

ORDER SHEET
THE HIGH COURT OF SINDH KARACHI

Suit No. 348 of 2020

DATE	ORDER WITH SIGNATURE OF JUDGE
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For hearing of CMA Nos:

1. 2977 of 2020.
2. 3866 of 2020.
3. 2554 of 2021.

01-03-2021

Mr. Sarmad Hani, Advocate for the Plaintiff.

Mr. S. Hassan Abidi, Advocate for the Defendants/KMC.

Adnan Iqbal Chaudhry J. - Pursuant to a notice inviting tenders, the Plaintiff was awarded a contract dated 24-02-2017 by the KMC (Defendants) for providing services of printing and distribution of utility bills. The contract was to expire on 28-02-2020. Clause 11 of the Statement of Work appended to the contract (hereinafter 'the contract') read as under:

"11. Estimated Schedule

Start Date : March 1st 2017 (Subject to this contract becomes Effective according Effective Date given in Definitions clause of the main contract).

End Date : Feb 28th 2020

End Date can be extended for two years with mutual written agreement of both Authorized Persons mentioned in section 5 of the Main Agreement".

2. Nearing the expiry of the contract, the KMC, by letter dated 14-01-2020, communicated to the Plaintiff that the competent authority has extended his contract up to 30-06-2020. This suit was filed contending that clause 11 of the contract (reproduced above) mandates that any extension of the contract beyond 28-02-2020 shall be for a period not less than two years. A declaration and injunction to that effect was sought. However, pending suit, and without prejudice to his stance, as noted in the order dated 05-03-2020, the Plaintiff accepted KMC's offer to extend the contract upto 30-06-2020. Thereafter, the Plaintiff's contract was again extended by

the KMC upto 30-09-2020, then up to 30-01-2021, and lastly upto 30-04-2021 vide letter dated 01-02-2021.

3. Now, to make arrangements for the period after expiry of the Plaintiff's contract (on 30-04-2021), the KMC published notice dated 07-02-2021 inviting fresh tenders for procuring same services, where under bids are to be submitted on 03-03-2021 at 3:00 p.m. and are to be opened the same day on 3:30 p.m. Apart from the pending CMA No. 2977/2020, a fresh CMA No. 2554/2021 is filed by the Plaintiff praying for a temporary injunction to restrain the KMC from opening the bids on 03-03-2021 and from cancelling the Plaintiff's contract.

4. Learned counsel for the Plaintiff submits that the case requires interpretation of clause 11 of the contract dated 24-02-2017, which interpretation should follow principles laid down in *House Building Finance Corporation v. Shahinshah Humayun Cooperative House Building Society* (1992 SCMR 19), and *Uniprix Inc. v. Gestion Gosselin Et Berube Inc.* (2017 SCMR 1734). He submits that clause 11 of the contract is unambiguous; that it entails an extension of the contract for two years upto 27-02-2022, and in view thereof, no fresh tenders can be called by the KMC. Learned counsel also relies upon *Monopoly Carriers and Cargo Pvt. Ltd. v. Union of India* (MANU/DE/3187/2011), a judgment by a learned single Judge of the Dehli High Court, whereby the respondents were directed to extend the petitioners lease in respect of cargo space based on an extension clause in the contract.

5. Learned counsel for the KMC submits that the KMC is bound by the Sindh Local Council (Contract) Rules, 2016 which mandate that in the procurement of goods, works and services, the provisions of the Sindh Public Procurement Rules, 2010 shall be followed; and for a contract exceeding a certain expense, tenders have to be called by way of public notice. Learned counsel further submits that the last extensions of the Plaintiff's contract had stipulated that the contract was being extended till a certain date "or till the finalization

of fresh tender, whichever is earlier”, and the Plaintiff had accepted such condition.

6. Heard the learned counsel and perused the record.

7. The argument on behalf of the Plaintiff is essentially that by clause 11 of the contract dated 24-02-2017 the parties had agreed that any extension of the contract beyond 28-02-2020 shall be for a period not less than two years; hence the Plaintiff is entitled to its specific performance. On the other hand, Rules 5 and 7 of the Sindh Local Council (Contract) Rules, 2016 (framed under the Sindh Local Government Act, 2013) stipulate that:

“5. MANNER OF MAKING CONTRACT.

(1) A formal deed of contract shall be executed between the Authority and the contractor for every contract

- (a)
- (b) shall be made after inviting tender; or
- (c)

“7. PROCUREMENT OF GOODS, WORKS AND RELATED SERVICES AND INVITATION OF TENDERS.

(1) In procurement of goods, works and services, the provisions of the Sindh Public Procurement Rules, 2010 shall be followed in letter and spirit.

(2) Subject to provisions of sub-rule (1), the Authority shall, at least seven days before entering into contract involving an expenditure specified in the First Schedule, give public notice in newspaper inviting tenders for such contract any may accept any of the tenders so made, which appears to be most advantageous.

(3) The Council may in cases where the question of securing competitive prices or rates is not involved, authorize the Authority to enter into a contract without inviting tenders.

(4)

8. The values in the previous extension letters of the Plaintiff’s contract manifest that the further extension sought by the Plaintiff would be in excess of the expenditure specified in the First Schedule to the Sindh Local Council (Contract) Rules, 2016, which then mandate that a contract cannot be awarded without inviting tenders from the public, and without going through the Sindh Public Procurement Rules, 2010. While I refrain from commenting on the extensions already granted to the Plaintiff, it is apparent that Rules 5

and 7 *supra* cannot be avoided or by-passed under the grab of an extension in contract. For all intents and purposes, the extension in contract will be a fresh contract. It is settled law that the parties cannot contract out of the statute. Thus, even if clause 11 of the contract was specifically enforceable, it cannot be enforced against the statute. In said circumstances, the case-law cited by the Plaintiff's counsel is of no help.

9. The other aspect of the matter is that the first extension of contract vide letter dated 14-01-2020 was unqualified and which was accepted by the Plaintiff without prejudice to his suit as noted in the order dated 05-03-2020. But then, the last extension vide letter dated 01-02-2021 had stipulated that it was upto 30-04-2021 "*or till the finalization of fresh tender, whichever is earlier*". Such term of extension of contract was accepted by the Plaintiff without demur, and thus clause 11 of the contract appears to have been superseded.

10. In view of the foregoing, the Plaintiff has failed to establish a *prima facie* case or a case of irreparable harm for the grant of a temporary injunction. The balance of convenience is also in favor of the municipal corporation. Resultantly, CMA No. 2977/2020 and CMA No. 2554/2021 are dismissed. CMA No. 3866/2020 is dismissed as infructuous.

SHABAN/PA*

JUDGE