

IN THE HIGH COURT OF SINDH AT KARACHI

Constitution Petition No.D-1802 of 2017

[Premier Battery Industries Pvt. Ltd.

Versus

Karachi Water and Sewerage Board and another]

Present:

Mr. Muhammad Shafi Siddiqui &

Mr. Justice Muhammad Faisal Kamal Alam

Dates of hearing : 31.07.2017 and 03.08.2017

Date of order : 15.08.2017

Petitioner : Premier Battery Industries Pvt Ltd. Through M/s. Haider Waheed and Shah Zeb Akhtar, Advocates.

Respondent No.1 : Karachi Water and Sewerage Board. Through M/s. Munir-ur-Rehman, Masroor Ahsan and Dhani Bux, Advocates.

Respondent No.2 : Province of Sindh. Through Mr. Saifullah Khan AAG.

Case law cited by the Petitioner's counsel.

Case law relied upon by Respondents' counsel.

- Law under discussion:**
- (1). The Constitution of the Islamic Republic of Pakistan, 1973.
 - (2). Sindh Public Procurement Rules 2010.

ORDER

Muhammad Faisal Kamal Alam, J: Through instant Constitutional Petition, the Petitioner Company [*Premier Battery Industries Pvt. Ltd*] has called in question the 'Public Notice' dated 08.02.2017 issued

by the Respondent No.1-Karachi Water and Sewerage Board (KW&SB), inviting expression of interest [E.O.I] for the Development of a Power Project at KW&SB/Respondent No.1 Dhabeji Pumping Station on Built Operate and Own Basis-BOO (**subject project**). The Petition contains the following prayer clause:

“The Petitioner hereinabove mentioned prays for the following: -

- 1. That the Honourable High Court of Sindh at Karachi may be pleased to declare that the Public Notice dated 08.02.2017 is mala fide, illegal and unlawful, and hence, of no legal effect;*
- 2. That the Honourable High Court of Sindh at Karachi may be pleased to restrain the Respondent No.1 from taking any further actions in pursuance of Public Notice dated 08.02.2017;*
- 3. That the Honourable High Court of Sindh at Karachi may be pleased to suspend Public Notice dated 08.02.2017 till the pendency of the proceedings;*
- 4. That the Honourable High Court of Sindh at Karachi may be pleased to award the costs of the petition to the Petitioner;*
- 5. That the Honourable High Court of Sindh at Karachi may be pleased to award any other relief as it may deem appropriate in the facts and circumstances of the case at hand;*

Prayer with profound respect in the interest of justice, fair play, good conscience and enquiry.”

2. Mr. Haider Waheed, learned counsel representing the Petitioner Company, on following grounds has impugned the aforesaid Public Notice, which is available at Page-33 and appended as Annexure “**B**” to the Petition.

- (i). the impugned Public Notice violates the Sindh Public Procurement Act and Rules made thereunder, particularly Rules 15 to 18 of the Sindh Public Procurement Rules, 2010 (**SPPRA Rules**).
- (ii). mandatory time of 45 (forty five) days was not given for submission of the bids as contemplated under Rule 18 sub Rule 2 (of SPPRA Rules) as the impugned Public Notice relates to the international bidding.
- iii). Respondent No.1 (KW&SB) is guilty of publishing the impugned Public Notice in violation of mandatory Rule 17, as evident from its language.

It would be advantageous to reproduce herein below the Rule 17 of Sindh Public Procurement Rules, 2010:

“17. Methods of Notification and Advertisement.

(1). Procurements over one hundred thousand rupees and up to one million rupees shall be advertised by timely notifications on the Authority’s website and may in print media in the manner and format prescribed in these rules.

(2). The advertisement in the newspapers shall appear in at least three widely circulated leading dailies of English, Urdu and Sindhi languages.

(3). The notice inviting tender shall contain the following information:

(a) main, postal address, telephone number(s), fax number, e-mail address (if available) of the procuring agency;

(b) purpose and scope of the project;

(c) schedule of availability of bidding documents, submission and opening of bids, mentioning place from

where bidding documents would be issued, submitted and would be opened;

(d) amount and manner of payment of tender fee and bid security;

(e) any other information that the procuring agency may deem appropriate to disseminate at this stage;

(4) In cases, the procuring agency has its own website; it shall also post all advertisement concerning procurement on that website as well;

(5) A procuring agency utilizing electronic media shall ensure that the information posted on the website contains all the information mentioned in sub-rule (3) above;

(6) In the case of international competitive bidding, the notice shall be advertised in two widely circulated local English language newspapers in accordance with sub-rules (1) (3) (4) and (5) above, and shall also be posted in English language on an internationally known website dedicated for the particular goods, works or services, or any widely circulated English language international newspaper.”

- (iv). The learned counsel for Petitioner particularly referred to sub Rules 3(c) and 6 of Rule 17 to substantiate his stance that the subject Public Notice having a nature of international competitive bidding ought to have given the details mentioned in sub Rule 3(c).
- (v). The Petitioner’s counsel also placed reliance on the Sindh Public Private Partnership Act, 2010 (Sindh Act No.5 of 2010) to advance his arguments that such type of Public Project have to undergo the procedure mentioned in the above referred statute, which procedure has not been followed in the present case and on this ground also the impugned Public Notice should be declared as unlawful.

3. The above arguments have been vehemently controverted by Mr. Munir-ur-Rehman, learned counsel representing the Respondent-KW&SB, which has also filed its Counter-Affidavit in rebuttal to Petition. It has been contended by the Respondent that in terms of recently incorporated Rule 15-A in the SPPRA Rules, copy whereof has been placed on record, the procuring agency, which in the present case is Respondent-KW&SB, has advertised the proposal for open competition, after its approval by the Technical Committee. In terms of this Rule 15-A, the procuring agency / KW&SB even has the authority to award the contract to an initiator of the proposal, if the bidding process remains uncontested, besides extending the benefit of first right of refusal to the initiator of proposal, if the latter does not emerge as the lowest bidder.

4. With the Counter-Affidavit, copies of the subject Public Notices published in different Dailies (Newspapers) have also been appended in order to show that ample and fair opportunity was given to everyone for participating in the process.

5. Mr. Saifuallah Khan, AAG, learned counsel for Respondent No.2-Province of Sindh, while supporting the arguments of learned counsel for Respondent No.1-KW&SB has further submitted that the bidding process has not started as yet and the Respondents have only completed preliminaries in pursuant to the expression of interest and short listed pre-qualified participants. In this regard and to comply the direction of this Court given on 31.07.2017, learned counsel for Respondent No.1 has produced the list of participants who have submitted their expression of interest. It would be advantageous to reproduce their description as under: -

	PARTICULARS/DESCRIPTION	A/C HEAD	AMOUNT RS
1	M/s. Gresham's Eastern (Pvt.) Limited. Pay order No.04606464 Dt: 10.2.2017 (Askari Bank Ltd., Shaheed-e-Millat Road Brach).	3522-00	3,000/-
2	M/s. Jafri & Associates (Pvt.) Ltd. Pay order No.00471587 Dt 14.2.2017 (Sindh Bank, Shara-e-Faisal Branch, Karachi).	3522-00	3,000/-

3	M/s. IMS Engineering (Pvt) Ltd. Pay order No.01922708 dated 13.2.2017 (Askari Bank, Shara-e-Faisal Branch, Karachi).	3522-00	3,000/-
4	M/s. Orient Energy System (Pvt.) Ltd Pay order No.17342854 Dt: 15.02.2017 (HBL, Korangi Industrial Area, Brach, Karachi).	3522-00	3,000/-
5	M/s. Quality Builders Limited. Pay order No.50618832 Dt: 14.2.2017 (Summit Bank, Abdullah Haroon road III Branch, Karachi).	3522-00	3,000/-
6	M/s. Turbo Machinery Services Pay Order No.00021781 Dt:14.2.2017 (Bank Alfalah, IBG SITE Branch, Karachi).	3522-00	3,000/-
7	M/s. Technomen Kinetics (Pvt.) Ltd. Pay order No.1043313 Dt; 17.2.2017 (Dubai Islamic Bank, Gulshan Branch, Karachi).	3522-00	3,000/-
8	M/s. Jaffer Brothers (Pvt.) Ltd. Pay order No.03164465 Dt: 21.2.2017 (Bank Al-Habib Limited, City tower Branch, Karachi).	3522-00	3,000/-
9	M/s. Energy Solutions (Pvt) Ltd. Pay order No.103347178 Dt; 23.2.2017 (MCB, PNS Karsaz Road KDA).	3522-00	3,000/-
10	M/s. Emcon Engineering Pay order No.14159726 Dt: 16.2.2017 (Allied Bank, Zaibunnisa Street Br. Karachi)	3522-00	3,000/-
11	M/s. Engro Powergen Limited. Pay order No.13234284 Dt: 22.2.2017 (Allied Bank, PIDC House Branch).	3522-00	3,000/-
Total			33,000/=

6. We have heard the respective submissions of the learned counsel representing the parties and with their able assistance have gone through the record of the case.

7. Learned AAG has referred to Rules 73-74 of SPPRA to demonstrate that the bid process has not commenced yet and the impugned Public Notice is only an expression of interest. Rule 74 spelt out criteria for short listing of consultants. Learned AAG has also referred to the definition of Bid as mentioned in Rule 2 sub Rule 1(d) that runs as follows:

*“**Bid**” means a tender, or an offer by a person, consultant, firm, company or an organization expressing willingness to undertake a specified task at a price, in response to an invitation by a Procuring Agency”*

8. The Respondents’ counsel then referred to the definition of ‘bid process’ as mentioned in sub Rule 1(h), which means, *inter alia*, the procurement procedure under which sealed bids are invited, received, opened, examined and evaluated for the purpose of awarding a contract.

9. The Respondents have only under taken exercise of pre-qualification of the above named entities as required under paragraphs 4 and 4.3 of the Expression of Interest [E.O.I.] Pre-qualification Document, which is available on record at Page-175 (annexed with the Petition).

10. The Respondents' side further referred paragraph-7 of the above Expression of Interest [E.O.I.] Prequalification Document, relating to invitation for bids, to substantiate their arguments that the bidding or bid process will now follow after the evaluation of the pre-qualification stage is complete.

11. In rebuttal, the learned counsel for the Petitioner has relied upon his main submission that even for this pre-qualification stage, Rules 17 and 18 (of SPPRA Rules) have to be adhered to. However, to a query it is not disputed that instant Petition was filed on 22.03.2017, that is, a month after the last date for submission of E.O.I.

12. It is also not disputed that the Petitioner did not participate in the post public notice proceeding, as according to learned counsel, since the impugned public notice itself is an illegal document, therefore, the Petitioner is not required to participate in any illegal proceeding subsequent thereto.

13. As to the maintainability of the Petition, the learned counsel for the Petitioner submits that present Petition is maintainable as the Petitioner has fulfilled his obligation being a law abiding citizen by laying the information before the Court about the illegalities committed by Respondents in a subject project, which is of public importance.

14. The present Constitutional Petition by its very nature is seeking a writ of *mandamus* regarding which it is a settled rule that the Petitioner has

to show *locus standi*. Admittedly, if the Petitioner has not opted to participate in the proceeding by not fulfilling any of the conditions mentioned in the impugned Public Notice, then we are afraid, the Petitioner has no *locus standi* to maintain the instant Petition. Secondly, it has not been disputed that the Petitioner is not even an engineering consultancy entity nor any document is brought on record that Petitioner has undertaken the assignment of the nature or having technical expertise at its disposal. This is one of the main eligibility criterion mentioned in the impugned Public Notice under the heading Eligibility, besides financial soundness. Thirdly, it is not disputed that the estimate cost of the subject project is more than One Thousand Million, whereas, Petitioner is a Private Limited Company having a paid up capital of only Rupees Five Million. Fourthly, even in a writ of *certiorari* where it is a settled rule that an applicant does not have to show his *locus standi* for maintaining the Petition, as primarily he is acting as an informer/relator, but exception to such principle is that such an informer should neither have a personal interest nor any other motive regarding which a writ of *certiorari* sought to be issued. Here the Petitioner undisputedly is complaining that the interest of Petitioner to participate in the bid has been violated, which in other words mean that present Petitioner at least has a commercial motive that the entire process should be started afresh. Fifthly, Rules 17(3) and 18 (of SPPRA Rules) will be actively applicable once the Respondent-KW&SB will start bidding/tendering process, which stage is a subsequent one and yet to reach, as discussed in the forgoing paragraphs. Thus the main arguments of learned counsel for the Petitioner in this regard, cannot be accepted. Consequently, the Petitioner lacs *locus standi* to maintain such a Petition when admittedly latter does not even participated in the first stage of the process by submitting E.O.I.

15. The impugned Public Notice is also perused and apparently it does not violate any of the provisions of SPPRA Rules, rather it is, *inter alia*, Rule 73 compliant, as it contains the basic information about the subject project, eligibility of participants, date of purchase **E.O.I** document, which can also be downloaded from the SPPRA Website and last date of submission also.

16. We have dismissed the present Petition by our short order on 03.08.2017 and above are the reasons for the same.

17. Before parting with this order, it is necessary to observe that the Respondents and particularly Respondent No.1 (the procuring agency) is required to fulfill the prescribed criteria, which is laid down in SPPRA Rules before awarding the contract to a successful bidder and it is expected that transparency shall be maintained in the entire process.

JUDGE

JUDGE

Dated _____

M.Javid.P.A.