

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suits Nos. 2592/ 2014 & 101/2015

DATE ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No.17489/14

12.3.2015

Mr. Obaid-ur-Rahman Advocate for plaintiff.

Mr. Akhter Hussain Advocate for plaintiff in Suit No.101 /15

Mr. Asim Iqbal Advocate for defendant along with
Muhammad Ahmed Sidduqi GM (Procurement) and Saleem
Akhter Shaikh Deputy GM (Procurement)

.X.X.X.

These are two suits relating to a tender notice No.066/13. The plaintiffs in both the suits have offered their tender in pursuance of advertised tender No. SSGC/FP/5201. The plaintiffs in Suit No.2592/14 have provided a bid bond bank guarantee of one Ahmed Jaffer & Company (Pvt.) Ltd. who claims to be an agent of a foreign company i.e. plaintiff No.1. The validity of this bond was once extended for 90 days from the date of pending of bid in terms of "invitation to bid" which extended period was expired on 21.9.2014 which date is disputed by the plaintiff Counsel.

Learned Counsel for the defendant has objected that though they have serious urgency insofar as the procuring of the goods are concerned, however they feel that Rule 26 of the Public Procurement Rules, 2004 does not allow them to extend it second time. Mr. Asim Iqbal learned Counsel for the defendant has relied upon Rule 26(3) of the Public Procurement Rules,2004 which reads as under:

"26. Bid validity:- (1) *A procuring agency, keeping in view the nature of the procurement, shall subject the bid to a bid validity period.*

(2) *Bids shall be valid for the period of time specified in the bidding document.*

(3) *The procuring agency shall ordinarily be under an obligation to process and evaluate the bid within the stipulated bid validity period. However under exceptional circumstances and for reason to be recorded in writing, if an extension is considered necessary, all*

those who have submitted their bids shall be asked to extend their respective bid validity period. Such extension shall be for not more than the period equal to the period of the original bid validity.

(4) *Bidders who:-*

(a) agree to extension of their bid validity period shall also extend the validity of the bid bond or security for the extended period of the bid validity;

(b) agree to the procuring agency's request for extension of bid validity period shall not be permitted to change the substance of their bids; and

(c) do not agree to an extension of the bid validity period shall be allowed to withdraw their bids without forfeiture of their bid bonds or securities."

Thus learned Counsel submits that since once it has been extended and the time has now been lapsed therefore, in terms of Rule 50 any breach of these Rules would amount to mis-procurement and hence learned Counsel submits that they would like to retender the procurement of all these goods in order to overcome multiplicity of litigation and the aforesaid issue in terms of the extension of bid validity. Learned Counsel for the defendant has relied upon Suo Moto Case No. 18 of 2010 reported in 2014 SMCR 585 wherein the Hon'ble Supreme Court has observed that ***the Public Procurement Rules have put the developed common law of public procurement on a statutory footing to ensure that the state largesse is dispensed keeping in view the cardinal principle of avoiding excessive and wanton expenditure of public money and violation of these rules is a clear indication of corruption.*** Learned Counsel thus submits that perhaps if this impediment could be overcome they would have no objection if at all it could be extended in consideration of Rule 26 and in doing so they would also save the time which requires in retendering for procurement of the goods, subject to price preference issue between the plaintiffs of two suits.

On the other hand Mr. Obaidur Rahman has argued that these Rules of 2004 do not provide a consequential effect as provided by the Sindh Public Procurement Rules, 2010. Learned Counsel in comparison to the Rule 26 of the Public Procurement Rules, 2004 has relied upon Rule 38 of the Sindh Public Procurement Rules, 2010 which relates to the bid validity. Learned Counsel submits that the bid validity in Rules 2010 was extendable for the reasons to be recorded in writing. Learned Counsel submits that Rule 38(5) of 2010 provides consequences that in case the procuring agency fails to finalize the bid evaluation within the extended time , the bids bond shall stand cancelled and a fresh bidding process be initiated. Learned Counsel submits that the situation in these federal Rules 2004 are quite different and distinct as it does not provide consequences and hence the restriction imposed is only directory and not mandatory. Learned Counsel submits that insofar as the judgment referred by the learned Counsel for the defendant is concerned, it only advances the case of the plaintiff as it could minimize time of procuring agency and the public money could be saved as otherwise it not only incur more expenditure and also requires more time for the local and international bidders to be invited. Learned Counsel has relied upon the report of the Engineering Development Board. He argued that the matter was referred to them by this Court in terms of the order dated 10.6.2014 in terms whereof they were to decide the controversy within a period of two months. It appears that in compliance of the order they have delayed the process by four additional months after consuming legitimate period of two months provided by the Court to resolve the controversy.

Mr. Akhtar Hussain learned Counsel for the plaintiff in the connected suit submits that insofar as the consequences in relation to Rule 26 of the Public Procurement Rules 2004 is concerned, he has adopted arguments of Mr. Obaidur Rahman and in fact to resolve the

controversy stated that in terms of the SRO No.827/2001 dated 03.12.2001 the question of price preference and matching right which was provided to the local manufacturer could also be addressed by the Engineering Development Board hereinafter referred to as the “Board”.

I have heard the learned Counsels and perused the record. The only question that could dispose of the entire controversy is in fact interpretation of Rule 26 of the Public Procurement Rules, 2004 in the present circumstances. As has been pointed out and rightly so, that the consequences as provided in terms of Sindh public Procurement Rules, 2010 are not available in Rule 26 of Public Procurement Rules, 2004. The only question that arises is whether such extension if at all provided through the orders or otherwise can be considered as mis-procurement for the goods. Although one extension was provided to one of the plaintiffs however subsequently the matter was referred to Board. The time that was consumed by the Board cannot be attributed to the plaintiff. Once the board saddled with this responsibility in resolving the controversy in terms of order dated 10.6.2014, any time that has been consumed in addition to and including the time given by the Court is to be excluded from the period if at all the bid bond are to expire in the said period. Insofar as the judgment relied upon by the learned Counsel for the defendant is concerned, no doubt these Public Procurement Rules are to be followed strictly, however this interpretation could only advance the principle laid down by the Hon’ble Supreme Court insofar as avoiding excessive expenditure of public money is concerned in addition to the time that is to be saved hence I am of the view that if at all the bid bond has been expired during the period when the matter was pending with the board or under litigation it ought to have been extended or request ought to have been made by the defendant for providing extended bid bond and only in case of such refusal they have legitimate right for its cancellation or scrapping out of entire process of tender. At this stage Mr. Obaidur Rahman also provided a copy of fresh

bid bond which is due to expire on 31.3.2015. In the meantime Mr. Akthar Hussain may also provide such extended period bid bond as he deems fit and proper.

The controversy in these two suits are now relates to the interpretation of Rule 3 which relates to price preference of SRO No.827/2001 dated 03.12.2001. It is agreed that insofar as the right of matching the bid of the foreign company by local manufacturer is concerned, the matter may be referred to the Board for adjudication directly in terms of Rule 3 of the aforesaid SRO, however since the urgency has been shown by the learned Counsel for the defendant, it would be proper if such controversy as between the two plaintiffs of these suits in terms of matching of the bid be resolved preferably within a period of 15 days from the date of receipt of this order. Both the plaintiffs shall file their requisite documents to the board within three days.

In view of the above, the suit and the pending applications stands disposed of.

Judge