

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

Suit No.116 of 2021

Gunvor Singapore PTE Ltd  
Versus  
Pakistan LNG Limited & another

Date	Order with signature of Judge
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For hearing of CMA 754/2021

**Date of hearing: 19.01.2023, 26.01.2023 and 27.01.2023**

Mr. Mayhar Mustafa Qazi along with Mr. Shahbakht for plaintiff.  
Mr. Abdul Rehman for defendant No.1.  
None for defendant No.2.

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**Muhammad Shafi Siddiqui, J.**- This suit for declaration and injunction is filed by one of the participants of the LNG procurement process initiated by defendant No.1 i.e. Pakistan LNG Ltd. (hereinafter referred as PLNG). Plaintiff (hereinafter referred to as 'Gunvor') has prayed that its bid in respect of second cargo, to be supplied under the subject tender of PLNG being tender No.PLL/IMP/LNGT27 advertised on 27.11.2020 stands rejected upon issuance of evaluation report dated 28.12.2020; in consequence claimed the bid bond is liable to be released. Along with suit Gunvor has filed application seeking order to restrain the defendants from encashing the bid bond in the form of unconditional bank guarantee, furnished in compliance of the bid documents.

2. Mr. Mayhar Qazi, Gunvor's counsel assisted me with the following fact and application of law.
3. Gunvor being a multinational commodity trading company, incorporated under the laws of Singapore and also involve in the business of supplying liquefied natural gas (LNG), participated in tender

advertised by PLNG inviting bids for supply of two LNG cargos on delivery ex-ship basis at Port Qasim Karachi, Pakistan; PLNG is a public sector energy entity and is being governed by Ministry of Energy (Petroleum Division) of the Government of Pakistan.

4. The subject tender related to two separate cargos with separate delivery windows, however, for the purpose of the instant suit, the dispute only relates to tender for supply of second cargo with delivery window 23-24 February, 2021. Gunvor participated in the tender on the basis of bid documents wherein the bid documents of each participant was required to be evaluated for a contract price based on the percentage of Brent<sub>m</sub>.

5. It is Gunvor's case that in the subject evaluation report, dated 28.12.2020, Gunvor was not the most advantageous bidder<sup>1</sup> and in terms of clause 5.6<sup>2</sup> of the bid documents, bid was to be awarded to the most advantageous bidder. Considering the evaluation reports, Emirates National Oil Company (ENOC) Singapore since was the most advantageous bidder in respect of second Cargo, the offer made by the Gunvor stood rejected automatically upon issuance of such evaluation report. It is contended that pursuant to Rule 35<sup>3</sup> of Public Procurement Rules, 2004 (PPRA Rules 2004) the evaluation report issued by procurement agency is meant to announce the results of bid evaluation and provide justifications of the acceptance or rejection of bids. It is thus on such assumption and understanding of law that the Gunvor

<sup>1</sup> The word "lowest evaluated bid" was substituted with the words "most advantageous bid" vide SRO No.442(1)/2020 dated 15<sup>th</sup> May, 2020

<sup>2</sup> **5.6 Process of Evaluation of Commercial Offer and Award Criteria**

5.6.1. PLL will evaluate each Commercial Offer of each of the Compliant Bidders. Award for a Contract in respect of each LNG cargo will be made based on the lowest percentage of Brent<sub>m</sub> (as defined in section 4.7.1 of the Bid document) offered by any Compliant Bidder for that LNG cargo.

5.6.2. PLL will announce the bid evaluation results in a bid evaluation report as per Bidding Timetable mentioned above.

5.6.3 The selection of a Bid, and award of an LNG cargo in accordance with that Bid, will be made by PLL and the Bidder will be notified as per Bidding Timetable mentioned above.

<sup>3</sup>**35. Announcement of evaluation reports.-** Procuring agency shall announce the results of bid evaluation, in the form of a report giving justification for acceptance or rejection of bids at least ten days prior to the award of procurement contract.

considered itself as being rejected on the announcement of bid evaluation report which essentially reflects ENOC above as most advantageous bidder with whom Award should have been made releasing all others. This evaluation report itself is a rejection of bid, for all others not came out as most advantageous bidder, as submitted by the Gunvor.

6. In consequence of such evaluation report it is claimed that PLNG should have returned the bid bond immediately thereby discharging the security provided on behalf of Gunvor.

7. On 05.01.2021 after the evaluation report was published and things were cleared that the Gunvor was not the most advantageous bidder, Gunvor's bank sent a request via SWIFT for cancellation of bid bond.

8. In response to this, it is claimed that an email was sent to the Gunvor on 07.01.2021 that PLNG intend to award the tender to the Gunvor and asked the Gunvor to provide confirmation and submit necessary performance guarantee. It is argued that such acceptance (*which Gunvor called to be an offer by PLNG*) is in contradiction to clause 5.6 of the bid document and Rule 35 and 38<sup>4</sup> of PPRA Rules 2004 in terms whereof Gunvor's bid stood rejected on the issuance of evaluation report. It is argued that on the same day Gunvor sent an email to PLNG to clarify that since it was not the most advantageous

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<sup>4</sup> **38. Acceptance of bids.**- *The bidder with the most advantageous bid, if not in conflict with any other law, rules, regulations or policy of the Federal Government, shall be awarded the procurement contract, within the original or extended period of bid validity.*

**38B. Single responsive bid in goods, works and services.**- (1) *The procuring agency shall consider single bid in goods, works and services if it-*

(a) *meets the evaluation criteria, ensures compliance of specifications and other terms & conditions expressed in advertisement or bid solicitation documents;*

(b) *is not in conflict with any provision of the Ordinance;*

(c) *conforms to the technical specifications;*

(d) *has financial conformance in terms of rate reasonability;*

*Provided that except unsolicited proposal, in case of pre-qualification proceedings single bid shall not be entertained.*

(2) *The procuring agency shall make a decision with due diligence and in compliance with general principles of procurement like economy, efficiency and value for money.*

bidder, it cannot accept the award of tender. On 08.01.2021 PLNG replied stating that the most advantageous bidder has since withdrawn itself therefore PLNG had decided to accept the bid of the Gunvor as next in line after calling bid bond of ENOC.

9. Since the Gunvor was not inclined to abide its offer on the basis of above assumption, PLNG deemed it as refusal to oblige its commitment, which led to a call for encashment of bid bond, according to Mr. Mayhar Qazi, is an unlawful call.

10. Gunvor's arguments could thus be summarized as:-

1. Pursuant to bid documents and Rules 35 and 38 of the Procurement Rules, PLNG could only award the contract to the compliant bidder whose bid is evaluated as the most advantageous bid and the withdrawal of the most advantageous bidder would end the procurement process and cannot be passed on to the next most advantageous bidder and so on.
2. On the announcement of bid evaluation report under rule 35 declaring the most advantageous bidder, the bid of other bidder in line stands automatically rejected, notwithstanding the validity of the bid bond.
3. Encashment of bid bond would be inconceivable where neither the bid documents nor the procurement Rules allowed PLNG to award contract to the second and/or third most advantageous bidder.
4. Section 74 of the Contract Act, 1872 does not permit the party complaining of breach to recover any amount more than reasonable compensation for the loss caused by the breach.

11. Mr. Abdul Rehman, learned advocate for PLNG (defendant No.1), on the other hand has argued that simply because Gunvor was not the

most advantageous bidder on the basis of evaluation report, the other bids cannot be considered as rejected unless Award was executed, performance guarantee is signed and/or the validity of bid lapsed. The scheme of procurement is such that if the most advantageous bidder seeks withdrawal from his offer and/or refused to execute the performance guarantee then after encashment of the bid bond of the said bidder, the offer of the next compliant bidder in line is accepted and asked to execute performance guarantee. Unless expiry of bid bond is reached on account of the afflux of time, the bid would remain alive as in this case when the acceptance of offer was made.

12. Learned counsel appearing for defendant submitted that the evaluation report nowhere rejects the offer of Gunvor and the bid bond was intact and alive within the timeframe described in the bid document. He concluded that in case of escape of the most advantageous bidder after issuance of evaluation report the next most advantageous bidder in line is to be substituted as the most advantageous bidder after forfeiting security of escapee. He submitted that discretion however vest with PLNG to justify any rejection, on a lawful count of the second most advantageous bidder, be it abnormally deviating price from the allocated budget of market price as analyse by the procuring agency or any other legitimate count. Thus, assumption of the Gunvor is imaginary as far as self-rejection of the bid is concerned; Gunvor's bid bond was intact and valid when its offer was accepted and since Gunvor has disclosed its intention that it is not willing to honour its commitment, the bid bond was called to be encashed by PLNG.

13. I have heard learned counsel and perused material available on record.

14. Procurement of LNG is a complexed but well settled process in international market. It has a limited and defined market and limited

suppliers with a constant pressure of fluctuating market prices. The suppliers are never seen at losses and at times poll in windfall gains because of fluctuating market and this is how the system works. Realistically they (LNG supplier) do not end up in losses, unless a senseless decision is made. Pakistan like many other countries has a limited capacity to dock/store and transport LNG.

15. On 27.11.2020 PLNG advertised an invitation, inviting bids for supply of two LNG cargos on a delivery ex-ship basis at Port Qasim Karachi on delivery windows of 15-16 February and 23-24 February, 2021 vide subject tender. This tender includes two cargos with separate delivery windows whereas instant suit is only concerned with second cargo with delivery window of 23-24 February 2021. Gunvor participated in tender process and got the bid documents issued which it later submitted with PLNG. Bid document includes bidding time table as well as salient features describing entire process and the suitabilities and liabilities. The bid table is as under wherein dates are crucial to be noted:-

Description of activity	Date	
Date for advertisement for tender process	28 November 2020	
Deadline for submissions	28 December 2020, 1200 hours (PST)	
Date envelopes marked "Technical information" will be opened	28 December 2020, 1230 hours (PST)	
Date when envelopes marked "Commercial Offers" of technically compliant bidders will be opened	28 December 2020, 1500 hours (PST) or such later date as PLL may advise	
Deadline for PLL to countersign and return (in person or by courier/post/e-mail (as applicable) MSPA to compliant bidders only and where MSPAs not already in place Non-compliant bids will be separated and returned with "Commercial Offer" envelop unopened	08 January 2021, or such later date as PLL may advise.	
Date of announcement of bid evaluation result (bid evaluation report)	28 December 2020 or such later date as PLL may advise	
Bid validity date	<u>Delivery window</u>	<u>Validity Date</u>
	15-16 February 2021 23-24 February 2021	11 January 2021, 2100 hours (PST)

Date of Award notification	<u>Delivery window</u> 15-16 February 2021 23-24 February 2021	<u>Award Date</u> 07 January 2021
Deadline for the successful compliant bidder to provide performance guarantee.	<u>Delivery window</u> 15-16 February 2021 23-24 February 2021	<u>Performance guarantee submission date</u> 08 January 2021 or such other date as PLL may advise
Deadline for PLL to prepare complete confirmation notice for the LNG cargo.	<u>Delivery window</u> 15-16 February 2021 23-24 February 2021	<u>CN execution dt.</u>
<b>Description of activity</b>	<b>Date</b>	
And to send to the successful compliant bidder scanned copies by email	11 January 2021 or such other date as PLL may advise.	

16. The applicable law to adjudicate the controversy is Public Procurements Regulatory Authority Ordinance, 2002 (PPRA 2002), Public Procurement Rules, 2004 (PPRA Rules 2004) and Contract Act. Gunvor along with other bidders sought to participate in the bid and processed and executed bid document and provided bid bond in terms of clause 5.4.12<sup>5</sup> of the bid document.

17. Clause 5.4.10<sup>6</sup> of the bid documents provides that a bid shall remain valid for acceptance until the relevant bid validity date indicated in the bidding time table, is reached. Clause 5.14.12 provides that bid bond of “unsuccessful bidders” will be returned within five Pakistani business days after the award of all contracts for which bidder(s) has/

<sup>5</sup> 5.4.12. Bidders are required to submit one (01) bid bond with their Bid irrespective of the number of LNG cargoes they are bidding for. This shall be in the form of an unconditional bank guarantee in the form attached as Appendix-A to Annexure 5 of this bid document. The bid bond shall be in favour of PLL from a scheduled bank operating in Pakistan with a long term credit rating of at least AA from PACRA/JCR-VIS or equivalent from a reputable international credit rating agency for the amount of United States Dollars Three hundred thousand (USD 300,000) (“Bid Bond”). The Bid Bond of the unsuccessful Bidders will be returned within five (05) Pakistan business days after the award of all Contract(s) for which such bidder has bid. The bid bond will be enforced by PLL:

(a) ...

(b) In the event of failure by the successful Compliant Bidder to execute the confirmation notice(s) in respect of the LNG cargo(es) which has/have been awarded to it or if it fails or refuses to duly furnish the performance (bank) guarantee referred to in section 5.4.13; or

(c) on the occurrence of any other event of default/breach mentioned in this Bid Document.

<sup>6</sup> 5.4.10. A bid shall remain valid for acceptance until the relevant bid validity date indicated in the bidding timetable.

have bidden. In this event bid was called pursuant to 5.4.12(b) and (c) ibid mentioned below the margin line of Para 16.

18. Clause 5.6 of the bid documents relates to process of evaluation of commercial offer and award criteria. Under this clause procuring agency evaluates the commercial offer of each compliant bidder. Award for a contract in respect of each LNG contract is required to be made purely on the basis of lowest percentage of Brent<sub>m</sub>, as required in terms of clause 4.7.1 of the bid documents, as offered by any compliant bidder for the subject cargo. Gunvor's bid documents also disclosed and confirmed the aforesaid scheme that (i) if the bidder withdraws its bid during period of bid validity specified by the bidder in the bid or (ii) if the bidder having been notified of the acceptance of its bid during validity of the bid bond etc. withdraws, consequences would follow. Thus, Gunvor has bound itself to the above contractual terms.

19. Perusal of the bid documents would reveal that PLNG rather had an option, in the event by refusal of the most advantageous bidder, to accept the offer/bid made by next most advantageous bidder. This discretion/option only vests with PLNG, which discretion certainly has legal contours.

20. The procedure to be followed in the evaluation of bids and the process of awarding a contract were lucubrated in the bidding timeline, the salient terms of which were:-

- i) The deadline of submissions, the date for opening of technical and commercial submissions was on 28.12.2020 at 12:00 p.m.*
- ii) The date of the announcement of the bid evaluation results was on 28.12.2020 as such later date as the PLNG would advise;*
- iii) The bid validity date was specified as 11.01.2021 as confirmed by clause 5.4.10 of the bid document;*
- iv) Date of award notification was 8.01.2021;*



- v) *The execution of a performance guarantee in terms of Clause 5.4.13<sup>7</sup> of the bid document equal to 10% of the value of the contract as performance of the award of the contract.*

21. As per bid document the process on the basis of which the contract was to be awarded is as follows:-

- The bids to be submitted by 28.12.2020 at 12:00 p.m.
- The bids to be technically evaluated on 28.12.2020 at 12:00 p.m.
- The bids to be commercially evaluated on 28.12.2020 at 12:00 p.m.
- The bidder with the most advantageous bid would be asked first to execute a performance guarantee in terms of clause 5.4.13 of the bid document.
- In the event that bidder with the most advantageous bid fails to execute the performance guarantee in terms of clause 5.4.13 of the bid document, then the said bidder's bid bond will be called and the PLNG would, before the expiry of the bid validity date, invite after accepting the second most advantageous bidder's offer to execute a performance guarantee in terms of clauses 5.4.13 (supra) of the bid document and so forth until all the bidders fail to execute the performance guarantee or one of the bidders in line executes a performance guarantee to conclude the bidding process.

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<sup>7</sup> 5.4.13. *Successful Compliant Bidder(s) will be required to substitute their respective Bid Bond with an unconditional and irrevocable performance guarantee for an amount of ten percent (10%) of the total value of the Contract (that is the price offered by the relevant Compliant Bidder(s) for the relevant LNG cargo multiplied by its Estimated Contract Quantity (as defined in the MSPA)) or, if relevant, the total value of all Contracts the Compliant Bidder is entering into with PLL calculated in accordance with section 5.4.14 of this Bid Document, in US Dollars, substantially in the form attached as Appendix-B to Annexure 2 of the Bid Document from a scheduled bank operating in Pakistan with a long term credit rating of at least AA from PACRA/JCR-VIS or equivalent from a reputable international credit agency ("Performance Guarantee") as per Bidding Timetable. The Performance Guarantee will be enforced by PLL in the event of failure of the Compliant Bidder to comply with any of the conditions of the Contract without prejudice to any rights and remedies to which PLL may be entitled under the relevant Contract.*

22. On 28.12.2020 the bids were opened and it was found that the Gunvor had placed a bid which was commercially third most advantageous bid. However, the price of LNG in the international market were fluctuating, perhaps increasing; the bidders holding the first and the second most advantageous bid choose to have their bid bond forfeited in favour of PLNG which is obvious for a better deal in their hands and it enabled them to sell their shipment to others at a rate which was commercially more favourable to them and which price would invariably offset the cost of forfeiting the bid bond.

23. On 07.01.2021, and prior to the expiration of the bid validity date, PLNG informed the Gunvor that it was accepting the bid that had been made by it. The Gunvor in its response of 07.01.2021 gave their excuses mentioned in their argument which are not tenable under the law. The scheme of procurement Gunvor got itself in does not let them assume that since on the date of evaluation it did not picture as the most advantageous bid, it is end of race. In fact last lap of the race started on the evaluation day. Participants would decide on the day to have their bid bond forfeited for a better deal or stuck the same it offered. By no means the bid process is deemed over for other participants on the evaluation date.

24. On 08.01.2021 PLNG attempted to call on the Gunvor's bid bond on the ground that the PLNG had withdrawn their bid/offer. On the same day Gunvor instituted this suit and obtained injunction against the encashment of bid bond.

25. Procurement process is thus clear. As per clause 5.4.10 (supra) of the bid document and the bidding timetable, Gunvor was aware that the PLNG had the option to accept its bid on any date prior to the expiry of the bid validity date i.e. 11.01.2021 hence PLNG was well within its right under the bid document to accept the Gunvor's bid before expiry of bid

validity date and having been withdrawn by it, permitted PLNG to call on the bid bond.

26. The bid bond is an entirely independent contract to the bidding document and is enforced on the basis of the terms indicated in the bid bond. Bid term's validity and enforcement were not discharged on the Gunvor not being declared the most advantageous bidder on the opening of bid but endured itself for the entire period during which the bid remained valid i.e. up to 11.01.2021.

27. With reference to contentions of mis-procurement, again substantial clause of bid document would come in the way as binding contract. This defence would violate and ignore clause 5.4.10 (supra) of the bid documents which permits the PLNG to accept any of the bids upto the date of the bid validity date. The Gunvor seems to be ignorant of clause 5.6.1 of the bid document:

*“PLL will evaluate each commercial offer of each of the compliant bidders. Award for a contract in respect of each LNG cargo will be made based on the lowest percentage of Brent<sub>m</sub> as defined in Section 4.7.1 of this bid document offered by any compliant bidder for that LNG cargo.”*

PLNG in terms of clause 5.6.1 (Supra) had a right to accept the bid of “any compliant bidder”, in order of the amount bid by the bidder.

28. The test of fraud as identified in the case of GKN Contractors<sup>8</sup> is where the named beneficiary presents a claim which he knows at the time be an invalid claim, representing to the bank that he believes it to be a valid claim<sup>9</sup>.

29. PLNG in its email dated 07.01.2021 informed Gunvor that they would treat its statement as of not participating further in the bidding process as a withdrawal of the bid. View expressed by Gunvor was clear

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<sup>8</sup> GKN Contractor (1985 30 BLR 98 at 63)

<sup>9</sup> As has been discussed and observed by me in Suit No.1797 of 2022 in the case of Hab Power Company v. China Power Hub.

in terms of its withdrawal from the race enabling PLNG to call the bid bond of Gunvor and hence since it withdrew itself from the race when they were not permitted it cannot be construed as fraud<sup>10</sup>.

30. Additionally, if the energy procurement system is not designed strictly in such way, it would frustrate the process and render the utility of the commodity as unavailable. As in this case, it is the energy requirement of a country in consideration of which such process of procurement is carved out. It is in this regard and background that the bid contract was prepared, submitted and was opened for acceptance.

31. LNG Procurement is designed, keeping in mind that PLNG would have to either pay a higher amount to another bidder or have to resort to re-procurement and for the subject procurement the call of the bid bond is neither unconscionable nor unrealistic, as it would permit PLNG to offset its losses faced on such withdrawal, nor it amounts to unjust enrichment. Gunvor, conscious and experienced enough to understand terms of such contract.

32. It is, in accordance with the bid documents that can be safely adjudged that PLNG had every right, in the event the most advantageous bidder reneged of their obligation, to accept the next offer available and thus called upon Gunvor to perform its obligation as per its offer and in the event of Gunvor reneged on its obligation, as per its bid, to call upon Gunvor's bid bond.

33. Gunvor in view of above does not have a prima facie case which entitles it to injunct the encashment of the bid bond. Up to 11.01.2021 PLNG had a right to accept the Gunvor's bid and which it did on 07.01.2021. Having accepted the Gunvor's bid, it ought to provide performance guarantee; rather it reneged on its obligations to provide a performance guarantee and having apparently sold the cargo elsewhere

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<sup>10</sup> Shipyard K. Damen International v. Karachi Shipyard & Engineering Works (PLD 2003 SC 191) and Pakistan Engineering Consultants v. PIA (1993 CLC 1926)

for a better deal. Calling of a bid bond is even otherwise legitimate in the absence of such evidence of sale and proof of losses would not come in the way. Section 74<sup>11</sup> of the Contract Act requires to be read with exception followed, which does not provide a room in view of limits provided by the exception clause for the withdrawal of bid bond.

34. In respect of balance of inconvenience and irreparable loss, keeping in mind that the PLNG would have to either pay a higher amount to another bidder or have to resort to re-procurement, both factors are in favour of PLNG to permit encashment of bid bond. Besides it is the national commitments, which were infringed and hence irreparable loss is caused and inconvenience for the nation.

35. With the above discussion and observation, the injunction application in hand is dismissed and the call to encash bid bond is being treated within time.

Dated: 13.02.2023

J U D G E

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<sup>11</sup> 74. **Compensation for breach of contract where penalty stipulated for.** When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation - ...

Exception.-When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.