

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
C. P. NO. D-3145/2015

Date	Order with signature of Judge
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- 1) For orders on Misc. No. 14256/2015.
- 2) For katcha peshi.
- 3) For hearing of Misc. No. 14259/2015.

15.9.2015.

Mr. Haider Waheed Advocate for the Petitioner.
Mr. Asim Mansoor Khan DAG.
Mr. Haleem Siddiqui Advocate for Respondent No. 2
along with Waqar A. Siddiqui, G.M. Accounts.

Through instant petition the petitioner has impugned Evaluation Report dated 29.4.2015 issued by respondent No.2, whereby the petitioner has been disqualified from participating in Tender Reference No. GM(C&A)/CONT-1/21/CANTEEN/KHI/15.

Counsel for the petitioner submits that the petitioner had participated in the aforesaid tender and respondent No. 2 (PIA), in the technical bids, has awarded a total of 67 marks out of a total of 100 marks, and has disqualified the petitioner as the minimum qualifying marks are 75. Counsel contends that the petitioner has been awarded zero marks in respect of *Average Annual Turnover* for the last five years, whereas, the petitioner was entitled for at least 15 marks in this category as the *Average Annual Turnover* of the petitioner is between Rs. 51 to Rs. 99 million. Counsel further submits that the petitioner has been disqualified in order to oust the petitioner from the bidding process, as respondent No.2 intends to award the tender to some other favorite bidder. Counsel contends that since the petitioner is entitled for 15 marks in this category, the same may be directed to be awarded to the petitioner, whereafter, the petitioner can participate in the opening of the financial bids, already submitted pursuant to the aforesaid tender.

Conversely, Counsel for respondent No. 2 vehemently opposes the maintainability of instant petition, and submits that the petitioner has failed to avail the remedy provided under the Public Procurement Regulatory Ordinance 2002 and Public Procurement Rules, 2004, and has approached this Court prematurely. Counsel has referred to Rule 48 of the Public Procurement Rules, 2004 and contends that the petitioner

could have approached the Grievance Committee after issuance of Evaluation Report under Rule 35, therefore, the petitioner may be directed to avail the alternate remedy as provided under the law. On merits, the Counsel submits that since the petitioner had failed to provide audited profit and loss account for the last five years, therefore, no marks were awarded to the petitioner in this category. He further submits that the petitioner had only annexed balance sheet of last three years and some papers of the Tax Returns, which do not reflect the annual turnover of the petitioner, hence; the Evaluation Report is correct, whereby the petitioner has been disqualified. Counsel further submits that the petitioner is working with three different trade names, and therefore, the turnover shown in the Tax Returns, cannot be accounted for in the name of "Cosmos Enterprises", hence the petitioner cannot be awarded any marks in respect of the *Average Annual Turnover*.

Learned DAG in addition to adopting the arguments of Counsel for respondent No.2, submits that the annual turnover can only be ascertained by examining audited profit and loss account, and not from the balance sheet, or the Tax Returns, therefore, the petitioner may be directed to provide such audited profit and loss account for the last five years which could be considered by respondent No. 2 in order to resolve the controversy.

We have heard all the learned Counsel as well as learned DAG and perused the record. We would first like to address the objection with regard to maintainability of instant petition, as raised by the Counsel for Respondent No.2. Insofar as availing of alternate remedy as provided under PPRA Rules is concerned, it is an admitted position that neither the petitioner has been disqualified in terms of Rule 18, nor has been blacklisted under Rule 19. The matter is still at the stage of Evaluation Report as required to be announced in terms of Rule 35 *ibid*. The petitioner contends that respondent No.2 had failed to post such report on its website, nor the petitioner was informed about its disqualification, therefore, no further remedy could have been availed under the Rules. It is pertinent to mention that in terms of Rule 48 the procuring agency (respondent No.2) is required to constitute a committee comprising of odd number of persons, with proper powers and authorizations, to address the complaints of bidders, whereas, the representative of respondent No.2, present in Court, has candidly conceded that no such committee has been formed, nor we have been assisted by the Counsel

for respondent No.2, regarding constitution of such committee. Therefore, in our view the objection in this regard is misconceived and we hold that the petition is maintainable.

Insofar as merits are concerned, it appears that respondent No.2 had fixed Evaluation Criteria for a total of 100 marks (pg:61) and in category "B" the financial standing / status of firm / catering is mentioned for which 20 marks can be awarded. This category is in respect of Income Tax paid during the last three years on the basis of audited Income Tax statement / balance sheet / Tax Challan. In this category, it is not disputed that the petitioner has been awarded the highest marks i.e. 20 as the petitioner has admittedly paid tax of Rs. 3 million and above. The category of Average Annual Turnover for the last five years also stipulates 20 marks and three separate categories have been specified. For annual turnover of Rs. 50 million, 7 marks can be awarded, whereas for annual turnover of Rs. 51 to 99 million, 15 marks can be awarded and finally for annual turnover of Rs. 100 million or above, 20 marks can be awarded. The petitioner has not been awarded any marks in this category, and such action has been impugned before us.

On a query by us, the officer present in Court could not controvert that though the petitioner has been awarded 20 marks on the basis of Tax Challans furnished with regard to financial standing / status of firm, however, the said Tax Challans / Returns, including the balance sheet, have not been considered for grant of marks in the category of *Average Annual Turnover*. On perusal of Income Tax Returns filed under Section 114(1) of the Income Tax Ordinance, 2001 (pg: 477) for Tax Year 2014, it reflects that the annual receipt of the petitioner is Rs. 261,062,400.00 which in fact is the annual turnover for 2014 as well. The Return further reflects that an amount of Rs. 10,442,496.00 is the tax collected / deducted / paid by the petitioner. If the *Average Annual Turnover* for five years is worked out on the basis of this amount of Rs. 261.0624 million, the petitioner's turnover would fall in category 2, which provides for a turnover of Rs. 51 to 99 million and therefore, entitles the petitioner for award of at least 15 marks. If these marks are awarded to the petitioner, then the petitioner stands qualified, insofar as the technical bid is concerned, and once qualified, would be entitled for participation in the financial bids. The reasoning assigned on behalf of respondent No. 2 does not appear to be justified for the reason that if the audited balance sheet and tax returns / challans are admitted for

the purpose of awarding marks in respect of the amount of tax paid, then why not the same could be considered for awarding marks in respect of the *Average Annual Turnover*, which has to be calculated for a maximum of five years, especially when no there was no mandatory requirement in the criteria to annex any specific document in support of such claim. In addition to these tax papers, the petitioner has also annexed the balance sheet of 2012 and 2013 as well as Returns of total Income for the year 2012 and 2013, which, reflects that the petitioner's receipts in 2012 were 10,313,736.00 and in 2013 were 92,232,334.00. This in our opinion reflects that the petitioner's *Average Annual Turnover* for the last five years, prima facie entitles it for grant of marks and the respondent No. 2 while evaluating the same has fallen in error by not granting any marks to the petitioner.

Adverting to the objection that the amount of tax reflected in the Tax Returns does not pertain to the petitioner's concern which has participated in the tender namely "Cosmos Enterprises" as the petitioner is having different companies / concerns established in his name, therefore, the total tax paid by the petitioner cannot be considered as its annual turnover, it would suffice to observe that the petitioner is participating in the tender as a Sole proprietorship concern, whereas, the trade names have no legal entity in a proprietorship concern, and the total receipts / tax paid is in fact the Annual Turnover of the petitioner in his own name. Even otherwise, perusal of the record further reflects, that at least the Returns of 2012 and 2013, very clearly mentions the name of petitioner working as "Cosmos Enterprises" and not in any other name as contended by the Counsel for respondent No. 2.

In view of hereinabove facts and circumstances of the instant case, we while disposing of instant petition direct the Respondent No.2 to reconsider the technical bid of the petitioner in the light of hereinabove observations and decide the same within a maximum period of 15 days from the date of this order and if the petitioner stands qualified after award of mark(s) in this category, he shall be allowed participation in the financial bids already submitted which shall be opened and processed in accordance with law.

JUDGE

JUDGE