



Appeal No. PPRA/AP-37/2024
Government of Pakistan
Public Procurement Regulatory Authority
(Appeal & Review Petition Secretariat)
1st Floor, FBC Building, G-5/2, Islamabad



ORDER

M/s WSKB Operator (Pvt.) Ltd.

...the "Appellant"

Vs.

National Highway Authority (NHA)

...the "Respondent"

<u>Date of Hearing</u>	<i>Mr. Ali Nawaz Kharal, Advocate Supreme Court, Mr. Hassan Muneeb Zia, Advocate, Mr. Sultan Rome</i>
20.03.2024	<i>(On behalf of Appellant)</i>
	<i>Sardar M. Haroon Sami, Advocate Supreme Court</i>
	<i>(On behalf of Respondent)</i>



APPEAL UNDER RULE 48(7) OF THE PUBLIC PROCUREMENT RULES, 2004
AGAINST REJECTION OF GRC BY NHA VIDE DECISION DATED 26.12.2023

The above-mentioned learned counsel(s) and representative(s) of the parties tendered appearance before the Appellate Committee (the Committee) sat the date and time fixed for hearing.

2. At the very outset of the hearing, the learned counsel of the appellant (M/s WSKB Operator (Pvt.) Ltd.) submitted before the Committee that through the instant Appeal, the appellant seeks issuance of an Order to withdraw / set aside the letter / Order dated 26.12.2023 of the respondent and an Order

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directing NHA to hear the grievance petition in relation to the illegal award of contract in violation of the bidding documents. The respondent i.e. National Highway Authority (NHA) invited bids through e-bidding process from prospective bidders with matching eligibility and qualification as mentioned in the bidding documents for “Provision, Operation and Management of 10 × packages of Permanent Weigh Stations and Mobile Weigh Stations on National Highway and Motorways” for the period ending till 30.06.2025. Hard copy of e-bids were to be reach on or before 15.09.2023 till 10:00 hours. Technical e-bids were to be opened on the same day at 10:30 hours. The package included Mullah Mansoor (NB & SB), Khanewal, D.I Khan (NB), Shorkot Inter (NB & SB) Din Pur Inter (NB & SB), Gojra (NB) Mobile WS Shamkot (loop-1 & loop 2 Shamkot SB-1) amongst others. The Technical Evaluation Report (‘TER’) was announced / published on 21.09.2023 and the Appellant was declared as a qualified bidder. Thereafter, on 14.12.2023, the Final Evaluation Report (‘FER’) was announced / published whereby the Appellant was declared as the qualified bidder in the following packages:-

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- a) Mullah Mansoor (NB & SB) Weigh Station on N-5
 - b) Shorkot Inter (NB & SB) Din Pur Inter (NB & SB) Weigh Station on M-4
 - c) Gojra (NB) Mobile WS Shamkot (loop-1 & loop 2 shamkor SB-1) Weigh Stations on M-4
 - d) Pensara (SBC), Pensara (NBC), Mobile weigh station, Aminpur (NBC) Deputywala (SBC) Weigh stations on M-4

3. The counsel of the appellant further submitted that the monthly quoted bid of the appellant was Rs. 1,298,500/- and was declared as responsive

in the FER, however, the bidder at Serial No. 12 of the FER was declared as “Substantially responsive lowest evaluated bidder as per clause 13.3 of the bidding documents”. Similarly, in respect of other packages, the appellant was also declared responsive but was not declared as the substantially responsive bidder. Resultantly, the appellant filed a Grievance Complaint under Rule 48 (2) of the Public Procurement Rules, 2004 on 15.12.2023 before the Grievance Redressal Committee (GRC) of the respondent (NHA), whereby the respondent was apprised of the unlawful awarding of contracts specifically in contravention with Clause 13.3 of the bidding documents. The contracts were awarded to bidders that submitted unrealistic and unbalanced rates / bids in stark contrast to the standard estimates formulated by the respondent (NHA).

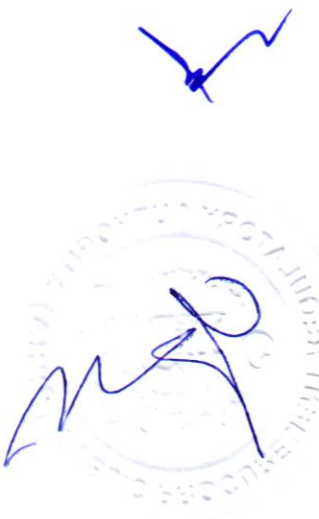
4. The counsel of the appellant added that pursuant to the grievance complaint dated 15.12.2023, the respondent vide letter dated 20.12.2023 directed the appellant to deposit the GRC fee amounting to Rs. 250,000/- per package, on or before closing hours on 22.12.2023, failing which the grievance complaint will not be entertained. The appellant received the said letter on 31.12.2023, moreover, it is evident from the dispatch receipt that the letter dated 20.12.2023 was dispatched by NHA on 22.12.2023, on the date which was fixed for submission of grievance fee vide the letter dated 20.12.2023. Since, the letter dated 20.12.2023 was not received in time (before 22.12.2023), the respondent disposed of the grievance complaint citing the non-payment of the fee to entertain the grievance complaint vide impugned letter dated 26.12.2023 (NHA letter No.2(210)/NHA/GM(Plg) /2023/1036). Hence, the respondent (NHA), deliberately and maliciously did not ensure the delivery of the

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forementioned letter dated 20.12.2023 to the appellant before the due date for payment.

5. It is further added by the counsel of the appellant that being dissatisfied by the conduct of the respondent, the appellant vide letter dated 01.01.2024, intimated to the respondent (NHA) that the letter dated 20.12.2023 was received by the office of the appellant on 31.12.2023. Furthermore, assurance was provided that the GRC fee would be remitted on 02.01.2024 considering that 01.01.2024 was observed as a bank holiday. Consequently, the GRC fee in the shape of pay order bearing No. GIMP007494 dated 02.01.2024 amounting to Rs. 250,000/- was submitted to respondent (NHA's) office by the appellant for processing of grievance petition for hearing of complaint of the package "Pensara (SBC), Pensara (NBC), Mobile weigh station. Aminpur (NBC) Deputywala (SBC) Weigh stations on M-4".

6. The counsel of the appellant argued that the appellant vide letter dated 04.01.2024 further reiterated its stance that the letter dated 20.12.2023 was dispatched by the respondent on 22.12.2023 and received by the appellant after 26.12.2023 and after receipt of the letter, the GRC fee has been paid on 02.01.2024. Furthermore, the letter dated 26.12.2023 pursuant to which the grievance complaint was disposed of was also dispatched on 02.01.2024 and received by the appellant's office on 03.01.2024. Hence, filed the instant Appeal.

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7. On the other hand, the counsel of the respondent (NHA) submitted that procurement for Ten (10) packages of Permanent and Mobile Weigh Stations on National Highways and Motorways was initiated through open competitive bidding process and IFB was advertised in print and electronic media dated 31.08.2023 with bid submission date of 15.09.2023. Pre-bid meeting for the procurement was held on 08.09.2023.

8. The counsel of the respondent further submitted that the technical bids for the procurement were opened on 15.09.2023 and were evaluated by Tender Opening & Evaluation Committee (TO&EC) in light of the RFP clause. The technical bid evaluation report was uploaded on NHA & PPRA website dated 21.09.2023. Further, the financial bids of technically qualified bidders were opened on 28.09.2023 by TO&EC in the presence of the authorized representatives of the bidders. The Bidders who were "announced lowest bidders" during financial bid opening in one package of weigh station, their bids in next packages of weigh station were not opened due to RFP Clause-13.1 i.e. "*Only one no. of package in the current bidding of weigh stations shall be awarded to one bidder participated either as sole bidder or as a partner in JV*".

However, during detailed financial evaluation of the bids, it was noted by the TO&EC that bidders announced lowest on 28.09.2023 were found non-responsive due to violations of PPRA rules / RFP provisions. Therefore, to give all such bidders an equal opportunity, their sealed financial bids in next packages were opened on 22.10.2023. Thereafter, the final evaluation report of the procurement was uploaded on NHA and PPRA websites on 14.12.2023.

9. The counsel of the respondent added that the aggrieved bidder / the appellant approached GRC of respondent (NHA), and GRC directed the appellant to deposit the GRC fee on or before 22.12.2022. Subsequently, the GRC informed vide letter no. 2(210)/NHA/GM(Pig)/2023/1036 dated 26.12.2023 that grievance petition is hereby disposed-of without any proceeding and Revenue section may proceed with the procurement.

10. The Committee heard arguments of parties at length and perused all available record provided by the parties. In terms of Rule 48(3) of Public Procurement Rules, 2004 the bidders are authorized to lodge a written complaint before the GRC within seven days of announcement of technical evaluation report and five days of issuance of final evaluation report. In terms of Rule 48 (6) of Public Procurement Rules, 2004 the GRC is under obligation to decide upon the complaint within 10 days of its receipt. It is pertinent to mention that in terms of Rule 48(7) of Public Procurement Rules, 2004 the bidder has been authorized to file an appeal before the Authority within 30 days of receipt of decision of GRC subject to deposit of prescribe fee. From the perusal of above Rule 48(3), 48(6) and 48(7) of Public Procurement Rules 2004, the intent of legislature is clear that the **GRC is not authorized to charge any fee from the bidder** whereas, the Authority (PPRA) in accordance with Rule 48(7) of Public Procurement Rules, 2004 is authorized to charge prescribe fee in accordance with Redressal of Grievance Regulations, 2023. Moreover, GRC is also under obligation to decide the complaint within 10 days and if the complaint is not decided within prescribed time the bidder is authorized to file appeal before the Authority in terms of Rule 48 (7) of Public Procurement



Rules, 2004 and in terms of Redressal of Grievance Regulations, 2023. Hence, in the instant case, after expiry of 10 days from the filing of written complaint the bidders were rightly invoked remedy by filing instant appeal.

11. The appellant participated in the bidding process advertised by the respondent for provision of operation, management and maintenance 10 x packages of permanent weigh stations and mobile stations. The respondent issued technical evaluation report on 21.9.2023 and appellant have been declared as responsive bidder. Thereafter, the respondent issued final evaluation report on 14.12.2023 wherein with regard to Mullah Mansoor weight station M/s Haji Mir Liaqat Ali Lehri and Co. was declared as substantial and most advantageous bidder in terms of clause 13.3 of bidding documents. Whereas, appellant was declared as responsive bidder. Similarly, for Pansara Mobile weigh station M/s MAB Brothers – M/s Sarim Associates (JV) was declared as substantially responsive/ most advantageous bidder in terms of clause 13.3 of bidding documents by quoting financial bid of Rs.2,015,500/-.

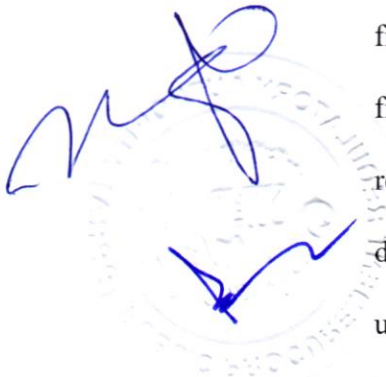
Whereas appellants were declared responsive but not as most advantageous bidder in term of clause 13.3 due to their financial bid of Rs.2,615,740/-. Clause 13.2 of bidding documents is reproduced as under:

“during financial evaluation, bids received shall be compared with the standard estimate prepared by NHA for bill 1,2 & 3 and any bid found unrealistic / unbalanced in terms of substantial responsiveness in comparison to the NHA’s estimate for each item given in BOQ shall not be accepted. If two or more lowest bids have been found at par then the lowest bidder who has more technical score in the technical evaluation shall be considered for acceptance.”

Whereas in term of clause 13.3 the respondents prescribed following eligibility criteria:-

“the contract will be awarded to the most advantageous substantially responsive bidder after evaluation in light of clauses 13.1 & 13.2. The bidder will quote fix rates for the Operation, Management & Maintenance of weigh stations based on salaries of staff, maintenance of IT equipment, weigh building and overhead & profits as per the bid forms”


12. The committee observed that despite of above-mentioned condition the respondent did not provide NHA’s estimates for any package to the bidder at the time of submission of their bids. Moreover, the respondent did not provide any criteria in their bidding documents with regard to the determination of unrealistic and unbalanced financial bid submitted by any bidder and make the complete procurement process ambiguous for the bidders. Moreover, in the final evaluation report the respondent did not consider this provision while declaring any bidder as most advantageous bidder. For example, in Pensara (NBC) mobile weigh station procurement package at fix estimated cost fixed by the respondent i.e. Rs.2,540,250/- whereas the respondent declared M/s MAB Brother and M/s Sarim Associates (JV) as most advantageous bidder who have submitted its financial bid amounting Rs.2,015,500/- i.e. much lower than the estimated cost fixed by the respondent. The final evaluation report also transpires that the respondent has not taken any exercise in terms of clause 13.2 of bidding documents and never declare financial bid of any bidder as unbalanced or unrealistic. Resultantly, as mentioned above it the criteria was compared with NHA’s estimate the respondent was under obligation to provide NHA’s estimate to all bidders before submissions of bid and later on at the stage of final


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evaluation report the respondent was also under obligation to strictly adhere to this clause and provide a clear and unambiguous criteria for the determination of any bid as unrealistic and unbalanced financial bid. Hence, in the instant procurement process the respondent is not adhered with its own criteria by not determining any financial bid and unrealistic and unbalanced and declared the bidder as most advantageous bidder to a financial bid which is lower than the NHA's estimate.

13. In the light of the foregoing Committee is of the View that the evaluation criteria prescribed by the responded in the instant procurement process is ambiguous and arbitrary which amounts to mis-procurement. Therefore, Committee has decided to direct the respondent to annul the instant procurement process under Rule 33 of Public Procurement Rules, 2004 and reinitiate the process by modifying all those clauses which are creating ambiguities in the evaluation criteria, in terms of Rule 34 of Public Procurement Rules, 2004 hence the instant appeal is disposed of with above mentioned direction.


(Dr. Muhammad Aslam Waseem)
Director General (Legal)
(Member)


(Dr. Asim J. Abro)
Director (M&E)
(Member)
04/4/2024


(Maqbool Ahmad Gondal)
Managing Director (PPRA)
(Head of the Committee)

Dated: 04.04.2024

Note: Each page of the order has been signed by all members of the Appellate Committee. The order comprises of nine (09) pages.



