). Legal team of Defendant No.1 has then referred to pages-93, 95 and 107 of the Court file to show that E-mails between Plaintiff and Defendant No.1 were exchanged seeking clarification of certain queries raised by Defendant No.1. Page-91 of the Counter-Affidavit was referred to, which is proceeding of that day when technical bids were opened, in which representative of Plaintiff was also present. Learned counsel states that all these show that Plaintiff was given equal opportunity to participate in the entire process as was done in the case of other bidders. It is argued, by making a Reference to Minutes of Meeting dated 30.04.2020; particularly Item No.5 of the Minutes of Meeting (Annexure D/15 at page-97 of the Counter-Affidavit), that since vehicles of Plaintiff were insufficient and many of them were leased through financial institution and not owned by Plaintiff, therefore, Plaintiff was not found suitable for providing the subject service under the RFP. Apart from this, other reasons mentioned for rejecting the technical bids of Plaintiff were the embezzlement of Rupees Six Million (as referred above) and filing of above Writ Petition. Learned Advocates representing Defendant No.1 (National Bank of Pakistan) have referred to E-mails of 14.06.2020, 17.07.2020 and 20.07.2020 and copies of file Note Sheet together with their Statement dated 27.07.2020 filed during today's hearing, to convince that Grievance Committee was properly convened, which gave its decision as per the Rules; even the certificates submitted by Plaintiff of different

branches of Defendant No.1 about provision of present CIT service, are either issued to Plaintiff authorizedly or are fake; referred to Rule 36(b) [PPRA Rules 2004] relating to single stage two envelopes procedure (which the subject RFP is) to advance his arguments that Procuring Agency (Defendant No.1) has to evaluate the technical proposal first and reject the same if it does not conform to the specified requirement; also referred Rules 4 and 18 (about ensuring transparency in procurements and disqualification of suppliers and contractors if they provide false information). Following case law is cited by legal team for Defendant No.1 (NBP) to augment their arguments_

- i. PLD 1979 Karachi page-668
[Messrs Quality Builders Ltd., Karachi vs. Messrs J.P. Brockhoven V. V. Dreading Contractors, Karachi and 9 others]
- ii. PLD 1970 Supreme Court page-139
[Shahzada Muhammad Umar Beg vs. Sultan Mahmood Khan and another]
- iii. PLD 1973 Karachi page-234
[Aboo Noor Muhammad vs. General Iron & Steel Works Ltd., Karachi]
- iv. 2011 CLD page-1774
[Gaggan Catering Service vs. Balana Restaurant]

Arguments heard and record considered.

From the above discussion following are the undisputed facts_

- i. Emails exchanged between Plaintiff and Defendant No.1, *prima facie* do suggest that there was no *mala fide* on the part of Defendant No.1 (as argued by learned Advocate for Defendant No.1), but all queries and clarifications raised and sought by Defendant No.1, particularly about details of vehicles to be used by Plaintiff in connection with subject service were also provided to Defendant No.1 by the

correspondence dated 16.04.2020. This E-mail is at page-251 of the Court file along with details of vehicles as well as CIT services provided by Plaintiff to various other Banks, including Defendant No.1.

- ii. Although Defendant No.1 has shown that a meeting of Grievance Committee of Defendant No.1 was convened and decision was taken but on a specific query learned Advocate replied that no notice was issued to Plaintiff for attending such meeting of Grievance Committee, on the ground, that no such requirement is mentioned under Rule 48 of PPRA Rules 2004. This defence is meritless, as now it is a well-established principle that principle of natural justice is to be read in every statute. Not notifying Plaintiff about proceeding before the Grievance Committee is an illegality on the part of Defendant No.1. **Secondly**, the said Grievance Committee of Defendant No.1 is not mentioned in the list of website of Public Procurement Authority. In this regard, directives of PPRA are pertinent, which Plaintiff has appended with their plaint at page-285 of the Court file. These directives of 29.10.2014 state that in terms of Rule 48(1) of PPRA Rules, procuring agencies have to grant right to the bidders to represent against decision of procuring agency. This has never happened. More so, in their correspondence of 15.06.2020, Defendant No.1 while referring to decision of Grievance Committee, has given reasons for rejection of their complaint on the basis of unsatisfactory past performance, existence of litigation in violation of Clause-11 and incapacity to handle CIT service due to sub-standard vehicles, in terms of Clause-14 of Bid

Document. The above Letter of 15.06.2020 (of Defendant No.1) is contrary to record as Writ Petition No.7584 of 2018 was withdrawn on 12.06.2019 because Plaintiff and Defendant No.1 tentatively agreed to a conditional settlement, which is reflected in the e-mail of 31.05.2019 (appended with Affidavit-in-Rejoinder of Plaintiff), that the alleged amount of rupees six million was deposited by Plaintiff with Defendant No.1 as 'security'. About alleged past performance and incapacity, it is not a disputed fact that still Plaintiff is providing CIT service to Defendant No.1 for its designated branches. However, learned counsel for Defendant No.1 states that complaint in Federal Investigation Agency (FIA) against Plaintiff was, rather still pending and when they submitted the bid documents, then in compliance of Clause-11, in their Affidavit (Annexure D/10 of the Counter-Affidavit of Defendant No.1), the above complaint should have been mentioned; since it was a false Affidavit, Plaintiff with such credential and credibility cannot be allowed to participate in the bid process and was rightly disqualified by Defendant No.1. **Firstly**, this argument cannot be sustained because it is again not disputed that Federal Investigation Agency till date has not formally started the inquiry against delinquent persons, including Plaintiff; **secondly**, Annexure 'D/27' (at page-181 of the Counter-Affidavit of Defendants Bank) itself shows that some internal inquiry was also going on in Defendant No.1 about the above incident of misappropriation of Rs.6 Million. **Thirdly**, reported Judgment of learned Islamabad High Court (*ibid*) has dealt with this issue about inserting a Clause of litigation in bid documents

by procurement agencies. It was held that a bidder cannot be disqualified merely because he had litigated against a procuring agency.

- iii. Adverting to the more important issue raised by legal team of Defendant No.1 about the technical soundness of Plaintiff for the subject service. It is stated that their (Plaintiff) armoured vehicles are not upto the standard. However, there is no Report available on record that the armoured vehicles of Plaintiff were ever inspected, which Defendant No.1 can inspect as per the terms of the Bid Document and at the cost and expense of Plaintiff. *Secondly*, it is also a matter of record that at present, Plaintiff is providing CIT service to Defendant No.1. Hence, this ground of rejection of technical bid at this stage of proceeding cannot be endorsed.
- iv. With regard to the arguments of legal team of Defendant No.1 that an interim relief sought is in the nature of final relief and cannot be granted at this stage, in view of the rule laid down in the above cited case law; *firstly*, the rule laid down in the reported decisions relied upon by Defendant No.1, is not absolute, but, exceptions are there; one such exception would be that when undisputed record itself does not support the stance of Defendants, particularly a procuring agency and if refusal of interim injunction would frustrate the entire suit, then in my considered view an interim injunction can be granted. *Secondly*, one should be mindful of the fact that in such **RFP**, transparency is one of the most significant factor for which the above referred Law and Rules have been promulgated, and if record of case does not support stance of

Defendant then transparency factor can be reinforced through a Judicial Process, including by grant of interim relief; *thirdly*, if facts of the case warrant then interim relief may be granted and not to be withheld only on this concept that it may amount to grant of final relief. Reported decisions of (i) *Shahid Mahmood vs. Karachi Electric Supply Corporation Ltd-1997 CLC page-1936 [Karachi]* and (ii) *Government of Pakistan through Ministry of Finance vs. M.I. Cheema, Dy. Registrar, Federal Shariat Court and others-1992 SCMR page-1852*, are relevant; conclusion is that the above discussion do justify that at this stage an interim injunction be given to Plaintiff.

- v. In view of the above, Plaintiff has made out a case that its bid may be considered along with other bidders but strictly in accordance with the PPRA Rules, therefore, Injunction Application (*CMA No.5348 of 2020*) is disposed of by giving the following directions_
 - a. Plaintiff will be allowed to participate in the bid process, strictly in accordance with the PPRA Rules along with other bidders;
 - b. the envelopes submitted by Plaintiff and other bidders will be considered by Defendant No.1 because the technical bid, since it has been clarified in the above discussion, cannot be rejected on the ground of pendency of litigation or complaint before an investigating agency;
 - c. Defendant No.1 being a Procuring Agency has every right to satisfy itself about the technical and financial soundness of any bidder, including Plaintiff and for that purpose, the officials of

Defendant No.1 can inspect the vehicles of Plaintiff at the latter's costs and expense.

It is clarified that any observations made in this order are purely of tentative nature and will not prejudice the conclusion of the main *lis* in any manner whatsoever. It is expected that Defendant No.1 while awarding contract will adhere to the good practices, transparency and PPRA Rules.

JUDGE

M.Javaid.P.A.