

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

Present:

Ahmed Ali M. Shaikh, CJ
Yousuf Ali Sayeed, J

C.P No. D-01 of 2020

Petitioner : Pegasus Consultancy (Private) Limited
through Maria Ahmed, Advocate.

Respondent No.1 : Federation of Pakistan through Khaleeq
Ahmed, D.A.G.

Respondent No.2 : Defence Export Promotion Organization
through Ch. Sultan Mehmood, Advocate.

Respondent No.3 : Badar Expo Solutions through Kazi Abdul
Hameed Siddiqui, Advocate

Date of hearing : 21.02.2022

ORDER

YOUSUF ALI SAYEED, J - The Petition impugns the pre-qualification bid process for the procurement of event management services by the Respondent No.2, the Defence Export Promotion Organisation (“**DEPO**”) for the 11th International Defence Exhibition and Seminar (“**IDEAS**”).

2. IDEAS is apparently a biennial event, described as providing a platform for suppliers of defence systems, technologies and equipment from all over the world to exhibit and showcase their wares. The first such exhibition was organized in Karachi in the year 2000, and thereafter, with the exception of the aborted exhibition of 2010, subsequent exhibitions have otherwise been organized by DEPO in the city every two years.

3. The 11th IDEAS was scheduled to originally have been held in Karachi in November 2020 but was postponed due to the outbreak of COVID-19, and we are informed that the same is now set to be held between the 15th and 18th of November, 2022.

4. The contract for event management of the first few IDEAS exhibitions had apparently been granted in favour of the Petitioner. Thereafter, the event management contracts for the 2012 and 2014 exhibitions were secured by Badar Expo Solutions, the Respondent No.3, through open bidding. However, the contracts for the 2016, 2018 and 2020 exhibitions were then privately awarded to the Respondent No.3, which was challenged before this Court through C.P. No. D-20 of 2017, with it being held by a learned Division Bench that the award of such a contract by DEPO had to be through an open and competitive bidding process as per the PPRA Ordinance and the PPRA Rules 2004 (the “**PPRA Rules**”). The contract for the 2020 exhibition was thus set aside – the 2016 and 2018 having already taken place in the interim. That decision has since been reported as *Humera Imran v. Government of Pakistan* PLD 2019 Sindh 467. As such, in keeping with that judgment, the Expression of Interest (“**EOI**”) for event management in respect of the 11th IDEAS was advertised by DEPO on 15.11.2019 in various newspapers.

5. Prior to submitting its application to the EOI, the Petitioner had approached DEPO for modification of the Qualification Criteria, alleging that the requirements to pre-qualify were anti-competitive as only two event managers (i.e. the Petitioner and Badar Expo) could realistically be expected to meet the criteria, in as much as the same *inter alia* emphasised work

experience in conducting “defence related” exhibitions, and required experience of organizing events valuing a minimum of PKR 50 million in the last 10 years as well as sale of sponsorship valuing a minimum of PKR 25 million over that period, and attributed higher marks for exhibition management related to defence affiliations and certifications. However, that request was declined on 27.11.2019, whereafter the Petitioner went on to submit its application to pre-qualify in light of the terms prescribed.

6. On 6 December 2019, DEPO asked the Petitioner to submit certain additional documents for purpose of evaluating its application. As it then transpired, on 13.12.2019 it was communicated to the Petitioner that it had been found to be “unqualified” under the Experience and Past Performance and Financial Position categories.

7. On 14 December 2019, the Petitioner wrote to DEPO asking for the details of its evaluation, the evaluation report under the PPRA Rules, and a review of DEPO’s decision. The meeting of the Grievance Redressal Committee (“**GRC**”) constituted in the matter was then held on 19.12.2019, with the minutes of the meeting, reflecting that the Petitioner had been disqualified as:
 - (i) proof of valuation of the Expo Pakistan (2006 - 2010), UAE Expo 2011 and TEXPO events over PKR 50 million was not provided and therefore no marks were given,
 - (ii) the credit line from Faysal Bank of PKR 2,049 million (extendable by PKR 1000 — 1500 million) was not accepted and therefore no marks were given, and
 - (iii) the Petitioner’s annual financial turnover of the last 5 years is less than PKR 100 million when calculated on an average basis and therefore no marks were given.

8. The comparative table of the grievances raised by the Petitioner and the decision made in respect thereof by the GRC is as follows:

| Ser. | <u>Grievances Raised</u> | <u>Decision by Committee</u> |
|-------------|---|--|
| a. | <u>Criteria 1- Experience and Past Performance: Result: Unqualified</u> | |
| | <ul style="list-style-type: none"> ▪ Pegasus Consultancy (Pvt) Ltd conducted IDEAS 2000, 2002, 2004 and 2006 and received commendation letters from the President of Islamic Republic of Pakistan and other senior officials. ▪ Pegasus Consultancy (Pvt) Ltd conducted Expo Pakistan (2006-2010), UAE Expo 2011 and TEXPO 2019 events. ▪ Criteria 1 contradicts with Criteria 4 (Managerial Capabilities) | <ul style="list-style-type: none"> ▪ Pegasus was clarified that marks for IDEAS 200, 02, 04 and 06 have been included in their marks sheet (Anx B) ▪ Proof of event worth Rs.50 Mn or above was not provided for the said exhibition and therefore no marks have been given (Anx B). ▪ There is no contradiction as full marks have been given for space booking above 3000 sqm. |
| b. | <u>Criteria 2 – Financial Position: Result: Unqualified</u> | |
| | <ul style="list-style-type: none"> ▪ Pegasus Consultancy (Pvt) Ltd has submitted for Comfort Letter from Faysal Bank for a credit line exceeding PKR 1,000 Mn along with Audited Financial Statements of last 5 years with substantial Turnover. ▪ Pegasus Consultancy (Pvt) Ltd has sold the sponsorship for UAE Expo 2011 for over Rs 25 Mn | <ul style="list-style-type: none"> ▪ Pegasus consultancy was told and shown that as per the evaluation committee, there is no available/existing credit line in the name of Pegasus (letters Anx C). ▪ Tax returns for last 5 x years were asked to calculate Annual turnover. The annual turnover of all the contenders were calculated by taking the average of last five years tax return receipts by the board and the average of Pegasus consultancy is Rs 97.2 Mn (Anx D) which is less than 100 Mn as required by qualification criteria. ▪ Marks for sponsorship of UAE Expo 2011 have been included in the marks sheet of Pegasus Consultancy (Anx D). |

| | | |
|----|--|--|
| c. | Misc. | |
| | <ul style="list-style-type: none"> ▪ Pegasus Consultancy has requested DEPO for provision of:- <ul style="list-style-type: none"> ▪ Details for Evaluation with marks assigned to Pegasus Consultancy under each category, along with complete Evaluation Report including marks given to all the Bidders. ▪ Review of Evaluation result of Pegasus Consultancy on merit | <ul style="list-style-type: none"> ▪ Pegasus consultancy has been shown marks for each category in the meeting and were given rationale for marks. Complete score sheet along with rationale is attached as Annx E. ▪ Each category of criteria along with the marks was explained and re-evaluated by the committee and there was no change in the marks decided unanimously by the Grievances Redressal Committee. |

9. In the wake of the Petitioner’s disqualification, as maintained by the GRC, the Respondent No.3 emerged as the only qualified bidder and went on to submit its Financial Bid so as to be awarded a contract on 06.01.2020.

10. Impugning the actions of DEPO and decision of the GRC, learned counsel for the Petitioner argued that the qualification conditions under the EOI had been restrictive and anti-competitive as the allocation of marks for purpose of evaluation placed emphasis on past experience in “defence related” work experience and events, that too of a high sponsorship value, hence only those event managers who had previously conducted IDEAS could have meaningfully participated as IDEAS is the only defence related exhibition in Pakistan that takes place at such a large scale. As such, the bidding process had not been fair and competitive as it failed to ensure the widest possible competition. It was contended that the conditions and scoring methodology had been designed and were applied by DEPO to favour the Respondent No.3, and as the Petitioner was its only real competitor, it had deliberately been disqualified on flimsy and unjustified grounds so as to pave the way for the award of a contract in favour of that Respondent.

11. It was argued that the Petitioner had wrongly been denied marks for experience and past performance in relation to its organising of Expo Pakistan (2006-2010), UAE Expo 2011 and TEXPO 2019 on the ground that proof of valuation of those events had not been provided. It was firstly contended that such information was not available with the Petitioner, and secondly, that it was within DEPO's knowledge that those events were valued at above PKR 50 million as they had been conducted by the Trade Development Authority of Pakistan ("**TDAP**"), which was also the endorsing agency of the 11th IDEAS, hence the information could have been verified by DEPO of its own accord, as authorised by the Petitioner in terms of Clause 3 of its Letter of Application. As to the evaluation of the Petitioner's credit line, it was contended that the observation that "there is no available/existing credit line in the name of Pegasus" was unjustified as a letter had been issued by Faysal Bank Limited stating that a credit facility of PKR 2,049 million available to its sister concern, namely Premier Mercantile Services (Pvt.) Limited, could be used by the Petitioner and the letter confirmed that the bank was further willing to extend the facility by PKR 1000 - 1500 million to the Petitioner should the need arise. As such, the failure to allocate marks to the Petitioner against that criterion was also unwarranted. It was argued that the relevant criteria only stated "Available Bank Credit Line and Bank Guarantee" and did not specify whether it had to be in the name of the applicant or available through an affiliate, therefore the rejection of the credit line for not being in the name of the Petitioner was based on an extraneous consideration. On that note, it was also submitted that DEPO's scoring of the Petitioner's annual turnover on an average rather than cumulative basis was an evaluation criterion that was not provided anywhere in the EOI or known to the Petitioner. It was argued that the fairness of the procurement process was thus under a cloud and there was serious doubt that the award of the contract to the Respondent No.3 was mala fide.

12. Conversely, it was argued by learned counsel appearing on behalf of the Respondent No.2 that it was the prerogative of the procuring agency to set the pre-qualification criteria as per Rule 15 of the PPRA Rules and that the procurement process had been conducted fairly and in accordance with the law. It was submitted that having participated in the prequalification process, the Petitioner could not impugn the evaluation criteria upon conclusion of the procurement simply because the Petitioner had failed to qualify as per the requirement.

13. Learned counsel for DEPO further submitted that the Petitioner as well as other participants had presented their documents and after conducting proper scrutiny, the marks were allocated to all the participants according to the criteria set, as per which bidders were required to obtain at least 50% marks in each individual category with an aggregate overall score of at least 65%. It was submitted that during the evaluation process it had come to the fore that the Petitioner had failed to provide relevant documents supporting its claim with respect to its past performance and experience, as well as its financial position. Furthermore, it had failed to demonstrate the availability of a bank credit line. Hence the Petitioner could obtain only 43.5 marks out of a total of 100, resultantly failed to meet the qualification criteria and was informed accordingly. He pointed out that the Petitioner had then approached the GRC, and submitted that after hearing the Petitioner and analysing the record the GRC had passed a detailed order turning down the grievance application while setting out its reasons in that regard.

14. For his part, learned counsel for the Respondent No.3 adopted the arguments preferred on behalf of the Respondent No.2 while asserting that the procurement process had been fair and transparent.

15. We have considered the arguments advanced on behalf of the contestants in light of the material referred to in support of their contentions.

16. On the subject of judicial review in matters of public procurement, it has been held by the honourable Supreme Court in *Suo Motu Case 13 of 2009 PLD 2011 Supreme Court 619* that in such matters the exercise of judicial oversight is intended to prevent arbitrariness or favouritism, with public interest as the paramount consideration. It was further observed that the basic test in such regard is to see whether there was any infirmity in the decision making process and interference in such a process is warranted where it appears to be predicated upon arbitrariness, illegality, irrationality, procedural impropriety and / or actuated by mala fides. Furthermore, in the case of *Asif Fasihuddin Vardag v. Government of Pakistan and others 2014 SCMR 676*, the Apex Court held that it is the duty of the Court to determine the legality of a decision and such duty was to be exercised inter alia by determining if the decision making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable person would have reached; or abused its powers. It was reiterated that principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. An observation in the same vein was also made by this very Bench in the case reported as *Badar Expo Solutions through Managing Director v. Federation of Pakistan through Chief Executive Trade Development Authority and 12 others PLD 2022 Karachi 336*.

17. The PPRA Rules envisage that while engaging in pre-qualification, a procuring agency may tailor the evaluation criteria while taking into consideration relevant experience and past performance; capabilities with respect to personnel, equipment, and plant; financial position; and appropriate managerial capability, along with any other factor that the procuring agency may deem relevant that is not inconsistent with the Rules. No cogent factor has been raised as would lead us to conclude, keeping in mind the size and nature of the event, that the requirement as to experience or financial standing ought not to have been incorporated in the manner imposed. Thus, the fate of the Petitioner's challenge essentially turns on a determination of whether its disqualification in light of the criteria could be termed unreasonable, which entails an assessment of whether or not the same ensued for reason(s) that could reasonably be regarded as being valid.

18. Looking then to the evaluation of the Petitioner's credentials from the standpoint of the criteria in respect of which marks were withheld so as to result in it falling short of the threshold, and the reasons forthcoming in that regard, it merits consideration that it is evident from the very stance of the Petitioner that proof of valuation of the particular past events were not provided. The contention of the Petitioner that as it had authorised DEPO through its Letter of Application to conduct enquiries and investigations to verify the statements, documents and information submitted, hence DEPO could and should have independently obtained such information from TDAP is hardly compelling, as there is a marked distinction between the right of a procuring agency to 'verify' the documents and information submitted by a bidder, as opposed to the 'gathering' of such information so as to make up deficiencies in a bidder's application. Needless to say, the burden to supply the requisite documents and information was on the Petitioner and could not be shifted to DEPO.

19. As to the financial requirement of an available bank credit line, which was to be supported by documentary proof, it merits consideration that the documents submitted by the Petitioner in that regard were certain letters dated 28.11.2019 issued by Faysal Bank Limited and Premier Mercantile Services (Pvt.) Limited respectively. Those letters read as follows:

“28th November, 2019

TO WHOM IT MAY CONCERN

This is to certify that Premier Mercantile Services (Pvt) Limited is maintaining a satisfactory relationship with Faysal Bank Limited since 2004 and is availing the following credit facilities from our counters:

PKR in Millions

| No. | Facility | Limit |
|-----|--------------------------------|----------|
| 1 | Funded Facilities – Short Term | 1,600.00 |
| 2 | Non Funded Facilities | 419.00 |
| | Total | 2,049.00 |

It is also certified that the markup, principal and any other charges due from Premier Mercantile Services (Pvt) Limited are promptly serviced and there exists no event of default. Faysal Bank is willing to further extend this facility by PKR 1,000Mn to PKR 1,500Mn to Premier Mercantile Services or its Associate/Sister Concerns like Pegasus Consultancy (Pvt.) Limited, if need arrives based on the financial strength and long standing relationship. This will be subject to Premier Mercantile Services/Associate Concern / Sister Concern meeting Faysal Bank’s internal credit evaluation criteria and fulfilling our credit approval process.

This certificate is issued on the specific request of the customer without any risk and responsibility on part of Faysal Bank or any of its employees.

For and on behalf of Faysal Bank Limited

Yasir Hassan
Senior Relationship Manager
Corporate Banking

Ali Ayaz Siddiqui
Unit Head
Corporate Banking”

“November 28, 2019

TO WHOM IT MAY CONCERN

This is to certify that Premier Mercantile Services (Pvt) Limited is maintaining a credit facility with of PKR 2,049 Million from Faysal Bank Limited which can further be extended by PKR 1,000 Million to PKR 1,500 Million.

In this regard, we further state that this facility can be utilized by our sister concern Pegasus Consultancy (Pvt) Ltd. as and when required.

For & on behalf of
Premier Mercantile Services (Pvt) Limited

Muhammad Masood Ahmed Usmani
Director and Chief Financial Officer”

20. Having examined the content of those letters, we are of the view that the same do not qualify as an unequivocal expression of an available credit line in favour of the Petitioner, but reflect a tentative arrangement contingent on further processes, evaluations and approvals, that too by or at the behest of a third party. Suffice it to say that under such circumstances it cannot be said that DEPO acted unreasonably in withholding marks from the Petitioner on this score.
21. As such, no substantial case on merit as to arbitrariness or a contravention of the PPRA Rules stands made out so as to require remedy through judicial review. That being so, the Petition stand dismissed.

JUDGE

CHIEF JUSTICE

Karachi
Dated _____