

IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. 2140 / 2018

Plaintiff: M/s Gastech International through
Mr. Raj Ali Wahid Kunwar Advocate.

Defendant: The Sui Southern Gas Company Ltd.
No. 1. through Mr. Asim Iqbal Advocate.

For hearing of CMA No. 16275/2018.

Date of hearing: 15.03.2019.

Date of order: 15.03.2019.

ORDER

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Permanent Injunction whereby, the Plaintiff is aggrieved by Letter dated 4.4.2018 issued by Defendant No.1 taking a decision to temporarily blacklist the Plaintiff from participating in their procurement proceedings.

2. Learned Counsel for the Plaintiff submits that Plaintiff is a local agent of Defendant No.3 and pursuant to a Tender Inquiry No. SSGC/FP/8288, Defendant No.3 participated in bidding through Plaintiff and was declared the lowest bidder, and was issued a conditional letter of intent as well as foreign purchase orders. He submits that Defendant No.3 could not honor the purchase order, as in China there were some restrictions imposed by the Environmental Agency, restricting the production of the goods to be supplied, and for this reason, Defendant No.3 failed to honor its commitment. According to him the bid money was also given by Defendant No.3 and all documents including the purchase order was issued in the name of Defendant No.3 through Plaintiff as an agent, and therefore, the Plaintiff cannot be categorized as a contractor, a supplier or even a

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bidder. According to him the impugned order has been passed against Defendant No.3 whereby, the bid security has been forfeited and the company has also been blacklisted; but at the same time the Plaintiff has also been blacklisted for one year which is without any lawful authority and justification. He has referred to various correspondence on record and so also the bid terms and conditions as mentioned in Clause 28 and Clause 34 and submits that the same does not apply to the Plaintiff. Learned Counsel has also referred to Public Procurement Rules 2004 and Rules 2(b)(d)(k) as well as Rule 19 and submits that in view of these provisions the Plaintiff who is neither a supplier nor a contractor cannot be blacklisted. He has also referred to the documents placed through the written statement and submits that the commitment honored by another supplier in China, is in respect of a different Province where such restrictions were not apply hence, irrelevant; however, per learned Counsel the Plaintiff is not contesting the blacklisting of Defendant No.3 and forfeiture of its bid bond as it the case of the Plaintiff that action if any, can be taken against Defendant No.3 for default but not against the Plaintiff.

3. On the other hand, learned Counsel for Defendant No.1 submits that the bid was filed by the Plaintiff and all along the Plaintiff has been present before Defendant No.1 in respect of all events, including meeting conducted after default was committed by Defendant No 3, and has defended the case of Defendant No.3. According to him all documents have been signed and stamped by the Plaintiff, and in fact it is the case of the Defendant No.1 that Plaintiff has stepped into the shoes of Defendant No.3. Learned Counsel has also referred to the freight certificate issued by PNSC and submits that it is in the name of the Plaintiff. He has further argued that in the minutes of meeting held

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on 22.12.2017 the Plaintiff concealed various facts and the stance now taken in this case is totally against the earlier stance and therefore, the conduct of the Plaintiff warrants blacklisting. According to him, Defendant No 1 opened a Letter of Credit for US\$ 125.0 million and since the goods were not supplied, huge losses were suffered, therefore, the impugned order is justified. Per learned Counsel all acts done by the Plaintiff were done knowingly and with consent of Defendant No.3 therefore, no case is made out. In support he has relied upon *Yale Law Journal* whereby, the liability of an agent to third persons in taught is discussed.

4. I have heard both the learned Counsel and perused the record. Facts have been discussed briefly hereinabove and it would be advantageous if straight away reference is made to the impugned order / Letter dated 4.4.2018 which reads as under:-

“SSGC
Sui Southern Gas Co. Ltd
Ref.# SSGC/FP-8288-PO-21862
April 04, 2018

M/s. Honghua International Co. Ltd. China
Through Local Agent:

M/s Gatech International
Suit # 301, 3rd Floor, Business Centre
19-A/I, P.E.C.H.S. Block 6, Main Shahrah-e-Faisal, Karachi
Tel: +92-21-34322252
Fax- +92-21-34304503

Purchase Order No. 22/TKC/21682
Pre-Coated Line Pipe 30”x 0.469” (Lot# 03 & 04)

Dear Concern,

This is with reference to our correspondence through various emails & letters / notices (letter ref # SSGC/DGMPS/PO-21682 dated 14-Dec-2017, Notice vide letter ref SSGC/DGMPS/PO-21682-1 dated 28-Dec-2017 & Final Notice vide letter ref # SSGC/DGMPS/PO-21682-2 dated 01-Jan-2018) with you & your local agent M/s Gatech International in connection with procurement of Pre-Coated Line Pipe 30”x 0.469” (Lot# 03 & 04) through purchase order 22/TKC/21862 dated 06-Nov-2017 for FOB value amounting USD 12,540,000,00/-.

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In consideration of above, Letter of Intent & Purchase Order was placed on your firm dated 19-Oct-2017 & 06-Nov-2017 respectively, wherein you were required to submit Performance Bank Guarantee (10% of order value) within fifteen (15) days from the date of issuance of Letter of Intent dated 19-Oct-2017 as per clause # 6.1 of Additional Terms for Tenders on F.O.B./C&F basis of tender documents, which has not been submitted by M/s Gatech International Co. Ltd. in spite of the several reminders & continuous follow-up with you & your local agent.

Furthermore, we had been following up with your firm regarding Production Plan / Delivery (within validity i.e. latest by 20-Feb-2018) due to criticality of the time bound project. Although a meeting was held on 22-Dec-2017 with your Local Agent M/s Gatech International, despite of their assurance resulted in no respite in terms of submission of PBG and furnishing of Production Plan / Delivery Schedule. Moreover, this delay has severely jeopardized our project timeline and it is clear cut violation of tender terms.

It is to apprise that we had exercised our tender terms and already forfeited the bid security USD 150,000 (Guarantee # 0525BGA003256 dated 12-July-2017 for USD 75,000 & Guarantee # 0525BGA003257 dated 12-July-2017 for USD 75,000) by invoking clause of Annexure-A, Bid Bond Bank Guarantee, Additional Terms for Tender on F.O.B./C&F basis of tender documents.

Through this letter, Sui Southern Gas Company Ltd., hereby notifies you that Purchase Order # 22/TKC/21862 has been cancelled by invoking the Clauses 28.1.2 and 28.2.1 Default by Supplier of the Terms and conditions and pursuant to clause 34 of the tender enquiry and Rule 19 of the Public Procurement Rules 2004, the Management has decided to temporary blacklist M/s Honghua International Co., Ltd and your local agent M/s Gatech International for one (01) year form participating in Sui Southern Gas Company's procurement proceedings.

Yours sincerely

FOR SUI SOUTHERN GAS CO. LTD

Sd/-
Muhammad Ali Khan
A/General Manager (Procurement)"

5. Perusal of the aforesaid letter reflects that after forfeiting the bid security, Defendant No.1 has notified that purchase order stands cancelled by invoking Clause 28.1.2 and 28.2.1 i.e. *default of supplier of the terms and conditions* and Clause 34 of the Tender Inquiry read with Rule 19 of the Public Procurement Rules, 2004. The management has also decided to temporarily blacklist Defendant No.3 and the Plaintiff for one year from participating in their procurement proceedings. It is a matter of record and as reflected from all documents of Defendant No.1 that all along they have addressed Defendant No.3 through the Plaintiff and the use of the words "*through local agent*" are of significant importance. It is

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also an admitted fact that tender was awarded in the name of Defendant No.3 through the Plaintiff, whereas, the bid security was also furnished by Defendant No.3 and not by the Plaintiff. Merely for the fact that Plaintiff was acting as a local agent would not ipso facto mean that the tender was also awarded to the Plaintiff. The tender in question is in respect of international supply for which a direct Letter of Credit has been established by Defendant No.1 in the name of Defendant No.3 which has no concern with the Plaintiff. The Maximum the Plaintiff was doing was to act as a local agent of Defendant No.3, and participate in the international tender and to appear as their representative. The default has been alleged and established against Defendant No.3 and for that the bid security of US\$ 1,50,000/- has already been forfeited. Similarly, the Defendant No.3 has also been blacklisted. It will also be advantageous to refer to the minutes of meeting held on 22.12.2017 whereby, this issue of default was discussed and certain points are relevant to adjudicate the issue in hand and they read as under:-

- “A/GM (P) enquired the reason from **local agent** regarding non-submission of Performance Bank Guarantee and the violation of tender clauses being committed by the bidder.
- Mr. Owais Mir presented the stance of M/s. Honghua International that due to exceptional Increase in HR Coil price, suppliers’ top management required 10 days (due to Christmas & New-year Holidays) to communicate action plan to SSGC. Mr. Owais expressed that they are pursuing with the supplier to oblige the supply of material. Mr. Owais further added that in view of the current market prices of HRC if the material is supplied to SSGC as per order then there is potential loss of about USD 1.7 million for supplier.
- In response, **local agent** was conveyed that in case **the bidder** deviates from its stance the tender clauses will be invoked in letter & spirit but not limited to for forfeiture of bid bond guarantees and de-barr / blacklisting of (Principal & Local Agent) from company business.
- A/GM (P) informed local agent that **the bidder M/s. Honghua International** violating the tender clauses from the time when contract was awarded, neither LOI nor Purchase Order

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acceptance submitted to SSGC despite several reminder & follow-up.

- Further, **local agent** was told Earnest money / **bid bond valued USD 150,000 submitted by M/s. Honghua International** is secured with SSGC, which can be confiscated if supplier draw-back from supplying of goods as per contract.”

6. Perusal of the aforesaid discussion clearly reflects that all along the default has been attributed against Defendant No.3 as admittedly it is Defendant No.3 who is the bidder and not the Plaintiff, whereas, both i.e. the Plaintiff and Defendant No.3 have been addressed distinctly. Though attempt has been made to hold the Plaintiff also responsible for such default; but on the basis of the material placed on record at this injunctive stage, it is not established that the Plaintiff could be penalized as well as blacklisted for the default committed by the Defendant No.3. In the aforesaid discussion it is clear that Defendant No.1 is giving a warning to the bidder i.e. Defendant No.3, that if the commitment is not honored, action will be taken under the terms and conditions of the award of tender.

7. Moreover, the law is also very clear in that Rule 19 of PPRA Rules 2004, makes reference only to *suppliers* and *contractors* and does not cater to the conduct of and action against local agents in respect of an International Tender, when the procurement is being made on the basis of a Letter of Credit. This kind of transaction cannot be equated with a transaction wherein the agent is itself importing goods and supplying the same on its own. Both are distinct and different situations and may be in the latter, the agent may have some responsibility within and of itself, as regards the failure to honor a commitment. Therefore, in the given facts such a harsh action has put the Plaintiff out of business not only with Defendant No.1, but may also affect tender business with other governmental agencies, and merely for a default of one of its

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suppliers, the Plaintiff cannot be put, out of business to represent other worldwide suppliers who are may be required to be represented by the Plaintiff in future business / procurement.

8. In view of hereinabove fact and circumstances, I am of the view that the Plaintiff has made out a prima facie case, whereas, balance of convenience also lies in its favour and if the injunction is refused, irreparable loss would-be caused which could not be compensated. Therefore, by means of a short order dated 15.03.2019 listed application was allowed and the impugned Letter dated 4.4.2018 was suspended to the extent of Plaintiff's blacklisting pending final disposal of this Suit and these are the reasons thereof.

J U D G E

ARSHAD/