



Review Petition No. PPRA/RP-39/2024
Government of Pakistan
Public Procurement Regulatory Authority
(Appeal & Review Petition Secretariat)
1st Floor, FBC Building, G-5/2, Islamabad



ORDER

M/s Mega Plus Pakistan.

...the "Petitioner"

Vs.

Federal Board of Revenue (FBR)

...the "Respondent"

<u>Date of Hearing</u> 03.04.2024	Mr. Misbah Ul Mustafa (ASC), Mr. Faisal Malik, Mr. Sh.A. Samad (M/s Mega Plus) <i>(On behalf of the Petitioner)</i> Barrister Muhammad Bin Majid, Mr. Chaudhary Haq Nawaz (Advocate), Mr. Adil Iqbal (Advocate), Mr. Amjad Khan. <i>(On behalf of the Respondent)</i>
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The above mentioned learned counsel(s) and representative(s) of the parties tendered appearance before the Review Petition Committee ("the Committee") at the date and time fixed for hearing.

2. The learned counsel of the petitioner i.e., M/s Mega Plus Pakistan submitted that he filed the instant Review Petition under Rule 19(3) of the Public Procurement Rules, 2004 ("Procurement Rules") against the order dated 06.02.2024 passed by the respondent i.e., Federal Board of Revenue (FBR)

whereby the petitioner has been blacklisted for a period of three (03) years due to alleged contractual non-performance. The bid security amounting to Rs.18,058,000/- (eighteen million, fifty eight thousands only) has also been seized by the respondent.

3. The learned counsel of the petitioner also submitted that the petitioner participated in a competitive bidding process carried out by the respondent under a Request for Proposal ("RFP") for the Supply of Laptops, Desktops (All in one), Desktops, LaserJet Printers, Scanners, and Heavy Duty A3 Multi-Function Printers for FBR's Field Formations - RFP No. 1 (10)SS(IT) Field Offices 2017 (pt). The last date of submission of bids was 28.02.2022. As per Schedules D and E of the RFP, there were six (06) lots, out of which the petitioner submitted its bid in respect of following three (03) lots:

- a. Supply of Laptops (Lot- 101/2022)
- b. Desktops AIO (Lot 102/2022)
- c. Desktop (Lot 104/2022)

4. The counsel of the petitioner further submitted that the bids were opened in February 2022 and thereafter Purchase Orders were issued by the respondent. The respondent deposited performance security and Bank Guarantee #1301LBG220134/MCB Bank Limited which was executed on 08.12.2022 for an amount of Rs.57,925,350/- (fifty-seven million, nine hundred twenty-five thousand, three hundred fifty rupees only) for the supply of Lot-101 and also deposited bid

security Rs.158,600/- (One Hundred Fifty Eight Thousand Six Hundred Rupees Only) which was still not reimbursed to the petitioner.

The counsel of the petitioner added that the their company fulfilled its obligations in respect of the Purchase Orders for Lot-101 and Lot-102 although with loss due to inflation and increase in Dollar exchange rate. The delivery of equipment under the said Lots was fully made though was a bit behind the schedule due to delayed approval of Letter of Credit by State Bank of Pakistan in favour of Lenovo, the principal company which delivered the equipment/ Laptops etc.

5. The counsel of the petitioner further highlighted that they had substantially performed its obligations as per its overall bid for the said Lots however it had to face force majeure situation in respect of fulfilling its obligations only in respect of Lot-104. The Purchase Order for supply of Lot-104 dated 04.04.2022 was issued by the respondent under the RFP for supply of 4300 Desktop Computers. The said items to be supplied under the Purchase Order for Lot-104 were to be imported in Pakistan by the Petitioner for onward supply to the respondent as these were not locally made, assembled or manufactured. The detailed specifications of these items were mentioned in the said Purchase Order.

6. The counsel of the petitioner argued that during the period of economic stress in the country, entire business

community was facing multiple hardships specially those which were dealing in importing goods from abroad. The new administration, aiming to stabilize the economy, imposed ban on imports without specific permissions unless deemed essential whereas the IT equipment were never included in any list for the purpose of urgency. It is relevant to mention here that the petitioner requested the respondent to re-tender the supply order because the petitioner had already incurred hefty loss in supplies for Lot-101 and Lot-102 but upon the request of the petitioner, the respondent issued a letter dated 13.02.2023 to submit delivery schedule of Lot-104 and submission of performance guarantee till 21.02.2023. In the said letter, the petitioner was threatened that in case of failure to comply with, the blacklisting proceedings shall be initiated against the petitioner.



7. The counsel of the petitioner further submitted that in response to said letter the petitioner filed a Civil Suit for "Declaration, Rescindment / Cancellation of Contract and Permanent Injunction" in the Court of District Judge, Islamabad, by seeking interim protection against the adverse actions of the respondent. The application for interim relief was finally dismissed on 07.01.2024 on the basis that no blacklisting proceedings have been initiated against the petitioner and the petitioner has the appropriate remedies available under the procurement laws.



8. The counsel of the petitioner further added that the respondent had already terminated the Purchase Order for Lot-104 pursuant to a notice dated 27.02.2023. With the said termination, the respondent has not claimed any losses incurred to it due to any default of the petitioner which could have been an appropriate remedy after the said termination. This shows that no loss has occurred to the respondent due to any default of the Petitioner. Instead of choosing the contractual remedies, due to mala fide of certain officers of the respondent, the respondent opted the path of causing greater damage to the petitioner. With the said dismissal of application for interim relief, the respondent promptly issued a so-called Show Cause Notice dated 22.01.2024, offering a final opportunity to the petitioner to explain why a blacklisting order should not be passed under Rule 19(b) of the Public Procurement Rules, 2004. A detailed reply dated 31.01.2024 to the Show Cause Notice was submitted to the respondent explaining the reasons why not blacklisting order should be passed. It was emphasized that the petitioner had fulfilled obligations for Lot-101 and Lot-102 and had a commendable track record of supplying to the respondent. The delays and request for cancellation of the Purchase Order for Lot-104 was on account of circumstances beyond the control of the petitioner. Resultantly, the respondent passed the Blacklisting Order and the PPRA Authority also published / uploaded the name of the petitioner in the list of blacklisted firms, hence filed the instant review petition.

9. On the other hand, the learned counsel of the respondent i.e., Federal Board of Revenue (FBR) presented their arguments at length and denied all the assertions made by the petitioner side. At the first instance the counsel of the respondent raised the preliminary objections and argued that the captioned Petition is based on misleading and incomplete facts, and reflects mala fide on part of the Petitioner. The instant case is a most appropriate for blacklisting, since the petitioner has contumaciously and brazenly defaulted on its obligations under a public contract, causing irreparable loss to the respondent. Furthermore, in order to evade the consequences of its actions, the petitioner has initiated multiple proceedings before various forums in an attempt to delay blacklisting proceedings. Such conduct not only reflects the petitioner's disregard for the prescribed mode of dispute resolution provided under the contract and the Public Procurement Rules 2004 ("PPRA Rules") but also undermines the authority of this learned forum.



10. The counsel of the respondent also submitted that the Purchase Order for Lot 104 was issued on 04.04.2022 and the petitioner was required to submit performance security within twenty-eight (28) days, and was issued reminders on 09.06.2022, 27.06.2022 and 14.12.2022 respectively. Further submitted that the petitioner continued to represent that performance security and Letter of Credit (LC) were under process, and sought extension for performance of its obligations wide letters dated 16.06.2022, 29.06.2022, and 21.12.2022. Moreover, the

petitioner failed to submit any performance security, and has not provided any proof to show that he applied for an LC for Lot 104. After that the respondent provided the petitioner a final opportunity to perform its obligations on 13.02.2023. Consequently, the petitioner filed civil suit for cancellation of contract, titled "Mega Plus Pakistan v. FBR", claiming force majeure for the first time ever.

11. The counsel of the respondent further argued that the instant review petition is not maintainable as the captioned Petition is already sub-judice before the civil Court in the Second Civil Suit, wherein PPRA has also been made a defendant, and the Injunctive Order is binding upon PPRA, this learned forum has effectively become Coram non Judice. Proceeding to adjudicate the captioned Petition would be contrary to the principles of justice, and would severely prejudice the respondent, since any order passed in favor of the petitioner could not be termed independent application of mind, while any order in favor of the respondent would be rejected by the petitioner and would hold no legal value in light of the Injunctive Order. Even otherwise, since PPRA is a defendant in the Second Civil Suit, proceeding with the captioned petition would render it a judge in its own cause', thus entirely negating the sanctity of any order passed by this learned forum.

12. The counsel of the respondent further added that the captioned Petition ought to be dismissed on the basis of 'doctrine

of election' since the petitioner has already elected to avail remedy before the Civil Court, and cannot be allowed to engage in 'forum shopping' in the hope of getting favorable orders to evade the consequences of its willful default and mala fide conduct. The 'doctrine of election' is a well-recognized principle of waiver recognized by the superior Courts of Pakistan, whereby, once an aggrieved person has exercised a choice to pursue a particular remedy, then they are prohibited from launching another proceeding seeking the same relief. Thus, on this score alone, the captioned Petition ought to be dismissed.

13. The counsel of the respondent argued that the contract provides for resolution of disputes through arbitration, the petitioner never issued a notice of dispute. The first time ever that the petitioner raised any 'dispute' was when the petitioner sought cancellation of the contract on ground of force majeure in its First Civil Suit. However, by voluntarily surrendering to the jurisdiction of the civil Courts in relation to a potentially arbitrable dispute, instead of submitting it for arbitration, the petitioner has waived their right to arbitrate. Thus, the Petitioner, through its own conduct, has rendered the dispute resolution clause inapplicable. In such circumstances, the requirement to exhaust the forum of arbitration under Rule 19 of Public Procurement Rules 2004 would not be operative, since it would be deemed that there was no provision of arbitration in the contract.



The image shows a handwritten signature in blue ink, followed by a circular official stamp. The stamp contains the text 'JUDGE' and 'PUBLIC PROSECUTOR' around the perimeter, with a signature in the center.

14. The counsel of the respondent further submitted that the petitioner has entirely failed to substantiate their case of force majeure and have only offered financial loss as a justification of their inability to perform the contract. Furthermore, the petitioner has failed to provide any proof that if, even applied for issuance of LC, which was rejected owing to the restrictions claimed as force majeure. Rather, record proves that the Petitioner never even undertook the necessary preliminary steps for ensuring performance, including submission of performance security, hence request for dismissal of the instant review petition.

15. The Committee heard arguments at length and perused all available record provided by the parties. The committee also gone through the judgement of superior courts provided by the parties. The petitioner relied on the judgement reported as PLD 2015 Lahore34 titled as (M/s Habibi Rafique Pvt Ltd. Vs. Government of Punjab & Others), 2022YLR 773 titled as Ahmed Latif Vs. The Cane Commissioner & Others, 1994 SCMR 2232 titled as Miss Aneesa Rehman Vs. PIAC & Others and PLD 2023 Supreme Court 553 Suo Moto No.4/2010, whereas the respondent also submitted various judgements of the Supreme Court in support of his contention including a judgement reported as PLD 2022 Supreme Court 119 titles as Justice Qazi Faiz Issa & Others Vs. President of Pakistan wherein it was held that:

“Thus the general consensus of judicial opinion as noted by this Court in University of Dhaka Vs. Zakir Ahmed seems to be that to ensure the principle of fairness embedded in the right of hearing, the person sought to be affected must be at least (i) be aware of the allegations made against him upon which the basis the decision is to follow”

16. In the instant Review Petition the petitioner challenged the blacklisting order dated 06.02.2024 passed by the respondent under Rule 19(1)(b) of Public Procurement Rules, 2004. The committee also observed that in addition of blacklisting order the respondent has also forfeited the bid security of the petitioner amounting to Rs.18,058,000/- (eighteen million, fifty-eight thousand only) submitted by the petitioner at the time of submission of his bid for the lot No.104/2022. It is pertinent to mention here that the petitioner was declared as most advantageous bidder after final evaluation report in supply of laptops (Lot No.101/2022), supply of Desktop AI10 (Lot 102/2022) and supply of Desktop (Lot No.104/2022). In accordance with the ITB 38 of the standard bidding documents signing of a contract is mandatory. Furthermore, ITB 38.1 of the bidding documents requires that within 14 days from the date of furnishing of acceptable performance guarantee under the conditions of contract the purchaser will send the successful bidder the contract agreement in the form provided in the standard bidding documents, incorporation all agreements between the parties. Moreover, in accordance with clause 38.2



of ITB of the standard bidding document issued by the respondents a formal agreement between the purchaser and the successful bidder shall be executed within 14 days of receipt of the contract agreement by the successful bidder from the purchase. The Committee observed that in the instant procurement process for supply of desktop Lot No. 104/2022 the petitioner being the most advantageous bidder was required to submit performance guarantee in the light of the above-mentioned clause but the petitioner was failed to submit performance guarantee and hence the respondent because of non-provision of performance guarantee forfeited the bid security of the petitioner amounting Rs.18,058,000/-, hence, the contract agreement for the Lot No. 104/2022 was not executed as required in the Standard Bidding Document. Moreover, both parties corresponded with each other for the explanation of their stances and ultimately respondents blacklisted the petitioner on 06.02.2024 for a period of three years due to contractual non-performance. The Committee observed that in accordance with Rule 44(b) of Public Procurement Rules, 2004 a procurement contract shall come into force where the procuring agency required signing of written contract from the date on which the signature of both the parties and the successful bidder are fixed to the written contract. But in the instant case, in accordance with the above referred clause of the bidding document a formal agreement was required to be executed hence purchase order issued by the respondent could not construe the execution of

formal contract. Hence in the instant case, procurement contract has not come into force. So, respondent could not proceed in lieu of contractual non-performance which is the requirement of Rule 19(1)(b) of Public Procurement Rules, 2004. It is also evident from the conduct of the respondent by forfeiting bid security amounting to Rs.18,058,000/- that the procurement contract has not come into force and respondent could not invoke Rule 19(1)(b) of Public Procurement Rules, 2004.

17. The Appellate Committee also observed that keeping in view the requirement of Rule 19(1)(b) of Public Procurement Rules, 2004 the respondent was also under obligation to exhaust the remedy of arbitration before proceeding for any penal action against the petitioner including forfeiture of bid security. Admittedly, no arbitration was sought from any party and the respondents immediately proceeded under Rule 19 (1)(b) of Public Procurement Rules, 2004 and blacklisted the petitioner by abovementioned order. Hence this blacklisting order is violative of this provision.

18. The Committee also observed that the respondent did not formulate any blacklisting mechanism which is requirement of Rule 19 of Public Procurement Rules, 2004 and respondent could not proceed against any bidder without prescribing a blacklisting mechanism. Moreover, it has also been observed that the respondent did not provide opportunity of personal hearing to the petitioner before taking this penal action of



blacklisting for period of three years on account of contractual non-performance.

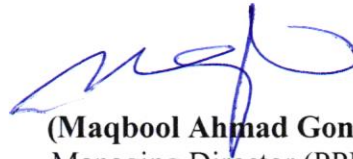
19. In the light of the foregoing the Committee is of the considered opinion that the respondent blacklisted the petitioner on account of contractual non-performance is violative of Rule 19 of Public Procurement Rules, 2004 and therefore, declared as illegal. The Review petition is **allowed** by setting aside the blacklisting order 06.02.2024.



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



(Dr. Asim J. Abro)
Director (M&E)
(Member)



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

Dated:04.04.2024

Note: A copy of this order is being forwarded to the Director General-IT (PPRA) for implementation of this order and to de-list the petitioner's company i.e., **M/s Mega Plus Pakistan** from the list of active blacklisted / debarred firms on PPRA's website.

Each page of the order has been signed by all members of the Review Petition Committee. The order comprises thirteen (13) pages.

