JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.496 of 2021
Sarhad Engineering & Electric Company
Versus
The Learned Additional District Judge, (West), Islamabad and others

Date of Hearing:	01.11.2022.
Petitioner by:	Mirza Nabeel Tahir, Advocate.
Respondents by:	M/s Umer Ijaz Gillani and Sajjad Hameed, Advocates for respondents No.3 and 4.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Sarhad Engineering & Electric Company, impugns the judgment dated 01.02.2021 passed by the Court of the learned Additional District Judge, Islamabad, whereby the petitioner's appeal against the order dated 26.10.2020 passed by the Court of the learned Civil Judge, Islamabad, was dismissed. Vide the said order dated 26.10.2020, the learned Civil Court had dismissed the petitioner's application for interim relief under Order XXXIX, Rules 1 and 2 C.P.C. filed along with its suit for permanent and mandatory injunction.

2. The facts essential for the disposal of the instant writ petition are that on 16.03.2020, respondent No.3, the Pakistan Engineering Council (**"P.E.C."**), published an advertisement inviting bids for the award of the contract for the construction of P.E.C. Regional Office Building at Hayatabad, Peshawar. In response to the said invitation, the petitioner participated in the competitive tender bidding process. After the submission of its bid, the petitioner realized that two pages from its financial bid submitted to P.E.C. were missing. Apparently, P.E.C. had announced that the petitioner had submitted the lowest financial bid. Along with its letter dated 15.06.2020, the petitioner forwarded the two missing pages of its financial bid to P.E.C. In the said letter, it was also mentioned that the two pages went missing due to an unintentional mistake during the process of photocopying. Nevertheless, on 17.07.2020, P.E.C. issued a letter of acceptance to the petitioner. At no material stage was a formal contract executed between the petitioner and P.E.C.

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3. After the petitioner learnt that P.E.C. had published a fresh advertisement on 20.09.2020 inviting bids for the award of the contract, it participated in the bidding process. In this process, Rehman Construction Company was declared as the successful bidder.

4. Aggrieved by the steps taken by the P.E.C. to encash the bank guarantee furnished by the petitioner as bid security, the petitioner filed a civil suit for permanent and mandatory injunction against P.E.C. and others before the Court of the learned Civil Judge, Islamabad. Through the said suit, the petitioner sought a permanent injunction to restrain P.E.C. from encashing the bank guarantee for an amount of Rs.1,30,00,000/-. Along with the said suit, the petitioner filed an application for interim injunction. Vide order dated 26.10.2020, the learned Civil Court dismissed the said application. The petitioner preferred an appeal against the said order dated 26.10.2020 before the Court of the learned Additional District Judge, Islamabad. Vide judgment dated 01.02.2021, the said appeal was also dismissed. The said concurrent order dated 26.10.2020 and judgment dated 01.02.2021 have been assailed by the petitioner in the instant writ petition.

5. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that in the first round of tender bidding process for the award of the contract pursuant to the advertisement dated 03.06.2018, the petitioner had submitted the most responsive bid but was denied the award of the contract; that in the second round of the tender bidding process, the petitioner participated; that inadvertently, the petitioner's bid did not include two pages of the financial bid which the petitioner sought to be included in the bid through letter dated 15.06.2020; that the petitioner was not permitted to include two missing pages in its financial bid; that on 17.07.2020, P.E.C. issued letter of acceptance in the petitioner's favour and required it to convey its acceptance as well as furnish a performance guarantee; that P.E.C. initiated a third round of a tender bidding process, which has culminated in the award of the contract to Rehman Construction Company; that P.E.C.'s attempt to encash the bid security furnished by the petitioner is

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unlawful; that the bid security was valid up to 27.10.2020, and could not have been encashed prior to its expiry; that on 27.10.2020, P.E.C. has made a call for the encashment of the bank guarantee furnished by the petitioner as bid security; and that the said demand is unlawful and liable to be declared as such by this Court. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

6. On the other hand, learned counsel for P.E.C. submitted that indeed the petitioner had submitted the most responsive bid pursuant to the tender bidding process initiated through advertisement dated 16.03.2020; that P.E.C. committed no illegality by not accepting the two missing pages from the petitioner's financial bid after the lapse of the last date for the submission of the bids; that if the petitioner's assertion that the two missing pages did not have any bearing on the *"read out cost of the project of Rs.614,705,553/-,"* it should have accepted the terms of the letter of acceptance dated 17.07.2020 and furnished a performance guarantee; that since the petitioner was reluctant to proceed further by furnishing a performance guarantee equal to 20% of the contract price, the P.E.C. was well within its rights to cancel the process and to reinitiate it by issuing advertisement dated 20.09.2020; and that the concurrent order and judgment passed by the learned Courts below do not suffer from any jurisdictional infirmity so as to warrant interference in the Constitutional jurisdiction of this Court.

7. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 4 above and need not be recapitulated.

8. The Instructions to Bidders (**"I.T.B."**) issued by the P.E.C. with respect to the bidding process for the award of the contract for the construction of P.E.C. Regional Office Building at Hayatabad, Peshawar clearly provide that the bidders would be required to furnish bid security for an amount of Rs.13 million. Clause 15.1 of the I.T.B. provides that each bidder shall furnish as part of its bid, a bid security in the amount stipulated in the bidding data sheet. Paragraph

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16 of Appendix-A to Bid contained in the Special Stipulation Clause (Conditions of Contract) provides that the bid security of Rs.13 million shall be in the form of a bank draft / pay order or bank guarantee. Clause 15.2 of the I.T.B. also gives an option to the bidder to submit a bid security in the form of a bank guarantee. Furthermore, it is provided that the bid security shall be valid for a period of 28 days beyond the bid validity date. More importantly, clause 15.5 of the I.T.B. provides that the bid security of the successful bidder will be returned when the bidder has furnished the required performance security and signed the contract agreement. Clause 15.6 provides *inter alia* that the bid security may be forfeited in case the successful bidder fails to furnish the required performance security or fails to sign the contract agreement.

9. The case at hand pertains to the bid security for an amount of Rs.13 million furnished by the petitioner in the form of an irrevocable bank guarantee issued on 28.04.2020 and having a validity period up to 27.10.2020. It is during the bid validity period that the petitioner was declared as the most responsive bidder. On 17.07.2020, a letter of acceptance was issued to the petitioner.

10. In the said letter of acceptance, P.E.C. expressed its intention to award the contract to the petitioner at the bid price of Rs.516,421,554/- quoted by the petitioner. Additionally, the petitioner was required to furnish a performance guarantee for an amount equal to 20% of the contract price in accordance with clause 10.1 of Particular Conditions of Contract. The petitioner was warned that in the event the petitioner does not return an original signed letter of acceptance within seven days, the bid security furnished by the petitioner would be forfeited.

11. There is nothing on the record to show that the petitioner had either furnished a performance guarantee or accepted the terms and conditions set out in the letter of acceptance dated 17.07.2020. It is also an admitted position that at no material stage was a formal contract entered into between the petitioner and P.E.C.

12. The petitioner justifies its conduct in not acting upon the terms of the letter of acceptance by asserting that P.E.C. should have accepted the petitioner's request made in its letter dated 15.06.2020

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to include in its financial bid the two missing pages which the petitioner mistakenly did not include in the financial bid submitted by the deadline for the submission of the bids i.e., 08.04.2020. It is well settled that after the deadline for the submission of the bids, a bidder cannot be permitted by the procuring agency to make good the deficiencies in its bid. In this regard, reference may be made to the following case law:-

(i) In the case of National Institutional Facilitation Technologies (Pvt.) Limited Vs. The Federal Board of Revenue (PLD 2020 Islamabad 378), this Court held as follows:-

> *"If this Court were to hold that it was lawful for a procuring agency or a G.R.C. to allow requests by bidders for a change in the amount entered in their financial bids after all the bids had been opened, it would set a terrible judicial precedent and be a transgression of the norms of propriety in a tender bidding process for the award of contracts by the State or its instrumentalities. It would make it permissible for bidders to submit financial bids and wait until all the bids of the contesting bidders are opened and their contents revealed, and thereafter to assert that its financial bid was not what was explicitly quoted in its bid but a different amount."*

(ii) In the case of West Bengal State Electricity Vs. Patel Engineering Co. Ltd. (AIR 2001 S.C. 682), it was held *inter alia* that negligent mistakes in bid documents cannot be permitted to be corrected on the basis of the equity, and that where facts indicate that (i) it was not beyond the control of a bidder to correct the error before submission of a bid; (ii) that he was not vigilant, and (iii) that he did not seek to make corrections at the earliest opportunity, such bidder cannot be permitted to correct his bid documents afterwards. It was also held that rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism, which are contrary to the rule of law and Constitutional values.

(iii) In the case of Muhammad Ayub and Brothers Vs. Capital Development Authority (PLD 2011 Lahore 16), the Capital Development Authority had invited bids for the award of a construction contract. One of the tender conditions was that the bids had to be accompanied with bid security in the form of a Deposit at Call or a Bank Guarantee. One of the bidders (whose bid was the lowest) submitted an insurance bond as bid

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security. At first its bid was declared to be invalid on account of not being accompanied with a Deposit at Call or a Bank Guarantee, but a day after the opening of the tenders, C.D.A. permitted the bidder to submit a Deposit at Call. C.D.A.'s decision to allow the bidder to substitute the insurance bond with a Deposit at Call was challenged by another bidder in a writ petition before the Hon'ble Lahore High Court. C.D.A.'s stance that Rule 31 of the Public Procurement Rules, 2004 permitted a procuring agency to allow a bidder to substitute an insurance bond with a Deposit at Call was spurned by the Division Bench of the Hon'ble Lahore High Court in the following terms:-

> ***"12. It needs to be seen if in the light of the afore-quoted Public Procurement Rules, 2004, CDA was bound to reject respondent No.6's bid or consider it for award of contract. Rule 25 prescribes the bid security of 5 per cent but the form of such bid security as to whether it should be an insurance guarantee or Deposit at Call is left to the option of the procuring agency. Rule 30 mandates that the bids have to be evaluated in accordance with the terms and conditions set forth in the prescribed bidding documents. In the present case, the bidding documents not only prescribed bidding security in the form of Deposit at Call or bank guarantee but also emphasized that if a bid was not accompanied by Deposit at Call or bank guarantee, the same was to be rejected. CDA's failure to reject respondent No.6's non-responsive bid and accept it for consideration was, thus, in violation of Rule 30. In fact, by allowing respondent No.3 to substitute its insurance guarantee with a Deposit at Call, CDA allowed respondent No.6 to alter or modify its bid after the opening of a tender which is prohibited by Rule 31. In this view of the matter, the argument that substitution of insurance guarantee by Deposit at Call is a case of clarification rather than alteration or modification is ex-facie misconceived and untenable. There is also no doubt that respondent No.6 was unduly favoured whereas the appellant, who had submitted a responsive bid, was ignored despite having a right to be considered for award of a contract for being the lowest bidder in view of Rule 38 read with Rule 2(h)."***
> **(Emphasis added)**

13. In view of the law referred to above, the petitioner could not make the refusal on the part of P.E.C. to accept the two missing pages from the financial bid after the deadline for the submission of the bid to be a valid ground not to accept the terms and conditions of the letter of acceptance or not to furnish the performance security. Therefore, I find the call for the forfeiture / encashment of the guarantee furnished by the petitioner as bid security to be in conformity with clause 15.6 of the I.T.B.

14. Where a call for the encashment of a bank guarantee is made by the creditor within its validity period and thereafter the encashment of the guarantee is injuncted by a Court, it is obligatory on the bank / guarantor to keep the guarantee valid until the case is decided. In the case at hand, a call on the encashment of the guarantee furnished as bid security at the instance of the petitioner was made during its validity period. Therefore, its expiry after a call for the encashment is made by the creditor is immaterial.

15. It is apt to mention here that an order to grant or refuse an injunction is a discretionary order and once the Trial Court exercises discretion and grants or refuses to grant interim injunction, the same will not be normally interfered with by the appellate or Constitutional Court, unless it is found that such discretion has been exercised arbitrarily or capriciously or perversely, or where the Court ignored settled principles of law regarding the grant or refusal of interim injunction. Since I do not find any arbitrariness or jurisdictional error in the concurrent order dated 26.10.2020 and judgment dated 01.02.2021 passed by the learned Courts below, the instant petition is dismissed with no order as to costs. Needless to mention that nothing observed herein shall operate to the benefit or detriment of either party during the proceedings in the civil suit instituted by the petitioner.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 07/11/2022.

(JUDGE)

*Ahtesham**

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