

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3140 of 2019
Telconet Private Limited
Versus
I.E.S.C.O. and others

Date of Hearing:	30.01.2020
Petitioner by:	M/s Malik Qamar Afzal, Saad Khan and Misbah Ashiq, Advocates, Mr. Tahir Maqsood Butt, Advocate for the petitioner in W.P. No.3542/2019,
Respondents by:	Mr. Muhammad Asif Khan, Advocate for respondent No.1/I.E.S.C.O. Mr. Noor-ul-Najam, Advocate for respondent No.4/P.P.R.A. M/s Shehzad Ata Elahi and Shameer Naveed, Advocates for respondent No.7

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition the petitioner, Telconet (Pvt.) Ltd., impugns the letter dated 13.09.2019 whereby respondent No.1/Islamabad Electric Supply Company Limited (“I.E.S.C.O.”) rejected the technical bid submitted by M/s Landis+Gyr Pty Ltd. (“L+G”) for the award of contract for design, supply, installation and commissioning of an Advanced Metering Infrastructure Project in Rawalpindi Circle, Customer Information System and New Billing System (“contract”) on the sole ground that it failed to submit an affiliate company guarantee by 02.08.2019.

2. The facts essential for the disposal of the instant petition are that on 07.01.2019, I.E.S.C.O. published a notice inviting bids for the award of the contract. In the said notice, it was explicitly stated that payments under the contract were to be made from a loan from the Asian Development Bank (“A.D.B.”) which had been received by Pakistan to meet the cost of the Second Power Distribution Enhancement Investment Program. Bidding for the award of the contract was to be conducted in accordance with the A.D.B.’s Single-Stage: Two-Envelope bidding procedure. In order for a bidder to be eligible for participation in the bidding process, it had to have a minimum average annual turnover of US Dollars 80 million calculated as total certified payments received for contracts in progress or completed within the

last three years. The last date for the submission of the bids was 21.02.2019, which was subsequently extended to 07.03.2019.

3. L+G, a company established under the laws of New South Wales, Australia, was one of the bidders which submitted its bid on 07.03.2019. Vide letter dated 31.01.2019, L+G had authorized the petitioner to collect the bidding documents from I.E.S.C.O. The bidding documents were purchased by the petitioner on behalf of L+G. Clause 7.3 of the instructions to bidders provided *inter alia* that if a bidder intends to sub-contract major items of products and/or services, it shall include in the bid the details of the name and nationality of the proposed sub-contractor including vendors for each of those items. Under clause 7.4 of the instructions to bidders, bidders were free to list more than one sub-contractor against each item. L+G, in its bidding documents, had mentioned the petitioner's name as one of its sub-contractors.

4. Vide letters dated 20.03.2019, 11.04.2019, 03.05.2019 and 20.06.2019, I.E.S.C.O. sought clarifications from L+G with respect to different aspects of its bid. Vide letter dated 24.07.2019, I.E.S.C.O. required L+G to *inter alia* provide an affiliate company guarantee from each of its subsidiaries, parent entities or affiliate companies if its bid proposes the qualifications of other firms. The affiliate company guarantee was required to be submitted by 11:00 a.m. on 02.08.2019. Since L+G could not submit the parent entity or affiliate company guarantee by the said deadline I.E.S.C.O., vide impugned letter dated 13.09.2019, informed L+G that its bid had been rejected due to the non-submission of the affiliate company guarantee. Furthermore, L+G was informed that its financial bid would be returned unopened. L+G was requested to depute an authorized representative for the collection of its financial bid.

5. The instant writ petition was filed on 19.09.2019. Vide order dated 20.09.2019, this Court passed the following ad-interim injunction:-

"Notice. Until the next date of hearing, respondent No.1 is restrained from returning the petitioner's financial bid. Any steps in the bidding process taken henceforth shall be subject to the final outcome of this petition."

6. The financial bid of the sole technically qualified bidder, namely KT-Kaifa Consortium (respondent No.7), was opened on 23.09.2019.

Learned counsel for I.E.S.C.O. confirmed that respondent No.7's financial bid was for an amount of US \$104,918,487.83 plus Rs.1,817,531,973.9. I.E.S.C.O.'s Board is yet to decide whether to execute a contract with respondent No.7. On 31.12.2019, I.E.S.C.O. entered into a contract with M/s CESI S.p.A-Capital Strategies Group to act as a project implementation consultant for the advanced metering system.

7. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that there was no requirement in the advertisement or in the bidding documents for a bidder to furnish an affiliate company guarantee; that after the technical and financial bids had been submitted I.E.S.C.O., vide letter dated 24.07.2019, required L+G to furnish an affiliate company guarantee by 02.08.2019; that since a resolution of the Board of Directors of L+G's affiliate company was necessary for the furnishing of an affiliate company guarantee, such a guarantee could not be furnished within a short period of one week; that L+G's bid could not have been rejected due to non-provision of the affiliate company guarantee by 02.08.2019; that vide letter dated 31.07.2019, L+G requested an extension up to 13.09.2019 to furnish the affiliate company guarantee; that along with its bid, L+G had submitted letters dated 22.03.2019 and 07.05.2019 which were stronger than an affiliate company guarantee; that after an approval by Landis+Gyr Group Board, an affiliate company guarantee was submitted to I.E.S.C.O. by L+G on 16.10.2019; that in the Invitation to Bids issued by the Lahore Electric Supply Company Limited for an A.D.B. funded project, there was an explicit requirement in the bidding documents for an affiliate company guarantee to be furnished by a bidder; and that L+G's technical bid could not have been rejected for the non-provision of a document for which there was no requirement in the bidding documents.

8. Learned counsel for the petitioner further submitted that the petitioner could not participate in the tender bidding process for the award of the contract due to the onerous financial conditions placed in the bidding documents for the eligibility of bidders; that the Invitation for Bids provided that the bidder should have participated in one

successfully completed contract of a similar nature in the last five years; that it was also provided that the cumulative amount of a bidder's participation in such contracts must exceed US Dollars 100 million and participation in one contract must exceed US Dollars 40 million; that L+G, in its executive summary, had clearly stated that it had a partnership with the petitioner who had *"an impressive track record of successful implementation of IT systems since 1993, both across Pakistan and globally, and most importantly, have the experience of working closely with DISCOs in Pakistan"*; and that in view of the law laid down by the Calcutta High Court in the unreported case of Sidwal Refrigeration Industries Vs. Union of India, the petitioner, being one of L+G's nominated sub-contractors, had sufficient interest for the contract to be awarded to L+G and for this purpose it has the *locus standi* to file the instant writ petition.

9. By the time arguments were being addressed by the learned counsel for the petitioner, the financial bid submitted by respondent No.7 had already been opened. Learned counsel for the petitioner had been made aware of the amount quoted by respondent No.7 in its financial bid. Given the high moral stature and intellectual caliber that the learned counsel for the petitioner is known for, he very fairly conceded that the amount quoted by L+G in its financial bid was higher than that quoted by respondent No.7. Since this Court had restrained I.E.S.C.O. from returning the sealed financial bid submitted by the petitioner on behalf of L+G, it is only L+G and/or the petitioner who were aware of its contents.

10. Since the opening of respondent No.7's financial bid was a crucial development that had taken place during the pendency of the instant petition, this Court was duty bound to take the same into consideration before deciding to proceed further in the matter. In the cases of Evacuee Trust Property Board Vs. Mst. Sakina Bibi (2007 SCMR 262), Mst. Muhammadi and others Vs. Ghulam Nabi (2007 SCMR 761) Syed Bhais (Pvt.) Ltd. Vs. Government of The Punjab Excise and Taxation Department (PLD 2000 Lahore 20), Amina Begum Vs. Ghulam Dastgir (PLD 1978 S.C. 220), Saeeda Khatoon Vs. House Building Finance Corporation (PLD 1998 Karachi 99), Sheikh Fazal Rehman & Sons Limited Vs. Ghee Corporation Of Pakistan (2003 CLC 1823), Ch.

Riyasat Ali, Advocate Vs. Returning Officer (2003 CLC 1730), Muhammad Rashid Vs. Member (Revenue), Board Of Revenue, Punjab (2001 MLD 548), and Muhammad Nazir Vs. Collector/Deputy Commissioner, Lahore (2001 CLC 767), it was held *inter alia* that a Court has ample jurisdiction to look into subsequent events for the purpose of giving complete and effective relief in a case. The nature of the subsequent development in the case at hand is such that would make further proceedings purely of an academic nature and an exercise in futility. Reference in this regard may be made to the following case law:-

- (i) In the case of District Bar Association, Rawalpindi Vs. Federation of Pakistan (PLD 2015 S.C. 401), it has been held *inter alia* that Courts must exercise caution against unthoughtful utilization of purely academic theories while adjudicating upon practical issues, particularly in matters affecting governance and the running of the State.
- (ii) In the case of Disciplinary Committee of University of Punjab Vs. Abdul Majid (1984 SCMR 1302), it has been held *inter alia* that Courts normally do not undertake a purely academic exercise but only deal with live issues.
- (iii) In the case of Muhammad Ilyas Suleri Vs. Muhammad Naseem Khan (1993 CLC 417), it has been held *inter alia* that Courts should not enter into an exercise which is purely academic in nature.
- (iv) In the case of Liver Brothers (Pakistan) Ltd Vs Senior Member, National Industrial Relations Commission (PLD 1986 Lahore 90), it was held *inter alia* that where questions raised by the parties are of purely academic interest, Courts would avoid to undertake an academic exercise.

Law to the said effect has also been laid down in the cases of Shahsawar etc Vs. The State (2000 SCMR 1331), Ardeshir Cowasjee etc Vs. Sindh Province etc (2004 CLC 1353), M. Enver Shaukat Vs. Federation of Pakistan (1981 PLC C.S. 15), Zafar Iqbal Vs. Province of Sind (PLD 1973 Karachi 316), Doaba Goods Forwarding Agency Limited Vs. Province of Punjab (1971 SCMR 527), and Abdul Hameed Vs. Muhammad Shahidullah (PLD 1969 S.C. 535).

11. Learned counsel for respondent No.7 had raised several objections to the maintainability of the instant writ petition and had also made detailed submissions to repudiate the petitioner's assertions.

12. A finding on the issues on which the contesting parties in this case were at variance would be unnecessary. This is because, assuming that it is declared that I.E.S.C.O. was not justified in rejecting L+G's technical bid due to the non-submission of an affiliate company guarantee, or that the petitioner, as L+G's sub-contractor, did have the *locus standi* to file the instant writ petition *sans* L+G, the award of the contract in L+G's favour would nonetheless be out of the question. It is not disputed that the contract was to be awarded to a technically qualified bidder whose financial bid was the lowest. Since it is an admitted position that L+G's financial bid was for an amount more than the one quoted by respondent No.7 in its financial bid, the instant writ petition is dismissed as having been rendered infructuous. No order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON ____/2020

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

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