JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.186 of 2022
Salahuddin
Versus
Federation of Pakistan through Secretary Ministry of Energy and others

Dates of Hearing:	04.10.2022 and 31.10.2022
Petitioner by:	Mr. Gulzar Ahmed Khan, Advocate.
Respondents by:	Mr. Ahmed Ejaz Yousaf, Advocate for respondents No.4 to 8. Mr. M. Khurshid, Deputy Director (Legal), P.P.R.A/respondent No.3. M/s Ali Rukh Khattak, Law Officer and Sajjad Khan, Senior Deputy Chief Engineer, S.N.G.P.L.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Salahuddin, assails the decision taken by the Sui Northern Gas Pipelines Limited (**"S.N.G.P.L."**) to demand the payment of security deposit so as to enlist the contractors, who may participate in the bidding process for the award of contracts. Furthermore, the petitioner assails the Invitation to Bid (**"ITB"**) issued by S.N.G.P.L. for the enlistment of contractors.

2. Learned counsel for the petitioner submitted that S.N.G.P.L. had initiated the process of enlistment of contractors to whom contracts could be awarded by S.N.G.P.L.; that in this regard S.N.G.P.L. has issued ITB; that the said ITB required the contractors enlisted by S.N.G.P.L. to deposit security in the shape of pay order etc.; that the Public Procurement Rules, 2004 (**"P.P.R. 2004"**) only require a bidder to submit security in the form of either a bid bond or performance security; that the P.P.R. 2004 do not envisage a security deposit which is either a bid bond or performance security; and that the petitioner has been required to submit security even though no contract has till date been awarded to the petitioner. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

3. On the other hand, Mr. M. Khurshid, Deputy Director (Legal) appeared on behalf of the Public Procurement Regulatory Authority

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("P.P.R.A.") and submitted that P.P.R.A., vide letter dated 13.11.2020, had already directed S.N.G.P.L. to refrain from the practice of collecting a security deposit for the enlistment of contractors and that there is no provision in the P.P.R. 2004 for the procuring agencies to require the submission of security deposit which is neither in the form of bid security (envisaged by Rule 25 of P.P.R. 2004) nor in the form of a performance security (envisaged by Rule 39 of P.P.R. 2004).

4. Learned counsel for S.N.G.P.L. submitted that the petitioner has been working with S.N.G.P.L. since the past 25 years; that the petitioner was assigned work while resorting to alternative method procurement permissible under the P.P.R. 2004; that in an emergency like situation (for example underground gas leakage) work has to be assigned to enlisted prequalified contractors without going through a time consuming bidding process; that the contractors engaged to carry out such emergency work are required to deposit a security so as to remedy the loss caused to S.N.G.P.L. by the contractors' employees; that in emergency like situation, contractors cannot be asked at the eleventh hour to furnish a security deposit; that the security deposit sought by S.N.G.P.L. in ITB has no connection with the bid bond or a performance security envisaged by Rules 25 and 39 of the P.P.R. 2004 respectively; and that the security deposited by the enlisted contractors is liable to be refunded to them. Learned counsel for S.N.G.P.L. prayed for the writ petition to be dismissed.

5. I have heard the contentions of the learned counsel for the petitioner and respondents No.4 to 8 as well as Deputy Director (Legal), P.P.R.A., and have perused the record with their able assistance.

6. ITB issued by S.N.G.P.L. for the enlistment of contractors provides that the contractors which are enlisted by S.N.G.P.L. shall deposit security in the shape of pay order etc. for the purpose of safeguarding S.N.G.P.L.'s assets and financial interests during the execution of works on different gas supply schemes. For ditching, backfilling, reinstatement and provision of casual labour, the enlisted contractors are required to deposit security amounting to Rs.2 million.

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7. The petitioner's primary grievance is that since the provisions of the P.P.R. 2004 do not require a bidder to deposit security. Now, Rule 25 of the P.P.R. 2004 provides that a procuring agency may require the bidders to furnish a fixed amount of bid security not exceeding five percent of the estimated value of procurement determined by the procuring agency: provided that in case where the procuring agency does not require the bid security, the bidder shall submit bid securing declaration on the format prescribed by P.P.R.A. in standard procurement documents. Rule 39 of the P.P.R. 2004 provides that where needed and clearly expressed in the bidding documents, the procuring agency shall require the successful bidder to furnish a performance guarantee which shall not exceed ten percent of the contract amount.

8. There is no provision other than Rules 25 and 39 in the P.P.R. 2004 which entitle a procuring agency to require prospective bidder to deposit a security. In the case at hand, ITB was not for the award of any specific contract for construction but was to enlist contractors who could be prequalified for participating in a tender bidding process which may be initiated by S.N.G.P.L. at any point of time in the future for any specific project. The amount which is deposited by the enlisted contractors with S.N.G.P.L. remains in the coffers of S.N.G.P.L. until it is either returned on the removal of the enlisted contractor's name from the list of prequalified contractors or en-cashed if the enlisted contractor defaults on any contractual obligation that may be given to him in the future. Even if resort is not made to a competitive tender bidding process in exceptional circumstances and subject to the fulfillment of the conditions prescribed in the P.P.R. 2004, there would be nothing to prevent S.N.G.P.L. to require the contractor to furnish a performance security.

9. The Regulator / P.P.R.A. has already taken a position in its letter dated 13.11.2020 that other than the bid security or performance guarantee, there is no provision in the P.P.R. 2004 for the collection of a security deposit by the procuring agencies. S.N.G.P.L. appears not to have complied with the directions issued by P.P.R.A in the said letter to refrain from the practice of recovering a security deposit.

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10. The grounds on which S.N.G.P.L. has tried to justify the demand of security deposit as a precondition for the enlistment of contractors are not just vague but also presumptive.

11. In view of the above, the instant petition is allowed in that the demand made by S.N.G.P.L. for the deposit of security in ITB as a condition for the enlistment of contractors is declared to be unlawful and in violation of the P.P.R. 2004. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN OPEN COURT ON 03.11.2022.

JUDGE

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