

2021 M L D 1846

[Islamabad]

Before Miangul Hassan Aurangzeb, J

RELIANCE IT SOLUTIONS (PVT.) LTD. Through Authorized Representative---Petitioner

Versus

FEDERATION OF PAKISTAN through Secretary, Ministry of Finance and others---Respondents

Writ Petition No.3794 of 2019, decided on 5th May, 2020.

Public Procurement Rules, 2004---

---R.36---Constitution of Pakistan, Art.199---Constitutional petition--- Procurement procedure---Invitation of Licence (IFL)---Awarding criteria---Licence to provide track and trace system for tobacco products was awarded to respondent---Petitioner assailed process of awarding of licence on the plea that criteria of licence was amended---Validity---Formula for computing marks for a bidder's financial bid was omitted in amended IFL thus no marks were to be awarded for a bidders financial bid---Criteria for grant of licence under amended IFL was the lowest financial bid of a technically qualified bidder---Reason why marks were to be allocated for a bidder's technical bid was because only those bidders who were able to obtain 70 or more marks were to be considered as technically qualified---Under amended IFL no marks could be given to a bidder for its financial bid, the marks obtained by a bidder for its technical bid would only determine whether a bidder was technically qualified or not---No formula existed to determine a bidder's score for its financial bid under amended IFL, and question for decision to grant licence to a bidder on the basis of combined score for a bidder's technical as well as financial bid did not arise---No reason existed for Federal Board of Revenue to announce technical score of bidders as such score was only to determine whether or not a bidder had been technically qualified---Only technical bids of technically qualified bidders could be opened under terms of amended IFL---Technical score of bidder played no role in procurement process in question---If petitioner did not understand import of changes made in IFL and amended evaluation criteria, it had only itself to blame for unsavory situation it found then itself in---High Court declined to interfere in procurement process--- Constitutional petition was dismissed, in circumstances.

Salman Akram Raja, Asad Ladha and Malik Ghulam Sabir for Petitioners.

Arshid Mehmood Kiani, Deputy Attorney-General for Respondent.

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Muhammad Nadeem Khan Khakwani, Assistant Attorney-General.

Syed Ali Zafar and Jehanzeb Sukhera for F.B.R./respondents Nos.2 to 6.

Khalid Ishaq, Law Officer, NADRA/Respondent No.11.

Noor ul Najam, Departmental Representative, P.P.R.A./Respondent No.07.

Salman Aslam Butt and Anique Salman Malik, for Respondent No.8./N.R.T.C.

Imtiaz Rashid Siddiqui, Hasnain Ibrahim Kazmi, Shehryar Kasuri and Raza Imtiaz Siddiqui and Akram Shaheen for Respondent No.10/N.I.F.T.

Umer Ijaz Gillani and Haider Waheed for Respondent No.12.

Dates of hearing: 6th, 13th, 14th, 18th, 19th, 20th, 24th February and 6th March, 2020.

JUDGMENT

MIANGUL HASSAN AURANGZEB, J.----Through the instant writ petition, the petitioner, Reliance IT Solutions (Private) Limited ("Reliance"), seeks a declaration to the effect that the entire procurement process for the grant of a licence to provide the track and trace system for tobacco products conducted thus far by the Licencing Committee of the Federal Board of Revenue ("F.B.R.") is a mis-procurement. Furthermore, the petitioner also seeks a direction to the F.B.R. to invite fresh applications for the grant of the said licence.

2. The facts essential for the disposal of the instant petition are that on 03.11.2004, Pakistan had ratified the Framework Convention on Tobacco Control ("F.C.T.C."), and on 29.06.2018 acceded to the F.C.T.C. Protocol to Eliminate Illicit Trade in Tobacco Products. Article 8.2 of the F.C.T.C. Protocol requires Pakistan to establish a tracking and tracing system, to be controlled by Pakistan, for all tobacco products that are manufactured in, imported into or transiting through its territory. Pakistan had to embark on a project to implement a track and trace system for tobacco products to meet its national need to monitor and protect its revenues and address the high level of illicit trade within its borders, and to meet its international obligations under the F.C.T.C. The track and trace system was to form part of a regional and global international track and trace regime for tobacco products. In order to prevent the leakage of revenue, under-reporting of production and sale of tobacco products, and to ensure proper payment of federal excise duty and sales tax on the manufacture and sale of tobacco products, the F.B.R. was mandated to licence the implementation of the track and trace system, which was required to be developed, operated and maintained by the licensee for tobacco products manufactured within and imported into Pakistan.

3. On 06.08.2019, the F.B.R. published an advertisement inviting applications for the grant of a five-year licence to be issued under the Sales Tax Rules, 2006 for the development, maintenance and operation of a track and trace system in accordance with the provisions of the said Rules and the Invitation of Licence ("I.F.L.") issued by the F.B.R. The procedure for the bidding was provided in the I.F.L. and the Chapter XIV-B Sales Tax Rules, 2006, inserted through notification (SRO 250(I)/2019), dated 26.02.2019 ("the Licencing Rules, 2019"). The I.F.L. had

been placed on the website of the Public Procurement Regulatory Authority ("P.P.R.A."). The bidding was to be through a single stage - two envelope procedure. Sealed applications were required to be delivered within thirty days of the publication of the said advertisement. It is an admitted position that the deadline for the submission of the bids was extended to 27.09.2019.

4. The licensee was to be responsible for the end-to-end installation and operation of a track and trace system connecting cigarette manufacturing sites and import stations to the F.B.R. and the law enforcement officials. The track and trace system was to include the provision of tax stamps and integrated codes to enable real time electronic monitoring of the cigarette supply chain throughout Pakistan.

5. The bid evaluation criteria in the I.F.L. provided inter alia that the applications for the grant of the licence found to provide the high combined score of the technical and financial requirements was to be recommended by the F.B.R. for the issuance of the licence. The licensee which submitted the economically most advantageous offer, taking into account the relative weightage of the following selection criteria, was to be selected:-

Assessment criteria		Marks
A	Applicant's experience and capability	35
B	Features of the tract and trace system	45
C	Cost (applicant's total price)	20
	Total	100

6. It was explicitly mentioned in the I.F.L. that the total score will be the sum of the scores of all the three categories together. The I.F.L. also provided the formula for computing the bidders' financial bids. Furthermore, Annex-6 to the I.F.L. required the bidders to quote the price for 1,000 tax stamps with unique identification markings.

7. Vide letter dated 08.08.2019, the F.B.R. informed the prospective bidders that a pre-licencing conference was scheduled to be held on 22.08.2019 in order to address any queries and discuss matters relating to the procurement in question. Several queries had been raised and suggestions made by the prospective bidders/I.T. Solutions Providers with respect to the I.F.L. Vide letter dated 21.08.2019, a host of queries were raised on behalf of Reliance. In the said letter, Reliance pointed out that there was an apparent inconsistency between the requirements of Rule 36 of the Public Procurement Rules, 2004 ("P.P.R.") and the I.F.L. inasmuch as under the "single stage - two envelope procedure" envisaged by Rule 36 *ibid*, technical bids are evaluated first and after the elimination of the bidders, who do not meet the technical requirements, only the financial bids of technically qualified bidders are opened and the lowest financial bid is supposed to be accepted, whereas under the I.F.L., the technical and financial bids are to be considered together and the bid that scores the highest marks under the evaluation criteria is to be accepted. Reliance requested the F.B.R. to reassess the requirements of the I.F.L. so that the letter and spirit of the P.P.R. are complied with.

8. The F.B.R.'s response to Reliance's said query was that Rule 150ZK(2) and Rule 150ZL of the Licencing Rules, 2019 were in conformity with Rule 36 of the P.P.R. It was explained that the bids of the technically non-compliant bidders will be rejected and their financial bids will be returned un-opened; the bids of the technically qualified bidders will be evaluated in accordance with the evaluation criteria and scores will be allocated for both technical and financial proposals; and the applicant scoring the highest cumulative marks shall be recommended for the grant of the licence. The F.B.R., in its clarification, reiterated that "the technically successful applicant(s) found to have high combined score of the technical and financial requirements as per the evaluation criteria shall be recommended to the Board for issuance of licence". The said clarification was issued on 05.09.2019.

9. On 17.09.2019, the F.B.R. amended the I.F.L. The deadline for the submission of the bids was also extended to 27.09.2019. Paragraph 7 of the evaluation criteria made in the amended I.F.L. provided that the P.P.R. regarding single stage - two envelopes process for procurement shall be followed in letter and spirit. Furthermore, it was also provided that the Licencing Committee will evaluate the technical proposals, and any applicant scoring 70 or more marks out of total 80 marks for "technical and experience" shall be considered as a technically accepted application. For the purposes of clarity, a comparison of paragraphs 7 of the evaluation criteria in the original and the amended I.F.L. is given in the table herein below:-

Original I.F.L.	Amended
The application(s) for grant of licence found to provide the high combined score of the technical and the financial requirements as per the evaluation criteria shall be recommended to the Board for issuance of Licence.	PPRA rules regarding single stage, two envelope process of procurement shall be followed in letter and spirit. The Licencing committee will evaluate technical proposals. The applicant scoring 70 or more marks out of total 80 marks for technical and experience will be considered as technically accepted application.

10. The F.B.R. also amended the evaluation criteria by removing the competent for "cost (applicant's total price)" from the said criteria. Under the amended criteria, a maximum of 80 marks could be given for the applicant's experience and capability (35 marks), and features of the track and trace system (45 marks). Despite the said amendment, the amended I.F.L. also provided that "[t]he total score will be the sum of the scores of all the three categories together."

11. The I.F.L., prior to its amendment, had provided a formula for the computation of marks for a bidder's financial bid. In the amended I.F.L., no formula for computing a bidder's financial bid has been mentioned/provided.

12. After the issuance of the amended I.F.L., Reliance sought further clarification on "whether the applicants who receive 70 marks or above will be

considered technically qualified and will thereafter be treated at par with each other for the purposes of the financial stage regardless of the number of marks they were given for the technical stage". The F.B.R.'s response dated 24.09.2019 was: "P.P.R.A. Rules will be applied". Reliance had also asked the F.B.R. to clarify the meaning of the term "economically most advantageous offer" employed in the I.F.L., and whether only the financial proposals of the technically qualified bidders would be taken into account in isolation of the applicant's technical marks. Furthermore, Reliance asked whether the lowest responsive price quoted by a technically qualified bidder would automatically be considered to be the "economically most advantageous offer". The F.B.R.'s response to this query was: "as per P.P.R.A. Rule 36".

13. On 27.09.2019, thirteen bidders submitted their bids for the award of the licence, five out of whom were declared as "not responsive". Vide office order dated 09.10.2019, the F.B.R. constituted a three-member Grievance Redressal Committee ("G.R.C."), which empowered to address complaints of the bidders pertaining to the licencing under the Licencing Rules, 2019 and the 2004 Rules.

14. The financial bids of the technically qualified bidders were opened on 14.10.2019. As mentioned above, Annex-6 of the I.F.L. required the bidders to quote a price for 1,000 tax stamps with unique identification marks. Reliance had quoted Rs.987/- per 1,000 stamps, whereas National Radio and Telecommunication Corporation ("N.R.T.C.") had quoted Rs.0.731 per 1,000 stamps.

15. As per the bid evaluation report dated 14.10.2019, N.R.T.C.'s bid of Rs.0.731 per 1,000 stamps was the lowest. Consequently, N.R.T.C. was declared as the lowest evaluated bidder. On 15.10.2019, the bid evaluation report was posted on P.P.R.A.'s website. Vide letter dated 17.10.2019, N.R.T.C. informed the F.B.R. that on 14.10.2019, it had clarified that as a result of an oversight, it had quoted Rs.0.731, and that the said unit price when multiplied by 1,000 comes to Rs.731 per 1,000 stamps. Furthermore, N.R.T.C. requested the F.B.R. to amend the bid evaluation report so that its quoted price is stated to be Rs.731 per 1,000 stamps or Rs.0.731 per stamp.

16. N.R.T.C., vide letter dated 22.10.2019 (stamped by the F.B.R. as having been received on 23.10.2019), informed the G.R.C. constituted by the F.B.R. that it had "mistakenly written" Rs.0.731 per 1,000 stamps, and that it had already clarified that its bid was actually Rs.0.731 per one stamp, which made its bid Rs.731 per 1,000 stamps. N.R.T.C. requested the G.R.C. to accept the said clarification and declare its status as the lowest bidder in accordance with Rule 31 of the P.P.R.

17. To cut the long story short, on 28.10.2019, the G.R.C., after obtaining an opinion from the Law and Justice Division ("Law Division") accepted N.R.T.C.'s request for its financial bid to be treated as Rs.731 per 1,000 stamps. On 28.10.2019, the G.R.C. also turned down Reliance's grievance petition. Vide letter dated 29.10.2019, the F.B.R. informed N.R.T.C. that the Board had been pleased to grant a licence to it at the price of Rs.731 per 1,000 stamps for a period of five years to establish, maintain and operate the whole process of the track and trace

system for tobacco products in Pakistan subject to the terms and conditions in the Licencing Rules, 2019, I.F.L. and other relevant laws. A day after the issuance of the said letter, the instant writ petition was filed.

18. Learned counsel for Reliance, after narrating the facts leading to the filing of the instant petition, submitted that it was only after Reliance had pointed out that the procurement process originally adopted by the F.B.R. was not in consonance with Rule 36 of the P.P.R., that the F.B.R. amended the evaluation criteria in the I.F.L.; that under the amended evaluation criteria, the total marks for (i) a bidder's experience and capability, and (ii) features of the track and trace system were 80 ; that despite the said amendment, the amended I.F.L. provided that the "total score will be the sum of the scores of all the three categories"; that the confusion created by the said provision caused Reliance to seek further clarifications from the F.B.R. on the question whether the term "economically advantageous offer" employed in the amended evaluation criteria would only mean the financial proposal of the technically qualified bidders; that Reliance had also sought a clarification on whether the applicant who received 70 marks or above would be considered technically qualified and treated at par with the other technically qualified bidders for the purposes of the financial stage regardless of the marks given to it for the technical stage; that the F.B.R.'s response was only to the effect that the P.P.R. would be applied; that the F.B.R.'s response was vague and cryptic, which led Reliance to believe that the combined score obtained by a bidder for its technical and financial bid would be the criteria for selecting the successful bidder; that in an effort to obtain a high technical score Reliance formed a consortium with foreign entities of repute and experience; that Reliance would not have formed a consortium had it been made clear by the F.B.R. that the marks obtained by a technically qualified bidder would not play a role in selecting the successful bidder; that Reliance had quoted a higher price due to its understanding that its high technical score would contribute in getting it selected for the award of the licence; that at no material stage did the F.B.R. clarify that the licence would be awarded to the technically qualified bidder who submits the lowest financial bid; that the bid evaluation report dated 14.10.2019 shows that the F.B.R.'s intention was to award the licence to the technically qualified bidder who submitted the lowest financial bid; and that the manner in which the procurement process was conducted by the F.B.R. is mala fide and a perversion of the due process of transparency.

19. Learned counsel further submitted that on 16.10.2019, Reliance filed a complaint before the G.R.C.; that the position taken by Reliance in the said complaint was that the F.B.R. did not provide clarification to Reliance's queries regarding the amended I.F.L.; that since the amended I.F.L. provided that "the total score will be the sum of scores of all three categories", Reliance prepared a solution based on the understanding that the cumulative weightage shall be given to all the three categories, including the cost (applicant's total price), rather than the licence being granted to the technically qualified bidder with the lowest cost; that had the F.B.R. provided a clarification explicitly providing that the licence would be granted to the technically qualified bidder who submits the lowest bid, Reliance would have made certain material changes to both its financial and technical

proposals; that the F.B.R's stance before the G.R.C. was that the term "the total score will be the sum of scores of all three categories" was a typographical mistake; that on 28.10.2019, the G.R.C. rejected Reliance's complaint against the evaluation report dated 14.10.2019; and that the G.R.C.'s decision dated 28.10.2019 is unlawful and is liable to be declared as such. Learned counsel for Reliance prayed for the writ petition to be allowed in terms of the relief sought therein.

20. Learned counsel for the F.B.R. submitted that the amendment made in the evaluation criteria was communicated to all the bidders much before the date fixed for the submission of the bids; that all the bidders including Reliance were well aware that the score allocated to the cost factor in the original I.F.L. dated 06.08.2019 (i.e. 20 marks) was deleted and it was clarified that after the technical evaluation, the technically qualified bidder, who submits the lowest financial bid shall be awarded the licence in accordance with Rule 36 of the P.P.R. ; that the provision in the original I.F.L. that the bidder with "high combined score of the technical and financial requirements as per the evaluation criteria" would be recommended for the issuance of the licence was deleted; that the amended I.F.L. provided that the bidder "scoring 70 or more marks out of total 80 marks for technical experience shall be considered as technically accepted applications"; that the amendment made in the evaluation criteria was advertised by the F.B.R. on 18.09.2019 in the newspaper; that the amended criteria was also uploaded on P.P.R.A.'s website; that due to the change in the evaluation criteria, the last date for the submission of the bids was extended from 05.09.2019 to 27.09.2019; that the original as well as the revised I.F.L. was in accordance with the 2004 Rules; that the financial bids of only those bidders who were technically qualified by securing 70 or more marks in the technical evaluation process were to be opened; that the bidder who offered the lowest price was to be declared as the lowest evaluated bidder; that this procedure was in conformity with Rule 36 of the 2004 Rules; that in the amended evaluation criteria, there was one typographical error; that instead of providing that the total score will be the sum of the scores of all the two categories together, the amended evaluation criteria provided that the total score would be the sum of all the three categories together; that the said typographical mistake was bona fide in nature and did not result in prejudicing any party; and that Reliance, after participating in the competitive process, cannot turn around and submit that the bidding had not been carried out in accordance with the evaluation criteria which was made known to all the bidders. Learned counsel for the F.B.R. prayed for the writ petition to be dismissed.

21. Learned counsel for N.R.T.C. submitted that Reliance had submitted the representations wherein the position taken was that the evaluation criteria in the original I.F.L. was not in consonance with the requirements of Rule 36 of the 2004 Rules; that the evaluation criteria in the I.F.L. was changed and under the new criteria, the financial bids of only those bidders who were technically qualified by securing 70 or more marks were to be opened; that there was no ambiguity in the amended evaluation criteria; that since the formula for computing marks for a financial bid had been done away with in the amended I.F.L., the question of awarding marks for a bidder's financial bid did not arise; that the determination of

the successful bidder on the basis of the combined score obtained for the technical and financial bid was not envisaged by the new evaluation criteria in the amended I.F.L.; and that Reliance had assailed the bidding process simply because it had failed to be declared as the lowest evaluated bidder. Learned counsel for N.R.T.C. prayed for the writ petition to be dismissed.

22. Learned counsel for N.R.T.C. further submitted that there was no ambiguity in the bid documents; that the F.B.R. had taken into consideration Reliance's objection that the evaluation criteria in the I.F.L. was not in conformity with the requirements of Rule 36 of the P.P.R.; that after Reliance had raised objections to the I.F.L., the F.B.R. amended the I.F.L. by providing that the licence is to be awarded to the technically qualified bidder whose financial bid is the lowest; that in the amended I.F.L., the formula for awarding marks for a bidder's financial bid was done away with; that under the amended I.F.L., the technical qualification of a bidder was to be based only on (i) its experience and capability, and (ii) features of the track and trace system; that in order for a bidder to be technically qualified, it had to obtain 70 out of 80 marks; that the provision in the amended I.F.L. that "the total score will be the sum of the scores of all the three categories together" was an inconsequential typographical mistake; that since Reliance had already communicated the interpretation of Rule 36 of the P.P.R. to the F.B.R., and since the F.B.R. had clarified that the bidding was to be conducted in accordance with Rule 36 *ibid*, there was no room left for any ambiguity; and that Reliance wants the entire procurement process to be set aside since it had not emerged as the lowest evaluated bidder.

23. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

24. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 17 above, and need not be recapitulated.

25. It is an admitted position that on 06.08.2019, the F.B.R. published an advertisement inviting applications for the grant of the licence. The I.F.L. provided that the total score will be the sum of the scores of the three categories namely; (i) the applicant's experience and capability (35 marks), (ii) features of the track and trace system (45 marks), and (iii) cost (applicant's total price) (20 marks). After Reliance, *vide* letter dated 21.08.2019, raised an objection that the evaluation criteria was not in conformity with the requirements of Rule 36 of the P.P.R., the F.B.R. amended the evaluation criteria on 17.09.2019. The amendment made in the evaluation criteria was also published by the F.B.R. in the newspapers through a 'public notice'. The deadline for the submission of the bids was extended from 05.09.2019 to 27.09.2019.

26. Under the amended criteria, a maximum of 80 marks could be given for (i) the applicant's experience and capability (35 marks), and (ii) features of the track and trace system (45 marks). The amended I.F.L. also provided that the applicant scoring 70 or more marks out of total 80 marks for technical and experience shall be considered as a technically accepted application. Thereafter, Reliance, *vide* letter

dated 18.09.2019, asked the F.B.R. to provide a clarification regarding the amended I.F.L. Reliance wanted to know whether the bidders, who technically qualified by obtaining 70 or more marks, would be treated at par with each other for the purposes of the financial stage regardless of the marks they were given for the technical stage. The F.B.R.'s response dated 24.09.2019 was: "P.P.R.A. Rules will be applied". To Reliance's request for clarification of the meaning of the terms "economically most advantageous offer" employed in the I.F.L., the F.B.R.'s response was: "as per P.P.R.A. Rule 36".

27. Confusion appears to have been created by the non-removal of the words, "[t]he total score will be the sum of the scores of all the three categories together" in the amended I.F.L. The F.B.R.'s stated position before the G.R.C. was that the presence of the term "the total score will be the sum of scores of all three categories" in the amended I.F.L. was a typographical mistake. The procurement process in question had been undertaken in fulfillment of Pakistan's international treaty obligations. For the F.B.R. to let such a mistake remain in the amended I.F.L. was most negligent.

28. Be that as it may, it is my view that such a mistake cannot furnish a ground for striking down the entire tendering process. This is because the I.F.L., prior to its amendment, had provided a formula for the computation of marks for a bidder's financial bid. The said formula is reproduced herein below:-

"The formula for computing the applicant's price is: lowest responsive applicant's price (LAP) divided by the applicant['s] price (AP) multiplied by 20.

E.g. Lowest price (lowest applicant) gets 20 points ($LAP/AP = 1 \times 20 = 20$), and other applicants will get less points."

29. The said formula for computing marks for a bidder's financial bid was omitted in the amended I.F.L. Since under the amended I.F.L. no marks were to be awarded for a bidder's financial bid, Reliance ought to have understood that the criteria for the grant of the licence under the amended I.F.L. was the lowest financial bid of a technically qualified bidder. The reason why marks were to be allocated for a bidder's technical bid was because only those bidders who were able to obtain 70 or more marks were to be considered as technically qualified. Since under the amended I.F.L. no marks could be given to a bidder for its financial bid, the marks obtained by a bidder for its technical bid would only determine whether a bidder was technically qualified or not. As there was no formula to determine a bidder's score for its financial bid under the amended I.F.L., the question for the decision to grant the licence to a bidder on the basis of the combined score for a bidder's technical as well as financial bid did not arise. There was no reason for the F.B.R. to announce the technical score of the bidders since such score was only to determine whether or not a bidder had been technically qualified. Only financial bids of the technically qualified bidders could be opened under the terms of the amended I.F.L. Other than this, the technical score of a bidder played no other role in the procurement process in question. If Reliance did not understand the import of

the changes made in the I.F.L. and the amended evaluation criteria, it has only itself to blame for the unsavory situation it now finds itself in.

30. In view of the above, I do not find any merit in the instant petition, which is accordingly dismissed with no order as to costs.

MH/199/IsI. Petition dismissed.

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