ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.2951 of 2021
ONYX Associates
Versus
National Highway Authority and another

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	27.08.2021	**Mr. Jawad-ur-Rahim Malik, Advocate for the petitioner.** **Barrister Ayesha Siddique Khan and Mr. Raheel Ahmed, Advocate for NHA.**

Through the instant writ petition, the petitioner, ONYX Associates, seeks a direction to the National Highway Authority (“NHA”) to accept bid security in the form of a bank guarantee issued by an insurance company having at least AA rating from the Pakistan Credit Rating Agency (“PACRA”) / Journal Citation Reports (“JCR”).

2. Vide advertisement dated 07.07.2021, NHA invited bids from construction firms registered with the Pakistan Engineering Council (“PEC”) to participate in the tender bidding process for the award of the contract for the construction of Gilgit-Shandur Road (216 Kilometers). The procurement method was to be single stage – two envelope procedure. The bids were required to be submitted on or before 23.08.2021. The bid submission date has been extended to 01.09.2021.

3. Regulation 3 of the Public Procurement Regulations, 2008 (“the 2008 Regulations”) provides that a procuring agency, when engaged in procurement of works, shall use the standard form of bidding documents prescribed by the PEC.

4. The petitioner asserts that the standard form of bidding documents issued by the PEC on 11.06.2007 permits a bidder to submit bid security in the form of a bank guarantee issued by an

UNCERTIFIED COPY

insurance company having at least AA rating from the PACRA / JCR.

5. The petitioner is aggrieved by clause 15.2 of the Instructions to Bidders (**"ITB"**) issued by the NHA which requires bid security to be submitted along with the bids in the form of deposit at call or a bank guarantee issued by a scheduled bank in Pakistan or from a foreign bank counter guaranteed by a scheduled bank in Pakistan in favour of the NHA with a validity period of twenty eight days beyond the bid validity date. The said clause does not permit a prospective bidder to submit an insurance bond or a guarantee issued by an insurance company as bid security. Furthermore, clause 28.4 of the Bidding Data (which is the part of the tender document) also requires the performance guarantee to be in the form of a deposit at call or a bank guarantee issued by a scheduled bank in Pakistan. The said clause does not permit a bidder to submit performance security in the form of an insurance bond or a guarantee issued by an insurance company.

6. Learned counsel for the petitioner submitted that the refusal on the part of NHA to accept bid security in the form of a bank guarantee issued by an insurance company having at least AA rating from PACRA / JCR unduly restricts the competitive arena and violates Regulation 3 of the 2008 Regulations.

7. On the other hand, learned counsel for the NHA submitted that the instant petition is not maintainable as the petitioner does not fulfill the basic requirement of having PEC registration in category-C-A. He further submitted that the updated standard form bidding documents for the procurement of civil works issued by the PEC in April, 2010 does not give an option to the bidder /

UNCERTIFIED COPY

contractor to submit bid security or performance security in the form of an insurance bond or a guarantee issued by an insurance company. Learned counsel for the NHA prayed for the writ petition to be dismissed.

8. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

9. Whether or not the petitioner has a valid registration from the PEC in category-C-A is to be determined at the stage of the bid evaluation.

10. As regards the contention of the learned counsel for the petitioner that the NHA should be directed to accept from the petitioner bid security in the form of an insurance bond or a bank guarantee issued by an insurance company having AA rating from PACRA / JCR, the same is without any substance. The standard form bidding documents issued by the PEC on 11.06.2007 would not be applicable to the tendering process in question. It is an admitted position that in April, 2010, the PEC issued the standard form bidding documents for single stage – two envelope bidding procedure. It is also an admitted position that the procurement method adopted by the NHA in the case at hand is also a single stage – two envelope procedure. The standard form bidding documents issued by the PEC in April, 2010 do not give an option to a bidder to submit a bid security in the form of an insurance bond or a guarantee issued by an insurance company. For the purposes of clarity, clause 15.2 of the said standard from bidding documents is reproduced herein below:

> *"15.2 The Bid Security shall be, at the option of the bidder, in the form of Deposit at Call or a Bank Guarantee issued by a Scheduled Bank in Pakistan or from a foreign bank duly counter guaranteed by a Scheduled Bank in*

UNCERTIFIED COPY

Pakistan in favor of the Employer valid for a period 28 days beyond the Bid Validity date."

11. The standard form bidding documents issued by the PEC on 11.06.2007 cannot prevail over those issued in April, 2010 which are specifically for single stage – two envelope bidding procedure adopted by a procuring agency.

12. In the case of Global Energy Ltd. Vs. Adani Exports Ltd (2005 (4) SCCC 435), it was observed: ***"The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice."***

13. The absence of a provision in the tender documents for a bid security or a performance guarantee not to be in the form of an insurance bond or a guarantee issued by an insurance company is not arbitrary, discriminatory or malicious.

14. In view of the above, I do not find any merit in this petition, which is accordingly dismissed.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Ahtesham*

UNCERTIFIED COPY