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Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

W. P.No.19671 of 2012

3M Pakistan Pvt. Ltd. Vs The Govt. of Punjab etc

J U D G M E N T

Date of Hearing	14.5.2013
Petitioner By:	M/s Mueen Qamar, Hassan Irfan Khan and Mirza Saqib Asghar, Advocates
Respondents By:	M/s Nayyar Abbas Rizvi, Addl. AG, Waqas Qadeer Dar, AAG and Mrs. Samia Khalid, AAG alongwith Masood-ul-Haq, Director, Muhammad Asif, Director and Muhammad Azhar Tariq, ETO, MRA, Excise & Taxation Department, Lahore. Mr. Saad Rasool, Advocate for the Applicant (In CM No.374/2013.

Ayesha A. Malik J: Through this petition, the Petitioner has impugned the Blacklisting Order dated 29.5.2012 issued by the Respondent No.1 and has prayed for a direction to the Respondents to make payment of Rs.375,316,505/- being the price of the retro reflective vehicle registration plates supplied by the Petitioner to the Respondents under the agreement dated 1.2.2008. The Petitioner has also prayed for a declaration that the pre-qualification condition for *proof of customer satisfaction* by the bidder in the fresh tender of September 2011 is person specific, thus violative of Article 25 of the Constitution of Pakistan, 1973.

2. The basic facts relevant to the case are that the Petitioner was awarded a contract on 7.8.2004 for supply of retro reflective vehicle registration plates. This agreement was performed in its entirety by the Petitioner to the complete satisfaction of the Respondent No.1. The Respondent No.1 entered into another agreement dated 1.2.2008 again for the supply of retro reflective vehicle registration plates for a period of three years. This agreement has also been performed by the Petitioner. However the Respondents have withheld payment of the price of the plates supplied by the Petitioner under this agreement and an amount of Rs.375,316,505/- is payable by the

Respondents to the Petitioner. A fresh tender in September 2011 for the supply of retro reflective vehicle registration plates was floated by the Respondents. The Respondents added a pre-qualification condition for the submission of *customer satisfaction proof* in the Tender under the Instruction to Bid. For pre-qualification purposes, the Petitioner requested the Respondents to issue the *customer satisfaction proof* so that it could participate in the bid. Instead, the Respondents raised several contractual disputes regarding short supply of ordered plates, local manufacturing of the plates and non-performance of training obligations by the Petitioner. The Respondents then served a show cause notice bearing No.LEGIS-6-26/2011 dated 1.2.2012 threatening to blacklist the Petitioner in terms of Rule 19 of Punjab Procurement Authority Rules, 2009 (Rules). Alongwith the show cause notice, the Respondent No.2 also issued an arbitration notice dated 1.2.2012 under Clause 26.2 of the Contract dated 1.2.2008 to refer the dispute of short supply and training for arbitration. A personal hearing was granted to the Petitioner on 27.3.2012. The Petitioners were given 80 days for the supply of the short supplied plates and until then the blacklisting notice and arbitration notice were suspended. Another meeting was held on 4.5.2012 to review the implementation status of the decision taken on 27.3.2012. In this meeting essentially the position of 27.3.2012 was reiterated and the Petitioner was required to provide the unit costs of locally converted plates. In the meantime, the Petitioner received another notice dated 8.5.2012 from Respondent No.2 for personal hearing on 15.5.2012. The meeting on 15.5.2012 was attended by the Petitioner's representative alongwith its counsel. During the meeting of 15.5.2012, the Petitioner explained to the Respondents that the desired vehicle plates will be supplied in two installments such that 50% plates would be supplied by July 2012 and the remaining 50% by August 2012. It was also pointed out to the Respondents that a quantity of 8000 plates could be supplied immediately. When the Petitioner received the minutes of the meeting of 15.5.2012, from the Respondent No.2 they found that in paragraph No.10(i) of the minutes of the meeting, the committee recommended blacklisting of the Petitioner on the basis of (i) non-supply of 240,000 vehicle plates and (ii) non-submission

of cost/pricing formula. Subsequently the Petitioner through its letter dated 29.5.2012 submitted the cost factor/pricing formula prepared by Ernst & Young Ford Rhodes Sidat Haider for the plates supplied by the Petitioner to the Respondents which were processed by the Petitioner in its local facility from the imported material. The Petitioner also submitted the delivery schedule for supply of 240,000 vehicle plates. However, notwithstanding the understanding with the Respondents, the Petitioner received the Blacklisting Order No.SOE&M/1-29/03/RF(P-III) passed by the Respondent No.1 on 29.5.2012 holding that the Petitioner has been blacklisted for a period of one year.

3. Subsequently the Respondents through letter dated 22.6.2012 rejected the cost factors submitted by the Petitioner on 29.5.2012, again requesting for complete data of imports of finished plates and raw materials and detail of all costs since the vehicle number plates were locally manufactured. The Petitioner is aggrieved as it is unable to participate in the tender on account of the demand for customer satisfaction proof and the blacklisting order. Hence this petition.

4. An effort was initiated by this court vide order dated 23.8.2012 to settle the issues between the parties. However, the settlement process was unsuccessful and ultimately through order dated 21.2.2013, at the request of the Petitioner, it was decided that the case be heard on merits.

5. On 7.5.2013 an objection was raised by the learned Law Officer with respect to the third prayer of this petition. The learned Law Officer stated that the Petitioner seeks recovery of Rs.375,316,505/-. He argued that the same can not be done through this constitutional petition as it is a dispute which should be arbitrated as per the terms of the contract. During the course of arguments, the learned counsel for the Petitioner agreed that so far prayer No. iii is concerned, it is a matter which has to be arbitrated upon between the parties, as the same involves a factual controversy which cannot be decided in the instant petition. Learned counsel for the Petitioner therefore set out his case in relation to prayer No.ii, iv, v and vi.

6. Prayer No.ii.

The Petitioner seeks a declaration that the impugned blacklisting order No.SOE&M/1-29/03/RF(P-III) dated 29.5.2012 be declared to be without lawful authority and of no legal effect.

In support of this prayer, the learned counsel for the Petitioner argued that on 1.2.2011 show cause notice for blacklisting was issued to the Petitioner. Learned counsel argued that since 80 days were given to the Petitioner for supply of the short supplied number plates, hence there was no justification for issuance of the blacklisting order. He further argued that the grounds stated in the show cause notice dated 1.2.2011 are different from the reasons for issuance of the blacklisting order. He further argued that without following due process, the Respondents could not issue the blacklisting order in the manner that they had done. In this regard, learned counsel for the Petitioner has relied upon the cases titled "New Jubilee Insurance Company Vs National Bank of Pakistan, Karachi (PLD 1999 SC 1126), "Messrs Al Noor Construction Co. Contractors Vs Cantonment Board, Peshawar through Cantonment Executive Officer and 2 others"(2004 CLC 1647), "Messrs Nizami Construction Company through sole Proprietor Vs Chief Executive Officer, Gujranwala Electric Supply Company (GEPCO) and 2 others"(2005 CLC 366), "Tristar Shipping Lines Ltd Vs Government of Pakistan through Secretary, Ministry of Food, Agriculture and Livestock and 2 others"(1997 CLC 1475), "Zulfiqar Ali Vs Divisional Superintendent (Workshops), Pakistan Railways, Moghalpura, Lahore and another"(PLD 2001 Lahore 13), "Messrs M.A Aleem Khan through Chairman Vs Province of the Punjab through Secretary, Communication and Works Department, Lahore and 4 others"(PLD 2006 Lahore 84), "Preetam Pipes Syndicate Vs Tamil Nadu Slum Clearance Board Madras"(AIR 1986 Madras 310), "Atlas Cables (Pvt) Ltd Vs Quetta Electric Supply Company Ltd through Chief Executive Officer"(PLD 2011 Quetta 67) and "Muhammad Iqbal Vs Fatima Jinnah Medical College and another"(1989 MLD 4237).

Learned Law Officer argued that the blacklisting notice was issued with reference to the breach committed under the contract. An effort took place between the Petitioner and the Respondents to resolve the disputes arising under the contract. On 17.8.2011 a letter was issued to the Petitioner by the Respondent No.2 for resolution of its disputes through a joint reconciliation committee. The Petitioner was to provide the cost factors to the Respondents since the number plates had not been imported from their European facility but in fact were manufactured locally. He argued that the Petitioner continued to claim the exchange rate adjustments even though it was locally manufacturing the number plates since 2009 and also it never informed the Respondents that the plates were being locally manufactured. In this regard throughout the meetings held with the Respondents the Petitioner promised to provide the cost factors, however they failed to do so. They also failed to supply the short supplied number plates. Hence the blacklisting order was issued after hearing the Petitioner.

I have heard the learned counsels and reviewed the documents relied upon by learned counsel for the Petitioner as well as the learned Law Officer.

In terms of the notice dated 1.2.2012, the grounds for blacklisting were that the Petitioner was locally manufacturing the number plates instead of importing them from its European facility. Further, the Petitioners were required to provide the change in price for the number plates since the number plates were being locally manufactured. In a meeting on 27.3.2012 the Petitioner offered to supply the first installment of the short supplied number plates within 80 days. However this request was not approved by the Respondents at the meeting as it was to be approved from the finance department. With reference to the cost factors, it was agreed that the Petitioner would provide the unit cost of the local plates. It was also agreed at the request of the Petitioner that the blacklisting show cause notice and the request for arbitration issued on 1.2.2011 would remain

suspended. On 4.5.2012 another meeting took place to review the implementation status of the decisions taken on 27.3.2012. On this date the Petitioner stated that the cost factors had been sent to an independent audit firm for authentication and would be shared with the Respondents when received by the auditors. So far as the supply of the short supplied stock was concerned, it was stated by the Petitioner that supply would commence w.e.f. 27.4.2012. The Committee took note of the developments presented by the Petitioner and decided to provide a hearing on the blacklisting notice to the Petitioner as it was not satisfied with the response of the Petitioner. The hearing was scheduled for 15.5.2012. On this date the Petitioner appeared before the Respondents specifically in relation to the blacklisting notice and the arbitration notice. The Petitioners argued their case with respect to both these issues. However after hearing the Petitioner it was recommended that the Petitioner be blacklisted and that the arbitration process under the contract be initiated. It was also recommended that procurement of the number plates should be re-tendered by inviting bids. Therefore I find that the Petitioner was aware of the fact that the hearing of 15.5.2012 was with respect to the blacklisting notice. The minutes of the meeting dated 4.5.2012 clearly provide that they were to be given a hearing with respect to the blacklisting notice. Thereafter on 8.5.2012 the Petitioner was issued notice for 15.5.2012. On 15.5.2012 the long standing issues related to delivery of cost factors by the Petitioner, delivery of short supply by the Petitioner was heard and discussed at length. The Committee recommended that since the Petitioner was not inclined to resolving the issues, it be blacklisted and the process of arbitration under clause 26.2 of the Contract dated 1.2.2008 be initiated and that the procurement of number plates should be re-tendered by inviting bids indicating separate price for each security feature. Thereafter the impugned order of 29.5.2010 was issued. The blacklisting order provides that the Petitioner is blacklisted from 15.5.2012 for one year. The period of one year has now expired. At this point there is no order

in place which can be declared to be without lawful authority and of no legal effect. Furthermore by an order dated 15.8.2012, this court observed that the simultaneous issuance of a blacklisting notice and arbitration notice for short supply of number plates appears to be contradictory. Subsequently during the settlement process the issue of short supply was resolved as the Petitioner supplied the number plates to the Respondents, as recorded in order dated 5.11.2012.

7. **Prayer No.iv.**

Also a declaration to the effect that the inclusion of the Pre-Qualification condition of 'customer satisfaction proof' by the Bidder in the Fresh Tender floated in September 2011 is person specific, thus violative of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973, hence, without lawful authority thus of no legal effect.

8. **Prayer No.v.**

To direct the Respondents to issue customer satisfaction proof to the Petitioners in relation to agreement dated 1.2.2008 between the Petitioner and the Respondents as the Petitioner has entirely performed the agreement.

I will deal with prayer Nos.iv & v together as they emanate out of the same issue.

The basic grievance of the Petitioner is that the requirement of *customer satisfaction proof* is a person specific requirement. So far as the Petitioner is concerned it violates Article 25 of the Constitution of Islamic Republic of Pakistan, 1973. Learned counsel argued that the customer is the Government of Punjab, hence the Respondents cannot demand a *customer satisfaction proof* from the Petitioner since they are unwilling to issue the certificate. In this regard, learned Law Officer argued that the requirement of *customer satisfaction proof* is provided for under Rule 15 and 17 of the PPRA Rules. He argued that this is not person specific. It is the basic requirement under the PPRA Rules and as such the grievance of the Petitioner that the *customer satisfaction proof* is illegal and is discriminatory to the Petitioner is without merit.

The requirement of *customer satisfaction proof* is provided for under the PPRA Rules. Rule 15 provides that the procuring agency while engaging in pre-qualification may take into consideration the following factors, namely:-

- (a) relevant experience and past performance;
- (b) capabilities with respect to personal, equipment and plant;
- (c) financial position and
- (d) -appropriate managerial capability; and
- (e) any other factor that a procuring agency may deem relevant, not inconsistent with these rules.

Rule 17 provides that the procuring agency may require the supplier to provide information concerning their professional, technical, financial, legal or managerial competence whether already pre-qualified or not. In this case I am of the opinion that when the Petitioner entered into a contract with the Respondents for supply of retro reflective vehicle registration plates, the Petitioner was aware of the fact that the customer is the Government of Punjab, hence the requirement of a *customer satisfaction proof* in the event of a dispute may cause difficulty. During the course of the settlement effort, the Respondents were willing to issue the *customer satisfaction proof* provided that the Petitioner offered some sort of security due to the pending disputes. However, the Petitioner was not willing to offer any security. As per their contention the Respondents are bound to act fairly, justly and equitably and that the requirement of *customer satisfaction proof* is not based on these principles. I am of the opinion that the requirement of *customer satisfaction proof* is not discriminatory and does not violate any rights of the Petitioner. If there is a dispute between the Petitioner and the Respondents under the contract then they are not entitled to the *customer satisfaction proof* from the Respondents. Just because it is the Government of Punjab does not mean that the Petitioner can seek a direction from the court through this constitutional petition to compel the Respondents to give the *customer satisfaction proof* or to waive its requirement. In the event that it was any other customer, the Petitioner would not have the ability to file a constitutional petition and seek such a declaration. The

Respondents are the customer and if they are not satisfied with the performance of the Petitioner under the contract they are no obligated to remove this requirement or to issue a conditional certificate. Therefore to my mind this prayer is not maintainable and as such no case for interference is made out.

9. **Prayer No.vi.**

Also to direct the Respondents to ensure participation of the Petitioner in the Fresh Tender for supply of retro reflective vehicle registration plates as floated in September 2011 in a manner that Petitioner's bid is also considered in the open bidding process which the Petitioner has already submitted and the Petitioner is not disqualified from participation in the said Tender.

With respect to the 6th prayer, the Petitioner's request that they be included in the process does not merit any interference by this court as the period of blacklisting as stated above is already over and the requirement of *customer satisfaction proof* has to be satisfied by the Petitioner. If the Petitioner's bid satisfies the tender requirements, it may be considered by the Respondents.

10. In view of the aforesaid this petition is **dismissed**.

CM No.374/2013

This is an application for impleadment.

The grievance of the Applicant is that they may join in the proceedings essentially because the interim order issued on 7.11.2012 was undermining the business interest of the Applicant. The Applicant is a bidder in the bidding process and awaits the announcement of the award by the Government of Punjab. Since the main case has already been decided, hence this CM is **dismissed**.

(AYESHA A. MALIK)
JUDGE

Announced in open court on

JUDGE

Allah Bakhsh