

IN THE HIGH COURT OF SINDH AT KARACHI

C.P.No.D-2524 of 2012

Mega Currency Exchange Company (Pvt.) Ltd.

Versus

Sr. Manager Commercial C.A.A. & others

BEFORE:

Mr. Justice Mushir Alam, CJ

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 30.11.2012

Petitioner: Through Mr. S. Haider Imam Rizvi Advocate

Respondents No.1 to 4: Through Mr. S. Toqeer Hassan Advocate.

Respondent No.5 Through Mr. Munir-ur-Rehman, DAG

Respondent No.6 Through Mr. Ayaz Ali Chandio and Mr. Shafique Ahmed.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This petition is arising out of a tender notice published in Daily Dawn dated 15.5.2012.

Brief facts of the case are that the petitioner which is a private limited company deals in the business of currency/money exchange and in pursuit of its business affairs is operating many branches. Consequent upon the earlier tender proceeding, a license was issued to petitioner in respect of Booth No.1 in the year 2009 along with small cubical located inside Room No.2314 at Level II of Jinnah Terminal, JIAP, Karachi, (hereinafter referred to as the booth in question). The last tender which was successfully met by the petitioner commenced from 04.08.2009 and ended in August, 2012 at a monthly license fee of Rs.250,100/- and consequently at the verge of its expiry, the respondents got published a tender notice for the booth in question for further three years period vide tender notice dated 15.05.2012 and the reserved price of the concession was fixed at Rs.340,000/- and the cut of date was fixed for dropping the tender as 05.06.2012 by 1100 hours, which was notified to be opened on the same day at 1130 hours.

Learned counsel for the petitioner submitted that the tender proceeding were initiated and ended whereafter the tender box was sealed but surprisingly it was allotted to the respondent No.6 despite the fact that petitioner's financial bid was higher than respondent No.6. However, the respondent No.1 and 2 disclosed to the petitioner that the documents submitted by them are not attested, which resulted in technical knockout of petitioner. Learned counsel submitted that as they were operating since last three years, therefore, attestation of documents was only a

formality and substantial compliance of clause 7 of the terms and conditions were not really required. However, without prejudice the petitioner requested for time to get the documents attested along with production of original thereof. It is contended by learned counsel for the petitioner that on the crucial date i.e. 05.06.2012 the petitioner was not disclosed as being disqualified, however on 19.06.2012 the petitioner again submitted written request to respondent No.4 for submission/ presenting the attested document and originals thereof which were pre-requisites of tender notice. It is contended by Mr. Rizvi that they received notice on 28.06.2012 for such decline. By this letter it was informed to them that they have been disqualified in respect of subject tender for the booth in question. It is contended that the petitioner approached the respondents with the explanation that the license was given to some other company at a much less rate as compared to one offered by the petitioner, however, no reasonable answer to their satisfaction was provided. It is contended by the learned counsel for the petitioner that the authorities concerned were required to act fairly while conducting the tender proceedings, however, petitioner has been deprived of its legitimate and legal right to continue with the operation of the booth in question. Learned counsel further submitted that the offer of the petitioner as being highest bidder was not considered on account of non-attestation of the documents which resulted in loss to government exchequer.

As against this, learned counsel for respondents No.1 to 4 submitted that the petition is not maintainable as firstly the petitioner was only a licensee and secondly the final decision of the auction proceedings vest with the concerned authority and no vested right accrued in favour of the petitioner. Learned counsel relied upon clause 7 of the tender notice, which is reproduced as under:-

“7. CAA reserves the rights to reject any or all the tenders without assigning any reason and without being liable for any claim/ compensation of any nature whatsoever. Decision of CAA shall be final and shall not be challenged.”

He further submitted that the tenders were invited on the basis of two envelopes that is (i) technical offer and (ii) financial offer out of which if a bidder fails in the technical bid/offer, the financial offer of the said bidder would become irrelevant and immaterial. He submitted that on subsequent event of opening financial bid of the second bidder i.e. respondent No.6, the petitioner was accordingly informed in writing on 20.06.2012. Learned counsel submitted that the sealed box was opened at 1130 hours in terms of the tender notice and the bidders have signed the tender attendance register and since the petitioner submitted unattested documents along with tender documents and failed to produce the original documents in terms of clause 19 of the terms of tender, he stood disqualified on technical bid.

Learned counsel for respondent No.6 submitted that the respondent No.6 participated in the tenders and after due process of law they were declared as

successful bidder, in terms of both in technical and financial offer and such result was conveyed to them by letter dated 29.06.2012 and consequently the license was awarded on 04.08.2012 for three years ending on 03.08.2015.

We have heard learned counsel for the parties and perused the record.

There is no cavil to this proposition that the terms of the tender were to be complied with as it appears in the public notice dated 15.05.2012. Admittedly the tenders were invited on two envelop basis i.e. technical offer and the financial offer. We have perused the contents of the petition and it appears that the petitioner himself in letter dated 05.06.2012, which is claimed to have been received by the respondent, has admitted that they have submitted unattested copies of the required documents and also did not place original documents for verification of copies. Petitioner's claim that since they have been occupying booth in question for the last three years to the entire satisfaction of the respondents, therefore, they may be given chance to produce original documents for verification or be given an opportunity for participating the re-tendering appears to be a futile effort. We may observe that tenders for the subject concession was invited from all the eligible companies/firms as per clause 3 of the terms of the tender which terms do not provide any relaxation or concession to those who are already sitting and enjoying the earlier license and doing business pursuant to earlier tender. Petitioner admitted their disqualification by issuing letters on 05.06.2012 and 19.06.2012 and requested the concerned authorities to allow them to

present the original documents for verification. Their previous credentials does not qualify them for the present tender. This concession, if provided to them, would amount to usurpation of rights of other participants. More importantly this monopolistic approach should be curtailed and the rights are to be determined on the basis of terms and conditions of the tender notice and not on the basis of earlier clearance, occupation and license. In this era of competition one has to be vigilant and careful and such slackness on their part cannot be considered and condoned at the cost of succeeding party. In our view this point that they are already in occupation would turn nothing.

We have also observed that in terms of clause 2 of the tender procedure, the tender opening committee was made eligible to open technical offer and evaluate technically each bid and put up the recommendations to concerned APM-JIAP, Karachi. It was further highlighted in the instructions and terms and conditions of the technical offer that technical evaluation shall be conducted in the light of proclamation/evaluation form developed on the requirement of clause 18 (Sub-Para “A” to “L”) of the said instructions and terms and conditions. It was further observed that the company/firm who could not qualify will be informed accordingly. It was further made it clear that financial offer should be opened for short listed pre-qualified company/firm only in the presence of their authorized representatives within 15 days of the tender process. We observe here that the petitioner was

accordingly informed on 20.06.2012 vide Annexure E to the petition at page 49 although the petitioner claimed that they were informed on 28.06.2012, however, their admission is available in Para 10 of the memo of petition where they have admitted that the said letter i.e. Annexure E, referred to above, was received on 21.06.2012. Thus, there was neither any delay in informing the petitioner regarding the fate of the tender nor it is the case of the petitioner that they have received same on 28.06.2012. Apparently, this petition was filed on 28.11.2012 i.e. after delay of five months, which period of laches has not been explained at all. On point of laches, this petition alone is liable to be dismissed as the license was issued to the respondent No.6 on 29.06.2012 and it is almost five months that the petitioner has been illegally and unlawfully occupying the booth in question without any lawful justification. We, therefore, see no substance as far as the case of the petitioner is concerned.

We have minutely scrutinized the tender documents submitted by the respondent No.6. A statement appears to have been filed by the respondent No.6 along with two documents i.e. award of license and a pay order in the sum of Rs.18,75,000/-. It is through this pay order which was issued on 05.06.2012 and incorporated in the award of license dated 29.06.2012 which provides that this amount in fact is to be treated as cash security equivalent to four months license fee and one month license fee in advance i.e. (4+1=5 months) which comes to Rs.375,000/- per month whereas in the same award a monthly fee of Rs.345,000/-

per month was said to have been approved. This discrepancy perhaps does not tally with the tender offered at the rate of Rs.375,000/- and there is no cavil to this proposition that in fact without any hesitation the amount of Rs.375,000/- was approved in response whereof on the same day a pay order of Rs.18,75,000/- was deposited i.e. four months security and one month advance license fee. When these documents were confronted with learned counsel for respondent No.6, he initially admitted that the pay order in fact was deposited for four months security and one month advance fee, however, subsequently when he calculated the amount and he realized that it comes to Rs.375,000/- per month, he changed his stance and submitted that in fact it was an advance payment for six months also and the bid offer was only for Rs.345,000/-. On this he was again confronted that if at all he willing to continue by offering Rs.375,000/- as license fee, his offer will be considered failing whereof the respondents will be directed to re-tender the counter/booth in question for operating foreign currency exchange. Learned counsel conceded that they are willing to pay Rs.375,000/- as license fee. In view of this the offer of Rs.375,000/- per month made by respondent No.6 is approved and respondents No.1 to 4 are directed to claim and receive license fee at Rs.375,000/- per month.

These public functionaries/procuring agencies such as respondents No.1 to 4 are obliged to procure such services by means of open competitive transparent unambiguous bidding. These respondents are performing duty as a sacred trust which

require them to protect public interest and interest of authority and not to extend undue favour which it appears from their conduct not approvable by this Court. However, looking at the fact that respondent No.6 has agreed to abide by the offer in the sum of Rs.3,75,000/- per month, we do not wish to examine the matter any further .

Since we have already observed that the petitioner has not made out any case for consideration as they have been technically knock out, as observed above, therefore, this petition is dismissed with the observation that the respondent No.6 shall pay the license fee at the rate of Rs.375,000/- per month as agreed.

Judge

Chief Justice