

Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

WP No.61452/2021

Khan Construction Company

Versus

Punjab Province through Secretary HUD and PHED
Government of the Punjab, Lahore etc.

J U D G M E N T

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| Date of Hearing | 8.10.2021 |
| Petitioner By: | Mr. Raiz Karim Qureshi and Mr. Farrukh Ilyas Cheema, Advocates. |
| Respondents By: | Mr. Akhtar Javed, Additional Advocate General, Punjab along with Sadam Hussain, Assistant Director in the office of Respondent No.2 and Jawad Kalim Ullah, XEN, Public Health Engineering Division, Multan. |

Ayesha A. Malik J: Through this Petition, the Petitioner has impugned the act of the Respondents disqualifying the Petitioner's pre-qualification technical bid for the construction of Tuff Tile Drain in UCs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 63, 64, 65 and 66, District Multan.

2. The case of the Petitioner is that it is a contractor registered with Pakistan Engineering Council in category C-4 who responded to an advertisement calling for pre-qualification bids for the above mentioned public work. The Petitioner's case is that the technical bid was rejected on 30.9.2021 without specifying any reasons and without giving the Petitioner an opportunity to improve upon its technical bid. Learned counsel for the Petitioner argued that the Respondents have acted against the mandate of the Punjab Procurement Regulatory Authority Act, 2009 ("**Act**") and the rules made thereunder that is the Punjab Procurement Rules, 2014 ("**Rules**"). Learned counsel argued that the Petitioner has been disqualified in violation of the Act and the Rules in order to allow the favourites of the Respondents to get the

tender. Learned counsel argued that the Petitioner is a licensed contractor who is entitled to be duly considered for its bids, both technical and financial but the Respondents have failed to do so. Learned counsel has relied upon the order of this Court dated 5.10.2021 whereby the Respondents were ordered to open and consider the financial bid of the Petitioner subject to the outcome of this Writ Petition. Learned counsel argued that the Respondents have not considered its financial bid, hence strict action should be taken against the Respondents.

3. On behalf of the Respondents, learned Law Officer has raised several objections and has stated that the Petitioner has misled this Court on several grounds. He stated that in the first instance the subject matter of the tender is with reference to the construction of Tuff Tile Drain in UCs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 63, 64, 65 and 66, District Multan. The Petitioner is a contractor from Multan. The bids were opened in Multan and all the relevant officers hail from Multan. He states that the Petitioner has deliberately concealed this fact and has failed to inform the Court that the bids were opened in Multan, hence this Court should have not entertained the instant Petition, as it was appropriate for the Petitioner to file this Petition before the Multan Bench. Learned Law Officer has also argued that alternate remedy under Rule 67 of the Rules was available to the Petitioner which the Petitioner has failed to avail. Finally learned Law Officer argued that the Petitioner is seeking relief which is beyond the mandate of the Act and the Rules. Learned Law Officer stated that prequalification process is clearly provided in Rule 17 of the Rules wherein the procuring agency will consider the prequalification documents on the basis of the evaluation criteria and determine whether the contractor is prequalified or not. In the event that a contractor is not prequalified, it is informed immediately and such a contractor may ask for the reasons from the procuring agency in terms

of Rule 17(4) of the Rules. Therefore the Petitioner's contention that the reasons have not been given is incorrect as the reasons are provided for if the contractor asks for the same and in this case the Petitioner did ask for the reasons which were also communicated to it vide letter dated 7.10.2021. Learned Law Officer stated that even this fact has been withheld by the Petitioner. Learned Law Officer has also argued that in terms of Rule 38(2)(a) of the Rules *single stage two envelopes bidding* requires the bidder to provide two envelopes marked as 'financial proposal' and 'technical proposal'. The procuring agent first evaluates the technical proposal and if the contractor does not meet the evaluation criteria, it is rejected. The financial proposal can only be opened if the technical proposal has been accepted. Learned Law Officer stated that there is no requirement under the mandate of the law to discuss the technical evaluation or to provide reasons on the spot rather the Petitioner was required to ask for the reasons which it eventually did. Learned Law Officer argued that by misleading the Court, the Petitioner now seeks the implementation of order which is not possible under the mandate of the law as the relief sought by the Petitioner is beyond the scope of the Petitioner's entitlement.

4. Heard and record perused. The basic dispute between the parties is with regard to the procedure followed by the Respondents for the *single stage two envelope tender notice* with respect to the bid for the construction of Tuff Tile Drain in UCs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 63, 64, 65 and 66, District Multan. The Punjab Procurement Regulatory Authority Act, 2009 establishes the Procurement Regulatory Authority for regulating the procurement of goods, services and works in the public sector and for matters connected therewith. In terms of Section 26 of the Act, the Government may, by notification, make rules for carrying out the purposes of the Act. In terms of Section 27, subject to the provisions

of the Act and the rules, the Authority may make regulations for giving effect to the provisions of the Act. The Punjab Procurement Rules, 2014 set out a detailed procedure to be followed with respect to the procurement.

5. In terms of Rule 17 of the Rules, the prequalification process requires the procuring agent to provide for all instructions for the submission of prequalification documents, to provide the evaluation criteria, list of documentary evidence required by contractors to demonstrate their respective qualifications and other information as per the criteria set out by the procuring agency. In terms of Rule 17(3) of the Rules, the procuring agent must promptly inform the contractor who has applied for prequalification as to whether or not it has been prequalified and only on the request of the applicant provide for a list of contractors who have been prequalified. Sub Section 4 provides that the procuring agent shall on the request of the bidder communicate to the contractor, who has not been prequalified, the reasons for not prequalifying the contractor. Sub Section 5 requires that only prequalified contractors shall be entitled to participate in procurement proceedings. As per this Section, prequalification is required on the basis of the criteria prescribed by the procuring agent. The procuring agent is required to inform the contractors of whether or not they have been prequalified. Rule 17(3) merely requires that the contractor is informed as to whether it has been prequalified or not and therefore the procuring agent is not required under Rule 17 to provide for reasons of disqualification. In the event that a bidder wants to know the reasons, it can apply to the procuring agent for the reasons which the procuring agent shall then communicate to the said bidder. Rule 38 is relevant to the dispute. Rule 38(2) provides for the procedure for selection of contractors. As per Rule 38, there are three methods to select a contractor, either through single stage two envelope bidding or through two stage bidding or through two stage

two envelope bidding. The procuring agent specifies the procedure for carrying out the bidding process and accordingly the relevant procedure is adopted. In this case, it is a single stage two envelope bidding process which selects the contractor.

6. As per Rule 38(2)(a), single stage two envelopes bidding process can be used for the procurement of goods where the bids are evaluated on technical and financial grounds. As per Rule 38(2)(a) of the Rules, the applicant shall provide two envelopes marked as financial proposal and technical proposal. The technical proposal shall be opened in the first instance and the financial proposal shall be retained unopened by the procuring agent. The procuring agent shall first evaluate the technical proposal and shall reject any proposal which does not conform to the specified requirements. Rule 38(2)(a) and (v) of the Rules specifically provides that during technical evaluation no amendment in the technical proposal shall be permitted. Rule 38(2)(a)(v)(vi) provides that after the evaluation and approval of the technical proposals, the financial proposals of the technically accepted bid shall be opened. So far as the financial proposals of the technically non-responsive bids are concerned, they remain unopened and will be returned to the applicant on the expiry of the grievance period or the decision on a complaint, if any, which can be filed by the non-responsive bidder. Therefore in terms of the prescribed procedure, the applicant will provide two envelopes for bidding, one contains its technical bid and the other its financial bid. The procuring agent will first open the technical bid and immediately see whether the applicant meets the technical requirements on the basis of the criteria given. In the event that the applicant does not meet the requirements, the bid will be rejected there and then and the applicant is not given any opportunity to amend the technical proposal. Rule 38(2)(a)(iv) and (v) does not prescribe that any reasons could be given rejecting the technical bid. When read with Rule 17, with reference to

prequalification of the contractor, it appears that at the stage of the prequalification, a bidder is merely to be informed whether it meets the prequalification requirements or not. In the event that the bidder is desirous to know the reasons, it must move an application seeking the reasons why it is not qualified. Important to note is that against this decision remedy is available to the bidder under Rule 67 which provides as follows:

67. Redressal of grievances by the procuring agency

- (1) The procuring agency shall constitute a committee comprising of odd number of persons, with proper powers and authorizations, to address the complaints of bidders that may occur prior to the entry into force of the procurement contract.
- (2) Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written complaint concerning his grievances not later than [ten days] after the announcement of the bid evaluation report.
- (3) The committee shall investigate and decide upon the complaint within fifteen days of the receipt of the complaint.
- (4) Mere fact of lodging of a complaint shall not warrant suspension of the procurement process.

7. Learned counsel for the Petitioner has repeatedly stated that since this is not submission of a bid as the bidding process has to be completed wherein technical and financial aspects have to be considered, hence remedy of Rule 67 is not available to it. However, this understanding of Rule 67 is totally misconceived. As per Rule 67, any bidder feeling aggrieved by any act of the procuring agent after submission of its bid may lodge a written complaint not later than 10 days after the announcement of the bid evaluation report. This means that where a bidder participates in a single stage two envelopes bidding procedure and is technically disqualified, remedy under Rule 67 is available to such bidder to file its complaint not later than 10 days after it has asked for the reasons for rejection of his technical bid from the procuring agent.

8. In this regard, it is important to note that *single stage two envelope bidding process* is designed, such that the bidders submit two envelopes simultaneously, one showing the technical proposal and the second containing the financial proposal. The procuring agent first evaluates the technical proposal without reference to the financial proposal or the price and bidders who do not conform to the technical requirements as specified are rejected being deficient. The basic difference between the single stage two envelope bidding and the two stage bidding is that in the single stage bidding procuring agent is clear about its technical requirements and needs to evaluate price proposal of those bidders who are technically sound and meet the requirements. However, where it is two stage bidding process, in that case the bidders can be given an opportunity to meet the technical requirements which are prescribed under the Rules in terms of Rule 38(2)(b) and (c). In the two stage process, there is room to improve and discuss technical requirements whereas in the single stage, the technical requirements are specific and need to be met with.

9. In this case the tender notice clearly provides that the tender documents will be provided for the single stage two envelope bidding. The bidding shall be a single package consisting of the technical and financial proposal. The bidding took place in Multan at Raza Hall defunct Zila Council, Multan on 27.9.2021 at 2.00 PM and the technical bids were opened on the same day. The Petitioner participated and was informed on 30.9.2021 that its technical bid did not meet the criteria. The technical evaluation committee notified by the Chief Engineer (South), Punjab, PHE Department, unanimously did not qualify the Petitioner in its meeting held on 29.9.2021. As per the report filed, the Petitioner's technical bid was deficient in terms of experience, in terms of requirements of personnels and also in terms of its ability to establish its financial soundness. The Petitioner then applied on 7.10.2021 for the reasons for rejection of its technical bid

and was informed of the same on the same day being 7.10.2021. Interestingly the Petition was filed on 4.10.2021 and on 5.10.2021 the Petitioner stated that it did not know the reasons as to why its technical bid was rejected and therefore it should be given an opportunity to participate in the financial bidding process as its bid has been submitted.

10. The filing of the Petition and the arguments made by the Petitioner are totally misconceived and against the mandate of the law. The Petitioner was well aware of the fact that in terms of Rule 38(2)(a) read with Rule 17 of the Rules, the Petitioner had to apply to the procuring agent for the reasons why its proposal was rejected. The Petitioner did file its application and was communicated the reasons, yet in an attempt to have its financial bid considered, the Petitioner misrepresented itself before this Court and misstated the facts so that it could get an opportunity to have its financial bid considered notwithstanding the fact that it was technically deficient. During the course of arguments, it appears that there are two relevant facts which the Petitioner failed to mention even today to mislead this Court. In the first instance the Petitioner has insisted that the offices of the Respondents are at Lahore which are relevant to the dispute at hand being Respondent No.2, Chief Engineer (Sought), Punjab Public Health Engineering Department, Lahore and Respondent No.1, Secretary HUD and PHE Department, whereas the record shows that the bid was to take place in Multan and all communications between the Petitioner and the Public Health Engineering Department have been done through the Multan office. Hence the Petitioner filed this Petition and impleaded the Secretary, HUD and PHE Department, Lahore who is not relevant to the dispute at hand, simply so that its Petition should be fixed at Lahore. Although this Court may exercise constitutional jurisdiction at the Principal Seat in Lahore on all and any matters, the Petitioner is not at liberty to mislead the Court nor is

the Petitioner at liberty to misstate the facts. The second factual misrepresentation by the Petitioner is with respect to the procedure adopted by the Respondents. The Petitioner participated in the single stage two envelope procedure for the bidding of construction of Tuff Tile Drain in various UCs of District Multan. The Petitioner therefore for the purposes of the prequalification of its technical bid is governed not only by the process set out under Rule 38(2)(a) of the Rules but is also governed by the dispute resolution mechanism provided under Rule 67. The Petitioner deliberately and with malafide intent has misled the Court by insisting that due procedure was not followed whereas the record as produced by the learned Law Officer shows that the procedure was followed in terms of the Act and the Rules and that the Petitioner was technically deficient and could not have its financial proposal considered. During the course of arguments today, the Petitioner was aware of its technical deficiencies on the basis of which the Petitioner's technical proposal was rejected yet it failed to mention the same and it is only when confronted with the documents provided by the learned Law Officer, that this fact was admitted.

11. From the aforesaid, it appears that the Petitioner has used this Court for its own benefit in a manner which is not contemplated under the law but also against the concept of a single stage two envelope bidding process. At the very outset, the Petitioner was aware when providing its technical and financial proposal that this is a single stage bidding process which means that if the technical bid of the Petitioner is rejected, its financial bid cannot be considered. Moreover the Petitioner was aware that against the rejection of its technical bid, the Petitioner may ask for the reasons from the Respondents. During the pendency of the Petition, the Petitioner did apply for the reasons and was informed. The Petitioner's remedy was before the Grievance Committee yet by abusing the process of law, the Petitioner sought to have its financial proposal considered by filing this Petition. Even

today learned counsel for the Petitioner has insisted that its financial bid be considered which is totally against the mandate of the law and the single stage two envelope bidding process. Hence the Petitioner is directed to pay cost in the sum of Rs.50,000/- for wasting the time of the Court and abusing the process of the Court. This amount shall be deposited with the Dispensary of the Lahore High Court Bar Association, within one week's time positively.

12. Under the circumstances, no case for interference is made out. The instant Petition is **dismissed**.

(AYESHA A.MALIK)
JUDGE

Approved for reporting

Judge