

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui

Suit No. 2139 of 2021

Spirit Industries (Pvt.) Limited & others
Versus
Province of Sindh & others

Date of Hearing: 15.03.2022

Plaintiffs: Through M/s. Salahuddin Ahmed, Nadeem Ahmed and Shahzad Nizam Advocates.

Defendant No.1: Through Mr. Ghulam Abbas, Assistant Advocate General.

Defendant No.2: Through Mr. Muhammad Asif Malik Advocate.

Defendant No.3: None present.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Through this suit plaintiffs who have common interest in the instant proceedings have jointly sought a decree for declaration of contracts (five in number) having been executed between them and the procuring agency/defendants to be valid, subsisting and binding upon the parties and further sought directions for the defendants to adhere to the terms and conditions of such contracts, effectively seeking an order against the defendants, to accept the delivery of subject goods and restrained defendants from cancelling and terminating the aforesaid contracts.

2. Notices/summons were issued. Defendant No.1, Province of Sindh, through Secretary School Education & Literacy Department, Ministry of Education, and defendant No.2, the procuring agency, filed their respective parawise comments/written statement to the memo of plaint. Pleadings revealed that at no point of time the contracts/awards were threatened to be cancelled by defendants or such action was even

under consideration, the delivery however only delayed, perhaps on the count that high-powered committee was constituted for the investigation of the procurement process and to inspect complete inventory of the goods likely to be supplied under the subject contracts/ Awards.

3. The matter triggered and gained suspicion that goods were procured at a higher price when a story was circulated in the media, which prompted the plaintiffs to file the suit; that defendant No.1, through those who intend to take advantage of the situation, was being pressurized to cancel and terminate aforesaid contracts on account of some newspaper clippings.

4. I have heard learned counsel for parties who took me to their respective pleadings and documents attached. Since short controversy was claimed, the counsel sought disposal of this suit summarily on the basis of admitted material available on record and hence, as suggested by the learned counsel for parties, following issues were framed on 23.02.2022:-

- i. Whether lawful contract was (contracts were) executed between plaintiff(s) and defendant?
- ii. Whether any party thereunder could unilaterally cancel the agreement on any term of the agreement?
- iii. What should the decree be?

5. Plaintiffs are the entities who participated in the subject tenders initiated by Province of Sindh (defendant No.1) who through a procurement committee (defendant No.2) formed under Rule 7 of Sindh Public Procurement Rules, 2010 invited subject tenders whereas defendant No.3 is a statutory regulatory authority established under section 3 of Sindh Public Procurement Act, 2009. There was an earlier tender for procurement of similar goods in the year 2009 i.e. for the

procurement of dual school desks for different regions of the province of Sindh however the said tender could not be materialized on account of some litigation and tender was subsequently scraped, which is not disputed.

6. Fresh procurement process was initiated under Rules of 2010 and fresh advertisements were made in widely circulated newspapers on 17.03.2021 to procure the furniture for schools in Hyderabad, Sukkur, Larkana, Mirpurkhas and Shaheed Benazirabad regions. The bids were based on single stage two envelop procedure. In response to the bidding process ten entities including plaintiffs submitted their bids and plaintiffs were first declared technically responsive and thereafter they were declared successful bidders accordingly in respect of their respective regions. Plaintiff No.1 was declared successful bidder for Lot-08 Larkana Region-II, whereas plaintiffs No.2, 3 and 4 were declared successful for Lots-03A & 03B Hyderabad, Lot-09 Mirpurkhas Region-I and Lot-10 Shaheed Benazirabad Region, respectively. One of participants (plaintiff No.2), in pursuance of the bid terms, held successful for two bids, as permitted.

7. In pursuance of such process, letters of acceptance/Award dated 29.06.2021 were issued in favour of plaintiffs. As required, plaintiffs submitted samples of dual desk for approval and so also unconditional bank guarantee amounting to 5% of the contract amount. On fulfillment of such conditions five contracts of different dates were executed between plaintiffs and defendant No.1, description of which are as under:-

S.No.	Plaintiff	Contract price
1.	Plaintiff No.1/Spirit Industries (Pvt.) Limited.	PKR.725,059,530/- (for supply of 26,600 dual desks)
2.	Plaintiff No.2/Seiger Industries (Pvt.) Limited.	PKR.662,009,400/- (for supply of 26,600 dual desks)

3.	Plaintiff No.2/Seiger Industries (Pvt.) Limited.	PKR.662,009,400/- (for supply of 26,600 dual desks)
4.	Plaintiff No.3/Consortium led by Analytical Solutions (Pvt.) Limited.	PKR.733,611,060/- (for supply of 26,600 dual desks)
5.	Plaintiff No.4/SAM Traders	PKR.724,955,400/- (for supply of 26,600 dual desks)

8. It is claimed that no sooner the contracts were awarded they (plaintiffs) started purchasing raw material including wood and steel pipes of the required specifications and also claimed to have manufactured thousands of dual desks. It is case of the plaintiffs that those who were not successful bidder then resorted to media campaign (as disclosed above) and spread false rumors, created misleading impression and the prices approved for the subject goods were being compared with the locally manufactured dual desks such as the material used therein as available in the local market, which was made of cheap MDF and pipes of weaker strength. However, per learned counsel defendant No.1 on 15.09.2021 has reassured that the procurement process was transparent and has also refuted all allegations which were circulated in the media.

9. A notification dated 17.09.2021 at the relevant time was then came as a shock for plaintiffs whereby defendant No.1 formed a high-powered committee to review aforesaid procurement and to submit findings regarding the procedure/cost and quality of furniture. It is this notification which is also under challenge in these proceedings on the count that since procurement process was transparent, there was no justification in forming a high-powered committee. It was circulated in the media that high-powered committee is going to cancel and terminate the subject contracts which, as pleaded, were outcome of transparent process. It is under the above circumstances that plaintiffs pleaded that they have been declared successful after competitive and transparent bidding process and at this point of time, when the goods

have been manufactured and ready to supply, it is highly unjustified that contracts were threatened to be cancelled/terminated under the garb of said notification.

10. In response to the pleadings of the plaintiffs, defendant No.2 in terms of paragraph 10 of the written statement has conceded that though answering defendant i.e. defendant No.2 had no concern with the allegations of those who were not successful in the bidding process however they experienced it in the past that the firms who fail to qualify prequalification invariably use the media campaign to sabotage process of procurement. In paragraph 10 of this reply, defendant No.2 further pleaded that it was a transparent procurement process and each and every thing was vetted and inspected as per the specification of contracts. It further pleaded that the contracts were awarded on merit without any fear, inducement and personal liking or disliking.

11. In paragraph 13, defendant No.2 conceded that they (defendant No.2) never created any hindrance in performance of their (plaintiffs') work as per the contracts and that no notification that concerns with the cancellation of contracts has ever been issued by answering defendant affecting rights of the plaintiffs and that the purpose of the notification under consideration/challenge is to inspect the inventory of the goods likely to be supplied under subject contracts. Defendant No.2 thus concluded that since the contracts were never terminated nor had any intention, however, it is right of the defendants to inspect the goods in question and thus the cause to file instant suit never accrued. Defendant No.2 in fact filed a statement on the strength of arguments advanced on 15.03.2022 that they have no intention to cancel the contracts rather intend to inspect the inventory of goods as per specifications.

12. Similarly, defendant No.1 i.e. Secretary to Government of Sindh, School Education & Literacy Department in paragraph 12 of its parawise

comments agreed that the prices of the desk were at higher side. Paragraph 14 of the plaint has again denied the rumors of cancellation by defendant No.1 and it was clarified that the Committee was constituted to take appropriate action as per law. Defendant No.1 never pleaded for the dismissal of suit in the ultimate paragraphs.

13. Since no evidence led, pleadings and undisputed record perused. My findings on the above issues with reasons are as under:-

FINDINGS

Issue No.1	:	Parties are not at issue.
Issue No.2	:	Answered accordingly.
Issue No.3	:	Suit decreed in terms incorporated.

REASONS

Issue No.1

14. The first issue as framed is the lawfulness of contracts which were executed.

15. No doubt the second process of procurement of dual desks was initiated through public notices/advertisements wherein ten entities participated and at no point of time such process of procurement was challenged on any count by any of the parties who remained unsuccessful. It is only newspaper/media campaign which eventually halted process of supply of goods and in response thereto a high-powered committee through impugned notification was constituted. Defendants have not been able to satisfy this Court that the procurement process faulted or lack transparency. In pleadings, defendants kept mysteriously quiet leaving it to Court to decide, however, pleadings suggested that the parties are not at issue as far as Issue No.1 is concerned.

16. Nonetheless the high-powered committee since September 2021 has not taken any action whatsoever as far as the procurement process is concerned. Defendants were only restrained on 29.09.2021 in terms of interim order of this Court to the effect that no adverse/ coercive action contrary to the terms of the contract entered into between plaintiffs and defendants, be taken. Hence, there was nothing to stop them from taking a lawful action.

17. It is the responsibility of the procurement committee under the law to have inspected the inventory of goods strictly in terms of the specification as made out in the contracts to which Mr. Salahuddin Ahmed, learned counsel appearing for plaintiffs, has not objected. Mr. Muhammad Asif Malik, learned counsel for defendant No.2, has also very vocally stated while addressing the Court that they have no intention to cancel the contracts rather they are more interested in inspecting the inventory i.e. dual desks, to be supplied under the contract. Mr. Salahuddin Ahmed has not opposed inspection. Learned counsel for defendant No.2 has also filed a statement in writing in that regard, which was taken on record.

18. For Issue No.1, perusal of the record and/or replies of defendants No.1 and 2 clearly stipulate that parties are not at issue. In that regard paragraph 10 of the written statement of defendant No.2 i.e. procurement agency is very material, which is reproduced as under:-

“10. That, regarding the contents of Para 12 of the plaint, it is humbly submitted that the answering defendant has no concern with the allegations leveled by few firms, however it is humbly clarified that it has been experience in the past that if any firm failed to qualify the prequalification regarding provisioning of requisite furnitures as per the specifications, they used to sabotage the process of procurement. It is humbly clarified that there was transparent procurement process and each and every thing was vetted and inspected as per the specification of contract. It is specifically clarified that the contract were awarded on merit without any fear,

inducement, and personal liking or disliking. The contents of para No.3 and 4 above are reiterated as further reply of para under reply.”

19. In this reply defendants have gone far ahead. Though defendants were yet to receive the goods yet they claimed to have inspected as per specifications (if the emphasis meant for goods to be supplied). On the strength of this admission that there was a transparent procurement process and/or everything was vetted and inspected as per specification of contract and that the contracts were awarded on merit without any fear, inducement, personal liking or disliking, this Issue No.1 does not arise. Similarly, in response to paragraph 9 and 10 of the plaint, defendant No.1 has conceded rather agreed to the contents of these two paragraphs which substantially pleaded that the contracts were awarded as per law.

20. On the strength of these pleadings, I answer Issue No.1 that parties were/are not at issue as far as execution of lawful contracts are concerned and is answered accordingly.

Issue No.2

21. Insofar as issue No.2 i.e. whether any party under the contracts could unilaterally cancel the same on any term thereof is concerned, no doubt the execution of contracts and their lawfulness is not objected, however, the material/goods likely to be supplied thereunder shall be subjected to scrutiny of the procuring agency. Contracts further provide events when termination could be effected.

22. Clause 35.1 deals with the termination for default, which is reproduced as under:-

“35.1 Termination for Default

a) The Procuring Agency, without prejudice to any other remedy for breach of Contract, by Notice of default sent to the Supplier, may terminate the Contract in whole or in part;

- i) *If the Supplier fails to deliver any or all of the Furniture Items within the period specified in the Contract, or within any extension thereof granted by the Procuring Agency pursuant to GCC Clause 34; or*
- ii) *If the Supplier fails to perform any other obligation under the Contract.*
- b) *If the Supplier, in the judgment of the Procuring Agency has engaged in corrupt and fraudulent practices, as defined in GCC Clause 3, in competing for or in executing the Contract.*
- c) *In the event the Procuring Agency terminates the Contract in whole or in part, pursuant to GCC Clause 35.1(a), the Procuring Agency may procure, upon such terms and in such manner as it deems appropriate, Furniture Items or Related Services similar to those undelivered or not performed, and the Supplier shall be liable to the Procuring Agency for any additional costs for such similar Furniture Items. However, the Supplier shall continue performance of the Contract to the extent not terminated.”*

23. Similarly, the termination clause of the General Conditions of contract is 35.3 which provide details of the events when a termination could be caused, which is as under:-

“35.3 *Termination for Convenience

- (a) *The Procuring Agency, by Notice sent to the Supplier, may terminate the Contract, in whole or in part, at any time for its convenience. The notice of termination shall specify that termination is for the Procuring Agency’s convenience, the extent to which performance of the Supplier under the Contract is terminated, and the date upon which such termination becomes effective.*
- (b) *The furniture items that are complete and ready for shipment within twenty-eight (28) days after the Supplier’s receipt of the Notice of termination shall be accepted by the Procuring Agency at the Contract terms and prices. For the remaining Furniture Items, the Procuring Agency may elect:*
 - (i) *To have any portion completed and delivered at the Contract terms and prices; and/or*
 - (ii) *To cancel the remainder and pay to the Supplier an agreed amount for partially completed Furniture Items and for materials and parts previously procured by the Supplier.”*

24. It is not the case of any defendants that in violation of any of the above covenants of contract, any action is contemplated. Undoubtedly, contracts contemplate events where such action could be initiated but it cannot be unilateral as it is dependent on events disclosed but in any case, defendants have not put forward their case within frame of above clauses.

25. Insofar as inspection/inventory of goods is concerned, the parties have agreed in terms of the contracts/agreements in that regard followed by Clause 26 of General Conditions of Contract (GCC) and Particular Conditions of Contract titled as “inspection and tests”.

Relevant extract from the same are reproduced as under:-

“From General Conditions of Contract

26.1 The Procuring Agency or its designated representative/s shall have right to inspect and/or to test the furniture items to confirm their conformity to the specifications at no extra cost to the Procuring Agency. Also, the Supplier shall at its own expense and at no cost to the Procuring Agency carry out all such tests and/or inspections of the furniture items as specified in the Schedules to Bid.

26.2 The inspection and tests may be conducted on the premises of the Supplier or its Subcontractor, at point of delivery, and/or at the final destination of the furniture items, as specified in the PCC subject to GCC Sub-Clause 26.3, if conducted on the premises of the Supplier or its Subcontractor, all reasonable facilities and assistance, including access to drawings and production data, shall be furnished to inspectors at no charge to the Procuring Agency.

26.3 The Procuring Agency or its designated representative/s shall be entitled to attend the tests and/or inspections referred to in GCC Sub-Clause 26.2, and the cost of all such expenses incurred in connection with such attendance including, but not limited to, all traveling and board and lodging expenses will be borne by the contractor.

.....

From Particular Conditions of Contract

GCC Sub Clause 26.1

In addition to G.C.C, Inspection and tests prior to shipment of Goods and at final acceptance are as follows:-

- *Visual inspection.*
- *Any tests to ascertain the quality, standard and veracity of the furniture and the material so used.*
- *Goods packing for safe transportation till final destination (it will be responsibility of the supplier to ensure safety of goods till final destination and the SELD may ensure quality of goods before transportation - at the point of origin).*
- *Stage inspections where deemed necessary for example (Inspection of Raw materials to be used, source of materials, inspection during manufacturing, prior to polishing and then on finished product) at manufacturer's risk and expense.*
- *Goods are new and unused; and*
- *Beneficiary (each school) will inspect each item at final destination. (Document duly verified and signed by authorized representative(s) is mandatory to get final 10% (Ten) percent payment released from SELD/concerned office)*

GCC Sub Clause 26.4

The Supplier would give 07 days of advance notice in writing to the procuring agency before conducting any stage inspection and before final polishing of the furniture.”

26. The schedule of the supply of the dual desk is provided therein and so also specification of the goods and that was yet to mature when media campaign started and suit was filed. A very categorical statement was given by defendants that they are not cancelling the contracts nor have any intention, rather interested in inspection of the goods as per specifications.

27. As admitted by plaintiffs in the pleadings, they have already attempted to supply the goods in terms of paragraph 11 of the plaint. This statement of fact in terms of paragraph 11 of the plaint was not denied by defendant No.2 in terms of paragraph 9 of the written statement, whereas defendant No.1 has left it open subject to proof by the plaintiffs. It seems that strategically parties resorted to litigation to have an order of the Court in presence of media campaign and were not

willing to do it themselves. Cause for filing this suit is only to the extent that defendants gave a deaf ear to the requests of plaintiffs as far as supply and its acknowledgment is concerned. Defendants are within their rights to accept and inspect the goods as per specifications before goods could be acknowledged. Therefore, if a Committee is created or formed for inspection of goods, the plaintiffs should not shy away and the only purpose left for the Committee is to carry out above mandate as per terms of the contracts. The issue is answered accordingly.

Issue No.3

28. Upshot of the above discussion and findings of Issues No.1 and 2 is that the suit is decreed to the extent that contracts, since not disputed were/are lawful however supply and inspection of goods be carried out as per contracts. There will no order as to costs.

Dated:

J U D G E