

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

C.P No. D-3515 of 2021

Present:

Ahmed Ali M. Shaikh, CJ
and Yousuf Ali Sayeed, J

Petitioner : Ms. Tamzeer Construction Company, through Muhammad Vawda, Advocate.

Respondent No.1 : Province of Sindh, through Abdul Jalil Zubedi, AAG.

Respondent No. 2 : Sindh Public Procurement Regulatory Authority, through, Qamar Zaman Shah, Asstt. Director (Legal).

Respondent No. 3 : M/s. Iqbal Shaikh & Company, through Asadullah Soomro, Advocate.

Respondent No.4 : Water and Sanitation Agency, Hyderabad, through Zahid Ali Khemtio, MD WASA.

Date of Hearing : 15.11.2021

ORDER

YOUSUF ALI SAYEED, J – The Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution, seeking judicial review of Decision No. AD(L-II)SPPRA/CMS-/2020-21 dated May, 2021 (the **“Impugned Decision”**) rendered by the Sindh Public Procurement Regulatory Authority (“SPPRA”) under Rule 32 of Sindh Public Procurement Rules 2010 (the **“Rules”**) in respect of NIT No. T00861-20-0006 dated 24.12.2020, floated by the Water and Sanitation Agency (WASA), Hyderabad (the **“Procuring Agency”**) for construction of a 6.0 MGD Rapid Gravity Water Treatment Plant at Latifabad Unit No.4 Hyderabad (the **“Work”**), with it being prayed that this Court be pleased to:

“A. Declare that the Impugned Decision No. AD(L-II)SPPRA/CMS-_/2020-21 dated: May, 2021, is without jurisdiction, illegal, unconstitutional, mala fide and of no legal effect;

B. Suspend the Impugned Decision No.AD(L-II)SPPRA/CMS-_/2020-21 dated: May, 2021, and restrain the Respondents from taking any further steps pursuant to the Impugned Decision, including but not limited, to issuing a fresh advertisement for the Subject Tender;

C. Grant such further, additional or alternative relief, as this Honourable Court may deem fit and proper.”

2. The backdrop to the Petition is that the Petitioner submitted a bid in respect of the aforementioned work along with 8 other bidders, including the Respondent No.3. Out of those 9 bids, 5 were rejected as non-compliant and of the 4 remaining bids, the Petitioner's was the lowest as per the Bid Evaluation Report published by the Procuring Agency. However, the Respondent No.3 lodged a complaint dated 26.02.2021 under Rule 31 of the Rules before the Complaint Redressal Committee of the Procuring Agency, alleging mis-procurement on the allegation that the Petitioner had mis-calculated and tampered his financial bid; was not technically qualified but had submitted certain forged and fabricated work orders in relation to its antecedents; and that its Proprietor was also a government employee, in contravention of the Rules. Upon failure of the Redressal Committee to decide that Complaint, the Respondent No.3 escalated its grievance before the Review Committee vide letter dated 16.03.2021, which was received on 17.03.2021, with those proceedings then culminating in the Impugned Decision wherein it was observed that the Procuring Agency had failed to follow the rules for calling the bids on a Single Stage One Envelope bidding procedure in as much as it had failed to ask for the annual financial turnover of the last three years, as required under Rule-46(a)(ii). As such, the Review Committee, in exercise of power conferred by Rule 32(g) decided that the Procuring agency had violated Rule 46(1)(a)(ii) and thus terminated the procurement for initiation afresh, observing relevant rules and regulations.

3. Proceedings with the submissions, learned counsel adopted a three-pronged attack against the Impugned Decision, contending that the Review Committee had (i) acted in excess of its jurisdiction, (ii) failed to consider that the Appeal had been filed with delay of two days, after lapse of the period prescribed in terms of Rule 31(5), and (iii) that the Impugned Decision had been made without notice to the Petitioner in violation of the principles of natural justice and Article 10-A of the Constitution. In furtherance of those submissions, it was argued that:

(a) The jurisdiction of the Review Committee emanated from and was circumscribed by the terms of the complaint or appeal lodged by the aggrieved bidder and the scope of its enquiry was limited to the allegations raised, but in the instant case the Review Committee had travelled beyond the allegations levelled by the Respondent No.3 without recording any findings thereon and had made a determination as to mis-procurement on the touchstone of Rule 46(1)(a)(ii), albeit that the same did not form part of the Complaint. Hence, per learned counsel, the Review Committee had exceeded its jurisdiction and assumed what were termed '*suo motu* powers'.

(b) Under Rule 31(5), SPPRA Rules, 2010, if the Complaint Redressal Committee fails to arrive at a decision on a complaint within 07 days of the filing of the complaint, then the same stands transferred to the Review Committee which shall dispose of the Complaint in accordance with the procedure laid down in Rule 32 SPPRA Rules, 2010, if the aggrieved bidder files the review appeal within 10 days of such transfer. Therefore, the limitation for filing an Appeal before the Review Committee is 17 days. The Respondent No.3 had lodged the Complaint before the Procuring Agency's Complaint Redressal Committee on 26.02.2021 and

therefore the Review Appeal had to be filed before the Review Committee on or before 15.03.2021, whereas the same was lodged on 17.03.2021, with a delay of two days.

- (c) The Review Committee had violated the Petitioner's right to a fair trial, as guaranteed under Article 10A of the Constitution, as the Impugned Decision had been made without issuing notice to the Petitioner, thus condemning it unheard without an opportunity being afforded to rebut the allegations raised through the Complaint, even though, per learned counsel, a vested right had accrued in favour of the Petitioner by virtue of it having been declared the lowest bidder.

It was submitted that the Impugned Decision was thus without jurisdiction, illegal, and of no legal effect.

4. Conversely, the learned AAG, assisted by the Assistant Director (Legal), SPPRA and accompanied by the MD WASA, submitted that in compliance of the Impugned Decision, the Procuring Agency had cancelled the Tender under Rule -25(1), with the Notice published in that regard reading as follows:

**“CANCELLATION OF NOTICE INVITING TENDERS
(PPMS ID No. T00861-20-0007)”**

In exercise of the powers conferred upon the undersigned as provided in Section 25(1) the Sindh Public Procurement Rules 2010 and non- provision of the section 46(1) (a) (ii) of the said provision in the NIT called vide this office letter No.DDA/WASA/HDA/705/2020 dated 04.03.2021, published in leading newspapers vide INF-KRY # 726/21 on 06.03.2021, subsequently uploaded in the web-portal of PPMS/SPPRA vide ID # T00861-20-0007, in respect of work ***"Improvement / Rehabilitation of Water Supply & Sewerage System at Junejo Colony Taluka Latifabad District Hyderabad"*** is hereby cancelled on account of the non-observation of the section 46(1)(a)(ii) of SPPRA 2010.

MANAGING DIRECTOR
Water & Sanitation Agency
HDA Hyderabad”

5. It was emphasised that although the Work was related to an important public infrastructure of a fundamental nature, its retendering and execution had been impeded and held in abeyance due to the filing and pendency of the instant Petition. It was argued by the learned AAG, as confirmed by the M.D WASA, that no contract had been signed between the Petitioner and the Procuring Agency and no work order had been issued in favour of the Petitioner, hence no vested right had accrued and no question of any irreparable loss or harm arose. It was submitted that the Petition had become infructuous in the wake of such cancellation and the Petitioner was at liberty to participate in the retendering of the Work.

6. Having considered the arguments in light of the material on record and the relevant provisions of the Rules, it merits consideration at the outset that whilst mounting its challenge on the basis of the aforementioned grounds, the Petitioner has not impugned the applicability of Rule 46 (1) (a) (ii) of the SPPRA Rules, 2010, as cited by the Review Committee. The mere fact that the absence of the aforesaid provision in the terms of Tender was not a ground underpinning the Complaint lodged by the Respondent No.3 is not a matter of particular significance as it does not denude the Review Committee of its powers to examine whether the Rules and Regulations applicable under the given circumstances were adhered to and followed by the Procuring Agency, as is clearly within the powers of Review Committee in terms of Rule 32 (7), which reads as follows:-

“32. Appeal to the Review Committee:-

- (1)-----
- (2)-----
- (3)-----
- (4)-----
- (5)-----
- (6)-----

(7) Unless the Review Committee recommends dismissal of an appeal being frivolous, in which case the bidder may lose the bid security deposited with the procuring agency, the Review Committee may:-

- (a) reject the reference, stating its reason;*
- (b) state the rules or principles that govern the subject matter of the reference;*
- (c) point out the infirmities and breach of rules and regulations by the procuring agencies;*
- (d) annul in whole or in part of a non-compliant act or decision of a procuring agency, other than any act or decision bringing the procurement contract into force;*
- (e) if the procuring agency is in breach of its obligations under the Act, Rules or Regulations, order the payment of compensation by the officer(s) responsible for mis-procurement for cost incurred by the bidder on preparation of bid, or*
- (f) direct that the procurement proceedings may be terminated, in case the procurement contract has not been signed;*
- (g) declare the case to be one of mis-procurement if material violation of Act, Rules, Regulations, orders, instructions or any other law relating to public procurement, has been established.”*

7. Needless to say, to adopt the approach canvassed on behalf of the Petitioner would cast the Review Committee in so confined a role as to render it completely handicapped in the face of a violation that may come to its attention. Such a ‘blinkered’ view would be wholly undesirable and is not in consonance with the performance of a regulatory function.

8. Turning to the point of the Appeal before the Review Committee having been filed after lapse of the period envisaged under Rule 31(5), that too is of no avail as the said Rule does not prescribe the consequence of delay and is not on the same footing as the subject of limitation as dealt with under the Limitation Act, 1908. In the matter at hand, the Review Committee has seen fit to take cognizance and it is not open to the Petitioner to invoke Rule 31(5), especially when no contract had come into force as between it and the Procuring Agency and no Work Order had been issued in its favour. As such, no vested right stood created in favour of the Petitioner, and the Petitioner could not claim any entitlement of being a necessary party to the proceedings before the Review Committee or plead limitation by way of defence.

9. Indeed, the definition of “vested rights”, as per Black’s Law Dictionary (Sixth Edition), is as follows:-

“Vested rights. In constitutional law, rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. Such interests as cannot be interfered with by retrospective laws; interests which it is proper for state to recognize and protect and of which individual cannot be deprived arbitrarily without injustice. *American States Water Service Co. of California v. Johnson*, 31 Cal.App.2d 606, 88 P.2d 770, 774. Immediate or fixed right to present or future enjoyment and one that does not depend on an event that is uncertain. A right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy. *State ex Rel. Milligan v. Ritter’s Estate*, Ind.App., 46 N.E.2d 736, 743.”

10. The Petition thus fails and stands dismissed accordingly, along with the pending miscellaneous application.

Judge

Chief Justice

TariqAli/PA