

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE AMIN UD DIN KHAN
MR. JUSTICE JAMAL KHAN MANDOKHAIL

Civil Petition No. 3136 of 2022

(On appeal from the order of the High Court of Balochistan at Quetta dated 17.08.2022 passed in C.P. No. 1824 of 2021)

ICC (Pvt.) Ltd.

... Petitioner(s)

VERSUS

Ministry of Energy (Power Division) through its ... Respondent(s)
Secretary Civil Secretariat, Islamabad and others

For the Petitioner(s) : Kh. Ahmad Tariq Rahim, Sr. ASC (*through video link Lahore*)
Mr. Tariq Aziz, AOR

For Respondent No.4 : Mr. Hasan Rashid Qamar, ASC
Raja Abdul Ghaffoor, AOR

Date of Hearing : 12.09.2022

JUDGMENT

Jamal Khan Mandokhail, J. The petitioner is a private limited company that made a bid in response to a tender floated by the respondent No.2 for construction of transmission lines of 132kV in relation to a 300MW power project to be set up at Gwadar, Balochistan. The bid was subject to a bid security and validity period as per Rules 25 and 26 of the Public Procurement Rules, 2004 (the “Rules”), respectively. The petitioner furnished a bid bond in the form of a bank guarantee in the amount of Rs.84 million through the respondent No.4 which was valid until 15 August 2021. The initial bid validity period was set to expire on 14 October 2021. The respondent No.2 in exercise of powers conferred upon it by virtue of Rule 26(3) of the Rules further extended the bid validity period till the following dates: 29 October 2021, 13 November 2021, 30 November 2021, and lastly until 13 December 2021. It is necessary to mention

here that the extension of each bid validity period was made in writing and for the reasons mentioned therein. All bidders, including the petitioner, had given their consent for the extensions of the bid validity period. Following opening of bids, the respondent No.3 evaluated each bid according to Rule 38 of the Rules and found the petitioner's bid to be most advantageous. Hence, the petitioner was awarded the contract and a Notification of Award ("NOA") was issued in that regard. The petitioner accepted the NOA, however, expressed its concern about the escalation of prices in its reply. On 17 September 2021, the respondent No.3 reminded the petitioner to furnish a performance security in terms of clause 46.1 of the Instructions to Bidders ("ITB") document as the specified time had lapsed. Despite the reminders, the petitioner failed to furnish the performance security. Consequently, on 29 November 2021, upon the request of the respondent No.2 through a letter addressed to the respondent No.4, the petitioner's bank guarantee was encashed. The petitioner challenged the said act of encashment of the bank guarantee through a constitution petition before the High Court of Balochistan at Quetta, which was dismissed *vide* order dated 17.08.2022, hence, this petition for leave to appeal.

2. The learned counsel for the petitioner contended that the consent for the extensions of the bid validity period were conditional and subject to an increase in the prices of the items earlier offered through its bid. He took the view that the procuring agency was under a legal obligation to undertake an exercise to ascertain the exponential increase in prices between the period of submission and the date of acceptance of the bid. He stated that without following the provisions of the Rules, the act of encashment of the bank guarantee by the respondent No. 2 was unwarranted, illegal, and a blatant abuse of authority.

3. Heard the learned counsel for the petitioner and have perused the record. According to the Rules, the procuring agency is under an obligation to process and evaluate the bids within the stipulated bid validity period. However, under exceptional circumstances if an extension of the bid validity period is considered necessary, the procuring agency by exercising powers under Rule 26(3) of the Rules shall for reasons to be recorded in writing, request all bidders for an extension of the bid validity period, provided that such extended period shall not be more than the original or the extended bid validity period. According

to sub rule (4) of the said Rule, it is the prerogative of the bidders to either agree with or to oppose the extension(s) of the bid validity period. In case a bidder does not agree with the request of the procuring agency for an extension of the bid validity period, it shall be allowed to withdraw its bid, without forfeiture of the bid bonds or securities furnished along with bid document. If a bidder agrees to an extension of the bid validity period, it expresses its willingness to undertake the specified task within such extended bid validity period. The bidder under such circumstances is bound by the commitment and offer already made by it through its bid. Once the bids are finalized by the procuring agency and the bidding evaluation is completed, albeit within the original or extended bid validity period, the procurement contract shall be awarded to the most advantageous bidder in terms of Rule 38 of the Rules; provided that it shall not conflict with any other law, rules, regulations, or government policy. The procuring agency by exercising power under Rule 39 of the Rules shall issue a NOA, requiring the successful bidder to furnish a performance guarantee which shall not exceed 10% of the contract amount. In case the bidder fails to furnish the required performance guarantee, the procuring agency shall proceed as per the Rules.

4. Admittedly, the petitioner agreed to the extension of the bid validity period at all instances sought by the procuring agency. A perusal of the replies submitted by the petitioner reveals that it had simply mentioned its concern regarding the increase in the prices, which cannot be considered as a condition for its consent for the extension of the bid validity period. Even otherwise if such contention of the petitioner is accepted, the Rules do not permit the procuring agency to accept the request of the bidder to increase prices of the items mentioned in the bid at the stage of NOA. This is because Rule 26(4) of the Rules provides that in case of an extension of the bid validity period by consent of the parties, the substance of the bid and the prices of the items mentioned therein, shall remain unchanged. Had the petitioner been unsatisfied with the prices for undertaking of the specified work after the expiry of the bid validity period it had an option to withdraw its bid, without forfeiture of its bid security. Once the petitioner agreed to perform the specified work on the same terms and conditions and prices as mentioned in the bid document, it is estopped by its conduct of requesting an increase in the prices. Therefore, the respondent

No.3 was right in declining the request of the petitioner for the change in the prices, already mentioned in the bid, by correctly following the Rules.

5. As per the Rules, if any bidder is declared successful, it is bound to perform its obligations in terms of its commitment made in the already submitted bid. However, after execution of the contract and during performance of the work, if the bidder claims an increase in the prices it has a remedy under Rule 16B of the Rules. The petitioner's claim is premised on the issue of increase in the prices during the extended bid validity period, without having formally entered into the agreement, furnishing the performance guarantee, or commencing the work as required by the procuring agency. Under such circumstances, the petitioner's request for an increase in the prices made at the time of issuance of the NOA could not be justified. The petitioner's conduct compelled the procuring agency to request the respondent No.4 for encashment of the bid security as provided under the Rules. The learned judges of the High Court after having gone through the record and relevant provisions of the Rules reached the correct conclusion by upholding the decision of the respondent No.2. The learned counsel for the petitioner has not been able to show any point of law of public importance, warranting interference in the judgment impugned.

Thus, for the above reasons, leave to appeal is refused and resultantly, this petition is dismissed.

Islamabad, the
12.09.2022
K.Anees/-

Approved for reporting.