

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Suit No. 1007 of 2016

Falcon-I (Private) Limited

Versus

Federation of Pakistan & others

Date	Order with signature of Judge
------	-------------------------------

For hearing of CMA No.16294/16

Date of Hearing: 14.3.2017

Plaintiff: Through Mr. Ali Almani Advocate

Defendant No.1: Through Mr. Abdul Qadir Laghari Assistant
Attorney General

Defendants No.2 &
4 to 6: Through Mr. Kashif Nazeer Advocate

Applicant/Intervener: Through Mr. Muhammad Masood Khan
Advocate

ORDER

Muhammad Shafi Siddiqui, J.-This is an application under Order 1 Rule 10 CPC filed by the applicant NLC Construction Solutions (Private) Limited. The applicant/Intervener prayed that the subject matter of this suit is one that they are directly interested in and are thus necessary and proper party and their presence as being one of party is necessary and essential in order to reach to a fair and justified conclusion. The subject matter of the suit is procurement of a service under Procurement Ordinance, 2002 and Public Procurement Authority Rules, 2004 as alleged by the plaintiff. The subject service include tracking and monitoring of cargo from one destination to another. The plaintiffs have challenged the method adopted in awarding the license and also mode of evaluating the investment criteria which was claimed to have been changed subsequently to benefit some none deserving companies participated in the tender. Plaintiffs as such prayed as under:

- (1) Declare that the defendants have violated the provisions of the Ordinance, 2002 and Rules 2004 during the procurement process;
- (2) Declare that the license under the Rules 2012 and the Letter of Invitation dated 29.10.2015 should be awarded to the plaintiff.
- (3) Prohibit the defendants from directly as well as indirectly, through its officers, employees, servants, agents or assigns from awarding a license to any other party for the tracking and monitoring of cargo under the Rules, 2012.

2. Learned Counsel for applicant submitted that the Licensing Committee recommended awarding license in their favour i.e. NLC Construction Solutions (Private) Limited being one of the lowest evaluated bidder obtaining highest marks. Learned Counsel for the applicant submitted that such recommendation is based upon the combined effect of the requirement including but not limited to evaluation criteria laid down in the bidding documents. Technical and financial bid of the applicant was found competitive as they have secured highest marks in the combined evaluation report. The applicant thus is a necessary and proper party since in prayer clause-2 the plaintiff claimed that the subject service tender/license should have been awarded to them (plaintiff) under Rules 2012 and under letter of invitation dated 29.10.2015. It is urged that in case the plaintiff succeeds in the absence of applicant, the applicant would be deprived of their right which otherwise is granted to them by the Licensing Committee in terms of their recommendation under challenge. They have also prayed that the defendants be restrained from awarding a license to another party for tracking and monitoring the cargo under the Rules 2012 hence a decision of such nature as prayed by the plaintiff would directly curtail the rights of the plaintiff to which they are entitled in terms of the decision of the Licensing Committee. Counsel

submitted that they may have challenged the procedural mechanism adopted by the official defendant and the defendants may have been answerable to the questions raised by the plaintiff but ultimately it is the applicant who would suffer on account of a decision in favour of the plaintiff, hence it is urged that the applicant/Intervener is a proper if not necessary party under the circumstances of the case.

3. On the other hand learned Counsel for the plaintiff submitted that it is the official defendants who are responsible for justifying their decision based on altered criteria and procedure than the one earlier referred when the expression of interest was called. The applicant was added in pursuance of a letter issued by the defendant No.3 when the FBR was pleased to add NLC Construction Private Limited to the earlier shortlist of participants. In its letter dated 29.10.2015 thus amongst all those companies which were shortlisted, the applicant was included and that inclusion is without prejudice to the rights of the plaintiff. Counsel submitted that these reservations apart, the subject matter of this suit is such that it is only the defendant who are answerable to the questions. Neither the applicant is a necessary party nor their presence is necessary for this Court to reach to a just and fair conclusion. The issue that is likely to be framed is; whether the defendant (present defendants) have violated the provisions of Ordinance, 2002 and Rules 2004 during procurement of the subject service. Applicant as such has no role to play as far as the aforesaid issue is concerned. Learned Counsel submitted that if the proposition of the applicant is considered to be justified then apart from the applicant there are many other companies who participated in the bidding process and they would also be justified in moving an application to be impleaded as necessary and proper party.

4. Heard the learned Counsels and perused the material available before me.

5. The scope of the suit apart from the requirement of Order 1 Rule 10 CPC is very necessary to be considered. Order 1 Rule 10 (2) CPC requires that the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

6. The first criteria that is required to be considered is that whether the applicant is a person who ought to have been joined either as plaintiff or defendant, a simple answer to this question is in negative. The relief sought by the plaintiff is such that the official defendants are only answerable to a decision that they have taken. The second principle of this Rule 10(2) relates to presence of a party which may be felt necessary to enable the adjudicating Court to settle all questions involved in the suit. One of the questions involved in terms of prayer clause-2 is as to whether the license of the subject service is to be awarded to the plaintiff, if at all the procuring agencies have violated the evaluation criteria or any rules required under the law.

7. In one of my earlier decision referred in JM No. 01 of 2011 etc in the case of Suit Southern Gas Company Limited versus Oil & Gas Regulatory authority & another I have observed as under:-

“-----7. The prime question in determining the application under order I rule 10 CPC is the necessity of the applicant to determine the real question involved in the matter. Order I rule 10(2) insofar as the present applications are concerned provides that the Court may

at any stage of the proceedings..... that name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely adjudicate upon and settle all questions be added. What is important here is to see whether the plaintiff/petitioner in such a situation ought to have joined the applicant as necessary and property party and in this phrase of subsection this is the only essential consideration. I would score of this proposition that insofar as determination of questions involved in the petitions are concerned, the petitioner ought to have joined the applicants/interveners as party as in their absence not only that petitioner could present its case but the Court may have also factually and completely adjudicated upon the matter.

8. The second phrase of Sub-Rule 2 of Order I rule 10 CPC relates to a party whose presence may be necessary in order to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit. Such is also not the reality as the Court can factually and completely adjudicate upon all the questions raised by the petitioner in the petition. Any additional point, which may have been raised by these applicants, which does not form part of the pleadings in the petition, is not open for considering. The applicants/interveners may have independent cause in this regard and they may have been aggrieved of any determination as far as the present controversy is concerned, however they do not appear to be necessary and proper party and I am not inclined to join them as such hence their applications are dismissed. In the capacity of a shareholder they are bound by the decision of Board of petitioner and they have not presented the case of oppression. Similarly they cannot be deemed to be aggrieved of the determination of OGRA.-----”

8. In the above referred judgment I have ruled out the possibility of impleading such party where plaintiff was not obligated to implead

such entity and where in absence of such entity, applicant or Intervener the Court could come to a just and fair conclusion which could have been the possibility here in the absence of decision of the Committee which is the “subject matter” of the suit. The applicant/Intervener has certain interests developed in pursuance of a decision of the Committee which decision in fact directly or indirectly is the subject matter of the suit. Plaintiff may have claimed a relief on its own against the defendant but such relief cannot be granted to them unless the earlier decision on the basis of which the applicant is deriving interest, is set aside. While interpreting Order 1 Rule 10 CPC and its scope the questions involved in the suit are also very essential to consider the applicant as necessary and/or proper party. The word effectually and completely adjudicate upon and settle all the questions involved in the suit means not only the question raised by the applicant but all other issues ancillary and articulated with the questions raised to challenge the impugned decision of the Committee. Such issues and its decision is directly linked with the applicant’s interest. The person under Order 1 Rule 10 CPC is a person whose interest is likely to be affected even though no relief is claimed against him. This indulgence off course does not extend to a person who has no interest which is likely to be affected by the proceedings. In order to effectually and completely determine all the questions between the parties, it is necessary to consider the point or material which had not been raised or brought before the Court by the parties to the suit but shown by third party and has direct nexus with relief as claimed, and in that case the person who has raised such points or brought such material before the Court as was relevant for determining the questions involved in the suit is a proper party. Indeed such questions and points would not change the complexion and nature of the suit. Considering the case of the applicant, it cannot be presumed even remotely that the pleadings of the applicant are

strange as far as the plaintiff's case is concerned. In fact the plaintiff's case is built upon the alleged rights of the applicant.

9. In the instant matter the Licensing Committee has already recommended for awarding a tender in favour of the applicant. It is not that all other companies who have participated in the tender may have an interest in the proceedings. It is the stake of applicant who has already been recommended by the Licensing Committee which license would be at stake in case the instant suit is heard and decided in the absence of the applicant. No doubt that it is the present set of defendants who are answerable to the question but a possible decision of the suit may effect a right of a party/applicant without a contest and who has already been recommended for awarding a tender/contract. Had it not been the case, the applicant may not have been even a proper party. In a situation where right has been created in favour of the applicant, their presence cannot be ruled out in view of a possible decree that may be passed in the suit.

10. In view of the above, the application is allowed. The observations are without prejudice to the rights of the parties and may not influence further proceedings and trial. Amended title be filed within seven days from the date of this order.

Judge