



Review Petition No. PPRA/RP-42/2024
Government of Pakistan
Public Procurement Regulatory Authority
(Appeal & Review Petition Secretariat)
1st Floor, FBC Building, G-5/2, Islamabad
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ORDER

M/s Mkhdoom Logistics Services

...the "Petitioner"

Vs.

Trading Corporation of Pakistan (Pvt.) Limited

...the "Respondent"

<u>Date of Hearing</u>	Barrister Junaid Jahangir, counsel for the M/s Mkhdoom Logistics Services <i>(On behalf of Petitioner)</i>
29.05.2024	Mr. Sheeraz Ali, representative of the TCP <i>(On behalf of Respondent)</i>

REVIEW PETITION UNDER RULE 19(3) OF THE PUBLIC PROCUREMENT RULES, 2004

The above mentioned learned counsel and representative of the parties tendered appearance before the Review Petition Committee ("the Committee") and furnished their arguments at length.

2. At the outset of the hearing, the learned counsel of the petitioner i.e., M/s Mkhdoom Logistics Services submitted that the petitioner is a Logistics Company based in the Kingdom of Saudi Arabia. The Company has served over 1500 businesses and has successfully delivered more than 500,000 shipments worldwide. In the year 2022, there was a global shortage of supply of Urea which resulted in exponential increase in demand worldwide. In October 2022, the petitioner was approached by the Trade Mission of



Pakistan in Riyadh, Saudi Arabia and sought Quotation for the supply of Urea (in bulk) on the representation that the brotherly country was in urgent need of huge quantities. Accordingly and on priority, the petitioner set the wheels in motion but the required quantities were not available with the suppliers in Saudi Arabia. Further efforts bore fruit and the petitioner was able to secure sufficient quantities in the United Kingdom and vide its Offer Letter dated 10.10.2022, quoted price of US Dollars 595/MT. A tentative period of delivery with the last shipment by 15.12.2022 was also committed in the said correspondence.

3. The counsel of the petitioner also submitted that, the Trade Mission informed the petitioner that Pakistan will enter into an Agreement with it for the supply of 300,000 MT of Urea however, due to domestic legal requirements, the same will be done through an international tender wherein the petitioner company will have to place its bid. Given the fact that there was a global shortage of Urea, the petitioner advised the Trade Mission that delay in procurement may lead to difficulties as the international suppliers do not hold stocks in bulk for long duration and expressed that it will not indulge further. Nonetheless, an international tender was floated by the respondent i.e., Trading Corporation of Pakistan (Pvt.) Limited which availed no results as no bid was received against it.

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4. The counsel of the petitioner further submitted that, after sometime a second International Tender No.TCP/MA&TD/UREA/22- 3/2022 dated 19.10.2022 was floated by the respondent and the petitioner was approached yet again by the Trade Mission of Pakistan, Riyadh with the request to take part in the bidding process. The petitioner submitted a bid of US Dollars 520/MT vide its Bid dated 26.10.2022. It is pertinent to mention here that the



supplier in the United Kingdom, on this occasion, committed to hold the stock for procurement by the petitioner for a shorter duration and hence, the transaction for purchase had to be completed on war footings.

5. The counsel of the petitioner added that the respondent vide its letter dated 29.10.2022 accepted the bid of the petitioner Company and awarded the contract for supply of 300,000 MT (with 5% MOLSO) Urea on CFR Bulk, Karachi Port / Bin Qasim Port basis. In the same Letter of Award, the respondent required the petitioner to submit a Performance Guarantee in terms of Clause 12 of the Tender Terms and Conditions.

6. The counsel of the petitioner also submitted that, afterwards immediately, the petitioner initiated the process to obtain a Performance Guarantee however, after much struggle, it transpired that there was not a single bank "A" rated Bank in Pakistan, as per the requirement provided in the tender terms & conditions. The same was communicated to the respondent who instead of finding a resolution to the issue at hand, informed the petitioner that as per Clause 12 (iii) of the Tender Terms & Conditions, the respondent will forfeit the Bid Security for reasons of failure in providing the Performance Guarantee. Further, the petitioner vide email dated 07.11.2022, informed the respondent that the issue regarding non-submission of Performance Guarantee was beyond its control and power given that an "A" rated bank did not exist in Pakistan and thus, the requirement could not be met. The petitioner was then advised to remit the equivalent amount into the account of the respondent.

7. The counsel of the petitioner further added that, given the fact that the issue pertaining to Performance Guarantee was still not resolved, the supplier in the United Kingdom backed out from the arrangement and off loaded the



Urea to some other purchaser. Being left with no choice, the petitioner vide its letter dated 08.11.2022 requested the respondent to allow modification to the shipment schedule and proposed the final shipment period to be from 01.12.2022 to 07.12.2022. This was provisionally agreed to by the respondent vide its email dated 09.11.2022, whilst adding that the tender quantity landing at discharge port should not go beyond 22.12.2022.

8. The counsel of the petitioner further submitted that, in the meanwhile, a representative of the respondent visited Riyadh and held meetings on 09.11.2022 and 10.11.2022, wherein, it was agreed that the petitioner company should source the required quantities of urea from the Gulf region to meet the urgent demand in Pakistan and accordingly, the petitioner vide its email dated 12.11.2022 confirmed availability of 100,000 MT of urea in Qatar and Azerbaijan which was just four days away from Pakistan, in comparison to the United Kingdom which would have taken a longer period for arrival. The respondent's representative also informed the petitioner, that Pakistan was in the process of acquiring Urea from the People's Republic of China on a GTG basis and the petitioner assured the respondent that it shall not be an obstacle in such sourcing / procurement which would have led to decrease in the quantities of Urea to be procured by Pakistan.

9. The counsel of the petitioner further added that, the petitioner's company then requested the respondent to proceed with two transferable Letters of Credit (LCs) vide its email dated 12.11.2022 and a draft of the same was shared by the respondent on the same date. On the same date, the respondent advised the petitioner that LCs against the proposed shipments from Qatar and Azerbaijan will not be processed unless the issue of Performance Guarantee was resolved. Due to the policy introduced by State



Bank of Pakistan with regard to the issuance of LCs, the petitioner could not open LC despite of serious efforts. As a consequence, the Saudi Bank advised and demanded from the petitioner that payment in US Dollars be secured through guarantees from the State Bank of Pakistan and the same was communicated to the respondent vide email dated 13.11.2022.

10. The counsel of the petitioner submitted that, the procuring agency was under obligation to resolve the dispute in respect of the Performance Guarantee as well as LCs amicably as was being sought by the petitioner in terms of Clause 27 of the Tender Terms and Conditions. After that the petitioner vide its letter dated 08.12.2022, requested the respondent to withdraw the Termination Letter and offered to settle the dispute amicably. Unfortunately, the respondent did not pay any heed to such attempts made in good faith.

11. At the last, the counsel of the petitioner further submitted that the deadline for supply of the complete shipment was to expire on 22.12.2022 whereas, the respondent prematurely terminated the LOA on 19.11.2022 which was not warranted. It appears that the respondent was no longer interested in the procurement of Urea and attempts were being made to put the blame of failure to perform on the petitioner. The petitioner submitted that the proceedings were initiated and carried out by the respondent for the blacklisting of the petitioner without proper and adequate notice to the petitioner. All this while, the petitioner remained in communication with different institutions seeking an amicable resolution to the dispute and at the same time, the respondent carried out and concluded the proceedings of blacklisting and passed an impugned Order dated 09.01.2023 as ex-parte, hence aggrieved and filed the instant review petition.



12. It is important to mentioned that the petitioner filed an application for condonation of delay along with the instant review petition, wherein, it is submitted that the respondent did not serve adequate notice nor provided any opportunity of personal hearing to the petitioner and carried out blacklisting proceedings against the petitioner by passing the impugned Order dated 09.01.2023. Since the withdrawal of LOA vide letter dated 19.11.2022, the petitioner has been in coordination and corresponding with multiple governmental departments including the respondent to seek an amicable resolution to the dispute arising out of the Letter of Award dated 29.10.2022.

13. The learned counsel of the petitioner further argued on the said application that the petitioner was then informed that the blacklisting procedure had been carried out by the respondent and vide the impugned Order dated 09.01.2023. Accordingly, vide letter dated 02.04.2024, the respondent advised the petitioner to file the titled Review Petition. Hence, for all intents and purposes, the petitioner only came to know of the blacklisting upon receipt of Letter dated 02.04.2024 of the respondent. Immediately thereafter and within the stipulated period of time, the accompanying Review Petition has been filed by the petitioner. The delay is thus not contumacious therefore, delay in filing of the accompanying Review Petition maybe condoned on account of lack of knowledge regarding passing of the impugned Order dated 09.01.2023.

14. The learned counsel of the petitioner concluded his arguments and submitted some judgments of the superior courts (2023 LLD 879, 2023 MLD 511, 2023 SCMR 1502) in order to support his stance. Including, his stance on limitation period, maintainability and on the principal of natural justice i.e., *Audi Alteram Partem*.



15. On the other hand the representative of the respondent i.e., Trading Corporation of Pakistan (Pvt.) Limited presented their arguments at length. He further stated that, the petitioner was required to submit performance guarantee of "A" rated bank in Pakistan in accordance with international ratings of the banks. Further, he has also submitted that at that time there were numerous "A" rated banks available in Pakistan as evident from SBP's statement. Further admitted that, the petitioner was asked to directly remit the performance guarantee amount to the respondent (TCP's) account as a last resort in order to proceed further for opening of LCs. However, the petitioner failed to submit the required guarantee as per tender terms & conditions.

16. The representative of the respondent further submitted that the petitioner vide their email / letter dated 08.11.2022 requested for submission of vessel-wise Performance Guarantee which was also accepted by the respondent (TCP) vide an email dated 12.11.2022 in order to facilitate the petitioner and to proceed further for completion of the transaction. Moreover, the petitioner vide their letter dated 08.11.2022 requested for change in shipment schedule to be read as under instead of what was mentioned in the Tender terms and conditions:

12-18 Nov-2022 100 KMT

21-27 Nov-2022 100 KMT

01-07 Dec-2022 100 KMT

The said request of the petitioner was agreed to by the respondent (TCP) vide an email dated 09.11.2022. However, the petitioner failed to meet the deadline which was already extended on their request.

17. The representative of the respondent further added that the assertions of the petitioner in this petition reveals that there was no firm quantities



available with the petitioner as was certified by them. Whereas, the petitioner vide their email dated 12.11.2022 only gave confirmation of partial quantities and changed origins. Nevertheless, the petitioner failed to give any firm confirmation in terms of Performance Guarantee against the confirmed quantities nor provided any information with regard to opening of LC. He further stated that, the urea being procured from China on GTG basis, is not connected with the tender awarded to the petitioner.

18. The representative of the respondent further submitted that the LOA was withdrawn vide Notice dated 19.11.2022, as the petitioner failed to fulfill the following terms and conditions of the tender:

- i. Clause-12 by non-provision of Performance Guarantee.
- ii. Clause-17 by not offering cargo for inspection.
- iii. Clause-8 (i) as false Stock Availability Certificate was provided by the supplier.
- iv. Clause-15 by failing to ship the cargo as per agreed shipment schedule.

19. He further stated that LOA was withdrawn in pursuance of Clause-26 of the Tender terms & conditions, which provides that *"If the Seller fails to ship the goods within the specified delivery period for any reasons other than Force Majeure, the Buyer shall be entitled, at his option, to cancel the contract and recover the damages besides forfeiture / encashment of Performance Guarantee. The Buyer shall not be held liable to any risks and costs whatsoever in consequence of such cancellation of the contract."*

20. The representative of the respondent added that as the LOA is already withdrawn vide notice dated 19.11.2022, then settlement of dispute at this belated stage does not have any legal standing. He further stated that the petitioner's argument is totally baseless, as there was no any deadline for



shipment period as quoted by the supplier i.e. 22.12.2022 rather it was deliver / approval deadline at the discharge ports in Pakistan. Whereas, in their reply the respondent at para-8 of the reply stated that the shipment schedule was extended in accordance with the request of the petitioner.

21. The representative of the respondent (TCP) concluded his arguments by stating that show cause notice dated 15.12.2022 was issued to the petitioner on 15.12.2022, which was communicated to the respondent through M/s. M&P Courier vide receipt no.96253882664 dated 5.12.2022 and gave the opportunity to the petitioner to clarify his stance as to why he may not be blacklisted. He further stated that the petitioner was failed to submit his reply within stipulated period. However, the representative of the respondent failed to clarify that whether any opportunity of hearing was provided to the petitioner or not. He further informed the Committee that due to non-receipt of any clarification from the petitioner, the respondent passed the decision on 09.01.2023 and backlisted the petitioner for a period of three years. He further submitted that the backlisting order was communicated to the petitioner through email dated 10.01.2023, however, the same order was not communicated to the petitioner through any courier service.

22. The Committee heard arguments of the parties at length and perused available record. The Committee observed that the blacklisting order dated 09.01.2023 was passed without giving any opportunity of personal hearing to the petitioner and did not communicate the backlisting order to the petitioner through any reliable courier service, therefore the Committee presumed that the petitioner was unaware about any blacklisting order. Hence the application filed by the petitioner with regard to the condonation of delay is accepted as sufficient cause has been provided.



23. The Committee considering the arguments rendered by the parties and examination of the record, observed that the stance of the petitioner with regard to not providing opportunity of personal hearing stands correct. However, it is evident from the record regarding the issuance of the show cause notice to the petitioner on 15.12.2022 wherein, the petitioner was directed to submit his response within seven days from the issuance of the show cause notice. It is also pertinent to mention that after non receipt of the reply of the show cause notice, the respondent was under obligation to issue notice of the personal hearing to the petitioner before passing any blacklisting order. But in the instant case, no such type of notice was issued by the respondent to the petitioner.

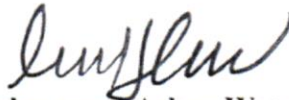
24. The Committee further observed that in accordance with Clause 12(i) of the bidding documents, the petitioner was failed to submit performance guarantee within stipulated period. However, in response to the email of the petitioner, the respondent directed the petitioner to remit the performance guarantee directly in the account of the respondent. The Committee is of the view that the respondent's response, with regard to the remittance of the performance guarantee into the account of the respondent is in contradiction with the terms & conditions prescribed in the bidding documents.

25. The Committee further observed that, the instant procurement process falls within the ambit of international competitive bidding, wherein, delivery of the required quantities of the urea was not possible without opening of LCs. Hence, in the instant case, due to the policy issued by the State Bank of Pakistan, petitioner was unable to open LCs within stipulated period. Moreover, the Committee is also of the view that the non-opening of LC is

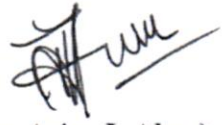


beyond the control of the petitioner and no one should be blamed for the actions which were beyond their control.

26. In the light of the foregoing, the Review Petition Committee unanimously decided that blacklisting order dated 09.01.2023 passed by the respondent (TCP) is not justified. Therefore, the instant Review Petition is allowed and the blacklisting order dated 09.01.2023 passed by the respondent (TCP) is hereby set aside.



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



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



(Hasnat Ahmad Qureshi)
Managing Director (PPRA)
(Chairman of the Committee)

Each page of the order has been signed by all members of the Review Petition Committee. The order comprises of eleven (11) pages.



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