



PAKISTAN TELECOMMUNICATION AUTHORITY
HEADQUARTERS, F-5/1 ISLAMABAD

<http://www.pta.gov.pk>

Re:
Space Telecom (Pvt.) Limited

Decision of the Authority under Order of the Islamabad High Court

Date of Hearing: 26th June, 2009
Venue of Hearing: PTA HQs, Islamabad

The Hearing Panel:

Dr. Mohammed Yaseen:	Chairman
S. Nasrul Karim A. Ghaznavi:	Member (Finance)
Dr. Khawar Siddique Khokhar:	Member (Technical)

The Issue:

“M/s Space Telecom (Pvt.) Ltd.’s Claim for refund of US\$5 Million from the total Bid Earnest Money of US\$10 million deposited by the Consortium M/s Space Telecom”

1. Brief Facts:

- 1.1. M/s Space Telecom, a consortium consisting of three companies, namely, M/s Space Telecom (Pvt.) Ltd., M/s Drex Technologies (Pvt.) Ltd. and M/s Siloserv Off Shore SOL (the “Consortium”) won the auction for Cellular Mobile Licence in the open bidding held on 14th April, 2004 by Pakistan Telecommunication Authority (“PTA”), at Islamabad, for the auction price of US\$291 million.
- 1.2. Vide PTA’s letter of 15th April, 2004, winning of the auction was formally confirmed to the Consortium and payment of the aforesaid US\$291 million in the following mode was also communicated:
 - a. Payment of the initial 25% of US\$291 million within ten working days commencing from 14th April, 2004 (A sum of US\$10 million, already deposited with PTA as earnest money will form part of this amount).
 - b. Payment of the remaining 25% of US\$291 million within 40 working days commencing from 14th April, 2004.
 - c. Payment of the remaining 50% of US\$291 million within equal annual installments within ten years of effective date as mentioned in the license.

- 1.3. The licence was to be granted on payment of 50% of the auction winning price of 291 million dollars as per clause (a) and (b), above.

2. Procedure for the Bidding and depositing the money:

- 2.1 Prior to the auction, all information regarding the bidding procedure and other relevant details were published by PTA, in consultation with the stakeholders, through an Information Memorandum (“IM”) dated 9th February, 2004.
- 2.2 Under clause 7.3(b) of the IM, the pre-qualified bidders/applicants, including the Consortium, were invited by PTA to deposit Bid Earnest Money of US\$10 million or equivalent in Pak rupees, through normal banking channels to be received by PTA by way of credit in PTA’s designated bank account by 12th April, 2004.
- 2.3 The Consortium deposited the Bid Earnest Money of US\$10 million as per the above conditions.
- 2.4 Clauses 9(k), (m) and (n) and 10(a) of Part III of the IM, being relevant to the case in hand, are reproduced as under:

(k) Each one of the winning Bidders shall deposit in PTA designated bank account, 25% of the Auction Winning Price (Licence Fee) after adjustment of the Bid Earnest Money within ten (10) working days. Each winning bidder shall deposit remaining 25% of the Auction Winning Price within forty (40) working days from the Bidding Date.

(m) If both or either of the winning Bidders fail to make the payments as referred in sub-clause (k) above within the stipulated time, the next highest bidder(s) in order of their bid(s) will be offered the License(s) on the same Auction Winning Price and on the same terms and conditions. If no Bidder is found ready to match the Auction Winning Price, the Bidding session will be closed without awarding any licence.

(n) The Authority shall forfeit the Bid earnest money and all other amounts received from the defaulting bidder(s).

3. Space Telecom’s Default and Forfeiture of the Earnest Money:

- 3.1 Pursuant to the foregoing, reckoning 10 working days from the date of auction, deadline for the Consortium to deposit 25% of the bid amount was 26th April, 2004.
- 3.2 The Consortium could not abide by the aforesaid obligation within the specified time. Therefore, on its failure to deposit the aforesaid amount within the specified period, the Consortium was informed vide PTA’s letter of 27th April, 2004 that the Consortium stood disqualified and its earnest money of US\$10 million has been forfeited under clause 9(n) and 10(a) of the IM.

3.3 After when the Consortium stood disqualified, the two Cellular Mobile Licenses were awarded, one to M/s Telenor and the other to M/s Warid Telecom (Pvt.) as per the IM.

4. Litigation among Members of the Consortium:

4.1 Before expiry of the deadline mentioned in para 3.1, above, M/s Drex Technologies SA, M/s. SiloServ Offshore SA and Pakistan Oilfield Limited (Members of the Consortium not approved by PTA), on 23.04.02, filed a Suit for Permanent Injunction and Declaration in the Court of Senior Civil Judge, Islamabad against Space Telecom (Pvt) Limited and PTA.

4.2 Drex Technologies SA etc on 24.04.2004 also filed an application under Order 39 Rule 1 & 2 of CPC requesting the court to direct the defendants to maintain status quo with regard to license.

4.3 On 07.05.2004 Drex Technologies SA etc filed an application under section 20 of the Arbitration Act, 1940 against Space Telecom (Pvt.) Limited in the court of senior civil judge, Islamabad, for reference of dispute between Drex Technologies SA etc and Space Telecom (Pvt.) Limited to the International Chamber of Commerce for appointment of an Arbitrator for the recovery of US\$5 million from Space Telecom (Pvt.) Limited. The court vide order dated 11.05.2004 restrained PTA from giving US\$ 5 Million to Space Telecom (Pvt.) Limited till next date of hearing.

4.4 The applications for temporary injunctions dated 23.04.2004 and 24.04.2004 were dismissed by the court vide order dated 25-05-2004 and Civil Suit dated 23.04.2004 was dismissed as withdrawn by the court on 19-06-2004.

4.5 Drex Technologies SA and SiloServe Offshore SA then filed Suit for Recovery of US\$ 5 Million deposited as earnest money and all other appropriate and consequential relief against PTA and Space Telecom (Pvt.) Limited on 18.01.2005 before Senior Civil Judge, Islamabad, which, after establishment of Islamabad High Court has been transferred to Islamabad High Court being suit of more than Rs.2.5 million. The same suit has been marked as CS No.2109/2008 and is still pending adjudication before Islamabad High Court.

5. M/s Space Telecom (Pvt.) Ltd (the “Company”)'s request for refund of US\$5 million:

5.1 M/s Space Telecom (Pvt.) Ltd. (the “Company”), a member of the Consortium approached PTA for a number of times for refund of its share of US\$5 million in the earnest money of US\$10 million deposited by the Consortium.

5.2 The Company's request was finally turned down by PTA through Director General (Licensing)'s letter of 19th January, 2005.

5.3 The Company assailed the order of refusal of US\$5 million in writ petition before the Lahore High Court at Rawalpindi upon which the Court set aside the letter of

19th January, 2005 directed Director General (Licensing) and Director General (Law & Regulations), PTA, to decide on the Company's request of refund of its share in the earnest money through a speaking order after hearing the Company.

5.4 In light of the aforesaid Court orders, the matter was heard by DG (licensing) and DG (L&R) on 27th December, 2005. Pursuant to the said hearing, order/determination dated 23rd February, 2006 was passed by aforesaid Director Generals vide which the forfeiture was declared valid. Order portion of the said determination is reproduced below:

4.1 *After hearing the arguments of the petitioner as well as the learned Counsel for the Authority, the hearing panel is of the opinion that the petitioner has failed to comply with the provisions as mentioned in the IM. The hearing panel also examined the case law presented by the learned Counsel for the Authority as to ascertain the legal implication and scope of the section 73 and 74 of the contract law. In Mst. GUL SHAHNAZ Versus ABDUL QAYYUM SOOMRO and others (PLD 2002 Karachi 333) it was held "Court, in order to determine the unconscionable forfeiture, has to take into consideration the nature of the contract, the conduct of the parties and proportion of the amount of deposit towards sale price. Where the purchaser has not merely defaulted but had repudiated the contract and his conduct suffered from impropriety, the court would refuse to come to his aid, because one who seeks equity must come with clean hands."*

4.2. *The hearing panel relying upon the fact, record, arguments of both sides, conduct of the petitioner and cited case law concluded that as the petitioner has failed to perform its obligation hence can not be entitled to the earnest money forfeited. Owing to petitioner's failure to comply with the provision mentioned in the IM, the Authority has rightfully forfeited the earnest money.*

5.5 The Company again went to court and challenged the aforesaid determination of 23rd February, 2006 in FAO No.41/06. The hon'ble Islamabad High Court converted the said FAO into Writ Petition, allowed it, set aside the determination of 23rd February, 2006 vide order dated 04.05.09 ("Order of the Court") with the following observations/directions:

"The next question is whether the petitioner is responsible for the breach of contract. The case of the petitioner is that the petitioner was ready to pay the first installment but because of the order of injunction passed by the Civil Court, it did not make deposit. The ground of inability to make the deposit by the petitioner was raised before the officers of the Authority who were examining the request of the petitioner to return the earnest money of 5 Million US \$, deposited by it. The order impugned does not show that this question was examined by the officers of the Authority. The finding whether the petitioner is responsible for the breach of the Contract was dependent on the answer to the question whether the petitioner prohibited by the Civil Judge through order dated 23.04.2004 to make the deposit. Order dated 23.02.2006 having been passed without considering this crucial question is declared to have been passed without lawful authority having no legal effect.

15. *The net result is that the request of the petitioner to return the earnest money shall be treated to be pending before the officers of the Pakistan Telecommunication Authority. A decision shall be taken after hearing the petitioner in the light of Section 74 of the Contract Act and the observations made herein above. No order as to costs.*

6. Re-hearing on the issue under Order of the Court:

- 6.1 Under Order of the Court, the matter was fixed again for hearing on 26th June, 2009 to re-consider the Company's claim in light of section 74 of the Contract Act, 1872 and by examining the crucial question as to whether the Company is responsible for the breach of the contract (default) i.e. to see if the Company was prohibited by the Civil Judge through order dated 23.04.2004 to make the deposit.
- 6.2 Mr. Ashtar Ausaf Ali, ASC, of Cornelius Lane & Mufti, alongwith Barrister Khurram Raza appeared on behalf of the Company.
- 6.3 The learned counsel argued that since the Company was barred by the Civil Judge/Court to make the payment, therefore, it is not responsible for the default in making the remaining payment as per 9(k) of the IM as the default occurred for reasons beyond its control. Being not responsible for the default, the learned counsel maintained that the forfeiture clause i.e. 9(n) of the IM can not be invoked against the Company.
- 6.4 The learned counsel submitted that the IM is properly worded; clause 9(k) ensures that only responsible bidders come and participate, therefore, no challenge to the IM, however, the IM needs to be interpreted properly. He argued that before invoking clause 9(k) of the IM, reason for the default has to be looked into.
- 6.5 While elaborating the points above, the learned counsel stated that if the cause is not justified he has no case but if the cause is the one which is not in his control, he may not be punished/made responsible for it.
- 6.6 It was contended that even otherwise the Company's default did not result in any damage or sufferings in terms of money rather PTA gained from it by awarding the licence to Warid.
- 6.7 Apart from oral arguments, the learned counsel submitted written arguments as well which are summarized as under:

ISSUES:

The Islamabad High Court vide Order dated 04.05.2009 in FAO No.41 of 2006 converted into Writ Petition set aside the Order of PTA dated 23 February 2006 and remanded the case to PTA for its decision afresh. The following issues need to be determined:

- 1. Whether the Petitioner was restrained to pay the first installment because of the order of injunction passed by the Civil Court?*

2. Whether any loss was caused to PTA because of non-deposit of first installment by the Petitioner?
3. Whether PTA is entitled to forfeit the earnest money of US\$ 5.00 Million where it has not suffered any loss?
4. Whether PTA is entitled to any compensation in the light of Section 74 of the Contract Act, 1872?

CONCLUSION:

The conclusion, in seriatim, on the said issues is as follows:

1. Yes. The Petitioner was restrained by the learned Civil Judge 1st Class, Islamabad, vide its Order dated 23.04.2009 to deposit the first installment of the License Fee.
2. No. The PTA did not suffer any loss because of non-deposit of 1st installment by the Petitioner because PTA issued License to the third highest bidder M/S Warid Telecom (Private) Limited on 26 May 2004 at the same price of US\$ 291.00 Million.
3. No. PTA is not entitled to forfeit the earnest money of US\$ 5.00 Million deposited by the Petitioner because PTA has not suffered any loss, in accordance with Section 74 of the Contract Act, 1872 and the judicial pronouncement on the issue.
4. No. PTA is not entitled to any compensation because the reasonable compensation is always subject to actual loss. It is an admitted and established fact the PTA has not suffered any loss, therefore, not entitled to any compensation.

For arriving on the above conclusion, the learned counsel relied on the following case law:

PLD 1991 SC 30, PLD 1969 Supreme Court 80, 1991 SCMR 1436, PLD 1973 SC 222, 2006 CLD 394, 1993 MLD 1571 Karachi, PLD 1998 Karachi 199, PLD 1967 Karachi 1, 1999 YLR 500, 1999 MLD 2617, 1986 MLD 754, 2004 CLD 824, 2001 MLD 1955,

7. Findings of the Authority:

Whether the Company is responsible for the default:

- 7.1 The Company's argument that it is not responsible for the default is admitted and the query as raised in the Order of the Court i.e. whether the petitioner (the Company) was prohibited by the Civil Judge through order dated 23.04.2004 to make the deposit is answered in affirmative. As *prima facie* the order of the learned Civil Judge, referred to above, excludes the Company from making the payment.

The Company's *locus standi* to Claim the Bid Earnest Money deposited by the Consortium:

- 7.2 However, the most important point for deciding on the maintainability of the instant claim of the Company is the Company's *locus standi* to ask for return of the earnest money or any portion of it.
- 7.3 It was the Consortium which was declared the winner/successful bidder and not the Company. Under the terms of the IM, the Bid Earnest Money was deposited by the Consortium with whatever proportion among the members, and not by the Company.
- 7.4 Mr. Abid Ali Butt's (CEO of the Company) letter of 6th April, 2004 clearly shows that the Bid Earnest Money was deposited by the Consortium.
- 7.5 The order of the Civil Judge dated 23.04.2004 could at the most be taken as an injunction barring the Company from making further payment. Barring the Consortium was nowhere spelled out from the said order. Rather the Honorable Civil Judge had sensed in advance the penal consequences of the Consortium's failure to deposit the rest of the amount.
- 7.6 The Bid Earnest Money was earlier forfeited on the Consortium's default and not for the default of the Company. Therefore, determining the Company's default and the reason for the same may not be of any help to the Company for deciding on its claim of refund of the whole or a portion of the Bid Earnest Money.
- 7.7 The Company might have a claim, if any, against other members of the Consortium for whose default and inaction the Company's share in the Bid Earnest Money also stood forfeited but has no *locus standi* against PTA for asking for the refund of the Consortium's money forfeited under the IM, properly worded by the Company's counsel and duly agreed to, by all the stakeholders, including the Company.
- 7.8 The above point regarding the Company's *locus standi* although not discussed before either in the previous determination or the court orders is taken up being a pure question of law which could be raised and addressed at any stage.
- 7.9 The question whether the Company is responsible for the default, although decided in the negative by concluding that it was barred by the Civil Judge through order dated 23.04.2004, however, may not have favourable implications on the claim of the Company being not relevant. To reiterate, it is the Consortium's default which had resulted in setting clause 9(k) of the IM in motion. The Company's default and the reasons thereof are, therefore, not material for deciding the instant complaint.
- 7.10 So far as forfeiture against the Consortium is concerned, the same was rightly done. Reliance, in this regard, is placed on *Claicon (Pvt) Ltd. Vs. The Federal Govt. of Pakistan* reported in 1999 SCMR 1758 wherein the Court held as under:

Successful bidder for acquisition of specified shares was required to deposit proportional share of the value of bid through bank draft within thirty days, failure of which would culminate in rejection of bid and forfeiture of earnest money---Petitioner as successful bidder instead of complying with the terms of acceptance of offer started raising all sorts of questions with respect to the terms of agreement which had not even been signed---Authority was correct in rejecting petitioner's offer and starting negotiations with the second highest tenderer--Such course was strictly in accordance with the commercial practice and the approved procedure---Petitioner, thus, had no right which could be enforced through constitutional jurisdiction---Leave to appeal was refused in circumstances.

- 7.11 The Sind High Court in the case of *Ahmed Vs. M/s Abdul Habib Haji Muhammad Co.* reported in PLD 1957 (WP) Karachi 819 has held that for the forfeiture on the event of default, even specific forfeiture clause is not necessary in the contract. Relevant extract is reproduced as under:

There is no difference in law between “deposit money” and the “earnest money”. These terms had been subject of interpretation by various authorities and the conclusion that one comes to after perusing those authorities is, that there is no vital difference between these two terms. In this connection, before I deal with the meaning of these terms, I may at the outset make it clear that “deposit money” and “earnest money” in view of the decisions that I would presently mention, serve two-fold object:

- (1) The primary object of the term “deposit money” and the “earnest money” is to serve as security for the performance of the contract; and*
- (2) If the contract was being fulfilled, the same was to be treated as part of the sale consideration*

...It would appear from the above discussion that the plaintiff-applicant has failed to show any agreement either express or implied that he was not liable to forfeiture of the deposit money. Moreover, on the finding of the learned Small Causes Judge that the plaintiff had committed breach of the contract, he is not entitled to the refund of the deposit money...

- 7.12 The Hon’ble Lahore High Court in case reported in PLD 1963 (W.P) Lahore 227 has upheld the rule that it cannot be denied, and in fact has never been denied at common law that forfeiture would be unassailable if the conditions regarding the bidding procedure conveyed to the bidders are not complied with. The forfeiture of the bid earnest money received from the highest bidder, therefore, cannot be recovered by that defaulting bidder at all at law.
- 7.13 In light of the above case law, since the Consortium had defaulted in complying with the terms of the IM, for no good reason, the Bid Earnest Money is liable to be forfeited.

Section 74 of the Contract Act, 1872

- 7.14 Notwithstanding the foregoing, the Company's claim i.e. the legality or otherwise of the forfeiture is also to be considered in light of section 74 of the Contract Act, 1872 (the "Contract Act"). The section is reproduced for ready reference as under;

Section 74:

When a contract has been broken, if a sum is named in the contract as the amount to be paid in stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for.

- 7.15 While considering the instant claim of the Company under section 74 of the Contract Act, 1872 as directed by the Islamabad High Court, wisdom may be borrowed from the judgment of the august Supreme Court of Pakistan reported in PLD 1969 SC 80 the relevant wherefrom is reproduced as under:

The argument that Section 74 of the Contract Act deals only with the right to receive from the party who has broken a contract reasonable compensation and not the right to forfeit what has already been received by the aggrieved party can not be accepted in view of the terms of the Section. The cases in which such a view has been taken appeared to have ignored the expression. "The contract contains any other stipulation by way of penalty" in the Section. This expression is comprehensive enough to include cases of forfeiture of money or any property already delivered as well as cases of recovery of money or any property on the basis of a promise to pay."

- 7.16 The Hon'ble Sind High Court in a case reported in PLD1961Karachi623, has held as under (only the relevant is reproduced in verbatim):

Now let us consider as to what is the import of the expression "earnest money" in relation to a transaction of sale of property and also whether in substance it is anything different from a deposit (described as a deposit) taken by the seller which would form a part of the sale price if the contract goes forward and which would also be in the nature of a guarantee for the performance by the purchaser and liable to forfeiture in case of his default.

10. The expression "earnest money" was construed in a case of a contract of sale of immovable property by the Privy Council in the case of Chiranjit Singh Vs Har Swarup (1), and this is what their Lordships said : —

"Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

This definition of earnest money, in our opinion, is no different from that of a deposit as was given in the case of Howe v. Smith (2), which is the leading case on the subject and has been almost invariably followed for about 50 years in this Sub-Continent This is what Cotton, L. J., says at page 95 of the report:—

"What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."

Normally in a contract of sale of immovable property the seller is, upon a breach by the purchaser, entitled to forfeit the earnest money or a deposit of the same character. But in cases in which from the consideration of all the relevant circumstances the forfeiture and the retention of the amount by the seller would be unconscionable, the Court would upon equitable principles intervene and grant relief to the defaulting purchaser. In order that this may be done it is not enough that the amount of the deposit appears to be unreasonable having regard to its proportion to the sale price, because what is reasonable must normally be determined by the parties at the time of the contract...It may be that in a certain case the amount described as a deposit may itself be so exorbitant that the interference may become irresistible that it is really in the nature of a penalty in the event of default, for equity looks to the substance and not to the form. In determining whether the forfeiture is unconscionable the Court will take into consideration the nature of the contract, the conduct of the parties and the proportion of the amount of deposit to the sale price.

7.17 A full bench of the hon'ble Supreme Court of Pakistan, in the case of *Province of West Pakistan Vs. M/s Mistri Patel & Co and another* reported in PLD 1969 SC 80 has recognized and endorsed the principle laid down by the Sind High Court reproduced above.

7.18 At page 86 of the above judgment, the hon'ble Supreme Court has reproduced the observations made by Denning, L.J. in the case of *Stockloser V. Johnson* reported in (1954) 1 AER 630. Relevant extract is reproduced as under:

"...But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the Court thinks fit...the difficulty is to know what are the circumstances which give rise to this equity,...two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense

that the sum forfeited must be out of all proportion to the damage; and secondly, it must be unconscionable for the seller to retain the money...”

Remedy under Equity:

- 7.19 The law as laid down by our superior courts is clear that the buyer is not entitled for recovery of the deposit money/Bid Earnest Money but may have a remedy in equity.
- 7.20 However, as far as a remedy in equity in the instant case is concerned, no equitable claim in favour of the Company arises to counter an express stipulation in the bidding process that gave a right to PTA to forfeit in the event of default by the highest bidder.
- 7.21 Recovery of any amount under this equitable jurisdiction considers the question whether the forfeiture is of a penal nature i.e. whether the bid earnest money is out of all proportion to the total amount of the Auction Winning Price (License Fee). This question is answered in the negative because the Bid Earnest Money forfeited accounts for even less than 4% of the total amount of the transaction in question.
- 7.22 In any event, discharging the Company by a return of the Bid Earnest Money would distort the purpose of including such a stipulation in the bidding process as it would encourage potential bidders in the future to enter into similar commercial arrangements without any real intent to conclude an enforceable contract. In the facts and circumstances of this case it would, therefore, not be unconscionable for PTA to retain the Bid Earnest Money.

8. Order:

- 8.1 In light of the above discussion, it is concluded that since the Consortium had defaulted in complying with the agreed provisions of the IM, the Bid Earnest Money deposited by the Consortium was rightly forfeited by PTA under the terms of the IM.
- 8.2 The Company is not entitled to the refund of the whole or part of the Bid Earnest Money, either under section 74 of the Contract Act, 1872 or otherwise.

(Sayed Nasrul Karim A. Ghaznavi)
Member (Finance)

(Dr. Khawar Siddique Khokhar)
Member (Technical)

(Dr. Mohammad Yaseen)
Chairman

Signed on this _____ day of August, 2009