

Stereo. HCJDA 38.  
**Judgment Sheet**  
**IN THE LAHORE HIGH COURT,**  
**MULTAN BENCH, MULTAN**  
**JUDICIAL DEPARTMENT**

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**W.P. No.2009/2024**

M/s Bilawal Gull Builders

**Versus**

Government of Punjab, etc.

**JUDGMENT**

Date of hearing: **05.03.2024.**

Petitioner by: Mr. Abdul Samad Ali, Advocate.

Mehar Muhammad Bashir, Nadira Noor, Mehar Muhammad Ilyas Wasli, Haji Tariq Aziz Khokhar, Rana Muhammad Asif Saeed, Mehar Irshad Ahamd Arain, Sajid Hussain Qureshi, Muhammad Akmal Khan Sial, Malik Muhammad Tariq Rajwana, Mirza Muhammad Idrees Khan, Muhammad Saleem Bashir, Malik Sohail Ashiq Shujra, Muhammad Shahbaz Mughal, Ch. Muhammad Saeed Machra, Kanwar Wajih-ud-Din, Najia Noreen Maitla, Rana Muhammad Shakeel, Tariq Murtaz Khan Mallezai, Mr. Muhammad Usman Jameel, Mehar Adnan Ahmad Maken, Mr. Sajjad Hussain Khan Butta, Advocates for the petitioners in connected petitions.

Respondents by: Mr. Imran Khan, Assistant Advocate General.  
Mr. Bilal Amin, Advocate/Legal Advisor.

Zain Rashid, SDO Highway Lodhran, Muhammad Nasrullah SDO, Jam Pur, Muhammad Asif SDO Taunsa Barrage Division, Kot Addu.

**ASIM HAFEEZ, J.** Present and other petitioners, claimed to be the bidders, hereby invoked constitutional jurisdiction *inter alia* for seeking declarations against alleged actions/directions of the procuring agency(ies), issued in the course of tendering process initiated for awarding of civil works in various districts of southern part of province of Punjab. Fundamentally, and in common, the grievance is directed against demand made by the procuring agency, directing the petitioners – [a distinct class of bidders] -, to furnish “***Quality Assurance Security***” (‘QAS’) or “***Quality Control Guarantee***” (‘QCG’) – nomenclature of the security(ies) demanded vary from case to case but *raison d`être* thereof indicates commonality. And likewise, quantum of security(ies) demanded in each case varies, depending upon the financial outlay of the tendered work(s).

Some of the petitioners, alternatively or additionally, laid a conduit challenge, seeking declarations against the directions of the procuring agency, whereby option of arranging security(ies) from Insurance companies was dismissed and instead securities issued by the Banks were declared acceptable. And decision of limiting the options / choices is questioned on the premise that it offends fundamentals of prevalent procurement regime, embodied in and enforced through Punjab Procurement Regulatory Authority Act, 2009 (“**Act of 2009**”) and Punjab Procurement Rules, 2014 (“**Rules of 2014**”).

2. Reasons and context of assumption of constitutional jurisdiction by this Division Bench are explained *infra*, while explaining the perspective of controversy raised. At the outset, it is pertinent to highlight that issues raised and pleaded do not qualify as disputes of first impression, rather aptly put, the controversy is old but cosmetically presented in a different shade. Simply, the semantic changes in some of the expression(s), referred then and now, are the cause of present proceedings, for instance, previously

expression employed was “*Additional Performance Security*”, which is altered to *QAS or QCG*. Though, seemingly, both expressions are linguistically dissimilar but, for the purposes of controversy at hand, expressions, in fact, complement each other in achieving the common objective / goal, which is to deal with contingency where bidder had quoted prices lower than the estimated cost of the works / project tendered. Previously, learned Division Bench principally affirmed mutually exclusiveness of additional performance security and performance guarantee, referred under Rule 56 of the Rules, 2014, while deciding the case of A.M. Construction Company (Private) Limited V. Province of Punjab through Secretary Communication and Works Department and others (2023 CLC 616) – during submissions we are informed that said decision was assailed before Hon’ble Supreme Court of Pakistan by the department(s)/procuring agency and by the bidders as well, matters were heard but no decision was announced to the best of information communicated.

In above-referred decision, substantially the controversy was that whether the procuring agency was lawfully entitled to demand additional performance security, in addition to the requirement of performance guarantee, and if such demand was contrary to the mandate of the law and rules. The context and rational of demand of additional performance security needs to be understood. Additional performance security was demanded only from such class of bidders, who had quoted bid price lower than the estimated cost, assessed by the procuring agency regarding tendered works and indicated in the advertisement. And quantum of additional performance security was restricted to the extent of the difference between quoted price and estimated cost – ratios for ascertaining difference were provided in clause 26-A of the standard contract form. It is evident that through Notification of 16.11.2022, a new expression ‘Quality Assurance Security’ was introduced, but it certainly meant to cover differential amount. Primary ground of attack was that demand of additional

performance security was contrary to Rule 56 of the Rules, 2014, which required provisioning of performance guarantee, to the extent of 10% of the contract price. In this backdrop, case of A.M. Construction Company (Private) Limited (supra) was decided, whereby additional performance security and performance guarantee were treated as distinct specie of securities. After aforesaid decision, fresh tenders were floated, and bids submitted were considered for ascertaining their responsiveness. Again, it was found that certain bidders had quoted bid price(s) lower than the estimated cost, which bidders were directed to provide Quality Assurance Security - covering the difference in the quoted price and estimated cost. Disputes, by and large of similar kind, again surfaced and departmental demand was questioned through invoking judicial review jurisdiction. One of such constitutional petition, bearing W.P No. 11476/2023, was disposed of on 24.07.2023 in terms of the observations recorded in the case of A.M. Construction Company (Private) Limited. Appeal bearing ICA No.209/2023 was preferred by the department, which is pending adjudication and heard along other petitions. In meanwhile learned Single Benches, occupied with petitions of similar nature, sought placement of cases before Division Bench on the premise that issues raised possessed proximity with the questions already decided in the case of A.M. Construction Company (Private) Limited (supra). Needful was done after fulfilling the requirements.

3. It is apt to explain relevance and context of other petitions, whereby directions of the procuring agency denying option of arranging securities from the Insurance companies were challenged. All those petitions came up for hearing before learned Judge(s)-in-Chamber(s). It is pertinently pointed that dispute(s) regarding acceptability of specific kind of security earlier came up before Judge-in-Chambers at principal seat, through petition bearing W.P. No.23988/2022, titled "M/s Jalal Construction Company V. The Secretary C&W Department, Government of Punjab and 3

others", which along other connected matters, was decided through judgment dated 09.01.2024, judgment was numbered as (**2024 LHC 329**) and can be accessed at <https://www.lhc.gov.pk>. To avoid conflicting decisions petitions were consolidated and placed before this Division Bench, after fulfilling the requirements.

4. After giving bird's eye view of the controversy, decided earlier but re-packaged, and explaining funneling of petitions before Division Bench, we proceed to discuss the ratio of the decision in the case of A.M. Construction Company (Private) Limited (supra) in the context of demand for furnishing QAS or QCG securities. It is appropriate to reproduce operative part of the decision of A.M. Construction Company (Private) Limited, which reads as,

“*ORDER OF THE COURT.*

- (i) *Demand of additional performance security under Para 26(A) of the General Directions is not violative of rule 56 of the Rules.*
- (ii) *In all those petitions/appeal, where the lowest bidder did not become successful bidder, the performance security or additional performance security under Para 26(A) of the General Directions could be demanded in terms thereof and rule 56 of the Rules had no bearing on such performance/ additional performance securities.*
- (iii) *However, if the lower bidder acquired the status of a successful bidder, then performance security or even additional performance security shall be governed by Rule 56 of the Rules and no payment of performance security or additional performance security could be demanded beyond the limit of 10% of the “contract price” prescribed in Rule 56 of the Rules.*
- (iv) *In case no performance security or additional performance security as per Para 26(A) of the General Directions was provided by the lowest bidder, the procuring agency was within its right to reject the bid under Paras 15 and 26(B) of the General Directions read with rule 35 of the Rules”.*

5. Learned counsel submit that demand of furnishing QAS or QCG securities offends the mandate of the Rule 56 of the Rules, 2014 – this was the same argument raised and addressed in the case of A.M. Construction Company (Private) Limited (supra). Learned counsels iterated that other than performance guarantee no other security could be lawfully demanded – not to mention bid security, which is not in dispute in these petitions. Learned counsels emphasized that petitioners were the lowest bidders and subjecting

them to additional security is unwarranted. Submits that mere change in the nomenclature of expression additional performance security through Quality Assurance Security, through Notification of 16.11.2022, was designed to defeat the decision in the case of A.M. Construction Company (Private) Limited.

6. On the point of restriction imposed qua the specific kind of security to be provided for securing contractual obligations, it is argued that purpose of denying the option of arranging guarantee from Insurance companies is discriminatory, intended to exclude contractors with limited capital and resources and dole out contracts to few blue-eyed contractors. Adds that limiting the acceptance of securities from Banks only would negate the fundamental principles of procurement, discourage inclusiveness and competition. Reference is made to the decisions handed down by Hon'ble Baluchistan High Court, Quetta, in cases of Constructors Association of Pakistan through Secretary General and 4 others V. Government of Balochistan through Secretary, Communication Department, Quetta and 8 others (PLD 2024 Balochistan 23) and an unreported judgment dated 04.08.2022 passed in **Constitution Petition No.1185/2022** titled as M/s Saad Ullah Khan & brothers V. The Secretary Irrigation Department Government of Balochistan & another. In the judgments referred various clauses of Baluchistan Public Procurement Rules, 2014 and bidding documents were declared invalid, upon being declared as inconsistent with the advice of the Executive Committee of National Economic Council (ECNEC) and conditions of bidding documents drafted by Pakistan Engineering Council (PEC).

7. Learned Law Officer, while elucidating the operative part of decision in the case of A.M. Construction Company (Private) Limited, submits that the observations recorded therein are misconstrued and confusion is deliberately created by misreading the expressions employed and reasoning extended to distinguish additional performance security from performance guarantee. Contends that additional security is demanded for covering

difference between quoted price and estimated cost of the works tendered. It is explained that quoting of price lower than estimated cost meant to outshine genuine, experienced and serious bidders, and sole purpose was to grab the contract. Adds that this adventurism was checked by directing submission of additional performance security to the extent of the differentials only. And requirement of performance guarantee is independent. Learned law officer emphasized on the discretion vested in procuring agency to decide that what kind of security is required and in order to standardize it, directives were issued to stop receiving guarantees from Insurance companies and only securities arranged from the Banks are considered as permissible kind of security. Representatives / learned counsels for procuring agency argued that instructions by ECNEC cannot claim preference against procurement laws, legislated by the Provincial Government. Adds that recommendations of ECNEC are otherwise administrative and advisory. Reference is made to the decision in the case of Peshawar Electric Supply Company Ltd (PESCO) and another V. SS Polypropylene (Pvt.) Ltd., Peshawar and others (PLD 2023 Supreme Court 316).

8. Arguments heard

9. Some factual narration is essential to contextualize controversy. Advertisement(s) issued for inviting bids contained condition regarding requirement of furnishing QAS or QCG, if some difference is found between quoted price and estimated cost of tendered works. It is misconception to confuse performance guarantee and security demanded under clauses 26(A) & 26(B) of the conditions of Standard Contract Form, which clauses are reproduced for ease of reference,

**"General Direction No.26(A).** *In case the total tendered amount is equal to or less than 5% of the approved estimated (DNIT) amount, the lowest bidder will have to deposit quality assurance security from the scheduled Bank equal to the amount of difference between approved DNIT amount and the quoted bid amount as given below, within*

*15 days of issuance of notice or within expiry period of bid, whichever is earlier.*

*26.(b) Lowest evaluated bidder shall, within 15 days of receipt by him of a notice in this regard, furnish to the tender approving authority in cash, bank draft, cashiers cheque, payment order or bank guaranteed (valid for three months beyond completion time/extended completion time) from any scheduled bank of Pakistan, the amount to make up performance security and/or additional performance security where required and specified in the tender in item (h) of memorandum of work. Should the lowest evaluated bidder refuse or fail for any reason to furnish the performance security within the specified time, it should constitute a just cause for rejection of his tender and in the event of such rejection the entire earnest money shall be forfeited to government as compensation for such default".*

10. Securities demand, in lieu of occurrence of difference in quoted price and estimated cost, manifest a distinct class of security, different from the scope and requirement of performance guarantee. Not every bidder is asked to furnish additional securities - QAS or QCG - but only those bidders whose quoted bid prices are lower than declared estimated cost. This odd situation raises a red flag. In fact, additional security is in the nature of contingency security, requirement whereof triggers in case of differential. Additional security is solicited to hedge the exposure of the procuring agency and risks. This position is explained with an illustration. A contract is advertised, wherein estimated cost of the works was assessed at Rs.10.00 Million. A, a bidder, quotes bid of Rs.11.00 Million – no occasion for submission of additional security arises and if A's bid is found lowest evaluated bid, contract would be awarded and then A was required to furnish performance guarantee. B, another bidder, quotes bid price of Rs.7.00 Million against estimated cost of Rs.10.00 Million. B's bid is apparently the lowest bid but lower than estimated cost – exposure encountered was the differential of Rs.3.00 Million. B is required to submit additional security to the extent of the exposure of the procuring agency to the extent of Rs.3.00 Million. B cannot lay claim to the contract on account of being the lowest bidder unless additional security is submitted. And till additional security is not submitted bid offered cannot be

classified as responsive – under Rule 2 (aa) of the Rules, 2014 “*responsive, means qualified for consideration on the basis of declared evaluation criteria and specified in the bid document or in the request for proposal*”. Once additional security is provided then the bid would be available for consideration. Acceptance of bid is next stage. An adjective, ‘successful’, is added to the status of lowest bidder, provided the occasion arises and additional security demanded is submitted, upon acceptance of bid. Once bid was accepted and contract awarded, then the contractor was required to furnish performance guarantee – which for all intent and purposes is an independent security. Bidder B is a distinct class of bidders, in the context of contingency of the differential in quoted price and estimated cost.

11. Submission that lowest quoted bid would *per se* make bidder successful and eligible for the award of contract is fallacious. In the context of present controversy, bid, whereby quoted price was lower than the estimated cost, is not responsive in the first place. Bidder with lowest quote is directed to provide the security for covering the differential – at that point of time there is no relevance of performance guarantee. If bidder meets the contingency and furnish requisite security, in the kind as directed, only then the bid would be classified as “lowest evaluated bid”. And unless contingency is met, no occasion for acceptance of bid arises, notwithstanding howsoever lowest the quote was. Once condition is fulfilled, the bid is accepted and contract awarded, when status of the bidder elevates to the contractor, who is then obligated to provide performance guarantee. Bid will be accepted only once it is found responsive, and it cannot be treated as responsive unless the security demanded, for the difference between quoted price and estimated cost, is provided. Only upon acceptance of lowest evaluated bid an adjective “successful” is added to the credit of bidder. This is the reasoning of decision in the case of “Messers GHULAM MUHAMMAD & SONS v. WATER AND SANITATION AGENCY (WASA) FAISALABAD”

*through Director General and others”* (**2022 MLD 1216**) and affirmed by Division Bench is the case of A.M. Construction Company (Private) Limited (*supra*). Reasoning extended in the case of A.M. Construction Company (Private) Limited need to be construed in the context of aforesaid illustration, for understanding rational, plausibility and commercial prudence of demanding additional security. Mere use of the expression ‘additional performance security’ in the operative part of the decision of A.M. Construction Company (Private) Limited would not obliterate or diminish the *ratio decidendi* of the decision. Judgment has to be interpreted in the context of its reasoning. We opine that takeaway from the decision in case of A.M. Construction Company (Private) Limited (supra) was the declaration contained in clause (i) of the operative part of the decision. Observations in rest of the paragraphs, from (ii) to (iv), are specific to the facts of the cases decided, which have had no precedential value and treated as mere obiter. It is reiterated that Rule 56 of the Rules, 2014 will not be construed or read to obliterate the option of calling for additional security, whenever the difference in the quoted price and estimated cost occurs. And furnishing of quality assurance security will not absolve the bidder-cum-contractor from furnishing performance guarantee to the maximum of 10% of the contract price, envisaged under Rule 56 of the Rules, 2014. Rule 34 of the Rules, 2014 is not attracted. No element of discrimination is pointed. In fact, absolving bidders from the obligation of providing additional security, where quoted bid is found lower than estimated cost, would tantamount to inverse discrimination with other category of bidders.

12. Now we take up the issue relating limiting the acceptability of security by the Banks, for the purposes of QAS or QCG security(ies) and / or performance guarantee. We confronted learned counsels to refer to any provision in the Act, 2009 and Rules, 2014 which extends discretion or option to the bidder to pick security of its choice and convenience, and instead learned counsels, referred to

clause 10.1 of Standard Bidding Document, drafted by Pakistan Engineering Council (PEC). Clause 10.1 had no application in wake of prevalent procurement regime in province of Punjab. There is no cavil that preference to a particular kind of security depends on various factors, which factors have had to be considered by the procuring agency and any decision taken calls for showing deference. There is no cavil that picking a form of security is a policy decision, which exercise of discretion is not amenable to constitutional jurisdiction, otherwise. Be that as it may, provisioning of security from Insurance companies is not permissible anymore. Question requiring consideration is whether act of limiting choice of security conflicts with prevalent procurement regime. No particular clause is referred to show any conflict or violation for limiting choice of acceptability of a specific kind of security. Judgments in cases of *Constructors Association of Pakistan through Secretary General and 4 others* and *M/s Saad Ullah Khan & brothers* had no application in the context of procurement regime, operative in the Province of Punjab. Under the present procurement regime, an Authority has been constituted through section 3 of the Punjab Procurement Regulatory Authority Act, 2009, *which Authority is entrusted with the functions of preparing standard document to be used in connection with public procurement - [Section 5-(h)]*. Authority, in exercise of powers under section 29 of the Act, 2009 and Rule 25(5) of Rules, 2014 framed Standard Bidding Documents for Procurement of Civil Works, wherein acceptable security was identified in shape of Bank guarantee/ CDR/ Demand Draft, etc. and not the securities from the Insurance Companies. Accordingly, changes were made in standard contract form.

13. Argument that instructions of ECNEC for extending preference to standard bidding documents drafted by PEC is biding and claim superiority vis-à-vis the prevalent procurement regime is misconceived. Instructions, though notified, does not restrict or impede the enforcement of public procurement regime envisaged

under the auspicious of Act, 2009 and Rules, 2014. Instructions, having advisory status cannot be construed to undermine the provincial autonomy and effective enforcement of procurement regime in Punjab. No jurisdictional objection is pleaded qua the powers of the Authority to draft sample bidding documents and tasks assigned to the procuring agency. Government of Punjab had introduced contract form for the guidance of the bidders and for regulating procurement matters. Violation recorded of any provision of the Act, 2009, Rules, 2014, regulations, orders or instructions made there-under, attracts mis-procurement. Notably, no facial challenge has been thrown qua the constitutionality of Act, 2009 and Rules, 2014 – no issue of legislative competence of the Province of Punjab to legislate is raised. And as-applied challenge to the application of various provisions of Act, 2009 and Rules, 2014 also fails. The instructions of ECNEC cannot be elevated to the standard of a legislative enactment for the purposes of conferring preferability under Article 143 of the Constitution. Scope of Article 143 of the Constitution has been misconstrued in the judgments referred. Petitioners' side failed to refer any entry in the Federal Legislative Schedule to disqualify the provinces from legislating on the subject of procurement matters. There is another aspect regarding applicability of standard bidding documents framed by PEC. Regulation 3 of the Public Procurement Regulations, 2008 – framed in exercise of powers under section 27 of the Public Procurement Regulatory Authority Ordinance, 2002 – directs the procuring agency to use standard form of bidding documents prescribed by PEC. Regulation 3, *ibid*, has no relevance and applicability in the context of Act, 2009 or the Rules, 2014, wherein no provision parallel to Regulation 3 is pointed. There is nothing in the Act or the Rules that circumvents the power of the Government, Authority and procuring agency to frame policy guidelines, issue instructions and orders for making procurement efficient, economical and transparent. The judgments referred are not attracted in the context of provisions of Act of 2009 and Rules of 2014.

14. With assistance of the leaned counsels we read various portions of the decision in the case of **"M/s Jalal Construction Company,** (supra), relevant paragraphs are reproduced hereunder:

*"27. It follows from the above that the Authority in exercise of its lawful powers under the PPRA Act, 2009 read with the Rules, 2014 has developed SBDs for use of all procuring agencies including Local Governments in the Province of Punjab which exclude insurance bond / guarantee from an insurance company as a form of security. Thus, in the context of the Province of Punjab, the decision of ECNEC dated 12.11.2007 and Notification of the Planning Commission, Government of Pakistan dated 12.02.2008 to use SBDs of PEC has lost its relevance as express provisions of law preempt an administrative decision. However, it is reiterated that even otherwise exclusion of insurance bond / guarantee from an insurance company as a form of guarantee is not in conflict with the decision of ECNEC as SBDs of PEC also permit the same. The 21 W. P. No. 23988 / 2022 directions of ECNEC to use SBDs of PEC, in essence, requires the use of standard contracts in the procurement process which purpose has been achieved by the Authority under the PPRA Act, 2009.*

*28. The upshot of the above discussion is that exclusion of insurance bond / guarantee as a form of security by the procuring agencies of the Federal Government and the Provincial Government of Punjab with respect to performance or additional performance / quality assurance guarantee is permissible in terms of lawful discretion of a procuring agency provided it is specifically stated in the SBDs. The bidders who participate in the bidding process, subject to bidding documents, have no vested right to tender securities in a particular form of their choice that is not part of the SBDs of a procuring agency as they knowingly participate in a bidding process in accordance with the terms and conditions of the SBDs. Moreover, as exclusion of insurance bond / guarantee indiscriminately applies to all bidders with reference to a particular bidding process, no case of discrimination is made out. The objection qua exercise of constitutional jurisdiction with respect to contractual matters is overruled as it is well settled that where facts emanating from contractual disputes are admitted, constitutional jurisdiction under Article 199 of the Constitution can be exercised.*

29 .....

*(iv) In the Province of Punjab, the Authority set up under the PPRA Act, 2009 read with the Rules, 2014 is legally empowered to devise SBDs which have been duly made and notified, as such, all procuring agencies including Local Governments in the Province of Punjab are obliged to use SBDs prepared by the Authority under the PPRA Act, 2009. Hence, the conscious act of exclusion of insurance bond / guarantee from an insurance company as a form of security with respect to performance or additional performance / quality assurance security is valid and the bidders are obliged to take part in the procurement process in accordance with the terms and conditions of the SBDs".*

15. We concur with the ratio laid in the case of **"M/s Jalal Construction Company,** to the extent of the findings recorded and conclusions reached regarding provincial procurement regime, which

is the domain of challenge under all petitions before us. No comments are made with respect to Federal Procurement laws and procurement laws of other provinces.

16. In view of aforesaid, this and other constitutional petitions and Intra Court Appeal, listed in Annexure-A, hereto attached, are disposed of in following terms:

- a) Findings recorded in clause (i) of operative part of decision in case of **A.M. Construction Company (Private) Limited** are endorsed.
- b) Demand for arranging Quality Assurance Security or for that matter the Quality Control Guarantee, where applicable and subject to the amount ascertained, does not conflict with the requirement of procuring performance guarantee, in terms of rule 56 of the Rules, 2014. Furnishing of additional security would not absolve the lowest evaluated bidder, identified as successful bidder in common parlance, from provisioning of the performance guarantee.
- c) Exclusion of arranging security from Insurance companies is policy matter decision. We hold that such exclusion applied does not violate the mandate of the public procurement regime, prevalent in the province of Punjab.
- d) Decision in the case of **"M/s Jalal Construction Company**, to the extent of the findings recorded and conclusions reached therein regarding the prevalent provincial procurement regime are endorsed.

(ANWAAR HUSSAIN)  
JUDGE

(ASIM HAFEEZ)  
JUDGE

*Imran/\**

Approved for reporting.

JUDGE

JUDGE