

M/S Sher Muhammad & Brother, Govt. Contractor Kohistan

.....Petitioner

Versus

Govt. of Khyber Pakhtunkhwa, through Secretary, Communication & Works Department
Peshawar and othersRespondents

Writ Petition No. 515-A/2018 before the Peshawar High Court, Abbottabad, Bench

Converted into the Appeal: No. KPPRA/GRR/Appeal/1-6/2017-18

Decision of KPPRA in compliance of Judgment/Order of the Honorable Peshawar High Court,
Abbottabad Bench dated 14.06.2018

The Honorable Peshawar High Court, Abbottabad Bench while disposing of Writ Petition No. 515-A/2018 titled “M/S Sher Muhammad & Brother, Govt. Contractor Kohistan Vs Govt. of Khyber Pakhtunkhwa, through Secretary, Communication & Works Department Peshawar and others” vide Judgment/Order dated 14.06.2018 (**Annex-I**) issued the following directions:

“that the instant writ petition is treated as appeal with direction to the Managing Director, KPPRA to consider the case/grievance of the petitioner in accordance with law, within a period of 30 days after affording him opportunity of being heard if not earlier, from the date of receipt of this order. With these observations, the writ petition is disposed of accordingly”.

Proceedings:

In compliance of the Orders of the Honorable Peshawar High Court, Abbottabad Bench the Managing Director, KPPRA referred the case to Registrar of Appeals for initial scrutiny under Clause 8 of the Guidelines for Grievance Redressal in Public Procurement. The Registrar of Appeals appointed under Grievance Redressal Rules (GRR), 2017 while scrutinizing such appeal called upon all the parties to hold a meeting vide letter No. KPPRA/GRR/Appeals/1-5/2017-18 dated 27.06.2018. During meeting the petitioner now appellant was asked to deposit prescribed fee for handling such appeal. Minutes of the meeting are annexed as (**Annex-II**). The petitioner now appellant accordingly deposited the required fee in the account of Authority on 11.07.2018 (**Annex-III**). After completing initial scrutiny and fulfilling all the codal formalities to the



Registrar of Appeals forwarded the instant appeal the Managing Director, KPPRA for admission and nomination of Technical Assistant thereto. The Managing Director, KPPRA while admitting the appeal nominated Mr. Muhammad Saeed Qureshi, Advocate Peshawar High Court, Peshawar as Technical Assistant from the list of Technical Assistants under Rule 10(2) of the Khyber Pakhtunkhwa Public Procurement Grievance Redressal Rules, 2017 and informed him vide letter No. KPPRA/GRR/Appeals/1-6/2017-18 dated 17.07.2018 (**Annex-IV**) to submit his recommendations to Managing Director, KPPRA.

The nominated Technical Assistant issued summons to both parties (**Annex-V**) to appear and present their case before the Technical Assistant in the office of Registrar of Appeals, KPPRA on 27.07.2018 at 10:00AM however, upon the telephonic request of both the parties the Technical Assistant rescheduled the date fixed for hearing to 30.07.2018. The Petitioner now Appellant as well as the representative of the Procuring Entity appeared before the Authority on the revised date and time so fixed and all the parties were heard at length.

Salient Features of the Case along with the Findings of the Authority are Given Below.

- a. That the procurement of the developmental scheme of the different projects were advertised in the newspaper and was published in the Newspaper i.e. Daily "AJJ" on 10.04.2018 (**Annex-VI**) and these schemes were for KOHISTAN. Total thirteen (13) works were advertised in the NIT. Petitioner now appellant in time applied online for the different works.
- b. Twenty one (21) bidders (**Annex-VII**) took part in the bidding process in which petitioner now appellant was one of them, under the name of Sher Muhammad & Brothers and whole process was conducted online.
- c. That the petitioner now appellant fulfilled all the requirements which were mentioned in the instruction given in advertisement. The petitioner now appellant applied for S.No. 11 of the NIT i.e. ADP NO.858/170359 construction of the RCC Bridge Bazaar Pattan Lower Kohistan.
- d. It is important to mention here that copy of license provided by the petitioner now appellant along with other documents was issued on 17.06.2017 valid up to 30th June 2018.



- e. That as per instruction mentioned in the advertisement there was no work code required or mentioned however, later on Respondent No. 4 being Procuring Entity objected to the effect that work code i.e. (CE-02) mentioned in the renewed license of the appellant, which otherwise is/was mandatory for the construction of bridges was only restricted to the piling work.
- f. It is also worth mentioning that the said code i.e. (CE-02) has two categories which are piling and bridge structure and issued by the Pakistan Engineering Council (PEC). In the aforementioned license initially provided by the petitioner now appellant the said code i.e. (CE-02) was not mentioned. However, the same category was mentioned in the subsequently submitted license apparently renewed on 11.6.2018 valid up to 30.6.2018 only to the extent of piling while bridge structure category was not allocated to the petitioner now appellant by the PEC.
- g. As per written statement of Respondent No. 4 being Procuring Entity and comparative statement following were the three (3) lowest bidders in the bidding process (Annex-VIII):

1. M/S Sher Muhammad & Brothers (Appellant)	36.75% below
2. M/S Akhter Shah & Brothers	36 % below
3. M/S Haji FAJA Akber & Brother	31.75% below

Findings:

During the process of hearing it has been observed that the whole appeal of the petitioner now appellant is revolving around a single point that Respondent No. 4 being Procuring Entity is not accepting bid of the petitioner now appellant even being lowest and fulfilling all the required eligibility criteria due to a reason that the petitioner now appellant does not possess (CE-02 bridge structure) code, which was neither asked for by the Respondent No. 4 being Procuring Entity nor mentioned in the advertisement. During the course of hearing Respondent No. 4 being Procuring Entity raised an objection on expiry period and non-mentioning of required code i.e. (CE-02) in the original/ initially submitted license of petitioner now appellant. However, the petitioner now appellant provided a copy of subsequently renewed license on 11.06.2018 valid upto 30th June, 2018 having the required code but to the extent of piling and not bridge structure.



During the course of hearing the Respondent No. 4 being Procuring Entity accepted that the petitioner now appellant is the lowest bidder with quoted bid of 36.75% below estimated cost and entitled for the award of contract but since the objection raised by the Respondent No. 4 being Procuring Entity is found tenable owing to the sensitivity of work though not mentioned in the advertisement hence accepted.

Recommendations of the Technical Assistant:

In the light of aforementioned facts and figures appeal of the petitioner now appellant is found correct to the extent that the petitioner now appellant is a lowest bidder @36.75 %. Objection raised by the Respondent No. 4 being Procuring Entity is also valid and relates to the public interest rather has direct bearing upon the life of general public/commuters of the bridge, therefore, it is/was recommended that appeal of the petitioner now appellant may be regretted and matter be put to re-tender. It was further recommended that Respondent No. 4 being Procuring Entity be directed to cancel the whole process related to the instant procurement and re-advertise the said procurement opportunity afresh subject to fulfillment of all other codal formalities.

Decision of the Authority:

The available record provided by the Honorable Peshawar High Court, Abbottabad Bench and proceedings conducted by the Technical Assistant so nominated in the instant appeal and statements submitted by the parties thereto have been perused and examined in threadbare. It has been found that the Procuring Entity has advertised the procurement opportunity on 10.04.2018 wherein it was mentioned that the qualified bidders were invited for submission of bids for different projects yet no specific work code was mentioned in the advertisement except Categories. However, it was found that the said code should have been the pre-requisite of such procurement.

As per written statement submitted by the Respondent No. 4 being Procuring Entity twenty one (21) bidders have submitted their bids through online E-bidding system wherein the following three (03) lowest bidders were lowest.



1. M/S Sher Muhammad & Brothers (petitioner now appellant) 36.75% below
2. M/S Akhter Shah & Brothers 36 % below
3. M/S Haji FAJA Akbar & Brother 31.75% below

Petitioner now appellant was the lowest bidder for the said project however, his bid was considered as non-responsive due to non-availability of specialization code (CE-02 bridge structure) though was not mentioned in the advertisement but is otherwise required. Whereas, Akhter Shah was 2nd successful bidder who withdrew his bid and hence the PE recommended the 3rd lowest bidder i.e. M/S Haji FAJA Akbar & Brothers for approval and execution of the scheme due to availability of specialization code.

Hence, being Managing Director of the Authority so empowered under Rule 13 of the Khyber Pakhtunkhwa Public Procurement Grievance Redressal Rules, 2017 agree with the recommendations submitted by the Technical Assistant nominated under Rule 8 of the Rules ibid which are reproduced as under:-

In the light of aforementioned facts and figures appeal of the petitioner now appellant is found correct to the extent that the petitioner now appellant is a lowest bidder @36.75 %. Objection raised by the Respondent No. 4 being Procuring Entity is also valid and relates to the public interest rather has direct bearing upon the life of general public/commuters of the bridge, therefore, it is/was recommended that appeal of the petitioner now appellant may be regretted and matter be put to re-tender. It was further recommended that Respondent No. 4 being Procuring Entity be directed to cancel the whole process related to the instant procurement and re-advertise the said procurement opportunity afresh subject to fulfillment of all other codal formalities.

Consequently, the instant Appeal is disposed of in the terms that the advertisement and the bidding process conducted by the respondent No. 4 is set aside and the procuring entity/respondent no. 4 is directed to reject all the bids in this instant procurement under the mandate of Rule 47 of Procurement Rules, 2014 with further directions to Procuring entity to call for rebidding by incorporating the revised specifications, evaluation criteria and any other condition which is necessary for construction of a bridge as provided under Rule 48 of the Procurement Rules, 2017.

Before parting with this judgment the administrative secretary is put on notice to look into the inefficiency of officers/officials of the PE who had ignored the basic and mandatory requirement required for construction of a bridge thus causing loss of time and finances to the government exchequer.



Managing Director
Khyber Pakhtunkhwa
Public Procurement Regulatory Authority

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