

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

CP D 2531 of 2019 : Guinault SA PA Orleans Sologne vs.
Federation of Pakistan & Others

For the Petitioner : Mr. Abdul Moiz Jafferri, Advocate

For the Respondents : Mr. Kafeel Ahmed Abbasi
Deputy Attorney General
(For the Respondent Nos. 1 & 2)

Mr. Jawad Sarwana, Advocate
Mr. Bilal Channa, Advocate
(For the Respondent Nos. 3 & 4)

Date of Hearings : 30.10.2019, 21.11.2019 & 10.12.2019

Date of Announcement: 24.12.2019

JUDGMENT

Agha Faisal, J. The present petition seeks the cancellation of a tender enquiry, floated by the Pakistan International Airlines Corporation (“PIA” / respondent no. 3 herein) for the procurement of ground power units compatible with wide body aircraft (“Equipment”), and requires this Court to declare the petitioner as the lowest evaluated bidder in respect of an earlier tender enquiry, admittedly cancelled two months prior to the issuance of the tender enquiry impugned herein.

2. Brief facts relevant to this determination are that PIA floated a tender enquiry dated 21.06.2017 (“2017 Tender”) for procurement of the Equipment and the petitioner participated in the said process. The petitioner expected to be successful in the aforementioned process, however, was aggrieved when it was communicated thereto on 04.02.2019 (“Cancellation Communique”) that the 2017 Tender had been scrapped in compliance with the directives issued by the Public Procurement Regulatory Authority (“PPRA” / respondent no. 2 herein). The petitioner made no ostensible effort to challenge the scrapping of the tender process and almost two months thereafter a fresh tender enquiry dated 29.03.2019 (“2019 Tender”) was floated for procurement

of the Equipment. The petitioner has since claimed to be aggrieved by the cancellation of the 2017 Tender, and the issuance of the 2019 Tender, hence, this petition.

3. Mr. Abdul Moiz Jafferi, Advocate insisted that in so far as the 2017 Tender was concerned, vested rights had accrued in favor of the petitioner and that subsequent thereto the procuring agency had no right to vitiate the tender process. It was argued that since the petitioner's bid had already been disclosed to its competitors, therefore, participation in a fresh bidding process would be to the manifest disadvantage of the petitioner. It was also argued that the petitioner is a renowned international purveyor of the Equipment and that such renown is generated on the basis of successful participation in tenders. The point argued was that if the petitioner was unsuccessful in its bid then the same would marginalize its international renown. It was also specifically pleaded that the respondent no. 3 had floated a tender in 2015, for procurement of some other goods, and the said tender was also cancelled despite vested rights having accrued in favour of the petitioner in respect thereof.

4. Mr. Jawad Sarwana, Advocate set forth the case of the respondent nos. 3 & 4 and submitted at the very onset that the 2017 Tender was scrapped, upon advice of the regulatory agency (PPRA), without rights having accrued in respect of any party whatsoever. Learned counsel articulated that the bid validity period in respect of the 2017 Tender had admittedly expired and proceeding further with the said tender would amount to *prima facie* misprocurement. It was demonstrated from the record that the cancellation of the aforesaid tender was not challenged by any party except the petitioner, which has also done so belatedly and only post issuance of the 2019 Tender. Learned counsel submitted that all eligible parties remained competent to participate in the 2019 Tender, however, the petitioner is seeking that the relevant procurement contract may only be awarded thereto vide the sanction of this Court and not through an open competitive process.

5. Mr. Kafeel Ahmed Abbasi, Advocate concurred with the arguments advanced on behalf of the respondent nos. 3 & 4 and

submitted that no infirmity was demonstrable from the tender process under challenge, hence, no interference was merited therewith in the exercise of Constitutional jurisdiction of this Court.

6. We have heard the respective learned counsel and have also considered the record to which our attention was solicited. It is settled law that disputed question of fact¹ and / or contractual matters² are not generally amenable for determination in the exercise of Constitutional jurisdiction, however, we do unreservedly retain the jurisdiction to judicially review the commercial actions of state enterprises, upon the anvil of the settled principles of law³. In view hereof the scope of the present determination is demarcated to the consideration of whether any arbitrariness and / or illegality has been demonstrated before us, by the petitioner, in respect of the tender processes under scrutiny.

7. The Public Procurement Rules 2004 (“Rules”) require a procuring agency to subject a bid to a validity period⁴ and stipulate that the relevant bid shall be valid for the period of time specified in the bidding document⁵. The 2017 Tender was floated with an express bid validity of 90 days from opening of tender. It is a matter of record, admitted by all parties, that the respective bids were opened and evaluated post expiration of the bid validity. The Rules contain a provision for extension of the bid validity period⁶ under exceptional circumstances, however, it is also an admitted fact that no such extension was ever sought or granted. In this context it is imperative to record that the Rules contemplate the award of a procurement contract only within the original or extended period of bid validity⁷.

8. Petitioner’s counsel had argued that since the Rules contemplated award of a procurement contract to the lowest evaluated bidder⁸, hence, it was imperative that the petitioner be declared successful per the 2017 Tender and consequently the 2019 Tender would be void. This

¹ 2015 PLC 45; 2015 CLD 1257.

² PLD 2011 SC 44; PLD 2007 SC 642.

³ Re: *Suo Moto Case 13 of 2009* reported as *PLD 2011 Supreme Court 619*.

⁴ Rule 26 (1) of the Public Procurement Rules 2004.

⁵ Rule 26 (2) of the Public Procurement Rules 2004.

⁶ Rule 26 (3) of the Public Procurement Rules 2004.

⁷ Rule 38 of the Public Procurement Rules 2004.

⁸ Rule 36 (b) (ix) of the Public Procurement Rules 2004.

argument is not sustainable *inter alia* as it is *prima facie* repugnant to Rule 38⁹, which categorically states that a procurement contract shall only be awarded within the original or extended period of bid validity.

Notwithstanding the fact that the bid validity period was never extended, it is prescribed that an extension, under the required circumstances, could only be granted for a period not more than the time equal to the tenure of the original bid validity¹⁰. The petitioner's counsel suggests a novel interpretation of Rule 36(b)(ix)¹¹, mutually exclusive to the other prescriptions of the Rules, in order to claim a vested right, however, the said rule refers to the lowest *evaluated* bid. In the present facts and circumstances admittedly the relevant evaluation took place more than 8 months (240 days) post expiration of the bid validity period. Therefore, even if the bid validity period had been extended, to the maximum possible of another 90 days, the pertinent evaluation would have been over 5 months (150 days) beyond the bid validity period.

9. It is pertinent to note that there is no record of the petitioner having initiated any proceedings to mitigate the delay in so far as the 2017 Tender was concerned, while proceedings were being carried out thereunder. No justification has been placed before us as to why was the delay not assailed before the appropriate forum. Notwithstanding the foregoing, it is *prima facie* apparent that the petitioner never challenged the cancellation of the 2017 Tender upon receipt of the Cancellation Communique.

It was also specifically pleaded that the petitioner was subjected to similar treatment in 2015 with respect to another tender. Upon a specific query the petitioner's counsel submitted that no challenge was made to the cancellation of the tender in 2015 as the petitioner expected to be awarded some other contract by the same procuring agency. In so far as the glaring delay in the challenge to the cancellation of the 2017 Tender is concerned, the petitioner's counsel submitted that the same was also predicated upon the petitioner's understanding, based upon

⁹ Rule 38 of the Public Procurement Rules 2004.

¹⁰ Rule 26 (3) of the Public Procurement Rules 2004.

¹¹ Rule 36 (b) (ix) of the Public Procurement Rules 2004.

purported oral assurances, that the procurement of the Equipment would be made from the petitioner.

While eschewing any commentary upon the conduct of the petitioner in such regard, we consider it appropriate to observe that failure to assail the delay in respect of the 2017 Tender and / or the delay occasioned in the institution of the present proceedings, more than two months post receipt of the Cancellation Communique, has not been justified before us.

10. There was yet another argument on behalf of the petitioner that the prescription of Rule 26¹², regarding the efficacy of bid validity periods, may be read as merely directory as the word *shall* may be read as directory and not mandatory; reliance was placed in such regard upon a recent Division Bench judgment of this Court in the *Gas Price case*¹³. In the said judgment this bench had maintained that mere employment of the word *shall* would not make a provision mandatory and it was imperative *inter alia* to consider the legislative intent¹⁴ in its empirical perspective. With respect, we find ourselves unable to sustain this argument.

It is clear from the Rules that award of a procurement contract is permissible within the bid validity period¹⁵. This ties in with Rule 26, which recognizes the validity of bids in the period specified for the same to be valid. The petitioner's counsel has been unable to demonstrate before us as to why the plain text of Rule 26, or Rule 38, may not be given primacy in interpretation of the relevant provisions. This Division Bench, in the *A P Moller Maersk case*¹⁶, relied upon a judgments from the Federal Court of Australia¹⁷ and the Supreme Court of Canada¹⁸ to maintain that primarily regard should be had to the four corners of the actual text and that the text must be given primacy in the interpretation process. The ordinary meaning of the words used are

¹² Rule 26 of the Public Procurement Rules 2004.

¹³ *Sindh Petroleum & CNG Dealer Association & Others vs. Federation of Pakistan & Others* (CP D 7097 of 2018).

¹⁴ *Collector of Sales Tax Gujranwala & Others vs. Super Asia Mohammad Din and Sons & Others* reported as 2017 SCMR 1427.

¹⁵ Rule 38 of the Public Procurement Rules 2004.

¹⁶ *A.P.Moller Maersk vs. Commissioner Inland Revenue & Others* (CP D 7097 of 2018).

¹⁷ *McDermott Industries (Aust) Ply Ltd. v. Commissioner of Taxation* (2005) FCAFC 67.

¹⁸ *Crown Forest Industries Ltd. v. Canada* (1995) 2 SCR 802.

presumed to be the authentic representation of the legislative intention.

The use of the word *shall*, as opposed to *may*, ordinarily implies that the prescription is mandatory, unless demonstrated to the contrary¹⁹. It is trite law that where an enactment provides for something to be done in a particular manner then it is to be done in that manner and that the role of courts is not designed to legislate but interpret statutes according to their ordinary and plain meaning and not import and or supply words or provisions²⁰, no matter how laudable and desirable it may appear to be²¹. A court of law is not ordinarily entitled to read words into enactments²², especially those which cannot be reasonably implied on any recognized principle of construction²³.

In view hereof it is observed that the reliance of the petitioner upon the *Gas Price case*²⁴ is misconceived and that no case has been made out before us to read the provisions of Rule 26²⁵ otherwise than in the manner prescribed and / or ascribe any import thereto but the plain meaning thereof.

11. The import of Rule 26 was considered by the honorable Lahore High Court in the *Kitchen Cuisine case*²⁶ wherein a procurement process, involving the respondent no. 3 herein, was set to naught in view of the acceptance of a bid not having taken place within the bid validity period. The discussion, in the aforesaid judgment, pertinent to the present facts and circumstances is reproduced herein below:

“18. The contexture and setting of rule 26 may be stated thus. A reading of rule 26 above makes it clear that a procuring agency shall evaluate the bid to a bid validity period. It is admitted on all hands that the validity period in the instant case was ninety days. By virtue of sub-rule (3) of rule 26, the procuring agency shall ordinarily be

¹⁹ *Statutory Interpretation by Eskeridge, Frickey & Garrett American Casebook Series published by West.*

²⁰ *AKD Investment Management Limited & Others vs. JS Investments Limited & Others (CP D 5016 of 2019).*

²¹ *Zahid Iqbal vs. Hafiz Muhammad Adnan & Others* reported as 2016 SCMR 430.

²² *Nadeem Ahmed Advocate vs. Federation of Pakistan* reported as 2013 SCMR 1062.

²³ *Amanullah Khan vs. Chief Secretary NWFP & Others* reported as 1995 SCMR 1856.

²⁴ *Sindh Petroleum & CNG Dealer Association & Others vs. Federation of Pakistan & Others (CP D 7097 of 2018).*

²⁵ Rule 38 of the Public Procurement Rules 2004.

²⁶ *Kitchen Cuisine (Private) Limited vs. Pakistan International Airlines Corporation & Others* reported as PLD 2016 Lahore 412.

under an obligation to process and evaluate the bid within the stipulated bid validity period that is ninety days in the instant case. However, under exceptional circumstances and for reasons to be recorded in writing, if an extension is considered necessary, all those who have submitted their bids shall be asked to extend their respective bid validity period. Such extension shall not be for more than the period equal to the period of the original bid validity. From the tenor and the context of sub-rule (3) of rule 26, the terms of the said rule seems to be obligatory and mandatory in nature and must be complied with. This is the very essence of the procurement procedure and the good faith which must permeate the entire procedure. In this regard, it may be stated that the bids were submitted on 26.3.2015 and the evaluation report was made on August 20, 2015 i.e after more than five months. The contract was admittedly awarded on 01.03.2016 i.e. after almost one year of the tender for the bids. Clearly, the mandate of rule 26 has not been complied with and has been contravened. The learned counsel for PIA does not deny the fact that bid validity period was not extended by a speaking order and the bidders were thus not asked to extend their respective bid validity period. The non compliance of rule 26(3), in my opinion, renders the subsequent acts of submission of the evaluation report as also the award of contract as ultra vires and void."

The Lahore High Court went further and considered the nexus of Rule 26 with Rule 38 and illumined as follows:

"23. Sub-rule (2) of rule 26 drives home the imposition of duty in this regard by stating that bids shall be valid for the period of time specified in the bidding document. Read with rule 38, the scheme that emerges is that the award of the procurement contract, too, has to be made within the original or extended period of bid validity. There is thus no room for doubt that the bid validity period is of fundamental importance and all acts must adhere to that period.

24. Rule 38 also has significance in the entire determination of the instant petition. Rule 38 is as follows:

"38. Acceptance of bids.- The bidder with the lowest evaluated bid, if not in conflict with any other law, rules, regulations or policy of the Federal Government, shall be awarded the procurement contract, within the original or extended period of bid validity."

25. By the terms of rule 38, the bidder with the lowest evaluated bid shall be awarded the procurement contract within the original or extended period of bid validity. Since the contract was awarded on 01.03.2016, it is clear that the contract was not awarded within the original period of bid validity. It has already been brought forth that no extension in the period of bid validity was ever granted and thus it follows ineluctably that any grant of contract in the period beyond the original period must be held to be unlawful and contrary to the PPRA Rules."

12. We now consider the final aspect of the 2017 tender, being its cancellation. Learned counsel for the respondent nos. 3 & 4 submitted that PIA had approached PPRA with respect to another tender and had

been directed to scrap the said tender as the bid validity period had expired. It was submitted that in uniform application of aforesaid advice the Store Purchase Committee of PIA decided, per the Rules, that all tenders with expired bid validity periods would be scrapped and the procurement be retendered.

13. Rule 33²⁷ prescribes that procuring agency may reject all bids or proposals at any time prior to the acceptance of a bid or proposal. The procuring agency shall upon request communicate to any supplier or contractor who submitted a bid or proposal, the grounds for its rejection of all bids or proposals, but is not required to justify those grounds.

Rule 34²⁸ contemplates that if the procuring agency has rejected all bids under rule 33 it may call for a re-bidding. In the present scenario the procuring agency appears to have rejected all the bids / cancelled the tender process, for the reasons enumerated supra, admittedly prior to acceptance of a bid / award of contract. Thereafter, a new tender process has been initiated for the procurement of the Equipment.

14. Petitioner's counsel had relied upon a reported order²⁹, rendered in determination of a civil miscellaneous application, of a learned Single Judge in an effort to belatedly assail the cancellation of the 2017 Tender. On the other hand respondents' counsel had relied upon a Division Bench judgment of this Court, in the *Gasport case*³⁰, wherein it was enunciated even a lowest bidder cannot claim its right to a contract to be absolute and unquestionable till acceptance of its bid and signing of the contract.

The Division bench of this Court, in the *Gasport case*, proceeded to contextualize the import of *Crescent Steel* and held the same was rendered on an injunction application and did not consider the ramifications of Rules 33 and 34, hence, the legal implications thereof were not examined by the Court. It was further expounded that seeking of a direction from the Court to a procuring agency to continue with the

²⁷ Rule 33 of the Public Procurement Rules 2004.

²⁸ Rule 34 of the Public Procurement Rules 2004.

²⁹ *Crescent Steel & Allied Products Limited vs. Sui Southern Gas Company Limited* reported as 2015 CLC 478.

³⁰ *Pakistan Gas Port Limited vs. Sui Southern Gas Company Limited & Others* reported as PLD 2016 Karachi 207.

bidding process that has already been scrapped is not warranted in law. In addition thereto learned counsel for the respondent nos. 3 & 4 also pointed out that there was no question of expiration of the bid validity period in *Crescent Steel*, hence, the said order was even otherwise distinguishable in the present facts and circumstances.

It is thus observed that reliance upon *Crescent Steel* did not augment case of the petitioner as the judgment appears to be distinguishable and even otherwise contextualized by the Division Bench in the *Gasport* case.

15. The prayer clause in the petition seeks a declaration from this Court stipulating that the petitioner is entitled to the procurement contract. It is thus apparent that the status of the petitioner remained that of a tender / bidding participant.

This Division Bench has considered the status of a bidder, albeit in analogous execution proceedings, in the *Muhammad Jawed case*³¹, and maintained that floating of a bid is only an offer and without confirmation it does not create any vested right in favour of a bidder. We had earlier held in *Muhammad Farooq*³² that mere submission of a bid, even if it was the highest bid, in itself confers no inalienable rights upon a bidder. A recent pronouncement of the honorable Supreme Court in this context is *Muhammad Khalil*³³, wherein it was observed that no rights could be construed to have accrued in favour of a bidder till confirmation is granted and until then no vested right can be claimed by any bidder.

The honorable Balochistan High Court maintained in *Mandokhail Brothers*³⁴ that mere tendering of the lowest bid would not conclude the contract and that till such time as the bid was confirmed / contract concluded no vested right would accrue in favour of the bidder. The

³¹ *Muhammad Jawed vs. Firs Women Bank Limited & Others* (First Appeal 109 of 2018).

³² Judgment dated 23.04.2019 in *Muhammad Farooq vs. Silk Bank Limited & Others* (First Appeal 50 of 2018).

³³ *Muhammad Khalil vs. Faisal M.B. Corporation & Others* reported as 2019 SCMR 321.

³⁴ *Mandokhail Brothers Commercial Trading & Government Contractor vs. Chairman Civil Aviation & Others* reported as 2017 CLC 221.

honorable Supreme Court has also enunciated the principle in numerous pronouncements that a mere bid does not create any right³⁵.

In view of the preponderance of authority cited supra we do hereby conclude that by virtue of being a participant in the tender process, no vested rights accrued in favour of the petitioner entitling it to award of the procurement contract.

16. We now consider the 2019 Tender, which was floated on 29.03.2019 and the bids were required to be submitted by 08.05.2019. However, instead of participating in the tender process the petitioner instituted the present petition on 13.04.2019 seeking to vitiate the tender process and requiring be declared successful in respect of a tender process admittedly cancelled more than two months thereto before.

17. It is patently apparent that there was no embargo upon the petitioner to participate in the 2019 Tender, however, it opted to file the present proceedings instead. We have already considered the submissions of the petitioner, regarding its claim to the award of the contract per the 2017 Tender, and found them to be without merit. The additional ground invoked to justify its non-participation, as voiced by its counsel, in the new tender is that since the petitioner's bid had already been disclosed to its competitors, therefore, participation in a fresh bidding process would be to the manifest disadvantage of the petitioner. With respect, we are unable to sustain this argument.

The petitioner claims to be an internationally established purveyor of the Equipment, and related products, and its eligibility to participate in the 2017 Tender is apparent from the record. However, the eligibility of the other participants in the 2017 Tender is also apparent. If the bid of the petitioner has been disclosed then the same holds true for the other participants as well, however, none of the others appear to be aggrieved by the *de novo* tendering process.

18. Petitioner's counsel had also argued that the petitioner's international standing is predicated upon its successful participation in

³⁵ *Babu Parvez Qureshi vs. Settlement Commissioner Multan & Bahawalpur Divisions & Others* reported as 1997 SCMR 337; *Munshi Muhammad & Another vs. Faizanul Haq & Another* reported as 1971 SCMR 533.

tenders, hence, it is imperative that it be conferred with the procurement contract per the scrapped 2017 Tender and the 2019 Tender be voided. Once again, with utmost respect, we proffer our inability to sustain this argument.

19. It is an admitted matter of record that proceedings in the 2017 Tender had far exceeded the bid validity period, in respect whereof no extension was ever sought, agitated and / or granted. It has been demonstrated before us that the said tender was scrapped in order to avoid misprocurement and a new tender process was announced in order to ensure transparency.

We had placed a specific query to the learned counsel for PIA seeking as to what measures had been taken to safeguard the 2019 Tender process from exceeding its bid validity. Learned counsel drew attention to the bidding documents and demonstrated *inter alia* that the bid validity period had now been enhanced to 180 days in order to account for eventualities and contingencies.

It is imperative to record at this juncture that the petitioner's counsel has not identified any infirmity with respect to the 2019 Tender.

20. The honorable Supreme Court has held in *Javed Iqbal*³⁶ that in a case where the highest bid is rejected and re-bidding is ordered which afforded equal opportunity to the person, claiming to have been the highest bidder in the vitiated auction, it cannot be said that any principle of natural justice has been violated.

21. This Bench has maintained, in the *Otsuka case*³⁷, that the role of this Court in matters of judicial review of commercial activities of state enterprises is grounded upon the deliberation as to whether a decision making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable person would have reached; or abused its powers. Subjecting the present facts and circumstances to the aforesaid anvil it

³⁶ *Javaid Iqbal Abbasi & Company vs. Province of Punjab & Others* reported as 1996 SCMR 1433.

³⁷ *Otsuka Pakistan Limited vs. Province of Sindh & Others* (CP D 881 of 2019).

is observed that the petitioner has been unable to demonstrate any such infirmity with respect to the tender processes under scrutiny.

22. In view of the reasoning and rationale herein contained we are of the considered view that the present petition is devoid of merit as no arbitrariness and / or illegality has been demonstrated before us in respect of the tender processes under scrutiny, hence, this petition, along with pending application/s, is hereby dismissed.

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*Farooq PS/**