

Stereo. H C J D A 38

JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

W. P. No. 685 / 2023

M / S NWEPDI-TEPC-UCC (JV)

Versus

National Transmission & Dispatch Co. Ltd. & 04 others

JUDGMENT

Date of Hearing:	04.03.2024
Petitioner By:	Mr. Shahzad Rabbani, Advocate
Respondents By:	Miss Maryam, Advocate Mr. Asad Raza Advocate Mr. Nasir Javed Ghumman, Deputy Attorney General

ABID HUSSAIN CHATTHA, J: This constitutional Petition brings a challenge to Orders dated 30.11.2022 and 02.01.2023 passed by Respondents No. 2 and 4, respectively and seeks a direction to the Respondents to the effect that they are not entitled to forfeit bank guarantee No. IGT12420144322PK dated 27.04.2022 tendered by the Petitioner as bid security.

2. Succinctly, the Petitioner in a joint venture mode participated in tender No. NOR-4387-2022 for design, manufacture, supply, installation, testing and commissioning of plant for 500 / 132 KV grid station, Allama Iqbal Industrial City / M-3, Faisalabad floated by National Transmission and Dispatch Company Limited (the “**NTDC**”), a public limited company, wholly owned by the Federal Government in accordance with Single Stage-Two Envelope (SSTE) procedure. The tender was issued pursuant to the Public Procurement Regulatory Authority Ordinance, 2002 (the “**PPRA Ordinance**”) read with the Public Procurement Rules, 2004 (the “**Rules, 2004**”). In order to participate in the bidding process, the Petitioner submitted bid security in accordance with the bidding documents in terms of Rule 25 of

the Rules, 2004 read with Clause IB 15 of Section 1-‘Instructions to Bidders’ in the form of a bank guarantee issued by Respondent No. 5 on the request of the Petitioner.

3. Four bidders including the Petitioner participated in the tender process out of which two bidders, the Petitioner and another were declared as technically qualified. On 16.09.2022, the financial bids of the said two bidders were opened. The Petitioner quoted the lowest bid at Rs. 9,570,858,540/- while the second lowest bid was of Rs. 10,279,025,550/- as per prevailing exchange rate at the given date.

4. During the process of price post-bid evaluation, Respondent No. 3, the consultant of NTDC raised certain queries and the Petitioner was directed to confirm the same. The corrections as desired by Respondent No. 3 were all catered for by the Petitioner. Subsequently, another price post-bid clarification No. 3 was sought vide letter dated 12.10.2022 which was replied by the Petitioner through letter dated 14.10.2022, whereby, all the corrections as desired by Respondent No. 3 were made and confirmed by the Petitioner. However, the Petitioner did not receive any response after submitting the above clarifications and after about 45 days from the date of reply of the Petitioner, Respondent No. 2 issued the impugned Order dated 30.11.2022 through which the Petitioner was informed that its bid has been rejected and bid security forfeited pursuant to Clause IB 26.2(e) of Section 1-‘Instructions to Bidders’, as the Petitioner has refused to accept arithmetical corrections according to the criteria of arithmetic corrections laid down in Clause IB 26.2. The Petitioner was also informed that the bidding process of subject tender has been annulled pursuant to Rule 33 of the Rules, 2004, as such, re-bidding process will be initiated within due course of time.

5. The Petitioner vide letter dated 02.12.2022 informed Respondent No. 2 that according to Clause IB 26.2(e) of Section 1-‘Instructions to Bidders’, the bid security cannot be forfeited. Inaction on the part of NTDC compelled the Petitioner to institute W. P. No. 77737 / 2022. The Court, in the first instance, referred the matter to the Grievance Redressal Committee (the “GRC”) / Respondent No. 4 under Rule 48 of the Rules, 2004. Through

the impugned Order dated 02.01.2023, the GRC rejected claim of the Petitioner by merely stating that grievance of the Petitioner qua forfeiting its bid security is declined keeping in view the relevant documents / information. Hence, this Petition.

6. Learned counsel for the Petitioner submitted that the impugned order passed by Respondent No. 4 is non-speaking as no reason whatsoever has been assigned by the GRC while declining request of the Petitioner for release of bid security. He further asserted that NTDC forfeited bid security based upon the assumption that the Petitioner refused to accept arithmetical error in one of the items in its bid price, however, the Petitioner did not refuse to accept a single arithmetic error as desired by NTDC. This is notwithstanding that mere inadvertent mentioning of incorrect unit rate of item K-8 was not an arithmetic error but only a typographical mistake which is evident from the fact that the total bid price remained unaffected and listing of incorrect unit rate resulting in incorrect price of a sub-item was elaborately explained in response to the clarifications sought by NTDC. However, without accepting or rejecting explanation / clarification offered by the Petitioner, the latter was simply apprised that its bid has been rejected on account of its refusal to accept the arithmetic correction as desired by NTDC. He further contended that even otherwise, bid security of the Petitioner could not have been confiscated in terms of IB 26.2(e) under Clause IB 15.7 of Section 1-‘Instructions to Bidders’. Moreover, the impugned Order dated 30.11.2022 depicts that instead of pursuing price post-bid clarification No. 3, NTDC itself had annulled the tender pursuant to Rule 33 of the Rules, 2004 and opted for re-bidding the subject procurement. As such, penalty in terms of confiscation of bid security is unlawful and highly unjust based on *mala fide* when the whole tender process was scrapped by NTDC without assigning any reason.

7. Conversely, learned counsel for the Respondents heavily relied upon preliminary objection qua maintainability of this Petition in terms of Rule 48(7) of the Rules, 2004 which provides a remedy of appeal to the Petitioner against the decision of GRC before the Public Procurement

Regulatory Authority (the “**Authority**”) constituted under the PPRA Ordinance. Reliance was placed on an unreported Judgment of this Court dated 05.10.2023 passed in case titled, “M/s Ahmad & Co. v. SNGPL etc.” (**W. P. No. 63291 / 2023**). Other objections were not pressed. On merits, it was asserted that in terms of Clause IB 26.2(e) of Section 1-‘Instructions to Bidders’, when the bidder does not accept arithmetic corrections in terms of Clause IB 26.2, the bid security is liable to be confiscated. Hence, the bid security of the Petitioner has been aptly and lawfully forfeited and the Petitioner is not entitled for release of the same. Learned Federal Law Officer also intervened to object that this Petition is not maintainable since the Federal Government has not been independently impleaded as party to this Petition.

8. In rebuttal, learned counsel for the Petitioner submitted that the scope and mandate of GRC is limited which postulates an ongoing procurement process. However, as NTDC had annulled the procurement process, therefore, GRC had no mandate to decide grievance of the Petitioner. This was candidly stated while arguing W. P. No. 77737 / 2022 but the Court in its own wisdom referred the matter to GRC in the first instance. He further stated that even otherwise, the remedy of appeal under Rule 48(7) of the Rules is not an adequate and efficacious remedy which cannot be availed without paying an onerous requisite fee equivalent to 0.2% of the procurement value. In the present case, when the Petitioner is striving for release of his bid security, the payment of such an onerous additional amount would be a double jeopardy. Hence, the constitutional jurisdiction of this Court is always available which has been lawfully invoked by the Petitioner for redressal of its grievance. He clarified that NTDC is an independent entity run by a board of directors appointed by the Federal Government and as such, there is no requirement to separately array the Federal Government as party to this Petition.

9. From rival contentions of the parties, following points emerge for determination by this Court:-

- i) Whether this Petition is maintainable in view of Rule 48(7) of the Rules, 2004 which provides remedy of appeal to the Petitioner; and
- ii) Whether the Petitioner is entitled for release of bid security.

10. In Order to address the first query, it will be beneficial to reproduce Rule 48 of the Rules, 2004 which pertains to redressal of grievance by the procuring agency. It importantly reads as under:-

“48. Redressal of grievances by the procuring agency.---

- (1) *The procuring agency shall constitute a committee comprising of odd number of persons, with necessary powers and authorizations, to address the complaints of bidders that may occur prior to the entry into force of the procurement contract.*
- (2) *Any party may file its written complaint against the eligibility parameters, evaluation criteria or any other terms and conditions prescribed in the bidding documents if found contrary to the provisions of the procurement regulatory framework, and the same shall be addressed by the grievance redressal committee (GRC) well before the proposal submission deadline.*
- (3) *Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written complaint concerning his grievances within seven days of announcement of the technical evaluation report and five days after issuance of final evaluation report.*
- (4) *In case, the complaint is filed against the technical evaluation report, the GRC shall suspend the procurement proceedings.*
- (5) *In case, the complaint is filed after the issuance of the final evaluation report, the complainant cannot raise any objection on technical evaluation of the report:*

Provided that the complainant may raise the objection on any part of the final evaluation report in case where single stage single envelope bidding procedure is adopted.
- (6) *The GRC shall investigate and decide upon the complaint within ten days of its receipt.*
- (7) *Any bidder or party not satisfied with the decision of the GRC, may file an appeal before the Authority within thirty days of communication of the decision subject to*

depositing the prescribed fee and in accordance with the procedure issued by the Authority. The decision of the Authority shall be considered as final.”

11. Perusal of Rule 48 of the Rules, 2004 clearly reveals that by way of subordinate legislation, a dispute resolution mechanism was provided by constituting the GRC within the ambit of the procuring agency itself to address multiple complaints of the bidders that may occur prior to the entry into force of the procurement contract. The rationale is to ensure that the bidding process may be conducted smoothly and unnecessary litigation outside the procurement framework may be avoided. Rule 48.2 of the Rules, 2004 specifically states that any party may file a written complaint with respect to eligibility parameters, evaluation criteria or any other terms and conditions prescribed in the bidding documents if found contrary to the procurement regulatory framework and the same shall be addressed by the GRC well before the proposal submission deadline. This Rule is not attracted as the Petitioner did not have any grievance with respect to eligibility parameters, evaluation criteria or any other terms and conditions prescribed in the bidding documents contrary to the procurement regulatory framework. Similarly, Rule 48.3 of the Rules confers a right to the bidder qua his grievance to lodge a complaint against any act of the procuring agency after submission of his bid within seven days of announcement of the technical evaluation report and five days after issuance of final evaluation report. In the instant case, the Petitioner was declared as technically qualified and had no grievance regarding the technical evaluation report. However, the final evaluation report had not been issued as NTDC had annulled the process of procurement during evaluation of financial bids. Thus, the grievance had occurred at a stage after issuance of technical evaluation report but before issuance of the final evaluation report with respect to rejection of bid of the Petitioner and confiscation of its bid security. As such, the GRC could validly take cognizance of the grievance and a decision thereon in accordance with law.

12. Rule 48(7) of the Rules, 2004 provides the remedy of appeal before the Authority against the decision of GRC. However, the remedy of

appeal under Rule 48(7) of the Rules, 2004 is subject to depositing the prescribed fee. In the instant case, requiring the Petitioner to deposit a heavy amount of fee, who is striving to release its bid security, would definitely be harsh and onerous when the procurement process had been scrapped and even the decision of GRC was completely non-speaking. Under these circumstances, the Petitioner cannot be compelled to seek redressal of its grievance within the regulatory framework by way of appeal. This precise question was addressed in case titled, “Messrs Zohongding International Engineering Co. Ltd. through Authorized Representative v. National Highway Authority and 2 others” (2023 CLC 1163). The relevant paragraphs No. 6 to 8 are reproduced as under:-

“6. Regulation 7 of the 2021 Regulations provides that the appellant shall append with every appeal a demand draft / pay order of a non-refundable fee as per Schedule-II of these Regulations. Furthermore, it provides that P.P.R.A. shall not entertain any appeal which is filed without the prescribed fee. Schedule-II to the said Regulations requires the payment of Rs.5,00,000/- as the fee for filing an appeal where the contract or procurement is up to the limit of Rs.250 million. The said Schedule requires 0.2% of the procurement value not exceeding Rs.5 million to be the fee for filing an appeal where the contract or procurement exceeds the limit of Rs.250 million.

7. The petitioner had filed a fee of Rs.5,00,000/- along with its appeal filed before P.P.R.A. which is not entertaining the appeal as it considers that the fee in this case should be 0.2% of the procurement value which would come to an amount not exceeding Rs.5 million.

8. The vital question that needs to be answered is whether this Court should decline to assume jurisdiction due to the availability of the remedy of appeal under Rule 48(7) of the 2004 Rules against the decision of the G.R.C. It is well settled that the invocation of jurisdiction under Article 199 of the Constitution is not available in cases where the remedy of statutory appeal is available and such remedy is effective and adequate. Given that an appellant before P.P.R.A. is required by Regulation 7 read with Schedule-II of the 2021 Regulations to deposit a disproportionately high fee for filing an appeal under Rule 48(7) of the 2004 Rules, I am of the view that such an appeal cannot be considered to be an effective and adequate remedy which is as equally efficacious as invoking the Constitutional jurisdiction of this Court. The availability of the remedy of an appeal under Rule 48(7) of the 2004 Rules before

P.P.R.A. against the decision of G.R.C. cannot be considered to be a bar against the petitioner's right to file a Constitutional petition before this Court against the decision of the G.R.C. because I find the quantum of the fee for filing an appeal specified in Regulation 7 read with Schedule-II to the 2021 Regulations to be highly arbitrary, onerous and excessive."

13. It, therefore, follows that normal rule is that when an alternate remedy is available to a party, it is required to pursue that remedy and the right to invoke constitutional jurisdiction of this Court is not available. However, where it is established that the available alternate remedy is not efficacious, the existence of such remedy is not an absolute bar to invoke the constitutional jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. The reliance by learned counsel for the Respondents on M/s Ahmad & Co. case (supra) is misconceived as in the said case, the Petitioner therein had assailed the evaluation report in an ongoing procurement process. Moreover, NTDC as a procurement agency is an independent company run by a board of directors appointed by the Federal Government, therefore, there was no need to independently implead Federal Government as a Respondent. Hence, the objections of the Respondents qua maintainability of this Petition are overruled.

14. Section 1-‘Instructions to Bidders’, Clause IB 15 pertains to bid security. It is apparent that the provision of bid security acceptable to NTDC was a pre-requisite to participate in the bidding process. Clause IB 15.4 stipulates that any bid not accompanied by an acceptable bid security shall be considered by NTDC as non-responsive pursuant to Clause IB 24. Clause IB 15.5 provides that the bid securities of unsuccessful bidders will be returned upon award of contract to the successful bidder or on the expiry of validity of bid security whichever is earlier. Clause IB 15.6 proclaims that the bid security of the successful bidder will be returned when the bidder has furnished the required performance security pursuant to Clause IB 34 and signed the contract agreement pursuant to Clause IB 35. The rationale of submission of provision of bid security is encapsulated in Clause IB 15.3 which provides that the same is required to protect the employer against the

risk of bidder's conduct which would warrant the security's forfeiture pursuant to Clause IB 15.7 and the same is reproduced as under:-

“15.7 The Bid Security may be forfeited:

- (a) if a Bidder withdraws its bid during the period of Bid validity, except as provided in sub-clause IB 16.2; or*
- (b) if a Bidder does not accept the arithmetical corrections of his Bid Price, pursuant to Sub-Clause 24.2 thereof; or*
- (c) if a bidder is found involved in corrupt and fraudulent practices; or*
- (d) in the case of a successful Bidder, if he fails to:*
 - (i) furnish the required Performance Security in accordance with Clause IB.34, or*
 - (ii) sign the Contract Agreement, in accordance with Clause IB.35.”*

(Emphasis Supplied)

15. Clause IB 24 pertains to preliminary examination and determination of responsiveness of bid. Clause IB 24.2 is reproduced as under:-

“24.2 The Employer shall confirm that the following documents and information have been provided in the Technical Bid. If any of these documents or information is missing, the offer shall be rejected.

- (a) Letter of Technical Bid is unsigned pursuant to IB 17.5 or altered pursuant to IB 17.3;*
- (b) written confirmation of authorization to commit the Bidder;*
- (c) bid is not accompanied by a substantially compliant bid security as per IB 15.4;*
- (d) it covers scope of work given in Bidding Documents partially.*
- (e) Technical Proposal in accordance with IB 14A.”*

It is apparent from bare perusal of the above Clause that the Petitioner was compliant with the same as admittedly his technical bid had been accepted. NTDC did not invoke Clause IB 24.2 reproduced above in the impugned Order dated 30.11.2022, rather, invoked Clause IB 26.2(e) to reject bid of the Petitioner and in consequence thereof, forfeited its bid security which is not mentioned in Clause IB 15.7 reproduced above under which a bid security could be forfeited. Clause IB 26 pertains to conversion to single currency and

correction of arithmetic errors. The relevant Clause IB 26.2 is reproduced as under for ready reference:-

- “26.2 During the evaluation of Price Bids, the Employer shall correct arithmetical errors on the following basis:*
- (a) where there are errors between the total of the amounts given under the column for the price breakdown and the amount given under the Total Price, the amounts given under the column for the price breakdown shall prevail and the Total Price will be corrected accordingly;*
 - (b) where there are errors between the total of the amounts of Schedule Nos. 1 to 4 and the amount given in Schedule No. 5 (Grand Summary), the total of the amounts of Schedule Nos. 1 to 4 shall prevail and the Schedule No. 5 (Grand Summary) will be corrected accordingly;*
 - (c) if there is a discrepancy between the grand total price given in Schedule No. 5 (Grand Summary) and the bid amount in point (1) of the Letter of Price Bid, the grand total price given in Schedule No. 5 (Grand Summary) will prevail and the bid amount in point (1) of the Letter of Price Bid will be corrected; and*
 - (d) if there is a discrepancy between words and figures, the amount in words shall prevail, unless the amount expressed in words is related to an arithmetical error, in which case the amount in figures shall prevail subject to (a), (b) and (c) above.*
 - (e) If the Bidder does not accept the corrected amount of Bid, his Bid will be rejected and his Bid Security forfeited as per IB 15.7.”*

(Emphasis Supplied)

16. It is importantly noted here that although Clause IB 26.2(e) reproduced above states that if the bidder does not accept the corrected amount of bid, his bid will be rejected and his bid security forfeited according to Clause IB 15.7 yet the latter Clause does not allow forfeiture of bid security under the former Clause. Hence, it is aptly evident that the bidding documents were hit by the doctrine of *Contra Proferentem* which, according to Black’s Law Dictionary (Tenth Edition), means, ‘in the interpretation of documents, ambiguities are to be construed unfavorably to the drafter’. It is also termed as ‘ambiguity doctrine’. Thus, it is apparent that the bidding documents were ambiguous and as per Clause IB 15.7, the bid security could not have been forfeited pursuant to Clause IB 26.2(e) for omission to mention the said Clause therein.

17. Notwithstanding the fact that Clause IB 26.2(e) of Section 1- 'Instructions to Bidders' could not have been invoked in terms of Clause IB 15.7 yet under the former Clause, bid of the Petitioner could have been rejected and his bid security was liable to be forfeited only if the bidder does not accept the corrected amount of bid. This necessitates to examine if the Petitioner had refused to accept the correct amount of bid or arithmetic corrections in his bid price as desired by NTDC. Letter dated 12.10.2022 depicts that the Petitioner with reference to price post-bid clarification No. 3 was required to confirm certain queries which were duly responded to as depicted from communication dated 14.10.2022. The relevant query in letter dated 12.10.2022 is with respect to Items No. 4 & 7 which is reproduced as under:-

“4. Arithmetic errors have been found in the total price of Item No. K-8 of price Schedule No. 4 when the unit rate is multiplied with the quantity. The correct total price for the said item is as under. Please confirm.

Item No. of Price Schedule No. 4	Total price quoted in column 10 (PKR)	Difference due to arithmetic correction (PKR)	Total corrected price in column 10 due to arithmetic correction (PKR)
<i>Item No. K-8</i>	<i>41,534,157</i>	<i>333,310,119,351</i>	<i>333,351,653,508</i>
<i>Sub-Total of Item No. K-8</i>	<i>41,534,157</i>	<i>333,310,119,351</i>	<i>333,351,653,508</i>

7. Due to arithmetic corrections in price Schedule No. 4 as described herein before, the corrected total price of Schedule No. 4 comes out as given hereunder. Please confirm.

Item No. of Price Schedule No. 4	Total price quoted in column 10 for respective item(s) (PKR)	Difference due to arithmetic corrections (PKR)	Corrected price of column No. 10 due to arithmetic corrections (PKR)
<i>Sub-Total of item No. K-2</i>	<i>540,721,511</i>	<i>(7,543,119)</i>	<i>533,178,392</i>
<i>Sub-Total of Item No. K-8</i>	<i>41,534,157</i>	<i>333,310,119,351</i>	<i>333,351,653,508</i>
<i>Sub-Total of Item No. K-10</i>	<i>8,150,590</i>	<i>(1,487,759)</i>	<i>6,662,831</i>
<i>Grand total of Items K-1 to K-15</i>	<i>2,491,218,957</i>	<i>333,301,088,472</i>	<i>335,792,307,430</i>
Grand Total of Schedule No. 4	3,029,778,979	333,301,088,472	336,330,867,451”

In this behalf, the Petitioner submitted its reply which is also reproduced as under:-

Reply of Item No. 4:

“We have already accepted the arithmetic errors in Schedule 4 through your clarification No. 2 dated 23/09/2022 including the total change in Grand summary schedule no.5.

We have quoted the correct total amount in the column for K-8 for price breakdown which is PKR 41,534,157 and quoted the correct sub total amount of Item No. K-8 which is PKR 41,534,157. Therefore, there is no arithmetic error between the prevailing total amounts. However, there is a genuine typo mistake while formulating in the excel sheet which resulted in the incorrect unit rate. The total Price of K-8 Supply and placing of river run gravel blanket including side retaining wall in switchyard area with Qty. 6500 Cum is 41,534,156.76 PKR, the unit price is 6,389.87 PKR and the same was added to total of Sch.4 and Sch.5 grand summary. The cost for Item K-8 gravel cannot be PKR 333 billion and we have provided the breakup unit rates which can be checked and verified from any local vendor of gravel and our total price quoted is reflective of those standard market rates.

Our actual intention was to quote the lump sum price for K-8 due to shortage of time during bid preparation and provide the breakdown of unit price if needed later. At the time of bidding the total cost for K-8 was PKR 51,284,870 but we applied a discount of 20% and the total cost entered was 41,534,157 but unfortunately this typo could not be removed. We have provided the actual unit price similar to your clarification point 1 without any change to the total lump sum amount. We sincerely regret any inconvenience caused to your office due to this typo error, e re confirm our price for K-8 is 41,534,156.76 PKR already accepted the arithmetic errors in Schedule 4 through your clarification No.2 dated 23/09/2022 including the total change in Grand summary schedule no. 5.

No.	Name	Unit	Qty.	Unit Rate / Unit Rate per Foundation (PKR)	Total (PKR)
K.8	Supply and placing of river run gravel blanket including side retaining wall in switchyard are.	Cu.m	6500	6389.87	41534156.76

<i>Break down of Unit Rate</i>					
<i>Name</i>	<i>Total (PKR)</i>	<i>Unit Rate (PKR)</i>			
<i>labor</i>	<i>5081993.70</i>	<i>781.85</i>			
<i>material</i>	<i>32419066.60</i>	<i>4987.55</i>			
<i>machine</i>	<i>1830527.54</i>	<i>281.62</i>			
<i>others</i>	<i>2202568.92</i>	<i>338.86</i>			
<i>Sum(PKR)</i>	<i>41534156.76</i>	<i>6389.87”</i>			

Reply of Item No. 7:

“We have already accepted the arithmetic errors in Schedule 4 through your clarification No.2 dated 23/09/2022 including the total change in Grand summary schedule no.5. The Schedule No.4 after recalculation, the total price should be:

<i>Item No. of price schedule No. 4</i>	<i>Total price in column 10 for respective Item(s) (PKR)</i>
<i>Sub-total of Item K.2</i>	<i>533,178,392</i>
<i>Sub-total of Item K.8</i>	<i>41,534,157</i>
<i>Sub-total of Item K.10</i>	<i>6,662,831</i>
<i>Grand total of Items K.1 to K.15</i>	<i>2,482,188,080</i>
<i>Grand total of Schedule No. 4</i>	<i>3,020,748,101”</i>

18. From bare perusal of the above reply, it is unequivocally clear that irrespective of the fact that the aforesaid post bid clarifications were arithmetic errors or typographical errors yet the clarifications sought by Respondent No. 3 on behalf of NTDC were accepted by the Petitioner and that the total bid price remained intact. Further, by no stretch of imagination, it could be concluded that the Petitioner had refused to accept the arithmetic corrections according to the criteria for such corrections laid down in Clause IB 26.2. Therefore, the impugned Order dated 30.11.2022 qua rejection of bid of the Petitioner and forfeiture of its bid security is based on erroneous assumption that the Petitioner had refused to accept the arithmetic errors, as such, the decision to forfeit bid security was unlawful.

19. NTDC instead of replying to the response of the Petitioner to clarification No. 3, informed the Petitioner through the impugned Order dated 30.11.2022 that the bidding process of subject tender has been annulled pursuant to Rule 33(1) of the Rules, 2004 which provides that the procuring

agency may reject all bids or proposals at any time prior to the acceptance of a bid or proposal. It further states that the procuring agency shall upon request communicate to any supplier or contractor who submitted a bid or proposal, the grounds for rejection of its bid or proposal, but is not required to justify those grounds. Rule 33(2) of the Rules, 2004 provides that the procuring agency shall incur no liability, solely by virtue of its invoking Rule 33(1) of the Rules, 2004 towards suppliers or contractors who have submitted bids or proposals. However, Rule 33(3) of the Rules, 2004 obligates the procuring agency to issue notice of the rejection of bids or proposals promptly to all suppliers or contractors that submitted bids or proposals.

20. It, therefore, follows that NTDC lawfully exercised its discretion to scrap the bidding process in terms of Rule 33 of the Rules, 2004 but was not justified to forfeit the bid security of the Petitioner as the bid of the second lowest bidder was available and the Petitioner had not refused to accept arithmetic corrections in his price bid as required by NTDC. Hence, from all angles, the act of NTDC qua forfeiting bid security of the Petitioner was unlawful, arbitrary, capricious, unfair, and unjustified.

21. In view of the above, this Petition is **allowed** and the impugned Orders dated 30.11.2022 and 02.01.2023 are set aside to the extent of forfeiting bid security of the Petitioner. The Respondents are directed to release bid security of the Petitioner in the form of bank guarantee if not already encashed. In case, the same has been encashed, Respondent No. 1 / NTDC shall refund the amount of bid security to the Petitioner within a period of thirty (**30**) days from the date of this Judgment.

(Abid Hussain Chattha)
Judge

Approved for reporting.

Judge

Announced in open Court on 15.03.2024.

Judge