

# THE HIGH COURT OF SINDH, KARACHI

## Suit No. 971 of 2022

[M/s. Insaf & Brothers versus Province of Sindh & others]

Plaintiff : M/s. Insaf & Brothers through Mr. Maaz Waheed, Advocate along with Mr. Usman Khan, Advocate.

Defendant No.1 : Province of Sindh through Mr. Imran Ahmed Jatoi, Assistant Attorney General, Sindh.

Defendants 2, 4 & 6 : Nemo.

Defendant No.3 : Superintendent Engineer, DMC (Central) through Mr. Muhammad Asad Ashfaq Tola, Advocate.

Defendant No.5 : M/s. Haji Syed Ameer & Brothers through M/s. Badar Alam and Farzana Yasmin, Advocates.

Defendant No.7 : Sindh Public Procurement Regulatory Authority through Mr. Qamar Zaman Shah, Assistant Director (Legal).

Dates of hearing : 08-11-2022, 23-11-2022 & re-hearing on 07-05-2024.

Date of decision : 13-05-2024

## ORDER

**Adnan Iqbal Chaudhry J.** - The suit is primarily for a declaration that the impugned order dated 15.06.2022 passed by the Review Committee under Rule 32 of the Sindh Public Procurement Rules, 2010 [**SPP Rules**] is unlawful, and for consequential relief. By **CMA No. 10044/2022** under Order XXXIX Rules 1 and 2 CPC, the Plaintiff prays for suspension of the impugned order pending suit. An interim order to that effect was passed by this Court on 27.06.2022 considering that the underlying project had commenced and was time-bound. By **CMA No. 11453/2022** under Order XXXIX Rule 4 CPC, the Defendant No.5 prays for vacating the interim order, and by

CMA No. 11454/2022 under section 10 CPC he also prays for staying the suit until decision in C.P. No. D-3302/2022.

The chronology of events discerned from the pleadings of the parties is as follows.

Chronology of events:

2. On 08.01.2022, the procuring agency i.e. the District Municipal Corporation Karachi (Central) [DMC - Defendant No.2] invited tenders for "Rehabilitation of existing 4400 Road from D-KA More (7000 Road) to 5000 Road, New Karachi" [the Project], which was part of a larger project called 'Competitive & Livable City of Karachi' (CLICK) funded by the World Bank.<sup>1</sup> The process was open-competitive bidding, single stage-one envelope procedure<sup>2</sup>. The Plaintiff and the Defendant No.5 were amongst the bidders.

3. The Procurement Committee of the DMC opened the bids on 26.01.2022 to reveal that the Plaintiff had quoted the third-lowest price for the Project, whereas the Defendant No.5 had quoted the highest price.<sup>3</sup> The bids were then sent to the Project Consultant (Defendant No.4) for evaluation.<sup>4</sup>

4. The Project Consultant submitted its evaluation report to the Procurement Committee on or about 11.02.2022, which found that only the Defendant No.5 and the Plaintiff had submitted complete and responsive bids *albeit* both were passed as follows:

Defendant No.5 - "Conditionally passed in Relevant Experience  
Conditionally passed in Plant & Equipment"

Plaintiff - "Conditionally passed in Plant & Equipment  
Conditionally passed in Key Persons"

Per the Project Consultant, the above shortcomings in both bids were 'minor deviations'. However, since the Plaintiff was found to be the

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<sup>1</sup> Bidding Data, page 267.

<sup>2</sup> As per Rule 46(1) of the Sindh Public Procurement Rules, 2010.

<sup>3</sup> Minutes of the meeting of the Procurement Committee dated 26.01.2022, page 277.

<sup>4</sup> *Ibid.*

'lowest evaluated bidder', the Consultant suggested that the Plaintiff "should be asked to provide ownership documents/rental agreements for Plant and Equipment and complete CVs for Key Persons before the issuance of Letter of Acceptance [LOA]."

5. Contrary to the above, on 14.02.2022, the Procurement Committee, headed by the erstwhile Superintendent Engineer namely Sikandar Ali Mallah, held that the Plaintiff was in 'major deviation' of the eligibility criteria and marked it's bid as 'non-responsive'; and on 15.02.2022, the Procurement Committee issued a Bid Evaluation Report under Rule 42, SPP Rules stating that only the Defendant No.5 was eligible and recommended that the contract be awarded to him.

6. On 17.02.2022, the Plaintiff filed a complaint under Rule 31, SPP Rules before the Complaints Redressal Committee [**CRC-Defendant No.6**] constituted by the DMC. In its meeting dated 25-02-2022, the CRC noted certain deficiencies in the bidding documents of the Plaintiff but referred that matter to the Project Director, PIU, Click for expert opinion, who in turn asked for the recommendation of the Project Consultant (Defendant No.4). By letter dated 03.03.2022, the Project Consultant recommended that the contract be awarded to the Plaintiff who had already been assessed by it as the lowest evaluated bidder.

7. By its decision dated 08.03.2022, the CRC reversed the Procurement Committee's decision for awarding the contract to the Defendant No.5, and agreed with the Project Consultant that the contract should be awarded to the Plaintiff as it would also save the exchequer a sum of Rs. 10 million.

8. It transpired, that in the meanwhile, the erstwhile Superintendent Engineer namely Sikander Ali Mallah had proceeded to issue a Letter of Award dated 18.02.2022 to the Defendant No.5, and on 22.02.2022 he executed a contract in favour to the Defendant No.5. However, given the decision of the CRC, the Defendant No.3 issued letter dated 11.04.2022 to withdraw said Letter of Award.

9. Thereafter, by Letter of Award dated 12.04.2022, the contract was offered to the Plaintiff, who accepted, and on 18.04.2022 the contract was executed in his favour. On 28.04.2022, the Project Engineer gave notice to the Plaintiff to commence works. By letter dated 24.05.2022, the Municipal Commissioner DMC made a reference to the Secretary, Local Government for taking action against Sikander Ali Mallah for causing loss to the national exchequer.

10. By letter dated 18.04.2022, the Defendant No.5 complained to the DMC, the Project Consultant and the SPPRA against the withdrawal of the contract from him. That complaint was forwarded by the SPPRA to the Review Committee, who treated it as an appeal under Rule 32, SPP Rules. On 28.05.2022, the Defendant No.5 also filed C.P. No. D-3302/2022 before the High Court to challenge the withdrawal of the contract from him.

11. On 15.06.2022, the Review Committee passed the impugned order under Rule 32, SPP Rules, which is challenged by the Plaintiff in this suit.

**CMA No. 11454/2022 under section 10 CPC:**

12. Per Mr. Badar Alam, learned counsel for the Defendant No.5, the suit is to be stayed under section 10 CPC as the same issue is pending adjudication in C.P. No. D-3302/2022, a petition prior in time by the Defendant No.5. Mr. Maaz Waheed, learned counsel for the Plaintiff of course opposed the application while submitting that section 10 CPC was not attracted.

13. Section 10 CPC codifies the principle of *res sub-judice*. The object of that is to prevent Courts of concurrent jurisdiction from simultaneously adjudicating parallel litigation in respect of the same issue. The policy of the law is to confine the parties to one case, thus obviating the possibility of contradictory adjudication on the same issue. One of the tests of section 10 CPC is that the matter in issue in

the subsequent case is 'directly and substantially' in issue in the previous case. Another test is that the previous case is pending in a Court having jurisdiction 'to grant the relief claimed' in the subsequent case.

14. It has been held by the Supreme Court in *Atif Mehmood Kiyani v. Sukh Chayn (Pvt.) Ltd.* (2021 SCMR 1446) that:

"6. For attracting the application of the provisions of section 10 of the Code of Civil Procedure, 1980 ("C.P.C."), the matter in issue or all the matters in issue, if there are more than one, must be directly and substantially the same. It is true that the matter as to determining which party is at fault for the alleged breach of the land purchase agreement is in issue between the petitioners and respondent No.1 in both the suits; but in the second suit filed by respondent No.1 an additional matter as to entitlement of respondent No.1 to receive damages from the petitioners for the alleged breach of the contract, loss of profits and opportunity costs has also been raised, which is not in issue, and cannot be decided, in the suit filed by the petitioners. Where some of the matters in issue in the subsequent suit are same and some are not, then proceedings of that suit cannot be stayed under section 10, CPC; ....."

Thus, where entitlement to the relief sought in the subsequent case cannot be decided in the previous case, and some matters in issue in the subsequent case are not the same as in the previous case, then section 10 CPC does not apply.

15. Though the Plaintiff herein is a respondent in C.P. No. D-3302/2022, that petition was filed by the Defendant No.5 to challenge the letter dated 11.04.2022 whereby the DMC withdrew the contract from the Defendant No.5. The relief sought in that petition is for a declaration that such withdrawal is contrary to the SPP Rules, and that the contract awarded to the Plaintiff is unlawful. On the other hand, the instant suit has been brought by the Plaintiff to impugn the subsequent order dated 15.06.2022 passed by the Review Committee under Rule 32, SPP Rules, whereby the contract awarded to the Plaintiff was declared contrary to the SPP Rules. Therefore, the issue taken by the Defendant No.5 in C.P. No. D-3302/2022 is with regards to the first leg of the procurement proceedings which went against him, i.e. the decision of the CRC; whereas the issue taken by

the Plaintiff in this suit is with regards to the second leg of the procurement proceedings i.e. the order of the Review Committee. The latter order came after C.P. No. D-3302/2022 was filed, and though that order was subsequently placed on the record of said petition, it is not directly and substantially in issue over there. The memo of said petition shows that the learned Division Bench seized of it is not being called upon to adjudicate the *vires* of the order dated 15.06.2022 passed by the Review Committee, and therefore the Plaintiff herein cannot be granted any relief in that petition. Resultantly, section 10 CPC is not attracted.

*CMA No. 10044/2022 under Order XXXIX Rules 1 and 2 CPC; and CMA No. 11453/2022 under Order XXXIX Rule 4 CPC - submission of counsel:*

16. Mr. Maaz Waheed, learned counsel for the Plaintiff submitted that the impugned order by the Review Committee was without jurisdiction; that the contract earlier awarded to the Defendant No.5 was rightly recalled by the CRC as it was in violation of Rule 31(6), SPP Rules; that the erstwhile Superintendent Engineer was complicit and was subsequently removed from his post; that the Plaintiff was not party to the proceedings before the Review Committee and was therefore condemned unheard; and even the findings of the Review Committee on the merits are erroneous. Learned counsel for the Plaintiff, so also Mr. Asad Ashfaque, learned counsel for the Defendant No.3 (the DMC) drew attention to progress reports on the record to demonstrate that 85% of the Project was complete by November 2022. They submit that though the entire Project was subsequently completed, nevertheless the impugned order operates to their detriment as it had declared the exercise a mis-procurement.

17. Mr. Badar Alam, learned counsel for the Defendant No.5 submitted that the Procurement Committee had given valid reasons for awarding the contract to the Defendant No.5; that after such contract was executed, the CRC had no authority to withdraw the same in view of the bar contained in Rule 31(1), SPP Rules; and that

the CRC itself had observed that bidding documents submitted by the Plaintiff did not meet the tender and therefore the evaluation report of the Project Consultant was contradicted. To the extent the impugned order declares the award of contract to the Plaintiff as contrary to the SPP Rules, learned counsel supported the same and submitted that in such circumstances the fact that the Project may have been completed did not matter as it had already been declared a mis-procurement by the Review Committee and consequences ensuing should be allowed to follow.

18. Heard learned counsel and perused the record.

**Opinion of the Court:**

19. As per the scheme of the SPP Rules, the procuring agency is required to constitute a committee (CRC) for redressing complaints of bidders during the procurement proceedings prior to the award of contract.<sup>5</sup> The CRC is empowered to prohibit the procurement committee from acting or deciding in a manner inconsistent with the SPP Rules and Regulations; to annul in whole or in part any unauthorized act or decision of the procurement committee; to recommend to the head of department that the case be declared a mis-procurement if a material violation of the law relating to public procurement is established; and to reverse the decision of the procurement committee or substitute its own decision for such a decision; provided that the CRC shall not make any decision to award the contract.<sup>6</sup> The CRC is required to announce its decision within 7 days, failing which the complaint shall stand transferred to the Review Committee which shall dispose of the same in accordance with Rule 32 if the aggrieved bidder files an appeal within 10 days of such transfer.<sup>7</sup> The procuring agency can award the contract only after the decision of the CRC;<sup>8</sup> provided that in case of failure of the

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<sup>5</sup> Rule 31(1) Sindh Public Procurement Rules, 2010.

<sup>6</sup> Rule 31(4) *ibid.*

<sup>7</sup> Rule 31(5) *ibid.*

<sup>8</sup> Rule 31(6) *ibid.*

CRC to decide the complaint, the procuring agency shall not award the contract until expiry of the appeal period or final adjudication by the Review Committee.<sup>9</sup> A bidder not satisfied with the decision of the CRC may appeal to the Review Committee within 10 days, provided he has not withdrawn the bid security.<sup>10</sup>

20. The Review Committee is empowered to annul in whole or in part a non-compliant act or decision of the procuring agency other than any act or decision bringing the procurement contract into force. If the procuring agency is in breach of its obligations under the Act, Rules or Regulations, the Review Committee may order payment of compensation by the officer(s) responsible to the extent of the cost incurred by the bidder on the preparation of his bid, or terminate the procurement proceedings in case the procurement contract had not been signed. The review Committee may declare the case a mis-procurement if a material violation of the law relating to public procurement is established.<sup>11</sup> On a declaration of mis-procurement, the head of the procuring agency, the SPPRA or the Review Committee shall refer the case to the Competent Authority for disciplinary proceedings against the officials responsible, and may also refer the matter to the Sindh Enquiries and Anti-Corruption Establishment for action against such officials.<sup>12</sup>

21. By the impugned order, the Review Committee declared that the decision of the CRC for withdrawing the contract from the Defendant No.5 and awarding it to the Plaintiff was contrary to the SPP Rules and thus a mis-procurement. It was further directed that officers of the procuring agency who were responsible should compensate the Defendant No.5 for loss suffered by him in the preparation of his bid; and the matter was referred to the Secretary, Local Government for taking disciplinary action against such officials. However, since the contract had already been executed in favour of

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<sup>9</sup> Rule 31(7) *ibid*

<sup>10</sup> Rule 32(1) *ibid*.

<sup>11</sup> Rule 32(7) *ibid*.

<sup>12</sup> Rule 32(A) *ibid*.



the Plaintiff, the Review Committee expressed in para 13 of its order that it was not empowered to annul that contract, apparently in view of the bar in Rule 32(7)(d), SPP Rules. It is also not the case of the Defendant No.5 that the Review Committee had restored his contract. For this reason, the Defendant No.5 too filed objections to said order when it was placed on the record of C.P. No. D- 3302/2022. Therefore, it is eventually for this court to determine what consequences would ensue should the findings of the Review Committee be upheld.

22. Learned counsel for the Plaintiff had objected at the outset to the exercise of jurisdiction by the Review Committee under Rule 32, SPP Rules. The first objection was that the Defendant No.5 had never filed any appeal before the Review Committee under Rule 32. Indeed, in filing C.P. No. D-3302/2022, and again by written statement in this suit, the Defendant No.5 himself pleaded that his letter of protest dated 18.04.2022 addressed to the SPPRA, the DMC and the Project Consultant, had been erroneously treated as an appeal to the Review Committee though he had never filed an appeal. In circumstances where the Defendant No.5 disowns the appeal on which the impugned order has been passed, where the Plaintiff too states that he was never given notice of any such appeal, and where the impugned order does not reflect presence of either party, the question to the exercise of jurisdiction by the Review Committee has force.

The second objection was that the Review Committee could not have exercised jurisdiction when the contract for the Project had already been executed in favor of the Plaintiff. While listing the powers of the Review Committee, Rule 32(7), SPP Rules stipulates:

“(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;

(f) direct that the procurement proceedings may be terminated in case the procurement contract has not been signed;”

On a tentative view of the matter, the above provisions do go to suggest that the exercise of jurisdiction by the Review Committee is restricted to cases where the procurement contract has yet to be

executed by the procuring agency. In the instant case the contract was executed in the Plaintiff's favor on 18.04.2022. The DMC informed the Review Committee of such contract *vide* reply dated 29-04-2022, but the Review Committee nonetheless continued to exercise jurisdiction.

23. The findings of the Review Committee in the impugned order are also not free from legal controversy. Those findings, juxtaposed with the observations of this Court, as follows.

24. The Review Committee has held that the CRC was not properly constituted as all of its members were officers of the DMC itself, which was contrary to Rule 31(2), SPP Rules which required the inclusion one independent professional, and in the case of a local government, the District Accounts Officer or his representative. But, in making that observation, the Review Committee was looking at the CRC constituted earlier by notice dated 08.09.2021, whereas the Plaintiff's complaint was decided by the CRC constituted *vide* notice dated 23.02.2022. In the latter CRC, the Director (Design & Technical) was an officer of the KW&SB, not the DMC, and it can be argued that he qualified as the required 'independent professional'. Be that as it may, the notice dated 23.02.2022 whereby that CRC was constituted, had been sent to the SPPRA who took no issue to it at that time. The CRC was *akin* to a domestic tribunal and the Plaintiff had no apparent role in its constitution. In such circumstances, the Review Committee should have deliberated that even if the District Accounts Officer or his representative was not part of the CRC, was that sufficient to vitiate the entire procurement proceedings especially when public funds had already been expended ?

25. The Review Committee has held that the decision of the CRC came after 7 days, by which time it's authority to decide the Plaintiff's complaint had ceased by virtue of Rule 31(5), SPP Rules which stipulates that:

"31(5). The complaint redressal committee shall announce its decision within seven days and intimate the same to the bidder and the Authority within three working days. If the committee fails to

arrive at the decision within seven days, the complaint shall stand transferred to the Review Committee which shall dispose of the complaint in accordance with the procedure laid down in rule 32, if the aggrieved bidder files the review appeal within ten (10) days of such transfer.”

In my humble view, the time-line prescribed in Rule 31(5) for the decision of the CRC is directory, not mandatory. As discussed by the Supreme Court in *Sales Tax Gujranwala v. Super Asia Mohammad Din and Sons* (2017 SCMR 1427), and by a learned Division Bench of this Court in *Sindh Petroleum & CNG Dealers Association v. Federation of Pakistan* (2020 CLC 851), the word “shall” is not the sole factor that determines the mandatory or directory nature of a provision, the presence or absence of penal consequences for non-compliance being another indicator, but it is ultimately the object and purpose of the provision that determines the intent behind it. Rule 31 does not go on to stipulate any penal consequences if the CRC does not decide the complaint in 7 days. The intent of that provision is not that the CRC becomes *functus officio* after 7 days. It is that if delay by the CRC is to the detriment of a bidder, he may approach the Review Committee instead for a decision under Rule 32, and that is why disposal of the complaint by the Review Committee is tied to an appeal by an aggrieved bidder. In the instant case, even after expiry of 7 days, no one invoked the jurisdiction of the Review Committee *via* Rule 31(5), SPP Rules. Rather, by letter dated 23.02.2022,<sup>13</sup> the SPPRA itself had directed the CRC to decide the Plaintiff’s complaint at the earliest.

26. The Review Committee held that the proviso to Rule 31(4), SPP Rules did not authorize the CRC to award the contract. The Review Committee appears to have mis-read the decision of the CRC which had only ‘suggested’ that in the given circumstances the contract may be awarded to the Plaintiff. The decision to do so was of the DMC.

27. The Review Committee held that the CRC had no authority to recall the contract already awarded to the Defendant No.5. However,

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<sup>13</sup> Page 317.

the Review Committee failed to consider that such contract had been awarded in violation of Rule 31(6), SPP Rules which prohibited the DMC from awarding the contract while a complaint was pending before the CRC. The written statement of the SPPRA also acknowledges that the contract was awarded to the Defendant No.5 contrary to the SPP Rules.

28. The Review Committee disagreed with the CRC and the Project Consultant that deviations in the bidding documents of the Plaintiff were minor. As per the Review Committee, those deviations were of mandatory requirements. But the Review Committee did not notice that clause IB-26 of the bidding documents and Regulation No. 7.6(B)(i)(2) of Procurement Regulations (Works) had already classified which deviations were to be treated as minor and which ones as major. In any case, as per the evaluation report of the Project Consultant even the bidding documents submitted by the Defendant No.5 were with similar minor deviations, and yet, without discussing the report of the Project Consultant, the Procurement Committee had proceeded to award the contract to the Defendant No.5 who had quoted the highest price for the Project. This material aspect of the matter has been completely ignored by the Review Committee.

29. In view of the foregoing, even if the impugned order dated 15.06.2022 passed by the Review Committee was within its jurisdiction, it is *prima facie* the result of a misreading of the record and an erroneous interpretation of the SPP Rules.

30. As per the progress reports on the record prepared by the Project Consultant, 85% of the works were complete by November 2022. At the re-hearing, counsel for the Plaintiff and the DMC affirmed that the Project has since been completed. In circumstances where the impugned order passed by the Review Committee is *prima facie* questionable, the declaration of mis-procurement thereby is likely to have adverse recurring consequences for the Plaintiff and the DMC leading to further litigation. On the other hand, no harm would

occur to the Defendant No.5 if the impugned order remains suspended, for even if that order eventually prevails it only entitles the Defendant No.5 to compensation for the cost incurred on submitting his bid. Consequently, the balance of convenience is also in favour of the Plaintiff and irreparable harm may occur to it if a temporary injunction is denied.

31. For the foregoing reasons, CMA No. 10044/2022 by the Plaintiff is allowed. The interim order dated 27.06.2022, whereby the impugned order of the Review Committee dated 15.06.2022 was suspended, is hereby confirmed. CMA No. 11453/2022 by the Defendant No.5 is dismissed along with CMA No. 11454/2022.

**JUDGE**

Karachi  
Dated: 13-05-2024