

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1392 of 2016

*Present:**Mr. Justice Arshad Hussain Khan.*

Plaintiff: M/s. Gul Construction through Mr. Ghulam Haider Shaikh, Advocate.

Defendants: Province of Sindh and others, through Mr. No. 1 to 4 Ziauddin Junejo, Additional Advocate General, Alongwith Ms. Fouzia Sikandar, Law Officer SPPRA.

Date of hearing: 01.08.2016

Date of order: 15.08.2016

ARSHAD HUSSAIN KHAN, J:- By this order, I intend to dispose of an application filed by the plaintiff under Order XXXIX Rules 1 & 2 C.P.C. read with Section 151 C.P.C. (CMA No. 9342/2016), praying therein to restrain the defendants from taking any adverse action against the plaintiff, including disqualifying the plaintiff from the subject tender on the basis of alleged discrepancy in the bank guarantee submitted with the defendant No. 2.

2. Material facts for deciding the instant application as averred by the plaintiff are that the plaintiff is an Association of Persons (AOP) engaged in the business of, inter alia, civil works and also registered with the Pakistan Engineering Council in category C-1. The Defendant No. 2 through an advertisement published in daily DAWN dated 28.01.2016 had invited applications for pre-qualification of the contracting firms for construction of Bus Rapid Transit System (BRTS) – Orange Line (Infrastructure Development). The tender comprising of two packages; **Package-I** from Town Municipal Administration Office Orangi Town to Bacha Khan Flyover at Banaras, Karachi and **Package-II** from Bacha Khan Flyover at Banaras to Board Office, Karachi. The plaintiff had applied and was subsequently declared qualified along with 18 other contractors for participating in the bidding process for BRTS – Orange Line Project Package-II (**subject project**). Subsequently, Defendant No. 2

through its letter bearing No. KMTC/TMTD/BRT-OL/2016/74 dated April 26, 2016 had invited the bids for the subject project from the pre-qualified contractors and called upon the plaintiff to submit the bid as per the guidelines mentioned in the said letter, wherein, it is, inter alia, mentioned that the bids must be accompanied with a bid security of lump sum amount of Pak. Rupees Twelve Million (Pak. Rs.12,000,000/=) in the form of deposit at call or a bank guarantee issued by a scheduled bank in Pakistan in favor of Project Director BRT Orange Line having a validity period of 28 days beyond the bid validity date. For the sake of ready reference the relevant portions of the said letter is reproduced as under:

“

1.
2.
3.
4. *Bidding Documents and drawings including all addenda/corrigenda (if any) dully fill in, signed and enclosed in a sealed envelope, addressed to Project Director BRT, Orange Line, 6th Floor, East Annex, Civic Centre, Gulshan-e-Iqbal, Karachi Shall be submitted on 17th May, 2016, by 2.00 pm.*
5. *Bids must be accompanied with Bid Security of Lump sum amount of Pak. Rs. Twelve Million (Pak. Rs.12,000,000/=) in the form of deposit at call or a Bank Guarantee issued by a scheduled bank in Pakistan in favor of Project Director, BRT Orange Line valid for a period of 28 days beyond the bid validity date.*
6. *Bids will be opened on the same day at 2.30 pm local time at the place of submission given above in the presence of those bidders who may wish to attend.*
7. *The Bidders are advised to study the Bid Documents and strictly comply with the stipulated instructions and conditions in the submitting the bid.*
8.
9. *The Employer reserves the right to accept bid in par or whole and to reject any or all Bids without assigning any reasons thereof and is not bound to accept the lowest bid.*”

[underlining is to add emphasis].

After scrutiny of 19 pre-qualified contractors, only three (3) contractors, including the plaintiff remained in the field to participate in the final tender/ bidding process of the subject project. The plaintiff submitted its bid on May 17th, 2016 along with the other requisite documents, including a Bank Guarantee issued by Trust Investment Bank Limited, Lahore. The bids were opened on the same day in front of the other participants and the plaintiff was announced as the lowest bidder. The defendant No.2,

thereafter, vide its letter bearing No. KMTC/TMTD/BRTS/OL/2016/108 dated 23.05.2016, asked the plaintiff to confirm whether Trust Investment Bank Limited, Lahore, was a scheduled bank and further to provide confirmation/certification by the bank in this regard. For the sake of ready reference the portions of the said letter is reproduced as under:

“This is with reference to bid opening meeting for package-II, held on May17, 2016 for the subject project.

During the initial scrutiny, it has been observed that the Bid security submitted by your firm in the form of Bank Guarantee is from Trust Investment Bank Ltd. Lahore.

Clause IB15.2 of the Instructions to Bidders state that:

“The Bid Security shall be, at the option of the Bidder, in the form of deposit at call or a bank Guarantee issued by Scheduled Bank in Pakistan or from a Foreign Bank duly counter Guaranteed by Scheduled Bank in Pakistan having AA rating from PACRA/GCR, in favour of the Employer valid for a period 28 days beyond the bid validity date”

It is, therefore, requested to please confirm that Trust Investment Bank Ltd., Lahore is Schedule Bank in Pakistan and also provide confirmation/certification by the Bank at the earliest for further necessary action.”

[underlining is to add emphasis].

The said letter was subsequently replied to by the plaintiff on the very same day through its letter bearing No.GC/A.A.K/ADMIN/2016/98 dated 23.5.2016 and the defendant No.2 was informed that the Trust Investment Bank Limited is a scheduled bank in Pakistan and in this regard the bank’s reply was also annexed with the above reply/letter. For the sake of ready reference the portion of the said letter as well reply of Trust Bank are reproduced as under:

“Immediately upon receipt of your above referred letter, we approached Trust Investment Bank Limited Lahore for clarification, asked for, that Trust Investment Bank is a schedule Bank in Pakistan and the confirmation/certification by the Bank as desired by you.

Their reply is enclosed, herewith, for your consideration please.”

Reply of the Trust investment Bank Ltd.,:

*“Mr. Siraj Khan
Managing Partner
Gul Construction Company
Karachi*

Sub: Bid Security

With reference to your letter dated May 21st, 2016, we hereby confirm that we the trust Investment Bank Limited is incorporated in February 1992 and scheduled/Investment Bank under Laws of Pakistan. Further we are authorized to issue a bank Guarantee and financial instruments under the provisions of laws as applicable.

We have issued Bank Guarantees which have been duly accepted by the beneficiaries such as follows:

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contd...P-2

P-2

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.....

This letter is issued on a specific request without any responsibility/obligation of Bank or any of its officers.

Truly Yours,

Authorized Signatory”

The defendant No.2 on the very next day, vide its letter (No. KMTC/TMTD/BRTS/OL/2016/112 dated 24.05.2016), again asked the plaintiff to provide proper documentary evidence from the State Bank of Pakistan confirming that the Trust Investment Bank Limited, Lahore is a scheduled bank in Pakistan. It would be advantageous to reproduce relevant portions of the said letter as under:

“With reference above letter, the reply provided by you does not prove that Trust Investment Bank Ltd., Lahore is a scheduled Bank in Pakistan.

You are, therefore, again requested to please provide documentary evidences from State Bank of Pakistan informing that Trust Investment Bank Ltd., Lahore is schedule Bank in Pakistan at the earliest.”

[underlining is to add emphasis].

The defendant No.2, having not received the reply from the Plaintiff, again addressed a letter bearing No. KMTC/TMTD/BRTS/OL/2016/114 dated 25.05.2016, for confirmation of Trust Investment Bank Limited as scheduled bank from the State Bank of Pakistan. The relevant portion whereof is reproduced as under:

“In continuation of this office earlier letter vide No.KMTC/TMTD/BRTS/OL/2016/112.

You are again requested please provide a clarification and a letter issued by State Bank of Pakistan (SPB) along with the signatory's name and designation confirming that Trust Investment Bank Ltd., Lahore is a Schedule Bank in Pakistan by tomorrow at 4.00 pm sharp to M/s. NESPAK (consultant BRTS Orange Line Project as well as in the office of the undersigned.”

The Plaintiff through its letter bearing No.GC/A.A.K/ADMIN/2016/101 dated 25.05.2016, replied the above letters of the Defendant No.2. The plaintiff in the letter, besides clarifying the queries, also alternatively offered to the defendant No.2, a pay order for an amount equivalent to the guarantee amount submitted through the Trust Investment Bank Limited. Relevant portion of the said letter is reproduced as under:

“The Trust Investment Bank is incorporated with SECP as per Government of Pakistan Rules. We, as an attempt to resolve the matter, the documentary support i.e. Statutory Notification (S.R.O) GOP, SECP dated November 25th 2015 is enclosing herewith (02 Pages) that states the Authority of trust Investment Bank regarding the issuance of the Guarantee and its viability. The Clause 15B (b) of SRO describe the support behind the guarantee.

However, to avoid arguments and counter arguments series, we are prepared to submit as an alternate a Pay Order for an amount equivalent to the Guarantee amount, we submitted, through trust investment bank with the bid submitted on May 17th 2016.

We hope, you would very kindly accept our request as above and the matter would be settled.”

[underlining is to add emphasis].

Thereafter, the defendant No.2 sent another letter bearing No.KMTC/TMTD/BRTS/OL/2016/116 dated 26.05.2016 to the Plaintiff informing the latter that since it has not provided the required information within the time limit as provided in the letter dated 25.05.2016, hence, the defendants are proceeding with the finalization of bid evaluation report as per the conditions of the contract. The relevant portion of the said letter is reproduced as under:

“Kindly refer our letter no. KMTC/TMTD/BRTS/OL/2016/101 dated 25.05.2016 wherein you were asked to provide a clarification and a letter issued by State Bank of Pakistan (SBP) along with the signatory's name and designation confirming that Trust Investment Bank Ltd., Lahore is scheduled bank in Pakistan.

The above information has not been submitted within the time limit as communicated to you vide our referred letter. Instead

you have stated that Trust Investment Bank Ltd. Is incorporated with SECP as per Government of Pakistan Rules.

You are unable to provide the above information in order to fulfill the requirements of “Clause IB15.2 of the Instructions to Bidders” of Bidding Documents.

We are proceeding with the finalization of the Bid Evaluation Report as per the Conditions of the Contract.”

The plaintiff, thereafter, on 27.05.2016 lodged complaint with the defendant No.3-Redressal Committee, for the redressal of its grievances. However, in the intervening period, the Plaintiff filed the present suit on 02.6.2016, for declaration, permanent injunction and damages with the following prayers:-

- “A) declare that the plaintiff being lowest bidder is entitled to be awarded tender/contract as per the tender documents and instructions;*
- B) declare that the plaintiff’s Bank Guarantee is valid/legal or accept pay order as bid security as per tender terms, and further declare that its refusal is illegal and arbitrary, and without justification.*
- C) declare that the impugned Notice is arbitrary, malafide, illegal and without legal effect and set aside the same;*
- D) declare that the defendants cannot award the tender arbitrarily in colourful exercise of powers and malafide intention in alleged/subject bidding process, including awarding of contract, work orders to any other without permission of this Hon’ble Court;*
- E) permanently restrain the defendants from taking any adverse action against the plaintiffs, and to award the tender of Orange Line to any other bidder/party for procurement and for construction of Bus Rapid Transit till pendency of this suit;*
- F) award damages against the defendants jointly and severally and in favour of the plaintiffs in sum of Rs.50 million (Rupees five crore) as the Hon’ble Court deem just and proper’*
- G) to take legal action against the defendants and any/all officials/persons involved in maladministration, fraudulent/illegal procurement/tender rigging and malpractice;*
- H) grant of cost of suit;*
- I) grant any other relief deemed just and proper by this Hon’ble Court.”*

[underlining is to add emphasis].

3. Conversely, the Defendants No. 2 and 3 (the contesting defendants) filed joint written statement and counter-affidavit to the application (CMA No. 9342/2016) and denied the contentions/allegations leveled in the plaint as well as in the application. The case of the defendants as averred in the joint written statement and the counter-affidavit is that no bidder was declared as “the lowest” at the time of opening of the bids as the same was to be established after evaluation of bids pursuant to Rule 42 of Sindh Public Procurement Rules (SPPR) 2010. For the sake of ready reference relevant portion of Rule 42 of SPPR Rule 2010 is reproduced as under:

“42. Evaluation of bids. (1) All bids shall be evaluated in accordance with the evaluation criteria and other terms and conditions set forth in the bidding documents.

During the initial scrutiny of the bids it was observed that the bid security submitted by the plaintiff was a bank guarantee from Trust Investment Bank Lahore. In order to verify conformity of said bank guarantee with the provision of Clause-IB15.2 of the bidding documents (Instructions to the bidders), the Plaintiff was requested to provide confirmation that the Trust Investment Bank Limited Lahore is a scheduled Bank in Pakistan as per clause 43 of SPPR, 2010, relevant portions whereof is reproduced as under:

“43. Clarification of bids:- (1) No bidder shall be allowed to alter or modify his bid(s) after the expiry of deadline for receipt of the bids:

Provided that the procuring agency may ask the bidder for clarification needed to evaluate the bid but shall not permit any bidder to change the substance or price of the bid.”

The bidder (Plaintiff) though submitted its clarification regarding the Trust Investment Bank Limited, but the same was not found satisfactory, hence the defendants sent further letters to the plaintiff for confirmation through documentary evidence. As per the averments, the above confirmation was necessary because the quarterly report for period ending March 31st, 2016 available on the above named Trust bank’s website has mentioned it as a Non-Banking Finance Company (N.B.F.C.) regulated by the Securities and Exchange Commission of Pakistan (S.E.C.P.), whereas a scheduled bank is regulated by the State Bank of Pakistan. Further, the letter submitted by plaintiff on behalf of the Trust Investment Bank Limited did not contain the name and designation of an authorized signatory, which made the contents of the letters, submitted by the Plaintiff in clarification,

somewhat doubtful. As regards the offer of the plaintiff to submit an alternate pay order for an equivalent amount to the Bank Guarantee, the said Defendant No.2 justified its refusal by stating that it would have amounted to altering/amending the Bidding instructions/guidelines; relevant portion whereof is reproduced herein below_

“IB.22 Modification, Substitution and Withdrawal of Bids.”

22.1 Any bidder may modify, substitute or withdraw his bid after bid submission provided that the modification, substitution or written notice of withdrawal is received by the Employer prior to the deadline for submission of bids.

22.2

22.3 No bid may be modified by a bidder after the deadline for submission of bids except in accordance with Sub-Clauses 22.1 and 27.2”

[underlining is to add emphasis].

As per the averments, the defendants also disposed of the complaint lodged by Plaintiff before the Defendant No.3-Redressal Committee. Relevant portion of the said decision as reproduced in the written statement is being reproduced hereunder:

“After reviewing all documents and deliberations, the Redressal Committee unanimously agreed that in consideration of the Bank Guarantee submitted by the bidder and rating of the Bank as confirmed through State Bank of Pakistan’s website and M/s Trust Investment Bank website, it has been transpired that M/s Trust Investment Bank is not in the notified list of scheduled banks in Pakistan published by State Bank of Pakistan and hence the bid of M/s Gul Construction Co. is “NON-RESPONSIVE” and cannot be considered for Bid Evaluation Process.”

4. To controvert the pleas taken by the Defendants in their counter-affidavit, the Plaintiff filed rejoinder and denied the contentions and allegations leveled against the Plaintiff. It is, inter alia, stated in the said rejoinder that SPPR 2010 clearly favors the contentions of the plaintiff and the performance security to be submitted to the procuring agency nowhere mentions that the relevant security has to be furnished through a scheduled bank, therefore, Rule 39 of SPPR 2010 is wide enough to cover security submitted through non-banking finance companies (NBFC) as well. For the sake of reference Rule 39 of SPPR 2010 is reproduced as under:

“39. Performance Security._ (1) Procuring Agency shall, in all procurement of goods, works and services, carried out through open competitive bidding, require security in the form of pay

order or demand draft or bank guarantee, an amount sufficient to protect the procuring agency in case of breach of contract by the contractor or supplier or consultant, provided that the amount shall not be more than 10% of contract price.

(2) The security shall be provided in an appropriate form and amount, as provided in the bidding documents.”

[underlining is to add emphasis].

5. I have heard Mr. Ghulam Haider Shaikh, learned Advocate for the Plaintiff and Mr. Ziauddin Junejo learned Additional Advocate General, Sindh for Defendants No. 1 to 4 and with their assistance also perused the material available on record.

6. Mr. Ghulam Haider Shaikh, learned counsel for the plaintiff, during the course of arguments has relied upon Annexure-**G** (*defendant's letter dated 23.05.2016*), **I** (*letter of Trust Investment Bank dated 23.05.2016*) and **K** (*plaintiff's letter dated 25.05.2016*) to the plaint as well as Rules 37 and 39 of SPPR 2010. In support of his argument he has also relied upon the following case law:

SBLR 2012 Sindh 1483 (*M/s. Iqbal & Sons J/V AS Engineering v. City District Government & Others*).

In this case the Hon'ble Division bench of this court while deciding the constitutional petition has held, that while rejecting the bid of the petitioner and awarding contract to respondent No.3, the concerned authority has not followed the Sindh Public Procurement Rules 2010, nor has given cogent reasons for considering the bid of the petitioner as non responsive and also petitioner has not availed the alternate departmental remedy provided under the rules, therefore, the impugned action respondents was declared not sustainable in law. Petition was disposed of and the matter remanded back to examine the claim of the Petitioner.

2009 CLC 1104 (*Fateh Muhammad Agha and another V. City District Government, Karachi and 5 others*)

In this case the Hon'ble Division bench of this court while deciding constitutional Petition has held, that the discretion and right reserved to reject bid or offer are to be exercised fairly, equitably and before the acceptance by the competent authority. Once the bid is accepted by the competent authority, it lacks discretion to cancel the auction.

7. In rebuttal, the learned Additional Advocate General, Sindh has argued that the Defendants have neither committed any illegality nor violated any of the provisions of Sindh Public Procurement Rules (SPPR) 2010. Conversely, the actions of the Defendants in the bidding process of

the subject project, which in fact is for the benefit of public at large, is fully covered under the procurement rules and the terms and condition of the bid documents. During the course of his arguments he relied upon terms of bidding documents, Rules 37 and 39 of SPPR 2010 and Regulations (framed there under), specifically Regulation 6.4. For the sake of ready reference Rule 37 of SPPR 2010 is reproduced as under:

“37. Bid Security. (1) The procuring agency shall require the bidders to furnish a bid security not below one percent and not exceeding five percent of the bid price, which shall remain valid for period of 28 days beyond the validity period for bids, in order to provide the procuring agency reasonable time to act, if the security is to called.

(2) Bid security shall be released to the unsuccessful bidders once the contract has been signed with the successful bidders or validity period has expired.”

8. I have given due consideration to the arguments advanced by the learned counsel for the parties, minutely perused the material available on record, the applicable laws and the case law on the subject.

9. From the record it appears that the Bids were opened on the very same day, that is, on 17.05.2016 and the Defendant No.2, being the procuring agency, read aloud the name of bidders and total amount of each bid as required under Rule 41(5) of the SPPR 2010. However, no bidder was declared ‘the Lowest’ at the time of opening of the bids as the same was to be done after evaluation of the bids in terms of Clause IB.26 of bidding documents (instruction to bidders) and Rule 42 of SPPR 2010. This factual aspect has neither been plausibly controverted by the Plaintiff, nor from the present record it appears that Plaintiff was declared the lowest/successful bidder. For the sake of ready reference relevant portion of Clause IB.26 of Bidding Documents is reproduced as under:

“IB.26 Examination of Bids and Determination of Responsiveness

26.1 Prior to the detail evaluation of bids, the employer will determine whether each bid is substantially responsive to the requirements of the bidding documents.

26.2 a substantially responsive bid is one which (i) meets the eligibility criteria; (ii) has been properly signed; (iii) is accompanied by the required bid security; and (iv) conforms to all the terms, conditions and specifications of the bidding documents without material deviation or reservation. A material deviation or reservation is one (i) which affect in any substantial way the cope, quality or performance of the Works; (ii) which limits any substantial way, inconsistent with the Bidding Documents, the Employer’s rights or the bidder’s obligations under Contract; or (iii) adoption/rectification whereof would

affect unfairly the competitive position of the other bidders presenting substantially responsive bids.

26.3 If a bid is not substantially responsive, it will be rejected by the employer and may not subsequently be made responsive by correction or withdrawal of the non-conforming deviation or reservation.”

[underlining is to add emphasis].

10. The perusal of correspondences exchanged between the Plaintiff and the Defendant No.2, reflect that the bank guarantee, which was required to be submitted along with the bid as per the terms and the conditions of the Bid Documents (Instructions to Bidders), was to be issued by a scheduled bank in Pakistan, whereas the plaintiff has submitted the Bank Guarantee issued by a Trust Investment Bank, which is Non-Banking Finance Company (NBFC), regulated by the Securities and the Exchanged Commission of Pakistan (SECP).

11. A Scheduled Bank and NBFC are two distinct entities, hence, cannot be considered on the same footing. A Scheduled Bank is regulated by the State Bank of Pakistan under the State Bank of Pakistan Act, 1956, whereas, a NBFC is regulated by SECP under Companies Ordinance 1984. Respective definitions of Scheduled Bank and NBFC under relevant laws are being reproduced as under:

“As per Section 2 (m) of the State Bank of Pakistan Act, 1956 “schedule bank” means a bank for the time being included in the list of banks maintained under sub-section (1) of section 37 of the State Bank of Pakistan Act, 1956.

The Scheduled Banks is defined under section 37 of the State Bank of Pakistan Act, 1956_

37. Scheduled banks. (1) The Bank shall maintain at all offices and branches an up-to-date list of banks declared by it to be scheduled banks under clause (a) of sub-section (2).

- (2) The Bank shall, by notification, in the official Gazette:--
- a) declare any bank to be scheduled bank which is carrying on the business of banking in Pakistan and which:--
 - (i) is a banking company as defined in section 277-F of the Companies Act, 1913, or a co-operative bank, or a corporation or a company incorporated by or established under any law in force in any place in or outside Pakistan;
 - (ii) has a paid-up capital and reserve of an aggregate value of not less than five lakhs of rupees:

Provided that in the case of a co-operative bank, an exception may be made by the bank:

- (iii) satisfies the Bank that its affairs are not being conducted in a manner detrimental to the interests of its depositors;

The structure and work of the Non Banking Finance Companies [NBFC] are defined under PART VIIIA, Section 282A of the Companies Ordinance, 1984_

Section 282A. The provisions of this Part shall apply to—

(a) non-banking finance companies (NBFCs) which include companies licensed by the Commission to carry out any one or more of the following forms of business, namely:--

- (i) Investment Finance Services;
- (ii) Leasing;
- (iii) Housing Finance Services;
- (iv) Venture Capital Investment;
- (v) Discounting Services;
- (vi) Investment Advisory Services;
- (vii) Asset Management Services;
- (viii) any other form of business which the Federal Government may, by notification in the official Gazette specify from time to time; and

In the circumstances, the bank guarantee issued by a NBFC, cannot be considered as the bank guarantee issued by a scheduled bank.

12. In absence of any material on record, which could confirm that State Bank has issued any directive and or notification declaring said Trust Investment Bank as a scheduled bank, the plea of the plaintiff that the Bank Guarantee issued by Trust Investment Bank be treated/considered as Guarantee of a scheduled bank is not tenable in the circumstances. Furthermore, despite various requests, the plaintiff has failed to provide requisite documents and instead offered a Pay Order of an amount equivalent to the Bank Guarantee issued by the same/said Trust Bank, was not covered either under the terms and condition of the Bid Documents (Instructions to the Bidders) or under procurement rules {SPPR 2010}.

13. The present record of the case also reveals that the plaintiff though approached the defendant No. 2- Grievance Committee on 27.05.2016, but, without waiting for the decision of the said Committee and without availing the remedy of appeal before the Chief Secretary under the SPPR 2010 as provided against the decision of the Redressal Committee, filed the present suit on 02.06.2016, hence, the Plaintiff has without any plausible reason bypassed the remedy available under Rule 31 of SPPR 2010, inter alia, whereby a Special Forum is created. In this regard it will

be advantageous to reproduce relevant Sub-Rules of Rule 31 of SPPR 2010 as under:

“31. Mechanism for Redressal of Grievances.- (1) The procuring agency shall constitute a committee for complaint redressal comprising odd number of persons, with appropriate powers and authorizations, to the address the complaints of the bidders that may occur during the procurement proceedings.

(2).....

(3) any bidder being aggrieved by any act or decision of the procuring agency during procurement proceedings may lodge a written complaint after the decision causing the grievance has been announced.

(4).....

(5) The committee shall announce its decisions within seven days. The decision shall be intimated to the bidder and the Authority within three working days by procuring agency. In case of failure of the Committee to decide the complaint, the Procuring Agency shall not award the contract.

(6).....

(7).....

(8) A bidder not satisfied with decision of the procuring agency’s complaints’ redressal committee may lodge an appeal to the Chief Secretary through the Authority, who shall refer the matter to a review panel as per Rule 32.

(9) A bidder may file an appeal to the Chief Secretary provided:
(a) that the bidder has exhausted his complaint to the complaint redressal committee: and

(b) that he has not withdrawn the bid security deposited by him during the procurement process.

(10).....

(11).....

(12).....

(13).....

(14).....

(15) The decision of the Chief Secretary shall be final and procuring agency shall act upon such findings. After the decision has been issued, the complaint and the decision shall be hoisted by the authority on its website within 3 working days.”

14. The provisions of Rule 31 of SPPR 2010 (ibid), provides an exhaustive time bound mechanism for the afore referred Committee to proceed and decide the complaint. Furthermore, in the event, if the bidder is still dissatisfied with the decision of Redressal Committee, an appeal to the Chief Secretary through the Authority has been provided. The Plaintiff, however, instead of waiting for the decision (at least seven days

as provided under sub rule (5) of Rule 31-SPPR, 2010 to the committee to decide the complaint) filed the present suit before the lapse of the aforesaid period.

15. The Plaintiff alleged *mala fide* on the part of the defendants for not accepting bid and awarding the contract to the plaintiff despite being lowest, which *mala fides* could only be proved after leading the evidence. In this regard reliance can be placed on the cases of *Sub.(Retd.). Muhammad Ashraf v. District Collector Jhelum and others*. Reported in PLD 2002 SC 706, AND *Tabussum Shehzad v. I.S.I and others*, reported in 2011 SCMR 1886.

16. It is an admitted position that the subject project is of national importance and Defendant No.2 being a procuring agency, it is saddled with a duty to scrutinize the financial health of bidders and to take measures for safeguarding public money. Main object of requiring a bidder to furnish a performance guarantee from a Scheduled Bank is to ensure that in the event of default such bank guarantee can be encashed without any let or hindrance, inter alia, to prevent causing any loss to the procuring agency. Thus, prima facie, it appears, that at present, the Defendants have not committed such acts for which the Plaintiff has an arguable case to the extent of grant of injunction.

17. Adverting to the case laws cited by the Plaintiff, I am of the considered view that the same are not applicable to the facts of the case in hand; inter alia, as in the first cited case the procuring agency violated the Procurement Rules while awarding the contract and in the second reported judgment, the petitioner was initially declared as lowest/successful and his bid was accepted, but, subsequently, rejected by the Respondent Authority, whereas, in the instant case neither any procuring rules have been violated, nor, as discussed above, the Plaintiff was declared lowest/successful bidder.

18. Keeping in view the fact that the subject project is for the benefit of the public at large, any delay in its commencement and completion on account of restraining order would cause a burden on public exchequer and inconvenience to public at large, hence balance of convenience lies in favour of the Defendants. Furthermore, since the Plaintiff itself quantified the damages it may suffer, hence, the plea of irreparable loss is also not available to Plaintiff. In this regard reliance can be placed on the case of

Muhammad Kashan v. Coca Cola Export Corporation Through Chief Executive and 3 others. Reported in 2015 CLD 1513.

19. It is a well settled principle that the applicant (Plaintiff) who seeks equitable and discretionary relief from court in the form of an injunction, under Order XXXIX Rules 1 and 2, C.P.C., has not only to establish that he has a prima facie case, but he has also to show that he has balance of convenience on his side and that he would suffer irreparable injury/loss unless he is protected during the pendency of suit. The court is required to take into consideration whether the question of balance of inconvenience or irreparable loss to the party seeking such relief co-exist or not. In this regard reliance can be placed on the cases of Puri Terminal Ltd. v. Government of Pakistan reported in 2004 SCMR 1092. AND Marghub Siddiqui v. Hamid Ahmed Khan and 2 others reported in 1974 SCMR 519.

20. Consequently, in my considered view, Plaintiff has failed to show that the basic ingredients for grant of injunction are present in its instant injunction application CMA No.9342 of 2016, which is accordingly dismissed and the ad-interim order passed earlier is hereby vacated.

21. However, it must be clarified that the observations made above are tentative in nature and may not influence the final determination of the case.

JUDGE