

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui

Miscellaneous Appeal No. 03 of 2021

M/s Jianguo Dajin Heavy Industry Co. Ltd.

Versus

Port Qasim Authority & others

Date of Hearing: 14.04.2021 and 29.04.2021

Appellant: Through Mr. Zaheerul Hassan Minhas Advocate

Respondent No.1: Through Mr. Hussain Ali Almani Advocate.

Respondent No.2: Nemo

Respondent No.3: Through Mr. Asfandyar Jahangir Advocate.

On Court Notice: Mr. Zahid Khan, Assistant Attorney General.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This statutory appeal under procurement laws is filed by appellant M/s Jianguo Dajin Heavy Industry Co. Ltd. in response to tender notices published nationally and internationally. The appellant amongst others has submitted its response in shape of tender documents based on single stage two-envelop procedure under Rule 36 of Public Procurement Rules 2004 for supply of two pilot boats and four tugs of the specifications highlighted in the public notices.

2. Respondent No.1 Port Qasim Authority is the procuring agency for the purpose of the dispute raised in this appeal whereas respondent No.2 Pakistan Procurement Regulatory Authority is an authority created under the provisions of PPRA Ordinance, 2002 and is empowered to regulate the procurements in Pakistan. Respondent No.1 i.e. procurement agency published two public notices in national and international

newspapers and invited sealed bids under single stage two-envelope procedure for supply of two pilot boats and four tugs.

3. Appellant considering itself to be qualified in terms of the prerequisites incorporated in the tender notices published, offered itself and participated in the tenders and submitted a sealed envelope for each having two envelopes inside, marked as technical and financial proposals/bids. As required under the Rule 36 *ibid*, the technical bid is to be evaluated first and only then financial bid of those who have technically qualified is to be opened in presence of the bidders. Appellant claimed to have received a letter of 13.11.2020 whereby they were informed that their technical bid is non-responsive and hence were disqualified. The appellant responded the letter of their disqualification but all in vain. On 17.11.2020 financial bids were opened for the remaining bidders who have successfully qualified the technical step or tier and respondent No.3 was declared as being lowest bidder for supply of aforesaid pilot boats and tugs.

4. It is urged by learned counsel for the appellant that this letter is in violation of Section 24A of General Clauses Act, 1897 and violative of the paramount principles of transparency, as required under the PPRA Ordinance, 2002. It is claimed by the appellant that the financial bid of the appellant was lowest as it was 710 Million less than respondent No.3's financial bid who was declared successful. Respondent No.1's action was thus stated to be biased one and based on malice.

5. Appellant then filed a suit bearing No.1843 of 2020 which was disposed of with directions to decide the grievance application of the appellant in accordance with law. On 21.12.2020 appellant received a letter from respondent No.1 which is dated 09.12.2020 in terms whereof they were accordingly informed that Grievance Redressal Committee has rejected complaint of the appellant. They claimed to have enclosed

copy of order in original as passed by the Grievance Redressal Committee.

6. The appellant thus in the instant appeal assailed its technical disqualification and rejection of complaint by respondent No.1 on the ground that originally it was not a speaking order when they were technically disqualified and subsequently the Grievance Redressal Committee failed to appreciate that the “bid security” was not part of technical evaluation criteria and is violative of Rule 30(1) Rules 2004. It is contended that bid security was not mandatory and should have been asked only when a party is declared as successful bidder being the lowest in financial bid.

7. Without prejudice to the above, it is further argued that the bank guarantees issued by the Bank of China and submitted by the appellant initially with the bids were sufficient compliance of Rules 2004 and adequate to cover the risk regarding conduct of the bidder as required under Para 10.1 of the tender documents. It is further argued that in addition to a foreign bank guarantee, the requirement of local bank guarantee was an exaggerated requirement and is violative of Rule 25 and 51 of Rules, 2004.

8. Respondent No.2 despite several attempts of service remained non-responsive. It is very surprising that a regulatory authority whose procurement process was challenged has remained indolent despite notices. Respondent No.1 Port Qasim Authority however filed their response and have substantially argued the matter. Gist of argument was also adopted by the counsel appearing for respondent No.3 Sanmar Shipyards, who was declared as successful bidder.

9. Learned counsel for respondent No.1 Mr. Hussain Ali Almani submitted that clause 10.2 of the invitation to bid pertaining to the tugs required that a foreign bank guarantee be accompanied with a counter

bank guarantee of Karachi based scheduled bank of Pakistan with minimum AA rating category issued by a Pakistani scheduled bank favoring Port Qasim Authority. It is argued that this clause further provides that bid will be rejected if found without bid security.

10. Similarly, invitation to bids for the purposes of boats also provides a similarly requirement. The security bid was in the sum of US \$.500,000 and US \$.150,000 for the tugs and boats respectively and the technical bids of the appellant as opened on 25.09.2020 and 05.10.2020 were found violative of the terms of invitation as the bids were devoid of any local bank guarantee as counter guarantee. It is argued that in response to such disqualification, on 12.11.2020 i.e. about a month later of the opening of the bids, appellant made an attempt to rectify its material non-compliance and furnish separate counter bank guarantee from Bank Al-Habib for both the tenders i.e. for tugs and boats.

11. This, per learned counsel, could not have been accepted as they were submitted well after opening of the bids and amounted to modification in the bid which, if accepted would have violated Rule 31 of the Rules 2004, hence they were initially replied on 13.11.2020 that their technical bid was not responsive followed by appellant's two applications of 15.11.2020 for redressal of the grievance under Rule 48 of Rules 2004. The Grievance Redressal Committee was then constituted, as informed vide letter dated 16.11.2020, yet a suit No.1843 of 2020 was filed wherein directions were given for their disposal by Grievance Redressal Committee vide order dated 26.11.2020 and opportunity was provided to the appellant and consequently vide order dated 09.12.2020 a detailed order was passed which was communicated to the appellant.

12. It is thus urged by learned counsel for respondent No.1 that since appellant participated in the tender and have surrendered themselves to

the process and the tender requirements, it does not lie in their mouth to now raise any question regarding any of the terms to be exaggerated requirement. It is argued that it is immaterial if bidder having been disqualified technically, raises hue and cry that his financial bid was much less than of the one who was declared successful. Till date of their rejection, either by respondent No.1 who technically disqualified the appellant, or subsequently by a committee, constituted by respondent No.1 as Grievance Redressal Committee, they (appellants) have never challenged any of the terms of the advertisement inviting bids nor it could as all terms were/are with frame of law.

13. I have heard the leaned counsel and perused material available on record.

14. Respondent No.1 floated two tenders inviting bids for supply of four LNG compatible ASD tugs (tugs) and supply of two pilot boats of 20 Knot speed (boats) through public notices published in national and international newspapers. For the purpose of both the tugs and boats invitations were published in Khaleej Times, Dawn and Jang on different dates. It was a single stage two-envelope procedure that was adopted which is steered by Rule 36(b) of Rules 2004. All bids i.e. for tugs or boats were required to be submitted with “bid security” in the manner prescribed in the tender documents and it was made obvious to all the proposed bidders that bids without bid securities would be rejected. The last dates for submission of bids for tugs and boats were extended to 05.10.2020 and 25.09.2020 respectively vide corrigendum which was also published in the same manner and is not disputed by the appellant.

15. The requirement of clause 10.2 of the invitation to bids for tugs provides that tenders should accompany with bid security (earnest money) in separate envelope with technical proposal in the form of either pay order of the required amount or foreign bank guarantee with

counter bank guarantee of Karachi based schedule bank having minimum of AA rating of any schedule bank of Pakistan favouring respondent No.1 i.e. Port Qasim Authority. It is in this clause that it was made obvious to all the proposed bidders that the tender documents will be rejected in case they are found without bid security.

16. Similarly in response to an invitation of bid regarding boats, an identical requirement was advertised which term was made part of tender documents. Technical proposal/bids thus were required to be opened on their respective dates i.e. 25.09.2020 and 05.10.2020 being the last date of submission and by then onward all bidders were disqualified/prohibited to carry out any amendment, addition alteration or substitution.

17. This is not in dispute that the appellant furnished only a foreign bank guarantee as bid security from the bank of China in response to clause 10.2 however this is not a complete response of the requirement. Complete response of the requirement was that there should have been a counter bank guarantee of a scheduled bank of Pakistan. Furthermore, foreign bank guarantee was only forwarded by Bank Al-Habib through their letter which simply stated that they are forwarding it without any liability, risk and responsibility on their part. Thus, this was an incomplete response of requirement of clause 10.2 of the invitation of bid and does not fulfill a complete bank guarantee. The stance of the appellant was similar in respect of both the bids i.e. it was without a local bank guarantee.

18. For the sake of convenience ITB 10.2 of bid terms is reproduced as under:-

“ITB-10. Bid Security (Earnest Money)

10.1 ..

10.2 *Tenders submitted are to be accompanied with Bid Security (Earnest money) in separate envelope(s) with*

Technical Proposal in the form of Pay Order of US\$500,000/- (Five Hundred Thousand US Dollar) or Foreign Bank Guarantee with counter Bank Guarantee of Karachi base scheduled Bank of Pakistan with minimum AA rating issued by Pakistani Scheduled Bank having AA rating and located in Pakistan in the name of Port Qasim Authority. Tenders without Bid Security will be rejected.”

19. Indeed, it appears that it was more than a month after opening of the bid that the appellant made an attempt to rectify its material inability by furnishing a separate/counter bank guarantee from Bank Al-Habib for both the tenders. This deficiency could not have been resurrected as by then the ship sailed. These belated attempts would have amounted to a modification of the tender documents, which is not permissible under Rule 31 of Rules 2004. Eventually only those whose technical bids were found to be in consonance with the terms of the invitation, were liable to be considered for further steps and were considered accordingly.

20. The appellant was accordingly informed on 13.11.2020 whereafter two separate applications were filed as grievance applications in respect to such rejection of technical bids. In response to said complaint respondent No.1 formed a redressal committee and despite this suit was filed by the appellant which was then disposed of accordingly. An immediate response to the complaint was given after hearing the appellant when detailed reasons were addressed to the appellant for the rejection of their technical bids which satisfied Section 24A of General Clauses Act. It claimed to have been passed on 09.12.2020 whereas it is claimed to have been received on 21.12.2020 but for the purposes of this statutory appeal it is not material.

21. Respondents were not in a position to be impressed with the financial bid of appellant since it was never opened in view of a non-responsive technical bid, having been rejected on the aforesaid counts.

22. Rule 25 of Rules 2004 enables the procuring agency to require from bidders to furnish bid security but it does not restrict procuring agency to act under Rule 29 of such Rules to formulate an appropriate evaluation criterion listing all information against which a bid is to be evaluated. Such evaluation criteria (within frame of law) forms an integral part of the bidding documents.

23. For the convenience Rule 25, 29, 30 and 31 are reproduced as under:-

“25. Bid security.- The procuring agency may require the bidders to furnish a bid security not exceeding five per cent of the bid price.

29. Evaluation criteria.- Procuring agencies shall formulate an appropriate evaluation criterion listing all the relevant information against which a bid is to be evaluated. Such evaluation criteria shall form an integral part of the bidding documents. Failure to provide for an unambiguous evaluation criteria in the bidding documents shall amount to mis-procurement.

30. Evaluation of bids.- (1) All bids shall be evaluated in accordance with the evaluation criteria and other terms and conditions set forth in the prescribed bidding documents. Save as provided for in sub-clause (iv) of clause (c) of rule 36 no evaluation criteria shall be used for evaluation of bids that had not been specified in the bidding documents.

(2) For the purposes of comparison of bids quoted in different currencies, the price shall be converted into a single currency specified in the bidding documents. The rate of exchange shall be the selling rate, prevailing on the date of opening of bids specified in the bidding documents, as notified by the State Bank of Pakistan on that day.

(3) A bid once opened in accordance with the prescribed procedure shall be subject to only those rules, regulations and policies that are in force at the time of issue of notice for invitation of bids.

31. Clarification of bids.- (1) No bidder shall be allowed to alter or modify his bid after the bids have been opened. However the procuring agency may seek and accept clarifications to the bid that do not change the substance of the bid.

(2) Any request for clarification in the bid, made by the procuring agency shall invariably be in writing. The response to such request shall also be in writing.”

24. Petitioner being aware of the said tender conditions participated and having participated in the tender cannot challenge or dislike

prerequisites meant for technical qualification. He could only expect judicious treatment within the playing rules however, it was too late for appellant when it realized that playing conditions were not palatable to it. The situation faced by appellant based on the aforesaid facts is not *res integra* as a number of judgments are in the filed covering the issue as settled law.

25. Even if I have to measure bidding terms on the touchstone of malice and mala fide, I would come out with understanding that these terms are for every one and not to exclude anyone. These are commercial transactions and decisions in this regard should base on strict compliance of terms of tenders whereas equity and fair play based on financial offer is not primary concern. Even if someone intends to impress by showing better financial offer, he has to qualify first on technical grounds. It is the overall impact till completion of job that needs serious consideration by procuring agency. Whether a bidder has the ability to deliver as per terms of tenders and having capacity to ensure project's completion should be the primary concern of procuring agency. There is thus nothing which could lead to conclude that the process ended up in a decision of rejecting technical bid of appellant was flawed.

26. In the case of Central Coalfield's¹ identical question came up for consideration i.e. whether furnishing bank guarantee in format prescribed in bid documents was essential requirement in the bidding process and consequently in its denial to comply, a bid could be treated as non-responsive. Conclusion drawn was that failure to furnish bank guarantee in the prescribed format was sufficient reason to reject its bid.

¹ AIR 2016 SC 3814 Central Coalfield Limited v. SLL-SML (Joint Venture consortium)

27. Any term within frame of law is also not open for a judicial review even under the hierarchy of procurement laws as Rule 25 enables the procuring agency to require bid security not exceeding five per cent of the bid price to be furnished by every bidder and procuring agency may save its effectiveness for a period as they required in terms of Rule 26.

28. In view of above, I am of the firm view that the appellant has failed to make out a case calling for interference in the tender process which led to award of the tender in favour of respondent No.3. Consequently instant appeal merits no consideration which is accordingly dismissed along with pending applications.

Dated: 03.06.2021

Judge