

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1684 / 2019

Plaintiff: Kainaat Development Association through
Mr. Basil Nabi Malik Advocate.

Defendants: Province of Sindh & another through Mr.
No. 1 & 2. Suneel Kumar Talreja AAG.
Mr. Farooq Ahmed Siddiqui Projector
Director.
Ms. Fakia Rasheed Procurement Specialist
Saaf Suthro Sindh Program.

Defendant: Health and Nutrition Development Society
No. 3. (HANDS) through Mr. Shahid Iqbal Rana
Advocate.

For hearing of CMA No. 13999/2019.

Date of hearing: 20.11.2019, 04.12.2019, 19.12.2019.
Date of order: 19.12.2019.

O R D E R

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Injunction, through which Plaintiff has challenged the award of Tender No.PK-PIU-1 MSAN-113853-NC-RFB (**Lot No.9**), for Service of NGO for Social Mobilization to achieve Open Defecation Free (**ODF**) Villages in District Kashmore, Sindh to Defendant No. 3 on the ground that there is violation of relevant rules as well as involvement of favoritism in the said award. Through listed application the Plaintiff seeks a restraining order as to the commencement of any work and action in respect of the tender.

2. Learned Counsel for the Plaintiff has contended that pursuant to funding from World Bank, the Defendant No.2 invited bids on 25.5.2019 from eligible bidders in respect of carrying out Social Mobilization to achieve ODF Villages in District of Sindh and the Plaintiff for the present purposes is aggrieved in respect of award of tender of Lot No.9 regarding such services in District Kashmore, Sindh. Per learned Counsel, the Plaintiff was the lowest bidder and was even technically qualified; but the tender has been awarded to Defendant

No.3 unlawfully, malafidely and illegally. According to him, the objection for disqualifying the Plaintiff having lesser experience is not based on true appreciation of the supporting documents furnished by the Plaintiff; including the average annual volume of Rs.10.0 million per year in the last five years, and in support he has referred to the Audit Report of the Plaintiff. He has further argued that the Defendant No.3 had qualified for more than 1 lots, and then an option was given to them to select any three, which is against Sindh Public Procurement Rules, 2004 (**SPPRA Rules**) and such authority cannot be abdicated by the official Defendants; whereas, the award of tender is tainted with malafide and lacks transparency and has benefitted Defendant No.3 by the conduct of the officials, as against losses to the Exchequer. He has argued that this Court must take cognizance against the Procuring Agency which is bound to procure service and material with effective costs and without favoritism. According to him, even the evaluation criteria has been changed and the Plaintiff has been technically disqualified; though the bid of the Plaintiff was found to be substantially responsive. In support he has relied upon ***Messrs Al-Noor through Partner V. The Province of Sindh through Chief Secretary Sindh and 8 others (PLD 2019 Sindh 400)***, ***Messrs Shaheen Construction Compnay through Mrs. Zeeshan Fatima V. Pakistan Defence Offices Housing Authority through Administrator (2012 CLD 1445)*** and ***M/s Iqbal & Sons J/V AS Engineering V. City District Government & Others (SBLR 2012 Sindh 1483)***.

3. Learned AAG has argued that in view of Rule 5 of the SPPR Rules, the restriction would not apply as the tender in question is funded by World Bank and their terms and conditions would override the one provided in Rules. According to him, the Plaintiff stands technically disqualified as the volume of their services is not Rs.10.0 million per year for the last five years, whereas, no proper supporting documents were ever annexed with the bidding documents. He has further contended that even otherwise, the Plaintiff does not have any direct experience of ODF Village handling and therefore, as against Defendant No.3, the Plaintiff is technically disqualified, whereas, the World Bank's guidelines are to be followed as they are mandatory in nature. Learned AAG has also referred to the bank documents and has contended that as per the tender requirements, the Plaintiff ought to have 5% of the bid

amount in the shape of Bank Guarantee available before offering the bids; however, only an amount of Rs. 366,724/- has been shown in their account; hence, financially also, they are disqualified. According to him Plaintiff's case is that though they do not fulfill the minimum requirements; but if the tender is awarded, they could do so and this cannot be accepted by the Procuring Agency.

4. Learned Counsel for Defendant No.3 in addition to adopting the arguments of learned AAG, has contended that Defendant No.3 has the requisite expertise in ODF Villages and is technically sound and qualified for the award of the tender and merely for the fact that Plaintiff's bid is the lowest; the tender cannot be awarded. To support his contention he has placed on record various certificates of being technically qualified for ODF Villages. Per learned Counsel the Plaintiff has itself admitted that they do not have the work experience of ODF Villages; hence, no case is made out. According to him, even otherwise, there were other lowest bidders as well who were also technically disqualified; but have not approached this Court as an aggrieved party nor have they come forward to support the case of the Plaintiff despite being joined as Defendants. He has prayed for dismissal of the listed application on the ground that the tender has already been awarded and no case is made out.

5. I have heard all the learned Counsel as well as learned AAG and perused the record. It appears that the Defendant No.1 after having received funding from the World Bank towards the cost of the Multi-Sectoral Action for Nutrition Projects and to apply such proceeds intended to hire services of NGOs for Social Mobilization to achieve ODF Villages in the District of Sindh. For the present purposes the dispute between the parties in respect of Lot No.9 pertaining to District Kashmore Sindh. It is not in dispute that Plaintiff was the lowest bidder, whereas, the Defendants No. 4, 5 as well as 6 were at serial No. 2, 3 & 4 as the next lowest bidders, whereas, Defendant No. 3 was at serial No. 5. Insofar as the bidding process is concerned, it is the case of the Plaintiff that despite such admitted facts, the Defendant No.3 was awarded the tender and therefore, according to them the same has been done in violation of the Procurement Rules.

6. On perusal of the record it reflects that the Invitation of Bids clearly reflects that the grant is mainly financed by the Department for International Development through the World Bank, whereas, the bidding is open to all bidders from eligible sources as defined in the guidelines of the World Bank. Clause 3 of the Invitation of Bids requires that in each lot the bidder has to make / achieve 400 Villages as Open Defecation Free and covering a minimum population of 200,000 rural inhabitants of the District, whereas, the bidders may bid for any one or all lots. The invitation for bids further provides as a risk mitigation, that no single bidder shall be awarded more than three (lots), whereas, the NGO's that have already been contracted for three lots are not eligible to bid. Clause 4 of the said document provides qualification of the bidders which besides other conditions also requires evidence of adequacy of working capital for this Contract (access to line(s) of credit and availability of other financial resources), whereas, Clause 4.4 which is the bone of contention for the present purposes reads as under:-

“4.4 To qualify for award of the Contract, bidders shall meet the following minimum qualifying criteria:

- (a) annual volume of Services of at least the amount **specified in the BDS;**
- (b) experience as prime contractor in the provision of at least two service contracts of a nature and complexity equivalent to the Services over the last 5 years (to comply with this requirement, Services contracts cited should be at least 70 percent complete) as **specified in the BDS;**
- (c) proposals for the timely acquisition (own, lease, hire, etc.) of the essential equipment **listed in the BDS;**
- (d) a Contract manager with five years' experience in Services of an equivalent nature and volume, including no less than three years as Manager; and
- (e) liquid assets and / or credit facilities, net of other contractual commitments and exclusive of any advance payments which may be made under the Contract, of no less than the amount specified in the **BDS.**

A consistent history of litigation or arbitration awards against the Applicant or any partner of a Joint Venture may result in disqualification.”

7. Perusal of the aforesaid clause reflects that to qualify for award of the Contract, bidders shall have annual volume of Services of at least the amount specified in the BDS which is provided under Section (ii) and provides that for each lot, the minimum required annual volume of

Services for the successful bidder in last five years shall be averagely 10 million per year. This is the first objection of the Procurement Agency and according to them the Plaintiff does not meet such requirement. The Plaintiff in support of its contention has placed on record the audit reports and the learned Counsel has argued that such volumes are already part of the record but have not been accepted. On perusal of the same, it appears that the figures so stated in the audit reports are gross in nature and do not specify as to the actual amount of services rendered which is the basic requirement for a successful bidder. Learned Counsel was confronted on this aspect of the case; however, he has been unable to show any such document which could reflect that the annual volume of services (and not the entire gross receipts) exceeds the minimum requirement of Rs.10.0 million per year on the average in the last five years.

8. The other requirement is in respect of the experience requiring to demonstrate as a minimum that they have executed during the last 5 years of having completed at least two Water Sanitation and Hygiene (WASH) or Nutrition related projects and; secondly, documented evidence of having undertaken social mobilization in the bidding District in the last five years. According to the Defendants the Plaintiff does not fulfill both these requirements and reliance has been placed on the evaluation of responsive bidders and to the extent of Plaintiff, it has been observed as follows:-

“No relevant experience of triggering through CLTS approach inclusive of achieving ODF village status OR of reduction in stunting through nutrition-sensitive approach at the village level.

Comments:

The lowest bidder is KAINAAT Development Association but bidder demonstrate no experience of WASH or Nutrition project or experience of reduction in stunting through nutrition-sensitive approach at the village level hence not qualified for award of the Contract according to ITB clause 4.4(b). Further to that it was not qualified for award of Contract according to ITB clause 4.4 (b). Further to that it was not qualified for award of the contract according to ITB clause 4.4 (a) where the “minimum required annual volume of Services for successful bidder in last five years shall be averagely 10 million per year” while Rs. 25,959,507/- is not fulfilling criteria and trial balance of 2018, Cash at Bank is Rs. 366,724/-.

Second lowest bidder is Goth Seengar Foundation whose WASH experience does not demonstrate triggering though CLTS approach inclusive of achieving ODF village status in any submitted project or experience of reduction in stunting though nutrition-sensitive approach at the village level hence not qualified for award of the Contract according to ITB clause 4.4.(b).

The lowest and the **single best evaluated** bidder is HANDS with demonstrated experience of declaring whole Taluka 100% ODF through the project UN Maternal & Child stunting Reduction Program district Khairpur-2018 (137.72M).

Third lowest bidder is Women Empowerment of Pakistan but could not demonstrated experience of WASH inclusive of achieving ODF status or experience of reduction in stunting through **nutrition-sensitive** approach at the village level hence not qualified for award of the Contract according to ITB clause 4.4(b).

9. Perusal of the aforesaid evaluation by the competent authority reflects that that the Plaintiff does not qualify technically and has failed to meet the minimum requirements provided in the bidding documents. Though learned Counsel for the Plaintiff has made extensive arguments and has also referred to various documents to rebut and challenge such assertion of the procuring agency; however, for the present purposes at the injunctive stage, when even the tender has already been awarded on 30.9.2019 much before filing of this Suit, this Court is unable to convince itself as to the contention of the Plaintiff on the basis of such documents, whereas, at the most this is a case of requiring leading of evidence by the Plaintiff. More so, when admittedly the tender in question is funded by World Bank and there is exception in Rule 5 of the SPPRA Rules; hence, I am also not inclined to examine these Rules and its applicability in a strict manner, as that would be against the guidelines of the funding agency and will amount to jeopardizing the benefits of such funding, which ultimately would be availed by the downtrodden and oppressed citizens of this country. It would be too technical to involve into this controversy at this specific stage of proceeding and therefore, I am of the view that the Plaintiff has failed to make out a prima facie case, whereas, balance of convenience also does not lie in its favour and no irreparable loss would be caused to the Plaintiff; hence, by means of a short order on 19.12.2019 the listed application was dismissed and these are the reasons thereof.

J U D G E

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