

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

Present:
Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Jawwad S. Khawaja
Mr. Justice Sh. Azmat Saeed

CONSTITUTION PETITION NO.33 OF 2013
(Under Article 184(3) of the Constitution challenging the appointment of DG, CAA and delay in completion of NBBIAP)

Asaf Fasihuddin Khan Vardag. ***Petitioner(s)***

VERSUS

Government of Pakistan and others. ***Respondent(s)***

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| Petitioner(s) | : Mr. Asaf Fasihuddin Khan Vardag, ASC
(in person) |
| On Court Notice: | : Mr. Muneer A. Malik,
Attorney General for Pakistan |
| For Respondents No.1 & 2
(Govt. of Pakistan through
Secretaries Defence &
Establishment Division) | : Mr. Shah Khawar, Additional A.G.P.
Qari Abdul Rashid, AOR |
| For Respondent No.3
(Air Marshal (R) Khalid Ch) | : Syed Iftikhar Hussain Gilani, Sr. ASC
Syed Safdar Hussain, AOR assisted by
Barrister Saad Buttar, Adv with
Air Marshal ® Khalid Chaudhry, DG, CAA |
| For Respondent No.4
(Ch. Muhammad Munir) | : Mr. Shahid Hamid, Sr. ASC
assisted by
Ms. Asma Hamid, Adv.
Mr. M.S. Khattak, AOR |
| For Respondent No.5
(M/s. Louis Berger) | : Mr. Uzair Karamat Bhandari, ASC
assisted by
Mr. Saad Aamir, Adv.
Mr. M.S. Khattak, AOR |
| For CAA | : Mr. Afnan Karim Kundi, ASC
Assisted by
Barrister Momin Ali Khan, Adv. |

	Mr. Mehmood A. Sheikh, AOR Mr. Obaid ur Rehman Abbasi, Sr. Law Officer Eng. Muhammad Musharaf Khan, Project Director (NBBIAP) Mr. Aamir Habib Sikandar, Dy. PD
For Aviation Division	: Mr. Muhammad Ali Gardezi, Secretary
For Technical Associates	: Miangul Hassan Aurangzeb, ASC Mr. M.S. Khattak, AOR
For LTH (JV)	: Kh. Haris Ahmad, Sr. ASC assisted by Barrister Ali Shah Gillani, Adv. Mr. M.S. Khattak, AOR
For M/s. China State Construction Engineering	: Syed Ali Raza, ASC Mr. Tariq Aziz, AOR
For FWO	: Mr. Asad Rajput, ASC
For M/s. Sambu Construction & Sachal Engineering	: Mr. Tariq Aziz, AOR.
For Hussain Construction	: Dr. Tariq Hassan, ASC Mr. Jawwad Hassan, ASC Mr. Arshad Ali Chaudhry, AOR
For Habib Construction	: Syed Ali Zafar, ASC Raja Zafar Khaliq, ASC
For M/s. Al-Tariq Construction	: Mr. Tariq Mehmood, Sr. ASC Mr. Mehmood A. Sheikh, AOR
For M/s. Ciemens	: Mr. Imtiaz Rasheed Siddiqui, ASC Mr. Hasnain Ibrahim Kazmi, ASC
For M/s. Xinjiang Beixin	: Mr. Shahid Kamal Khan, ASC Mr. Muhammad Siddique Baloch, AOR
For M/s. Gammon Pakistan	: Mr. Muhammad Munir Paracha, Sr. ASC
For M/s. Izhar (Pvt) Ltd	: Mr. Babar Ali, ASC Mr. Mehmood A. Sheikh, AOR
For M/s. Jaffer Brothers	: Syed Ishtiaq Haider, ASC Mr. Tariq Aziz, AOR
Remaining Contractors	: Nemo
Dates of Hearing	: 31/07, 19 & 22/08 and 3, 4, 5, 10, 11, 12, 24, 25/09/2013

ORDER

Iftikhar Muhammad Chaudhry, CJ.— The Petitioner, Mr.

Asif Fasihuddin Khan Vardag, an Advocate of Supreme Court of Pakistan, has invoked the jurisdiction of this Court under Article 184(3) of the Constitution of Islamic Republic of Pakistan by means of the instant petition.

2. The Petitioner, *inter alia*, has alleged corruption in the higher echelons of the government in the construction and completion of New Benazir Bhutto International Airport Project, Islamabad (NBBIAP), which was required to be completed at the cost of Rs.35 billions; and as it has not been completed on the due date i.e. December, 2011, the initial cost of Rs.35 billion now has shot up to Rs.73 billion. He further averred that there is every likelihood that the cost may further be escalated to Rs.90 billion. The Petitioner further alleged that Air Marshal (R) Khalid Chaudhry, who is Respondent No. 3 herein, was appointed as Director General, Civil Aviation Authority (DG, CAA) through executive arrangements made by the then Minister for Defence without observing legal formalities and therefore, he has pivotal role in this organized loot. In addition to this,, he has also been given the charge of another mega project, namely, the Multan International Airport.

3. The above facts, particularly allegations of corruption, necessitated this Court exercise its jurisdiction under Article 184(3) to examine, *inter alia*, whether the appointment of incumbent DG, CAA had been made in accordance with law and in adherence to the principle of transparency; and also to ascertain the status of the construction of both the above said airports. The DG, CAA submitted a

concise statement (CMA 4379/2013) in which he has annexed an Inquiry Report prepared by Lt. General (R) Shahid Niaz, Chairman of the Inquiry Committee constituted by Ministry of Defence fixing the responsibility upon all concerned for causing delay in construction of the airport. He was also directed to place on record, for our perusal, a study report. Relevant facts from the report of General (R) Shahid Niaz are as under: -

“The first development strategy (Feasibility) of the New Benazir Bhutto International Airport Islamabad was prepared by the French firm M/s Aéroport De Paris (ADPi) in association with NESPAK in October, 1984. It was concluded in the study that construction of the airport at a new site will be more feasible/economical than the expansion/upgradation of the existing International Airport at Chaklala. The new site selected/studied was located at Pindh Ranjha in Attock and Rawalpindi districts. The CAA started the purchase of land in 1986 through 2008 at Pindh Ranjha.

After a lapse of 22 years, the need for another feasibility study was felt necessary and therefore in 2006 the preparation of Master Plan was assigned to M/s Louis Berger Group (LBG) USA and M/s ECIL as joint venture partners. Later the same group was also selected as the Project Management Consultant (PMC) for NBBIAP by following due process of selection.

In March 2007, the CAA Board on recommendations of the PMC, approved M/s CPG Airports, Singapore as design consultant for Passenger Terminal Building (PTB) and the design work of remaining components of the project were assigned to M/s ADPi France & NESPAK (JV).

In March 2008, CAA Board approved the PC-I of the project at a cost of Rs. 37 billion, based on the Master Plan prepared by the M/s LBG. However, the ground breaking ceremony of the project was conducted earlier on 7th April, 2007 jointly by the then President and Prime Minister of Pakistan and it was directed by the Prime Minister of Pakistan to get the project completed in 30 months period. Although the detailed engineering designs of the project were not ready by that time except for design of the

Airside Infrastructure, CAA has reported that in compliance to the directives of the Prime Minister, site preparatory works of the runway was immediately started through package 00 in Feb 2007.

Against the approved PC-I cost of the project Rs. 37,000 Million, 10 contracts out of 17 packages (excluding cost of land, management and design) have been awarded at a total cost of Rs. 46,669.19 Million till September 2012. The contracted cost of these 10 packages is 26% higher than the overall approved cost of the PC-I. The expenditure incurred till September 2012 is Rs. 16,501 Million being 44.6% of the approved PC-I cost.

CAA prepared a revised PC-I at a cost of Rs. 66 billion in March, 2012 while keeping in view the cost incurred and expected increase in the overall cost of the project. The revised PC-I was considered in 140th meeting of CAA Board held on 16th April 2012 where in the Secretary Defence / Chairman CAA Board observed incoherence between the overall expenditure incurred and the physical progress of the project. The Secretary Defence constituted a Committee under the chairmanship of Lt. Gen. (Retd) Shahid Niaz, Member (I&M) Planning Commission with Additional Secretary (Military Finance), Finance Division, Director General, CAA and Director, Planning and Development, CAA as members to conduct an inquiry under the following parameters:

- a) To conduct a comprehensive study / audit of the project.
- b) To inquire into the reasons for increase in the cost of project
- c) To identify the persons responsible for this state of affairs and to fix the responsibility.
- d) To suggest ways and means to bring this project on track for its expeditious completion.

Since detailed audit of the project upto February, 2011 has been conducted by the Auditor General's Office and report to that effect has already been published / submitted, so to avoid duplication of effort it was decided by the Committee to conduct performance audit of the project. Accordingly Ministry of Defence was informed vide letter No. 4(16-133)/PC/T&C/ 2012/Vol-IX dated 9th August, 2012 placed at Annex-II.

In order to expedite and facilitate the Inquiry Committee, the Chairman of the Committee Lt. Gen. (Retd) Shahid Niaz constituted a subcommittee comprising Engr. M. Mustansar Khan, D.G. Projects Wing, Mr. Munir Ahmed Anjum Chief (T&C), Planning Commission, Mr. Muhammad Musharraf Khan, PD (NBBIAP), Mr. Rouhullah, Acting Director, P&D, CAA, Mr. Amir H. Sikandar, Deputy PD Finance (NBBIAP) and Mr. Noor Alam, Deputy Secretary, Ministry of Defence.

Following course of action has been adopted to complete the assignment:

- i. Obtaining relevant record and data from CAA, for which a set comprehensive formatted document was provided by the committee.
- ii. Meetings/Discussions with the concerned officials and other stakeholders.
- iii. Frequent site visits to the projects site/project office by members of the subcommittee.
- iv. Scrutiny of the records and reconfirmation through acquisition of related documents.

4. Khawaja Haris Ahmed, learned Sr. ASC appearing on behalf of M/s Lagan – Technical - Habib Joint Venture (LTH-JV), on our query, pointed out that the CAA Board, in its 140th Meeting held on 16.04.2012, expressed its extreme displeasure on the progress of NBBIAP. Thus the Inquiry Committee was constituted by the CAA Board to fix the responsibility by identifying the persons responsible for the state of affairs of the project and provide suggestions to put the project on the right track for its earliest possible completion.

5.

The Committee was required to conduct performance audit in such a manner that it shall not hamper the overall progress of developmental works at the site and was required to submit its report to the Secretary Defence/Chairperson CAA Board within a period of 30 days

from receipt thereof. The Committee, however, submitted its report on 23.01.2013.

6. It is to be noted that the Inquiry Committee could not complete its task within the stipulated period of 30 days as was required in the notification of appointment of Inquiry Committee, but it was noted in the report itself that flow of information and provision of relevant documents/record from the concerned authorities of CAA had been a sore issue and it was a major reason for the slow progress of the Committee proceedings. It was only through intervention of Ministry of Defence at the request of the Sub-committee through various letters/communications that the requisite information was provided. However, till the writing of that report, CAA was unable to provide the complete set of information required by the Inquiry Committee. In this very context, it is interesting to note that attitude of CAA was non-cooperative towards the Inquiry Committee. Although Air Marshal (R) Khalid Chaudhry, incumbent DG, CAA was one of the members of the Inquiry Committee he provided no information about cost of the project or the feasibility study to the Inquiry Committee. It is true that at the time when feasibility study was carried out, someone else was DG, CAA. However, at the time that the Inquiry Committee was conducting its investigations, Air Marshal (R) Khalid Chaudhry was the head of CAA and overall in charge of the executive functionaries. Therefore, he was in a position ensure their cooperation and to place all the important documents before the Inquiry Committee, but for the reasons best known to him the needful was not done. The Inquiry Committee, on the basis of whatever material brought before it, prepared a report which suggests that final Master

Plan/report was prepared by the Joint Venture of M/s Louis Berger Group, USA (LBG) and Engineering Consultants International (Pvt) Ltd. (ECIL), in the month of September, 2006 and an amount of Rs.27.767 million was paid to the Consultants for the preparation of the feasibility study/Master Plan. According to the Master Plan prepared by the Consultants, an amount of Rs.27,102.1 million (which included the total overall cost of engineering, supervision, PM & Admin and Fees for the project) was required in the year 2006 for the completion of Runway, Taxiway, Apron, Passenger Terminal, Cargo Terminal, Car/Taxi Parking, Roads/Bridges/Culverts, Rescue & Fire Station, etc. However, the financial impact of the land was not included in the Master Plan. The reservations/findings of the Inquiry Committee, recorded on the preparation of the Master Plan, read as under:-

- i. "The Master Plan (2006) was prepared after lapse of 22 years which resulted in cost appreciation from tentative cost of Rs. 1.267 billion (1984) to Rs. 37 billion. Main justification for delay as reported by CAA was the change in priority of constructing Allama Iqbal Airport Lahore over NBBIAP at Islamabad.
- ii. The Master Plan developed by M/s LBG and M/s ECIL (JV) in 2026 lacked some essential components i.e. link taxiway, state lounge, mosque, medical centre, bachelor accommodation, APM residence, M.T. Section, boundary wall and land for future requirement. The cost of these components at present is estimated at Rs. 1.3 billion. This lapse on part of the Consultant indicates negligence."

7. Similarly, in respect of the Land Procurement, after having gone through the facts of the matter, following findings were recorded by the Inquiry Committee:-

- i. "Acquisition of land was started in 1986 under Land Acquisition Act, much before the approval of the PC-I which was accorded

in 2008. Initially, the land was purchased at the average price of Rs. 44,896 per acre whereas the rate calculated in the original feasibility of 1984 was Rs. 12,140 per acre.

- ii. After the purchase of land in 1986, the purchasing activity continued till 2008. The land purchased during the period 1986-2008 was 3287 acres. The average cost comes to Rs. 277,037 per acre which is 22 times higher than the cost estimated in the feasibility of 1984. The responsibility for substantial increase in cost of land can be attributed to inaction on part of the CAA, for failing to procure the required land in the minimum possible time. The process for purchase of land was continued for 22 years and even then the total procured land may not be sufficient for the future operational requirement of the Air Port as reported by Project Authorities.
- iii. In the feasibility study / master plan of 2006, the requirement of 3155 acres of land was worked out on the basis of catering the needs upto 2035. These projections were made by using historical, demographic and socio economic data for the region and the country, presented in terms of annual number of passengers, aircraft operations and cargo for each year upto 2035. The breakup of the land use is attached at Annex-IV. In the given circumstances purchase of additional 137 acres of land is not justified.
- iv. An amount of Rs. 910.622 million has been paid on account of purchase of 3,287 acres of land. The said amount is not the part of the approved PC-I.
- v. It has been observed that further Rs. 2000 million has been kept in the approved PC-I for purchase of additional land. The said amount has been decreased to Rs. 900 million in the revised PC-I. In the given scenario, once 137 acres of excess land is already acquired, the original PC-I had Rs. 2000 million whereas the revised PC-I has Rs. 900 million for additional land, the consultant and CAA both are not sure about the actual requirement of land even at such an advanced stage of the project.
- vi. CAA has purchased 132 acres of land more than the estimates of Feasibility Report/Master Plan estimate 2006.
- vii. According to sponsors there are many left over areas embedded in the acquired piece of land. Reportedly, the sponsors have a

plan to acquire these areas to address the flight safety and security issues. Purchasing / clearing the land at this stage of development of the Airport will have a huge financial impact. It is reported that some embedded areas still exist in the acquired land and where over 80 persons are still residing within the project area. This is a serious issue and needs immediate addressal. Detail of the embedded land is at Annex-V.

- viii. It appears that the PMC while submitting the final Master Plan of the airport had not comprehensively worked out the proper use of land hence the total requirement of land is not yet finalized.
- ix. The Planning and Development Directorate, Civil Aviation Authority also bears the responsibility for not correctly working out the detailed requirement of land in consultation with the Consultants."

It is equally important to note that Mr. Afnan Karim Kundi, learned counsel for CAA has provided following project-wise details of each project: -

- (E) CONSULTANT FOR THE PROJECT
- (F) PROJECT MANAGEMENT UNIT (PMU)
- (G) PLANNING
- (H) EXECUTION
- (I) PERIPHERAL FACILITIES
- (J) CONCLUSION

The Inquiry Committee under the heading "CONSULTANT FOR THE PROJECT", thoroughly examined the status of the Project under following sub-headings: -

- (1) Project Management Consultant (PMC)
- (2) M/s CPG Airport (Design Consultant for Passenger Terminal Building)
- (3) M/s ADPI-NESPAK JV (Design Consultant for the project except PTB)

The Inquiry Committee also recorded its findings including one wherein division of the project of construction of Airport into 17 different

packages was termed as indicative of poor planning. The same finding is reproduced hereinbelow: -

- “vii. As per standard engineering practice adopted for development of major airports, the whole construction activity is normally divided into two major parts, one Airfield infrastructure and second Landside Infrastructure, the work is then awarded for execution to one or two internationally renowned and experienced firms. The division of this project into 17 different packages is indicative of poor planning. It may be highlighted that the PMC in the Minutes of Contract Negotiations” at Annex-XII has clearly and in unambiguous terms recommended to adopt an approach with two main contracts, one for the airfield, taxiways, utilities, water, drainage, fuel farm and lighting etc and a second contract for the terminal and all ancillary facilities. The view point given by CAA, that subsequently in May 2008 the PMC advised to split the work in various packages is not cogent as ultimate decision rested with the client. The only plausible reason for splitting the work into so many packages is due to non availability of timely designs. If at all the work was to be split, it could have been managed by having more compact packages, which could have helped in cutting down the costs and time over runs, besides eliminating the inter face problems.”

8. With regard to Project Management Unit (PMU) following findings were recorded: -

- i. PMU for the project was never notified by the authorities hence the distribution of work and specific duties to be performed by the members could not be determined in the absence of an approved TOR, which is a serious lapse on part of CAA.
- ii. There have been frequent changes of the Project Director i.e. five Project Directors have worked during the period 2006-till

date 2012, which has adversely affected the progress and management of the project as a whole. It may be mentioned that for any public funded project the project director of the project has to be appointed and should remain with the project till its completion.

- iii. Some of the officers indicated in the PMU incumbency position were employed part time performing duties other than the project.
- iv. The PMU has not been able to perform its basic and effective role of the clients (CAA) check through the PMC on various activities of the project."

9. Under the title **"PLANNING"** the Committee has discussed original PC-1, considered in the Development Working Period (DWP) meeting of Ministry of Defence held on 19.03.2008 and revised PC-1, prepared jointly by M/s LBG & NESPAK in March, 2012 at the cost of Rs.66 billion including Foreign Exchange Commission (FEC) of Rs.16 billion (equivalent to US \$ 180 million valued at Rs.80.62 for expenditure already incurred and Rs.90/US\$ for expenditure on balance work), which was considered in the 140th meeting of CAA Board held on 16.04.2012 and was deferred subject to submission of Inquiry Committee Report. In the Revised PC-1 an amount of Rs.46.2 billion has been reflected to be financed from CAA's own resources and remaining Rs.19.80 billion through borrowing. The following reasons/justifications were given for revision of the PC-I on account of non-inclusion of certain essential facilities overlooked by consultants while preparing the original PC-I:-

1. Site preparatory works	<u>Rs.</u>
	<u>Million</u>
2. <u>Airside Infrastructure:</u>	179
Airfield lighting System	1,004
Hydrant Refueling system	1,236
ATC equipment & NAVAIDS	1,530

ATC, FCR, RADAR & Radio Building.	1,470
Additional Aprons, Taxiways and Remote Parking for state Lounge	1,000
Other Miscellaneous additions.	1,553
Total:	7,793
3. Passenger Terminal Building:	
(addition of passenger boarding bridges, PCA, 400 Hz power supply)	
Increase of rate per sq. m of terminal building	
Original PC-I:	Rs. 82,000 per sq. m
Revised PC-I:	Rs. 126,900 per sq. m
	11,966
4. Landside Infrastructure:	
Sewerage treatment plant:	150
Landscaping:	400
Landscaping Building:	600
Cargo complex:	500
Additional area and facilities in landside infrastructure:	
Additional pedestrian link bridges and increase in width & height of departure level bridge (2 to 4 lanes):	2,000
Other miscellaneous additions (power distribution & Telecommunication network):	
Total:	5,378
5. Other components of project cost	
Increase in Project Management cost	278
Increase in Airside Design Cost	104
Increase in Terminal Building Design Cost	133
Increase in contingencies	538
Vehicles (Details not given)	15
Increase in Custom duties & Taxes	1,000
Decrease in Land Acquisition cost	(1,000)
Inflation / Escalation	3,200
Total:	4,168
Grand Total:	29,000

The Inquiry report finds mentioned that once the work started as per the scope of original PC-I, the project authorities divided the work of each component into different packages. During the course of implementation it was realized that there was likely to be a substantial increase in the overall cost of all the components from their indicated/estimated cost as reflected in the original PC-I. The component-wise increase in the cost of various packages has also been indicated in the report as follows: -

	PC-I Sub-Heads	Original Cost Rs. Million	Revised Cost Rs. Million	Increase in cost
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A	Site Preparatory Works (Phase-I)	1,080.531	902	(178.531)
B	Package 01: Airside Infrastructure (Civil Works)	10,375	12,928	
	Package 7A: Airfield Lighting System		1,004	
	Package 06: Hydrant Refueling System		1,236	
	Package 7B: NAVAIDS/MET/ATC Equipment		1,530	
	Package 8C-1: ATC Complex and FCR Building		1,470	
	Airside Infrastructure	10,375	18,168	7,793
C	Package 2: Piling Foundation Works for Passenger Terminal Building	14,760	370	
	Package 3A: Constructing of Pile Caps for Passenger Terminal Building		471	
	Package 03: Passenger Terminal Building		20,640	
	Package 04: Special Items of Equipment		3,599	
	Package 05: Furniture & Signage		617	
	Package 09: Aircraft Stand Equipment (PB Bridges, Power Supply)		1,029	
	Terminal Building	14,760	26,726	11,966
D	Package 8A: Landside Roads, Bridges, Drainage and Utilities	5,000	6,853	
	Package 8B: Electrical Power & Telecommunication Network		2,025	
	Package 8C2: Landside Buildings & Landscaping		1,000	
	Package 10: Cargo Complex & Allied Works		500	
	Landside Infrastructure	5,000	10,378	5,378

E	Project Management Consultancy	374	652	278
F	Design Consultancy (Airside Infrastructure)	410	514	104
G	Design Consultancy (Terminal Building)	390	523	133
H	Contingencies @ 3% (including CAA Establishment Charges & Overheads)	971.686	1,510	538
I	Vehicles	-	15	15
J	Custom Duties / Taxes	500	1,500	1,000
K	Environmental Study	2.7	3	
L	Additional Land Acquisition Cost	2,000	900	1,100
M	Escalation (Lump Sum) **	1,000	4,200	3,200
Grand Total		36,864	65,991	29,000

10. The Inquiry Committee has noticed that process of the preparation of original PC-I was faulty. Therefore, it is appropriate to note the findings of the Committee as reproduced hereinbelow: -

- i. The process of preparation of the original PC-1 was faulty and many important aspects were over looked. For example, detailed breakup of cost was not given, even quantities & Unit price of major items was missing and it was not prepared strictly in line with the parameters of the feasibility report.
- ii. In most of the components, lump sum provisions were made much against the formal engineering practice.
- iii. It is evident that the project despite its importance and strategic nature was neither properly scrutinized, nor appraised/evaluated at the planning and the approval stages.
- iv. The DWP meetings are very important, in development process as they play crucial role in the scrutiny/appraisal of proposals at technical & working level which results into improvement in the investment proposals. The CAA Board in its 125th meeting held on 19th September 2008 gave the ruling that CAA Board is fully empowered to approve self financed development schemes /

projects of CAA. As a sequel to this decision, no meeting of CAA DWP took place till end of 2011. The decisions of DWP of CAA meeting held in March, 2008 placed at Annex-XIX were therefore violated as per procedure for approval of self financing development schemes of autonomous organizations instructions issued by P&D Division vide OM No. 21(2-GEN)PIA/PC/2004 dated 18th December, 2004 placed at Annex-XX. Later, the matter was reviewed by CAA Board in 2012 and it was decided to reactivate CAA DWP. Revised PC-I was therefore processed accordingly and recommended by CAA DWP in its 11th meeting held in Feb 2012 for further consideration by the CAA Board.

- v. As mentioned above in the period when the holding of DWP was dispensed with, all contracts awarded were without legitimate approval / authority.
- vi. The original PC-1 catered for medium term development phase upto 2020 requirements while the revised PC-1 meets the projected requirements of 2035. The CAA has deviated from the recommendations of the feasibility report of 2006 in that instead of developing the airport in phases/stages; they have started construction for the ultimate phase which might result into excess capacity in an earlier timeframe.
- vii. The PC-1 was not based on the parameters of feasibility study conducted by M/S LBG in 2006 thus making the Master Plan / feasibility study redundant. This reflects poorly on management of the project at the preparation stage which is considered to be the most critical phase of a project in standard engineering practice.
- viii. CAA has separately approved two projects namely; (i) PC-1 for Site Preparatory Works at an estimated cost of Rs. 1081.531 million and (ii) PC-II for Consultancy Services at a cost of Rs. 1209 million. Inclusion of these two costs in the original & revised PC-1 is not understood, an appropriate course should have been to close these two PC-Is or include the left over components of these PC-Is in the original PC-I.
- ix. The PC-1 for such an important mega project, which was a Green Field Airport, should have been properly deliberated by concerned department of CAA, which apparently was not done, despite the available technical support from very expensive

panel of consultants. To sum it up the original PC-1 in its existing shape should not have been approved.

- x. Provision of lump sum escalation of Rs. 4,200 million in the revised PC-I is not justified as most of the contracts have been awarded or detailed costs are estimated. In view of this the escalation can only be given on the balance works and for contracts which have not been finalized."

While discussing the subject "**EXECUTION**", it was mentioned by the Inquiry Committee that in the month of February, 2007 first contract for Site Preparatory Work was awarded after getting approval of PC-I amounting to Rs.1,400 million. PC-II costing Rs.1,209 million was approved in November, 2007 covering all consultancy charges, whereas the Project Management Consultant was hired in January, 2006. The Original PC-I of the project costing Rs.37 billion was approved in April, 2008, against which 10 contracts (excluding the costs of land, management and design) were awarded at the cost of Rs.46.669.19 million, which is 26% higher than the approved cost of the PC-I. The expenditures incurred till September 2012 has been reported as Rs.16,501 million which is 44.6% of the approved cost. Therefore, in this background, in respect of Execution following findings have been recorded: -

- i. The award of contracts over and above the 15% limit of the approved cost is not permitted under the prevalent rules without approval of the revised PC-I, which in this case was grossly violated.
- ii. Implementation of certain components of the project was initiated without getting approval of the competent authority i.e. DWP/CAA Board in violation of the rules. The contract for site preparation was awarded in February, 2007 while the project was approved by the CAA Board in its meeting held on 28th

March, 2008. Reportedly this was done to facilitate holding of Earth Breaking Ceremony in an earlier time frame.

- iii. Out of 17 packages, the Executing Agency has awarded ten contracts so far (excluding cost of land, management and design etc). Out of the ten awarded contracts, three have been reported as 100% complete. However, the accounts of these contracts have yet to be finalized / closed. The remaining seven contracts are in progress and all are behind the schedule. In general, 33.8% overall physical progress has been reported in all 17 packages pertaining to the construction work in a time frame of total 67 months. If the planned date of completion of the Project i.e. June 2013 is kept in view, the cumulated lag at present in the overall progress of the under execution packages is 64%., Hence it is very difficult to meet the dead lines, unless extraordinary measures are put in place in right earnest."

11. The Committee has also stated that the said Project has been divided into following four major components having 17 contract packages:-

1. Site Preparatory Works
2. Airside Infrastructure Passenger Terminal Building
3. Passenger Terminal Building
4. Landside Infrastructure

In respect of **Site Preparatory Works**, the Committee has recorded its findings besides discussing the **Airside Infrastructure progress** which is also known under sub-heading as Package-01 Airside Infrastructure (Civil Works). The contract was awarded in August, 2008 to M/s Lagan-Husnain JV at a cost of Rs.11,825 million. The actual completion date of the project was August, 2010 but it was delayed. The progress of the Package was very slow till January, 2010 and stood at only 7-9% against the planned progress of 60%. Primary

reason for the delay was cited as internal rift between the JV partners. The physical progress by the end of September, 2012 was 82.45% whereas the anticipated completion cost based on the revised PC-I was Rs.12,928 million. The Committee on this issue recorded following findings: -

- i. According to the Project Authorities this contract is expected to be completed by February 2013 with a delay of 30 months. The award of contract at higher prices and increased completion cost over contract price can be attributed to the following factors: -
 - a) The project has sustained an additional cost of Rs. 1.500 billion due to conversion/intended use of a parallel taxiway into secondary runway.
 - b) The completion cost of the contract is expected to increase further due to change in scope and claims of the contractors on account of idling charges.
- ii. In sharp contrast to the contractual obligations which required termination of the contract due to default and imposition of penalties and re-award of a new contract, a new JV was formed (Lagan 60% TAPL 35% and Habib 5%) with exclusion/addition of partners to implement the contract on the same terms & conditions. Though provided in the contract of the JV to change its composition but only in the event of normal performance by the JV. However, in this particular case the JV at that point in time was in a default stage having achieved negligible progress (of around 9% against 65%) and the only course available was to terminate the contract. This undue favor to the new JV by taking all the responsibilities of delays by the Project Management has accrued the right of claiming idle charges by the new JV. This has already resulted into payment of idle charges/claims of Rs. 2.0 billion till to date to the new JV. It is apprehended that further claims in the shape of idle losses may be claimed by the contractor, which could result into enormous increase in the contract value. Detailed inquiry to probe into the matter needs to be conducted.

- iii. The PMC should have imposed penalty on the JV contractor for the expected 30 months delay in completion period of the contract, but such an action was not initiated for the delay in the contract implementation for which the PMC bears the responsibility.
- iv. There appeared no reason for converting parallel Taxiway (as proposed in original master plan) into Emergency Runway and subsequently as a Secondary Runway which has generated the requirement of a 3rd Runway with huge financial outlay. The changes effected have many implications for safe operation of Secondary runway, a detailed technical appraisal by the Ministry of Defence is therefore necessary.
- v. Against the contractual completion date August, 2010, the physical progress upto September, 2012 was 82.45%. The contract is expected to be completed by February, 2013 with a delay of 30 months. The contractual execution period has expired in August, 2010 and since then it is being implemented without issuing any extension letter to the contractor."

Under the sub-heading "Package-6 Hydrant Refueling System" it was observed that the contract was awarded in February, 2010 to M/s Al-Tariq (Pvt) Ltd. at a contract price of Rs.1,187.238 million and planned to be completed by April, 2011 but then re-scheduled to be completed by December, 2012 with a delay of 20 months for increased estimated cost of Rs.1,236 million. Findings on this issue are as under: -

- i. This contract is part of the Airside Infrastructure component. According to the justification given in revised PC-1 this item was not included in the original PC-1 and has been added to the scope of work. The increase in contract price by Rs. 48.762 was found to be on account of payment of claims to the contractor. In addition idling claims amounting to Rs. 140 million have also been reportedly received by the Project Management and are under process.

- ii. Delay of 20 months in the completion period of this contract is mainly due to coordination and interface issues between the Fuel Hydrant Lines and Apron works (Airfield Lighting System). Ideally both the works should have been awarded to one contractor to avoid such clashes.
- iii. As the feasibility study as well as PC-1 was prepared by the LBG therefore, non inclusion of these important components while preparing PC-I can be attributed to negligence on part of LBG.
- iv. A grave contractual anomaly was also noticed in the conditions of the contract formulated by PMC and subsequently executed by CAA. The predominant item of work in the contract pertains to laying of pipes involving almost 60% of the entire cost of the works. However, the import and supply of the pipes was taken up by CAA, because of which a delay of six months occurred in the import of pipes which has in turn paved the grounds for the contractor to raise idle claims for the delay. It is not understood why CAA decided to procure the pipes themselves and supply to the contractor. Information regarding the total claims paid to the contractor has not been provided.
- v. M/s NESPAK shifted the layout of the pipe line from the fair weather strips of the apron to the area specified for the construction of Apron. This has resulted into the adversity of interface between the contractors resulting in delay in execution of both package-1 and package-6 leading to time / cost overruns besides claims by both the contractors. This speaks of a highly non professional approach of the Consultants."

Under the sub-heading "Package-7A Airfield Lightning System" it was observed that contract was in September, 2009 to M/s Siemens Pakistan at a cost of Rs.946.771 million but was expected to be completed in Rs.1,104 million. The Inquiry Committee recorded following findings: -

- i. Against the contract value of Rs. 946.771 million the completion cost is expected to be Rs. 1004 million showing an increase of 6%. The contract is expected to be completed by December, 2012 with a delay of 20 months. The main reason for delay as reported was interfacing problems. The reason for increase of Rs. 57.229 million in the cost can be determined after having the relevant records which have not been provided by the Project Authorities. Further to this increase in cost, there are likely to be claims of the contractors, details of which have not been provided."

Under the sub-heading "Package-8C-1 ATC FCR Radar & Radio Building" it was mentioned that the contract was awarded in January, 2011 to M/s Beixen-Gammon JV at a cost of Rs.1,470.169 million and was to be completed by December, 2012. However, by the end of September, 2012 physical progress achieved was 46%. Findings on this issue are as under: -

- i. According to the revised PC-1 this item was not included in the original PC-1 and was added to scope of work. The contract is expected to be completed within contract value.
- ii. The work will not be completed by schedule time of December 2012 and likely to take 4 to 6 months more only if special efforts are made."

12. In the end the Committee gave general findings on the heading of Airside Infrastructure, which are reproduced hereinbelow: -

"General Findings on cost of Airside Infrastructure

As per approved PC-1, the amount reflected under Airside Infrastructure (Civil Work) was Rs. 10,375 million. However, besides Civil Works, the Airside Infrastructure also included HRS, ALS, ATC/FCR Radar & Radio and ATC equipments and Nav aids. Once the process of awarding contracts was undertaken, the cost for HRS, ALS, ATC/FCR Radar & Radio and ATC equipments and Nav aids amount came to Rs. 5,240 million. Thus the total tendered cost of all the five packages works out

to Rs. 17,065 million. However, in the revised PC-I total cost calculated for all five packages of Airside Infrastructure development is Rs. 18,168 million, showing an increase of Rs. 7,793 million or 75% over the approved cost. Out of this Rs. 2,553 million (25%) is attributable to escalation and Rs. 5,240 million (50%) is due to missing items which were otherwise integral part of Airside Infrastructure. Approval of PC-I with missing details of such important components is not understandable."

The "**Passenger Terminal Building (PTB)** was split into following packages: -

- | | | |
|-----|----------------|--|
| (a) | Package-2 | Pilling/Foundation Work |
| (b) | Package-3A | Construction of Pile Caps |
| (c) | Package-3 | Main Passenger Terminal Building (Super Structure only) |
| (d) | Packages 4,5&9 | PTB Special System, Furniture, Signage& Counters and Air Stand Equipments
(These works are yet to be awarded) |

The contract of Main Passenger Terminal (Super structure) was awarded to M/s CSCEC-FWO JV in January, 2011 at a cost of Rs.20,286.041 million against the approved cost of Rs.14,760 million and the findings of the Inquiry Committee are as under: -

- i. Against PC-1 approved cost of Rs. 14,760 million for Civil Works, the contract for the super structure component only was awarded at 37.4% higher cost of Rs. 20,286.04 million. The expected completion cost of the contract is Rs. 20,640 million showing an increase of 1.7% over tendered cost and 39.8% increase over approved cost. The reason for this increase is attributed to the increase in unit cost, which has increased from 82,000 per sq.m to Rs. 126,000 per sq.m showing an increase of 53.6%. It may also be mentioned that this cost does not include cost on account of piling and pile caps for which two

separate contracts have been awarded to justify abnormal increase in cost of Main Terminal Building.

- ii. As per the information gathered during discussion/deliberations with consultants/CAA, it has been concluded that M/s CSCEC has not been able to perform as expected, which is also hampering the progress of work by other JV partner M/s FWO (30% share) as the complete work of building structure has been split between two contractors much against the desirable engineering practices.
- iii. The contract was awarded in June, 2011 ending in Aug, 2013. The total progress up to end Sep, 2012 (15 months after the award of work) is barely 5% as against the contractually required progress of 67%. Keeping in view the scanty resource availability of shuttering, equipment and labor at site it can be very safely predicted that this JV will not be able to accomplish its contracted scope of work before the target date. The PMC and the client need to resolve this issue on priority.
- iv. Against the approved cost of Passenger Terminal Building of Rs. 14,760 million, the building is likely to be completed at a cost of Rs. 21,481 million inclusive of all the three activities; i.e. Super Structure, Piling foundation and pile caps. This shows an increase of Rs. 6,721 million or 45.5% over the approved cost and Rs. 168.226 million or 0.8% over the tendered cost. The reasons for such an enormous increase in cost has been reported as non availability of timely detailed design at the time of preparation of approved PC-1. The total increase in cost is attributable to escalation."

Regarding **Landside Infrastructure** it was mentioned that the project was divided into following four Packages: -

a)	Package-8A	Landside Infrastructure Work	6853 M
b)	Package-8B	Electrical power and telecommunication	2025 M
c)	Package-8C2	Landside buildings and Landscaping	1000 M
d)	Package-10	Cargo Complex and allied works	500 M

13. The contract of Package-8A was awarded to M/s LTH JV for a cost of Rs.6,852.506 million against Rs.5,000 million. The findings of the Committee on this issue are as under: -

- i. This works package was awarded to M/s LTH JV at a contract cost of Rs. 6,852.506 million. Incidentally, this is again the same contractor as of Package 1 who emerged as the lowest contractor for this works package which involves construction of internal road works of the NBBIA Project, Departure level bridge, Water works, Sewerage treatment plant and water treatment plant. The main reasons for delay in execution are interfacing issues between the contractors, lack of available design information and affect of flooding due to unprecedented rains.
- ii. The physical progress upto September, 2012, has been reported as 28.3% against the contractual completion date of March, 2013. The contract is expected (as reported) to be completed by the planned date provided special efforts are made."

The contract of Package-8B was awarded to M/s Siemens Pakistan Ltd. at a cost of Rs.2,005.789 million. As per revised PC-I the expected cost increased to Rs.2,025 million and was supposed to be completed by September, 2012. The findings of the Committee on this Package are as under: -

- i. This is also a component of Landside Infrastructure for which separate contract has been awarded to justify increase in cost of component. According to sponsors, these items were not part of the approved PC-I therefore, have been added to the scope. However, perusal of PC-I indicates that necessary provisions were made in the approved PC-I on lump sum basis for these jobs.
- ii. Physical progress achieved, after lapse of the contractual completion period in September, 2012 is as low as 2.5 %. In such circumstances, action should have been initiated against the defaulting contractor according to contractual obligations. However, no such action has been taken. The contract is expected to be completed by December, 2013

with a delay of 15 months as reported by Project Authorities. The planned execution period has expired in September, 2012. However, the contract is being implemented without giving any extension."

The Package-10 was not included in PC-I but was part of the revised PC-I with allocation of Rs.500 million. However, no progress on the contract was reported by the Project Authorities.

14. With regard to heading **"PERIPHERAL FACILITIES"** it was mentioned in the report of the Committee that as per arrangement CAA was to provide funds for the development of its own resources within the boundary of the new airport while the Prime Minister had directed to provide funds from the PSDP for infrastructure development works to make the Project fully functional.

In the end the Inquiry Committee under the heading **"CONCLUSIONS"** gave its findings, relevant therefrom are reproduced hereinbelow: -

1. While undertaking the comprehensive study of the project NBBIA, a clear picture has emerged which is indicative of the fact that the project has been beset from inception to its present stage by numerous issues and problems basically generated due to inappropriate planning of this mega airport project, which was followed by an inefficient implementation strategy.
2. It is worth mentioning that in the development of this scheme from its commencement to the execution stage, the Planning and Development Department of the CAA had a pivotal role to play. However, this setup has not been able to perform and deliver according to the dictates of the demand, which can be mainly attributed to its lack

of capacity and expertise, essentially required for a project of this magnitude.

3. A clear cut vision was neither developed nor available, through preparation of a road map based on critical path analysis of all major activities connected with the project. The CAA Board therefore was forced to take decisions at various stages of the project implementation on the basis of inaccurate assessment /analysis presented. This led to addressing the emerging eventualities only and that too on a short term basis with its obvious implications.
4. Ideally the overall project planning should have set out in detail as to how the Employers requirements are to be implemented. However, this deficiency in planning resulted in major implications in financial terms as well as in attaining the desired level of physical progress of various components. These are now summarized / concluded as follows;

4.1 Feasibility Studies

- I. The first feasibility study conducted in 1984 was meant to compare the merits of either to upgrade the existing airport at Chaklala or construct a new airport at Pind Ranjha. The report finally recommended the latter option and a master plan was prepared based on certain projected figures for year 2000 just catering for basic components, with an indicated cost of Rs. 1.267 billion. The final Master plan prepared in 2006 by M/S LBG, updated the data of the initial plan, however it missed out on certain essential details / components. This aspect was also over looked by P&D Dept. of CAA during its scrutiny / process of approval.
- II. Thus the original PC-I prepared on the basis of the final Master plan lacked clarity, realistic costing and missing out of certain essential components. It can be concluded that PMC failed in its responsibility to prepare a comprehensive PC-I for the project. R&D Dept. of CAA is equally responsible for this

negligence as it too failed in addressing the above mentioned weaknesses during the process of scrutiny/vetting of the PC-I.

4.2 Land Procurement

- i. Acquisition of land was started in 1986 through 2008 and 3,287 acres of land was purchased against requirement of 3,155 acres recommended in the Master plan, with an average cost of Rs. 277,037 per acre, which is 22 times higher than the cost estimated in feasibility study of 1984. The prolongation of the process of procurement has not only led to substantial cost escalation but has also effected the process of planning / execution, where in certain essential portions of land like the access to the airport for construction activities were not procured.
- ii. No serious effort appears to have been made to clear / take possession of left over embedded areas in the acquired land; where reportedly over 80 persons are still residing, with obvious security implications.
- iii. Due to lack of comprehensive assessment undertaken initially and because of certain arbitrary decisions taken for altering the scope of work during the currency of the project, the available land is considered now insufficient by the project authorities for housing the projected commercial facilities and construction of the second runway to cater for future operational requirements. The additional requirement of land as indicated is about 1500 Acres.
- iv. This is a reflection of poor planning by the PMC, superimposed by lack of correct assessment and scrutiny by the P&D dept. of CAA.

4.3 Role of PMC, Design Consultants, PMU and CAA

- i. The Project Management Consultants comprising M/s Louis Berger Group of USA and ECIL were engaged in Dec 2005 by CAA, through a proper process of prequalification. The quoted cost of Rs. 351.8 million the PMC was later enhanced to Rs. 374 million at the signing of the contract, on the plea that PMC will have a panel of 3 international experts in their group. The period of PMC's contract ended in Feb 2011, which was renewed in Nov 2011 with retrospect effect having extended date of June 2014. The decisions given by the PMC during the intervening period have no legal cover, though it has been covered by the retrospect effect approval.
- ii. The services of ECIL were not dispensed with in the renewed contract based on their substandard performance instead their role was relegated to that of a sleeping partner by LBG (PMC). However, no legal action was initiated against the PMC, which reportedly was responsible for causing enormous delays besides not providing the desired services since 2010. M/s LBG was facilitated / allowed to associate with NESPAK, with no punitive action taken against the PMC for non performance. The responsibility solely lies on the PD and P&D Dept. of CAA.
- iii. Placing NESPAK in the Project Management Group, when the same firm was also involved as a design consultant is a fundamental violation of the internationally approved principles of project execution. Though in certain works the design and supervision can be entrusted to one firm, but it is only done at the initiation of the works. In the instant case induction of NESPAK during the currency of the project in the management position has led to numerous problems including prolongation in the contracts period.
- iv. There have been repeated complaints about the delays in submission of designs by M/s CPG (Singapore) and M/s ADPi which has been a major source of delays in execution of all

packages. However, CAA has been unable to provide the record pertaining to the actual dates of submission of designs so that the delays can be translated into authentic information causing loss to the public exchequer. However, the aspect about frequent changes ordered by the CAA at various stages of the project implementation has also contributed towards delay in timely submission of designs/drawings. As per the latest state obtained almost 95% design work has been completed.

- v. M/S Louis Berger Group of USA as the lead partner in the PMC/JV was required to place 16 experts (all expatriates) — Refer. Annex VII in various fields, beside the locally hired engineers / staff, for the purpose of management. However, as per the actual deployment, the presence of the expatriates has been minimum, for instance in **Dec 2010**, the number was **Expatriates 2, local 27, NESPAK 23, May 2011, Expatriate 1, local 50, NESPAK 22, Current, Expatriates 4, local 70**. Thus the sole purpose of engaging M/s Louis Berger Group as lead partner appears to have been defeated. No concrete action was initiated against the PMC/JV. Responsibility lies with the PD.

- vi. The splitting of this project into 17 different packages has been the main cause of delay in execution, cost over runs and interface problems between contractors. The PMC as per the “Minutes of Contract Negotiations” had clearly recommended the division of work into two/three main contracts, however subsequently CAA accorded approvals for awarding different packages separately. The stance taken by CAA, that this too was done on advice of PMC, does not hold ground as they (PMC) only endorsed the decisions taken by the client. The main reason for splitting the works is due to delay in timely provision of designs and the urge to show progress on ground. This has led to mismanagement of the project, for which the P&D dept of CAA and PD are to be blamed.

- vii. The provision of Flexible Pavement for the runways instead of a Rigid Pavement is an issue that was discussed in the 7th meeting of the CAA DWP held on 19 March 2008, where in it was directed that the provision of "Rigid pavement instead of Flexible pavement should be examined and cost estimated accordingly". However, no response has been furnished by the project authorities as to why the Designer went ahead with designing of flexible pavements, despite the merits of a rigid pavement over a flexible pavement in terms of the very high cost of maintenance for provision of overlays after every 10 years for a flexible pavement.
- viii. As per the prevailing practice of FIDIC or PEC based contracts the bills of the contractors for actual work done are verified by the Consultants before payment. However, in case of claims, these are first referred to project authorities for their views and clearance and are then verified by the Consultant / Engineer (PMC in this case) for allowing payments. The insertion of sub clause (e) under the heading certificates and payments clause 60.1, in all ongoing contracts, has accrued the benefit to the contractors to lodge claims directly to the PMC. The consultant/Engineer PMC has been vetting/ recommending these payments ON ACCOUNT which made it mandatory for the client to allow payments for claims.
- ix. The major beneficiary on this account has been the JV (Logan -Tech-Habib), who has already received payment worth over Rs. 4.0 billion, with verified claims of Rs. 0.5 billion lying pending for payment. Over and above these, claims worth over Rs. 5.0 billion are pending with the PMC. This is a major drain on the project, and existence of this provision in the contract is an indirect enticement to the contractors to prolong the execution period to generate claims. This practice has been discontinued in the recently awarded work (one contract only) through appropriate structuring of contract document. However, all ongoing contracts have this provision with huge financial implications. This needs to be addressed through mutual consultations / negotiations with the contractors, as there is no clear cut legal remedy available. This is a very

serious lapse on part of the P&D dept of CAA which without due deliberations concluded these contracts.

- x. Arbitrary decisions taken by the client at various stages of the project has led to not only major cost escalations, but has also indirectly affected the scheduled working of the overall design process. This has further delayed the process of award of contracts and execution of work. Various committees / oversight bodies constituted at different stages gave recommendations for major changes in the scope of the project, which were then approved by the CAA Board. The Board obviously cannot be blamed as it was not a technical forum to deliberate / discuss such matters in the absence of detailed technical studies. Some of these issues are indicated as under:
 - a) The change in the scope of the terminal building (PTB) in utter disregard to the planning parameters of the Master Plan / feasibility study (2006) initially designed to cater for 6.5 mppa, for midterm period up to 2020 was enhanced to 9 mppa, which was the ultimate figure for third phase of development up to year 2035. This excess space created on the completion of PTB, will most likely remain under utilized, though it has caused major design changes, delay in execution and enormous cost increase.
 - b) Under the package 01 the contract was awarded for construction of one Main Runway, Parallel taxiway and link taxiways to cater for the needs of air traffic load of 2020, as per the approved Master Plan of NBBIAP. It was also decided that the parallel taxiway could also be used for an emergency landing if the situation so arose. Subsequently the parallel taxiway was converted into a full fledged secondary runway by the CAA on the recommendations of the Steering Committee which held its meeting in Dec 2010 and accordingly its Specifications were modified. The accumulated financial effect for this major change is around Rs. 3.4 Billion. It is pertinent to mention that due to

distance of 230 meters instead of 1030 meters between the two runways, simultaneous flight operations cannot be undertaken.

- c) These changes made during construction of Airside pavements have further generated the requirement of a 3rd runway for future operations, with cost effect of Rs 8-10 Billion including parallel Taxiway but exclusive of cost of land. Another serious issue is regarding provision of lighting system for the, Secondary runway. As at night only one runway can be used for operations because of the absence of appropriate lightening system for taxi operations. Other proposed option given by CAA is to add link Taxiway for the landing aircrafts to go all the way to the end of the runway.

- d) The Airside Infrastructure contract was awarded in August 2008 to M/s Lagan-Husnain JV at a cost of Rs. 11,825 million. The progress of this package till January, 2010 stood at only 7-9% against the planned progress of 65%, primary reason being internal rift between the JV partners. Termination Notice was issued to the JV by the project authorities on instructions of M/o Defence. In sharp contrast to the contractual obligations requiring termination due to default/imposition of penalties and re-award of a new contract, the CAA on the recommendations of a Committee under the chairmanship of Joint Secretary Admn. M/o Defence allowed formation of a new JV (Lagan 60% TAPL 35% and Habib 5%) with exclusion/addition of partners to implement the contract on the same terms & conditions.

Though provided in the above mentioned contract of JV to change its composition but only in the event of normal performance by the JV. However, in this case the JV was at a default stage, and the only course available was to terminate the contract. Despite recommendations of the PMC for termination of the contract, undue favor was given to the new JV by taking all the responsibilities of delays by the Project Management, which has accrued the right of claiming idle charges by the new JV. This has already resulted into payment of charges/claims of Rs. 3.5 billion till to date to the

new JV, with Rs 0.5 Billion claims vetted and pending and another Rs 5.0 Billion claims already lodged. This has resulted in to not only enormous increase in the contract value but also has caused expected 30 months delay in the contract implementation.

- xi. There have been frequent changes of the Project Director i.e. Five Project Directors have worked during the period 2006 - till date 2012, which has adversely affected the progress and management of the project as a whole. The bifurcation of the project in to numerous packages entailed proper staffing of the PMU, with experienced and technically sound engineers who could oversee and coordinate the various activities with contractors and the PMC. This however has remained a weak link. There has been some improvement in the physical progress of the project during last six to seven months, however, there is an urgent need to further restructure and strengthen the PMU, besides delegation of appropriate authority to the PD for facilitating site decisions.

The Committee also gave its recommendations, relevant therefrom are reproduced hereinbelow: -

"2. Way Forward

- viii. The CAA may take immediate action against the defaulting consultants / contractors while remaining within the contractual provisions, after due consultation with the legal and financial experts. Where required EOT (extension of time) be granted in the contracts for regularization of payments being made, while keeping the Client's interest in view.
- ix. The issue of contractor's claims is a sensitive issue, which needs careful handling. The amount of over Rs. 3.5 Billion paid "On Account" to the JV (Logan - Tech - Habib), against claims has been made on recommendations of PMC (Engineer), based on provisional supporting record. PMC must be instructed to provide complete authenticated/verified record of these claims

as per contractual obligations, before recommending fresh claims of the JV. Future claims of other contractors must also be dealt with, in a similar manner.

- x. The development and functioning of the Fuel Farm may be accorded priority, CAA needs to pursue this aspect on a priority basis.
- xi. CAA should follow up with M/O Communication, NHA, CDA, IESCO and Planning Commission for expediting the progress of peripheral Road net work and Electric supply connection to NIBBAP.
- xii. In the context of construction of link road to NBBIAP, CAA has to provide assurance to NHA for timely operation of the airport failing which the Concessionaire (FWO) is to be compensated by NHA on the basis of projected revenue in case of delay in operation of the project.
- xiii. The feasibility studies for sub soil water exploration and construction of Dam to meet the long term needs be initiated immediately. CAA may finance these initiatives to save on time.
- xiv. An independence monitoring mechanism may be put in place under the DG CAA with members from Planning Commission and MOD. The team should review the progress of the project against the revised execution plan prepared by the PMC on monthly basis. The team may also oversee the process of amicable settlement of contractor's legitimate claims and coordinate with various Government Agencies for expeditious development of peripheral facilities. The team leader should furnish progress reports to MOD and Planning Commission on regular basis.

15. It is important to note that until the institution of instant petition, report was not put forward for implementation, inasmuch as without prejudice to the case of either of the parties, it was also not made public. On 12.7.2013 National Accountability Bureau, Rawalpindi addressed a letter to the Secretary CAA which instructed firstly that after filing the report on 06.07.2013 letter was addressed to the Cabinet Secretary by the NAB, in pursuance whereof the Secretary Aviation was required to immediately provide copy of the Report of the Inquiry Committee to the NAB; and secondly that the competent authority has taken cognizance of the offence committed by the officials/officers of CAA under the provision of NAO 1999 and was requested to direct the focal person to provide certified copies along with Inquiry Report.

16. The Auditor General of Pakistan also highlighted irregularities and illegalities in the payments made to the contractors. Relevant paras therefrom are reproduced hereinbelow: -

"3.4.5 Irregular payment due to unauthorized Change of Joint Venture- Rs.7,811.23 million

Rule 19(iv) of General Financial Rules (Vol-I) provides that the terms of a contract once entered into shall not be materially varied without the previous consent of the Authority competent to enter into the contract as so varied. No payment to contractor by way of compensation or otherwise, outside the strict terms of the contract or in excess of the contract rates may be authorized without the previous approval of the Ministry of Finance.

During audit it was found that an Agreement for Package-I airside Infrastructure (Civil Works), of the project Construction of New Benazir Bhutto International Airport was signed between Civil Aviation Authority Limited and Joint Venture of M/s Lagan-Husnain, comprising Lagan Construction Limited and Husnain Cote Ltd with Lagan Construction Ltd as lead partner on July 24, 2008 with bid cost of Rs 11,825.30 million with completion period upto August 27, 2010.

Audit further found that the ibid Joint Venture with whom the agreement was executed, was changed from Lagan-Husnain to Lagan-Technical-Habib in January 2010 during the course of execution of works. Audit holds that sanctity of bidding was completely compromised and the work was awarded to the new Joint Venture without calling for open tenders. Deed of Accession was signed by the Project Director whereas, original agreement was signed by the Director General for and on behalf of CAA. The Joint Venture change was signed by the Project Director (BBIAP) without authority and provision of clause in the agreement. It was also noted by Audit that M/s Lagan (the lead partner) has not fully mobilized on the Project and the Project was being solely executed by M/s Technical Habib in violation of contractual parity of 60:40. thus payments of Rs 7,811.23 million made to Lagan-Technical-Habib (JV) through unauthorized change, stand irregular.

Audit maintains that the irregularity occurred due to inadequate oversight mechanism for enforcing relevant rules, regulations and weak internal controls.

Audit communicated the observation to the Authority in September 2012. The Authority replied that the change in the constitution of the Joint Venture was duly approved by CAA Board. The change in the constitution of the JV wherein the lead partner joined hand with M/S Technical Associates Pakistan (Pvt.) Ltd. and M/S Habib Construction Services (Pvt.) Ltd, to assume all the contractual obligations under the existing contract without any amendments, was duly approved by the authorized representative of the Employer i.e. the Project Director. The reply was not tenable because change of Joint Venture was without reference to any provision in the contract agreement. The registration of Lagan-Husnain Joint Venture was for the mega project which was ultimately terminated when the composition of the Joint Venture was changed.

The matter was discussed in the DAC meeting held on December 17-18, 2012. The Committee directed the CAA to conduct a Board of Inquiry. The Committee further directed the CAA to stop further payments and submit revised reply within 7 days. The compliance of DAC's directives was not reported till finalization of this Report.

Audit requires implementation of DAC's directives.

3.4.6 Invalid Engineer's decision involving Rs.3,552.30 million and overpayment Rs.1,556.46 million

Federation International Des Ingenious Conseils (FIDIC) Policy Statement describes that during the course of construction, the consulting engineering firm was charged with the responsibility of exercising discretion in accepting materials, expressing satisfaction or approval, determining quantities and giving opinion, consent or decision. The proper and impartial exercise

of that responsibility in the client's best interests was at the core of the consulting firm's role and was the essence of the FIDIC System.

During audit it was found that CAA (Project Director New Benazir Bhutto International Airport, Islamabad) accepted adverse Engineer's Decisions involving a sum of Rs.3,552.30 million in respect of Package-I; Airside Infrastructure in favour of the contractor M/s Lagan-Technical-Husnain, JV against which a sum of Rs.1,556.47 million was paid to the contractor in settlement of dispute under "The Engineer" decisions No.1 to 10. It was also noted that payments were made prior to approval of the Dispute Review Board. After making the payments the Authority applied to the Dispute Review Board. It was further noted that after award, the key officials i.e. Construction Manager and Construction Control Specialist were changed without authorization/approval of the Client.

Audit also observed that Interim Payment Certificates/decisions were signed by the representative of the Engineer, without any delegations and/or authority by the Engineer or the client. It was further noted that the Project Manager also left the project after certifying the unjustified claims which were decided in an unauthorized manner. Mr. James McClung signed the decisions as "The Engineer" without authorization from Louis Berger Group and without any authority from the Employer to act as "The Engineer". The decisions regarding claims/extension of Time were made by the consultants without consultation and approval of the client. IPCs were signed without any supporting data,

back-up details, certification, endorsement and calculations of the amount of the claims. It was further observed that to cover up human resource gap, CAA entered into an extra-contractual arrangement with another firm. In March 2010, a firm was engaged by CAA in the Project Management team in place of the previous firm (a Joint venture firm with M/s Louis Berger) as per decision of the Monitoring Committee NBBIA on March 16, 2010. As per invoice No.19, a monthly remuneration of Rs.173.29 million was paid to the firm from April, 2010 to November 2011. Simultaneously, M/s Louis Berger was also paid for the local component (ex-firm portion). The payment made to the firm was for Rs.33.00 million. Audit holds that due to complete management failure, invalid decisions and change in the positions of key personnel without provision in the contract, resulted in irregular expenditure of Rs.1,556.47 million.

Audit maintains that the irregularities occurred due to inadequate oversight mechanism for enforcing relevant rules, regulations and weak internal controls.

Audit communicated the observation to the Authority in September 2012. The Authority replied that the matter was already being contested in the Dispute Review Board.

The matter was discussed in the DAC meeting held on December 17-18, 2012, wherein the Committee observed that invoices were signed by the person who was not "The Engineer" and made decisions against the interest of the project/Authority. The Committee directed to conduct a Board of Inquiry. The

Committee further directed to stop further payments and submit revised reply within 7 days. No compliance of DAC directives was reported till finalization of this Report.

Audit requires implementation of DAC's directives.

17. This Court vide order dated 9.7.2013 also issued notices to the counsel appearing for CAA as well as Contractors to file their reaction both on the report of Lt. General (R) Shahid Niaz as well as on the report of Auditor General of Pakistan.

18. Mr. Shahid Hamid, learned Sr. ASC appearing on behalf of Ch. Muhammad Muneer (Respondent No.4) has submitted reply (CMA 4460/2013) stating therein that his client is not the contractor of New Benazir Bhutto International Airport at Islamabad, therefore, notice issued to him (respondent No.4) may be discharged/recalled.

19. Mr. Shah Khawar, learned Additional Attorney General for Pakistan submitted parawise reply to the petition through CMA No.4491/2013 wherein, *inter alia* it was partially admitted that the cost on the construction of NBBIAP has escalated because of the corruption of higher echelons of the Administrative and political structures in-charge of the project. It has also been mentioned in his reply that the recommendations of the Inquiry Committee headed by Lt. General (R) Shahid Niaz has been partially implemented and now the case has been referred to the NAB to investigate the matter for identification of the delinquent officers/officials.

20. M/s Sambu-Sachal-HRL (JV) submitted its reaction (CMA 4768/2013) to the Inquiry Report stating therein that there was

nothing against it either by the Inquiry Report or by the Auditor General. M/s Sambu-Sachal submitted its bid for Package-3A for construction of Pile Caps for the Terminal Building, which was accepted by CAA being the lowest bid for Rs.470,815,404/-. The project got delayed for five months due to some technical problems and extraordinary unprecedented rains in 2011, which was accepted and agreed by both the consultant and the employer i.e. CAA. The contract was completed within the contract cost and taking over certificate was issued, thus, the project stood contractually completed in all respects without any dispute.

21. Mr. Imtiaz Rashid Siddiqui, learned counsel appearing on behalf of M/s Siemens Pakistan Engineering submitted CMA 4845/2013 stating therein as under: -

- i. This august Court, with reference to the proceedings in the titled petition has noted that (a) there has been delay in timely completion of NBBIA (b) as a consequence of the same, NBBIA's cost has increased from PKR 35 Billion to over PKR 90 Billion; an overrun ostensibly due to corruption and (c) the DG (CAA) appointment is against the rules.
- ii. Pursuant to the aforesaid, the august Court has sought reply /comments' in addition DG CAA was directed to serve notice on all contractors. The contractors present before the Court, on to submit their directors and shareholders passports with Court and also to submit undertaking that they will not travel outside Pakistan without the permission of the Court.
- iii. The aforesaid observations of the august Court has been based on the conclusions drawn from (a) Report prepared by

General (R) Shahid Niaz and (b) the Auditor General of Pakistan. The Apex Court, has reproduced the "Conclusion" from the Report at serial "a" in its order dated 9.07.2013.

- iv. It is stated with respect that there does not exist any adverse comment/deliberation/observation with respect to Siemens Pakistan therein. The relevant portion of Report at serial number "a" is at pages 46, 47 and 55. The same relate to "Package-7A Airfield Lighting System" [The major components: Laying of cables for airfield lighting, runway lighting, taxiway lighting, installation of runway lights, installation of taxiway lights, establishment of control desk, construction of vault station, installation of transformer housing etc.] and Package-8B- Electrical power and telecommunication [the major components: Road lighting, laying of MV and LV cables, substations, etc.]
- v. The narration of events and comments viz these Packages, are general in nature and do not impinge on the performance/status of Siemens Pakistan at NBBIA.
- vi. In fact a perusal of the Report and appreciation thereof shows that Siemens Pakistan, has been hampered from performing its job due to various factors; some of these, in brief, are mentioned herein under:

["Package-7A Airfield Lighting System"]

- a) Conversion of Parallel taxiway was converted into full fledged secondary runway by CAA due to which our work stopped and on hold by CAA for approx 6 months hence adversely affected

- our execution activities and overall completion of the project.
(Refer Report of Lt. Gen ® Shahid Niaz Page-66]
- b) Change in the Method of laying of UPVC pipes i.e. pipes will be fixed using the Conceret instead of Sand (Our Letter Ref. IS/INF/NBBIA/7A/HO/000010 dated December 10, 2009)
 - c) Design Information Missing (Our Letter Ref.IS/INF/NBBIA/7A/HO/0030 dated March 17, 2010).
 - d) Design Issues (Our Letter Ref.NBBIA-P7/Site-0088/Gen.001 dated Sep, 02, 2010)
 - e) Delay due to Inter-related activities with Package -1 Contractor (Our letter Ref.NBBA-P7/Site-0088/Gen.001 dated Sep, 02, 2010) and Civil Aviation Authority – Caa Letter Ref. PD (BBIAP)/6280/52/Proj/-327)
 - f) Work Access Problem in different areas. [Refer Report of Lt. Gen (R) Shahid Niaz Page 69 (4.5, i)]
 - g) Rework due to Damages done by civil contractors to the laid UPVC Conduit & AFL cable.
 - h) Variation Orders (200mm UPVC pipes, LED TWY and Guidance Signs, UPS 200KVA, collapsible apron lighting mast, CTBC, FM200, TWY K ext)
 - i) Thef of AFL, LV and MV cable due to the airfield parameter not properly secured by employer, hence resulting in causing losses to Siemens Pakistan despite the fact Siemens Pakistan at its own cost and expense increased the number of security personnel's over and above which could have been reasonably forseen.

[Package-8B – Electrical power and telecommunication"]

- a) Design issues particularly utilization of energy efficient lights (CAA Letters Ref. PD (BBIAP)/6279/12/E&M-585 dated Jan 17, 2011, PD(BBIAP)/6279/12/E&M-591 dated Jan 20, 2011, PD(BBIAP)/6279/12/E&M-739 dated Feb 24, 2011, PD(BBIAP)/6279/12/E&M-99 dated Mar 10, 2011 etc.)
 - b) CAA initially asked to opt for LED Light fixture but after lapse of almost two years they decided to go for conventional as per contract and then again changed its decision and decided to go for LED Light Fixture.
 - c) Delay due to the non availability of work schedule of Civil Contractor Package 1/8A.
 - d) Work Access Problem in different areas.
- vii. It is humbly submitted that a reference to Page 60 and para-3 of Gen (R) Shahid Niaz's Report, shows that the delay has been attributed to award of 132 KVA Grid Station and 132 KVA transmission lines; thus Siemens Pakistan cannot be held responsible for the delay in completion and commissioning of Project 7A and 8B as the same is dependent upon completion of 132 KVA Grid Station and 132 KVA transmission lines.
- viii. It is also submitted that despite all odds, referred to afore, Siemens Pakistan has already accomplished 85% of the works at Package-7A; the remaining is dependent on timely provision of "work access". In case this is also given as per schedule, the entire work can be accomplished on or before January 2014.

- ix. Similarly despite all odds, referred to afore, Siemens Pakistan has already accomplished 45% of the works at Package-8B: the remaining is dependent on timely provision of "work access" and "drawings". In case these are also given as per schedule, the entire work can be accomplished on or before January 2014. Siemens Pakistan submitted an advance payment bank guarantee of PKR 300 Million to CAA against which CAA only disbursed advance of PKR 150 Million. It is noted here that Siemens Pakistan has performed 100% of the work against the advance payment of PKR 150 Million received from CAA.
- x. It is pertinent to mention that Package 7A values approximately PKR 1 Billion and Package 8B values approximately PKR 2 Billion; these are minor part of the entire Project and the nature of the work with Siemens Pakistan, by itself, could not delay other contractors at NBBIA.

Indeed claims/payments of Siemens Pakistan have been delayed and pending; despite the same, notwithstanding difficulties, Siemens Pakistan has accomplished substantial performance.

22. Mr. Ali Raza, ASC has filed concise statement (CMA 4846/2013) on behalf of M/s China State Construction Engineering Corporation (CSCEC) in reply to the notice. It has been stated that CSCE is the lead partner of the Joint Venture with Frontier Works Organization (FWO) who bid for and was awarded the contract for Package 3 of the construction project of NBBIA. Package 3 consists of construction of the Passenger Terminal Building including all associated utilities and electromechanical works etc. Initially the project was divided in two packages which later on sub-divided into more than 14

different packages. It has been admitted that completion of the Project is delayed and expected to be concluded by March 2014 as per estimates of CSCEC-FWO JV. However, in response to Inquiry Committee Report and Auditor General's Report it has been stated that no specific observations have been made against the Company. However, general findings of the Inquiry Report are pertinent. In principle, the Inquiry Report has aptly highlighted the failure of the employer (CAA) and the project management consultants. In any large-scale project of this nature the international practice is to ensure a central and singular project consultant/engineer and similarly a singular project design consultant with the construction of the project preferably divided into as few packages as possible to ensure coordination and avoid conflicts and roadblocks which would necessarily arise on account of delay of work by any one contractor. This is one of the principal practices lacking in the NBBIAP and the cause of majority of the problems. It has been further submitted that CSCEC was initially informed that only 10% of the Site would be handed over by the end of June 2011 but the first portion of the Site was handed over in July 2011 and the remaining portions of the Site was handed over in bits and pieces over the next year and portions of the Site still remain to be handed over to Company.

23. Mr. Uzair Karamat Bhandari, learned counsel for M/s Louis Berger Group (Respondent No.5, hereinafter referred to as "LBG") in his reply (CMA 4847/2013) stated that LBG's consultancy services were engaged for project management after its proposals, both technical and financial, were considered by the Prequalification Committee ("PQC") constituted by the CAA, to be of the highest

standard of the six firms which submitted proposals. According to him, it is acknowledged in the Inquiry Report (at pages 20 and 21) that LBG's appointment was made through a lengthy procedure which complied with the requirements of due process, and did not suffer from any lack of transparency. On 06.01.2006, LBG, in association with Engineering Consultants International (Pvt.) Limited ("ECIL"), was formally engaged by the CAA as a Consultant for the Project Management, through a contract executed between the parties (the "Consultancy Contract").

24. The learned counsel also submitted that many of the observations made in the Inquiry Report stem from misconceptions as to the actual scope of LBG's duties under the Consultancy Contract in relation to the Project. Therefore, it is important to dispel any misinformation on these matters at the offing, and also provide the context in which LBG's response to specific allegations (contained hereinbelow) may be read and understood. LBG was not engaged to do the work of a Project Manager, in the fullest sense of the word, an erroneous presumption from which many of the allegations against LBG stem. LBG's role was to provide certain consultancy services in relation to project management, and this envisaged the coordination of the overall Project, not de facto project management. It was submitted that though LBG provides such services across the globe in various projects, but its appointment for the Project did not include design consulting. Furthermore, LBG did not have the authority to control the Contractors, and was required to obtain the prior approval of CAA before exercising many of its powers and discharging many of its functions. LBG's role was that of a consultant/advisor to CAA, and the

final decision in most matters rested with CAA. Therefore, LBG cannot be blamed or held liable for the deficiencies of the Design Consultants and their designs, or for actions (or the lack thereof) taken by them or the Contractors under the directions of CAA.

25. According to the learned counsel, LBG as the consultant to CAA under the Consultancy Contract, and as the Engineer under the Construction Contracts with the Project Contractors, had a duality of role. As an advisor to CAA, LBG carried out certain acts on behalf of CAA, for example giving instructions to Contractors as to variations in works. At the same time, however, LBG owes a duty of care to the Contractors to administer their contracts in accordance with their true intent and purpose. This duality of role is underappreciated by both the Contractors and CAA, as well as in the Inquiry Report and the Audit Report, which is the cause of many misconceptions.

26. It was further submitted that LBG was dependant on CAA to provide it with the requisite funds, without which services could not be rendered. It was also in need of facilities by way of offices, equipment, accommodation, and transportation to meet the demands of the job. CAA has failed to provide LBG with the funds and facilities which it was contractually bound to provide. It has been guilty of non-payments, reduced payments, or delayed payments on some pretext or the other. It was further submitted that the significance of the role of the Design Consultants in all that has gone wrong with the Project cannot be overstressed, and it finds specific mention in a number of paragraphs of the Inquiry Report. The submission of designs took place over a protracted period and in a piecemeal fashion. The consequence of incomplete designs trickling in over an extended

period was for construction works to be split up into numerous smaller packages (seventeen in all) and awarded to multiple contractors. This in turn has created a logistical and management nightmare for the Project. As admitted in the Inquiry Report, LBG had advised CAA during the Consultancy Contract negotiations, to opt for two (2) contract packages in order for work to commence earlier and to ensure a better end-product; one contract to cover the airfield, taxiways, utilities, water, drainage, fuel farm and lighting etc., and the second contract for the terminal and ancillary facilities. These design defects have often caused the Contractors' works to be unbuildable as tendered. CAA ought to have ensured the completion of all designs prior to the awarding of contracts for construction, political pressure to commence work meant that such a course of action was not pursued.

27. It was further submitted that the Inquiry Report acknowledges that it has been drafted in the light of incomplete information provided by only one of the stakeholders. Therefore, the reliance on incomplete, one-sided information by the Inquiry Committee can hardly be considered to afford due process to the parties concerned. Further, LBG was not associated with the inquiry in any capacity. Hence the principles of natural justice were not followed by the Inquiry Committee, and to the extent the Inquiry Report makes any adverse findings or remarks, they cannot prejudice LBG's rights. The Inquiry Report has given findings and reached conclusions which are based on misconceptions and incomplete facts. Therefore, the Inquiry Report rightly shies away from assigning responsibility for the Project's failings. In a nutshell, the Inquiry Report identifies the possible issues and problems which have afflicted the Project, but

essentially calls for a further probe and inquiry on those matters. The Inquiry Report acknowledges that the breaking up of the Project into seventeen packages flew in the face of established practices, and was contrary to the specific advice from LBG that the Project be executed through two contracts.

28. Mr. Mohammad Asad Rajput, ASC has filed reply on behalf of Frontier Works Organization (FWO) through CMA 4848/2013, wherein it has been stated that a Joint Venture Agreement was made between CSCEC with 70% share and FWO with 30% share. They were awarded the contract for package-3 i.e. Passenger Terminal Building (ETB) Superstructure including Associated Utilities and E & M Works. After acceptance of Bid, the Civil Aviation Authority issued letter of acceptance on 20.04.2011 and agreement for the work was signed on 06.06.2011 whereas letter of commencement was issued by the Project Manager M/s LBG on 08.06.2011, as such Site for construction of Package-3 was handed over to FWO (JV) on 10.01. It has been stated in the reply/comments that the Inquiry Report is an in depth analysis of the affairs of the BBIA Project as a whole.

29. Khawaja Haris Ahmed, learned Senior ASC has filed concise statements (CMA 4859/2013 and CMA 4860/2013) on behalf of M/s Lagan Technical Habib JV (LTH) in response to the Audit Report and Inquiry Report respectively. According to him, in Para 3.4.5 of the Audit Report it was found that the agreement was signed between CAA and Joint Venture of M/s Lagan-Husnain with bid cost of Rs.11,825.30 million but during course of execution of works Joint Venture was changed from Lagan-Husnain to Lagan-Technical-Habib., Thus,

sanctity of bidding was completely compromised. In this context, it has been averred that consent of the Employer (CAA) was duly obtained to the proposed change in the structure of the joint venture, in line with the provision contained in sub-clause 77.1 of the Particular Conditions of Contract. As such neither sanctity of the bidding was in any manner compromised nor was there any occasion for calling for open tenders simply because of composition of the JV was being allowed to be changed. With regard to the Audit Report that "Deed of Accession was signed by the Project Director whereas, original agreement was signed by the Director General for and on behalf of CAA", it has been submitted that same individual who has signed the Deed of Accession in terms of the instant contract had also signed (i) Letter of Acceptance for Package I and (ii) Letter of Acceptance and Contract for Package 8A. In any case, at no stage did the CAA intimate to the Contractor that the Project Director was not authorized to sign the Deed of Accession. As far as the mobilization is concerned, M/s Lagan is providing *inter alia* construction management advice, construction planning, its expertise in the implementation of the contract, key personnel for carrying out the monitoring of the construction at site, such as Project manager, Planning Engineer, Technical Manager and other staff besides exclusively contributing towards Performance Guarantee in the sum of Rs.1.182 Billion.

30. Regarding paragraph 3.4.6. (Invalid engineers' decisions involving Rs.3,552.30 million and overpayment Rs.1,556.46 million) it has been submitted by the learned counsel that Contractor submitted his monthly bills for interim payment which comprised of two sections, i.e. (i) work done (ii) additional sums due regarding

which Engineer's decision/Dispute Review Board determination had already been rendered in favour of the contractor but payment had not been made pursuant thereto. So far as the allegation of making payment prior to the approval of the DRB is concerned, reference of sub-clause 67.1 of the Particular Conditions of the Contract has been given. Relevant part whereof reads as under: -

....the Contractor and the Employer shall give effect forthwith to every such decision of the engineer unless and until the same shall be revised, as hereinafter provided in the Dispute Review Board or in an amicable settlement or in an arbitral award."

31. As regards the change of key staff of the Consultant it has been submitted that this matter pertains to CAA and the Consultant has no concern with the Contractor. Besides, the representative of the Engineer had sent to the Contractor a copy of his letter dated 27th August, 2008 containing confirmation of the delegation of authority by the Engineer to the Engineer's concerned representative. It has been submitted in respect of overpayment that no overpayment to the Contractor has been made and the contract requirements for the release of all payments were duly followed by the Engineer, while payment itself was ultimately made on the recommendation made by the Committee set up by the CAA itself.

32. In response to Inquiry Report by Lt. Gen. (R) Shahid Niaz, it has been submitted that as per the applicable provisions pertaining to both FIDIC and PEC based contract the procedure for processing the claims of the Contractor before payment is the same as the procedure for processing the claims of the Contractor before the payment is the

same as the procedure for processing the bills of the contractors for actual works done. As regards the observation given in the Report that a "Termination Notice" was issued to the Contractor on directions of the Ministry of Defence, it has been submitted that no such Termination Notice was ever communicated to the Contractor, and even as per the contents of the Report, no copy of any such notice was provided to the Inquiry Committee. It has been admitted that the progress of this package was very slow until January 2010. However it was due to the failure of the Engineer/Employer to perform their reciprocal promises under the contract. It was further admitted that the change in the designation of the emergency runway to secondary runway caused major design changes in the Air Field Lighting Design, which caused major delays to the Works under Package-I. In his reply, Khawaja Haris Ahmed, Sr. ASC has referred to following findings: -

1. As far as delay in the completion of the Works under the contract is concerned, it is submitted that the new JV is in no way responsible for the said delay.
2. So far as the factors contributing to increased completion cost over contract price are concerned, the same are replied seriatim hereunder:
 - i. The Contractor is in no way responsible for the additional cost of Rs.1.5 Billion due to conversion/intended use of a parallel taxiway into secondary runway.
 - ii. The change in scope of Works is not attributable to the Contractor. As regards the claims of the Contractor, the same can be legitimately raised under the terms of the contract which are in accord with international standards as per FIDIC and PEC requirements. It may be reiterated here that such claims are not paid automatically,

rather they are paid only after determination/decision and certification by the Engineer and in case of dispute, the matter is referred to the DRB (Dispute Review Board) and, thereafter, to arbitration in case amicable settlement cannot be affected. It is also absolutely incorrect to allege that the contractual obligations required the employer to go for termination due to default (of the Contractor) or for imposition of penalties and re-award of a new contract. The fact of the matter is that there is no provision in the contract that mandates the termination of the contract, imposition of penalties or re-award of new contract in case of concurrent delays i.e. delays attributable to both the Contractor and the Engineer/employer. Nor has any such provision of the contract been cited in the Report in reference. In any case, even where the default is attributable to the Contractor, it is the prerogative of the Employer to decide whether the contract should be terminated or not. In this respect it is noteworthy that termination of a contract of this size and magnitude is not a straight forward affair, particularly when the Employer is itself guilty of serious defaults in the performance of its various reciprocal obligations which had materially contributed to the lack of progress in the implementation of the Works. Indeed, termination of the contract by the Employer in the prevailing circumstances would have had serious repercussions in terms of increase in the cost of the project itself as monumental time and cost overruns would have ensued.....

- iii. The finding that PMC should have imposed penalty on the LTH-JV for the expected 30 months delay in completion period of the project is utterly misconceived, as there is no justification for the imposition of such a penalty ascertainable

from the record. Rather to impose this penalty would be unfair, iniquitous and breach of contract by the Employer.

- iv. This finding does not attribute any adverse comment on the working of the Contractor.
- v. It is correct that initially the contractual completion date was August 2010 but the physical progress up to September 2012 was 82.45%. However, it is reiterated that the primary cause for this delay was not due to the Contractor rather it was on account of the failure of the Engineer/Employer to perform their part of the contract. Rather it was due to non-fulfilment of obligations on their part Engineer/Employer. Be that as it may, it is not correct that the contractual execution period is being implemented without issuance of any extension letter to the Contractor. In this respect it is submitted that although the project authorities has that the contract project was to be completed in February 2013, this was an advice based on unrealistic premises and was clearly incorrect. In fact, the Engineer/Employer could not perform their obligations under the contract which was a precondition for the Contractor to complete his Works accordingly the Contractor had submitted extension of time entitlement details under letter ref No.1737, dated 17th December 2012 demonstrating entitlement up to 8th June, while a further submission was made on 9th May 2013 in letter Ref No. 1969 demonstrating extension of time entitlement up to 14th November 2014. Accordingly, extension of time was awarded in Engineer's decision 16 by letter dated 10th January 2013 up to 23 April 2013 and, subsequently, by letter dated 5 April 2013 up to 30th June 2013.)"

33. Barrister Syed Ali Zafar, ASC has submitted reply (CMA 4866/2013) on behalf of Habib Construction Service Ltd. (HCS) stating therein that HCS was invited to substitute Husnain, thus new Joint Venture was made as Lagan-Technical-Habib, with the consent of CAA. This consent was duly obtained from CAA who approved the deed of accession dated 28.01.2010. About 95% of the contracted works on NBBIA Package-I have been completed. All billing/accounting details are with LTH JV. However, HCS is aware that 10% retention money from each Interim Payment Certificate (IPC) remains with CAA. Balance 5% work is held up because of failure of other contractors to complete their work.

34. Concise statement (CMA 4867/2013) has been filed on behalf of Technical Associates by Miangul Hassan Aurangzeb, ASC stating therein that during the last quarter of 2009, when the works on the said contract were underway, TAPL was approached by M/S Lagan Construction Limited to form a joint venture for the execution of the remaining works on the said Contract. Lagan had also approached M/S Habib Construction Services (Pvt). to become a part of the joint venture with Lagan and TAPL, as earlier Joint Venture Agreement dated 02.04.2008 executed between Lagan and M/s Husnain Context Limited was terminated. However, M/s Lagan was appointed as leader of the LTH-JV with the responsibility to act as coordinator of the members of the LTH-JV's combined activities for the successful implementation of the Contract. Lagan was required to represent the LTH-JV in interaction and communications with CAA in all matters connected with the performance of the Contract.

35. Mr. Tariq Mehmood, Sr. ASC has filed reaction of M/s Al-Tariq Construction stating therein, *inter alia*, that the "Hydrant Refueling System Contract" was awarded in February, 2010 at a contract price of Rs.187.238 million. Mobilization advance was 15% of the contract price, which has already been adjusted from the running bills. ATL has achieved 95% of the assigned work. Opening of LC for import of various items material was an obligation of the client. After conducting several meetings with Engineering Development Board (EDB), Board of Investment (BOI) and the Central Board of Revenue (CBR), relief was allowed by the concerned departments, which process took 3 months. Besides, some other reasons have been assigned for delay in completion of the work i.e. delay in approval of fuel pipeline materials and opening of L.C., delayed decision in revision of design, delay in establishment of L.C. for other items, hindrance/delay in handing over of Site by other contractions, unforeseen site conditions, harsh weather condition and unusual torrential rains, etc.

36. Mr. Shahid Kamal Khan, ASC has filed concise statement (CMA 4905/2013) on behalf of M/S Xinjiang Beixin Road and Bridge Construction Company Ltd stating therein that 55% of the construction work has been received by the Company up to 18.55% only of the contract value. According to them work has been delayed due to following reasons: -

- (i) Delay in approvals of shop drawings, material submittals & decision by consultant (Engineer)/Employer.

- (ii) Delay in approval of variations to the contract by Engineer/Employer.
- (iii) Miscellaneous delay and obstruction to works by Engineer.
- (iv) Delay in approval of extension in completion time.
- (v) Obstruction in work due to other contractors.

37. Mr. Babar Ali, ASC has filed CMA No.4940/2013 in compliance of the order dated 12.07.2013 stating that Izhar Steel (Pvt) Ltd. has already completed the work as against the agreement dated 13.11.2012 for the construction of Cargo Complex and allied areas worth of Rs.650 million on March 2013 and has submitted an application to the CAA for the issuance of completion certificate vide letter dated 25.03.2013. Thus, neither the CAA nor any other person from the public at large has any grievance at all in respect of M/s Izhar Steel (Pvt) Ltd. or to contractual assignment thereof.

38. Sysd Ishtiaq Haider, ASC has submitted Concise Statement (CMA 4965/2013) on behalf of M/s Jaffer Brother, M/s GECI Espanola & M/s Murshid Builders (JGM) stating therein that a contract was signed on 10.12.2012 between JGM and CAA for Package-7B relating to supply and installation of "Navigational Aids & Air Traffic Control Equipment" for NBBIAP. The construction of the Air Traffic Control Tower (ATC) and the Radio & Radar Building is yet to be completed where the equipments which are being supplied by JGM under Package 7B are to be installed. The JGM approached CAA vide letter No.NBBIAP/P-7B-L054/06-11/2013 dated 13.06.2013 on the subject of delays being faced by JGM JV with regard to slow pace of System

Design Document (SDD) approval and non-completion of infrastructure. JGM has placed the orders for the supply of the equipment but the same will be supplied only when the required information is furnished and the Project commences on the approval of System Design Document. JGM is facing financial loss due to delay in the commencement and completion of the Package 7B.

39. Dr. Tariq Hassan, ASC, has submitted Concise Statement (CMA 4966/2013) on behalf on behalf of M/s Husnain Cotex Ltd. (HCL), wherein the responses were given to the reports of the Inquiry Committee as well as Auditor General of Pakistan. According to learned counsel, HCL is not involved in the construction of the Project at present. In fact, HCL has not been involved in the Project, in any capacity whatsoever, for over three years, since January 2010, rather was only a minority partner in the Lagan-Hasnain JV that was initially awarded the CAA Contract for the Project. However, in accordance with the provisions of the Operating Agreement (clause 12) and Joint Venture Agreement (clause 17), HCL exited the Joint Venture with Lagan and settled all outstanding rights and obligations with regard to the Joint Venture, with complete knowledge and accord of CAA. To this, a Settlement as well as Release Agreement was duly signed between HCL and Lagan, and the same were duly accorded to by CAA through a tri-party agreement dated 27.01.2007. The consequent departure of HCL from the JV was that 40% shares in the JV were transferred its to the majority partner (Lagan). HCL's exit from the Project, completed in accordance with the law and no extra claim or payments had been made to the JV. All variations and escalations in the Project have only been done much after HCL's exit from the

Project. HCL has been afforded no concessions or benefits above or beyond the strict contours of the CAA Contract with CAA and the Joint Venture agreement with Lagan. No detriment or loss of revenue has resulted to the CAA from HCL exiting the Project.

40. It was further submitted that the Inquiry Report admits that the Contract allows the JV to change its composition. The contents of the paragraph also allege that the Project was progressing slowly at the time of HCL's exit from the JV. According to learned counsel, in such international tenders and projects, the progress is usually slower in the initial stages of the Project, and only picks up pace once all the requisite approvals and infrastructure are in place. In this regard, it is important to note that at the time when the first package of the CAA Contract was awarded, there were enormous difficulties on the Project site. Most, if not all delays emanated from the conduct of the CAA. To this end, up until January 2010, HCL, through the JV, kept the CAA fully informed of the causes and consequences of any delays being experienced. At the time of HCL's departure from the Project, there was still ample time for the Project to be completed per the timeline envisaged in the CAA Contract.

41. The Petitioner, in response, averred that Respondent No. 3 was appointed as DG, CAA in May, 2011 illegally without observing the fair play requirements, through an Executive order made by the then Minister for Defense. He was then given the charge of the two Mega Projects, namely, the BNBI Air port and the Multan International Airport. On the 3rd of November, 2012 Respondent No. 3 was again appointed as DG, CAA on contract basis for a period of 2 years on deputation replacing Capt. Nadeem Khan Yousafzai. The Petitioner

submitted that the Pakistan Engineering Council has directed that all assignments requiring supervision of Engineering projects be headed by an Engineer. However, Respondent No. 3 is not an Engineer but an Ex-member of the Pakistan Air Force. He has no knowledge or experience of any engineering project yet he was first made Chief Coordinator mega projects and then made DG, CAA to supervise construction of the two Mega Airports at a combined cost of nearly 100 billion in utter violation of the dictates of the Pakistan Engineering Council. The petitioner further submitted that the respondent No. 3 had no experience of flying a civilian aircraft prior to the appointment as DGCAA and thus, did not fulfill the requirement of being a pilot in command of a Civil Aircraft. His appointment was in violation of the Rules governing the appointment of DG, CAA. The Petitioner emphasized that the previous DG, CAA Capt. Nadeem Khan Yousafzai was, prior to his appointment as DG, CAA, the MD of Pakistan International Airlines (PIA), he was a pilot as well as an Engineer and had varied experience at higher levels of PIA. He was forced to relinquish charge in order to create a vacancy for the induction of Respondent No. 3. In this way the removal of Capt. Nadeem Khan Yousafzai and induction of respondent No. 3 were both illegal.

42. In response, the CAA submitted that Air Marshal (Retd.) Khalid Choudhry was appointed as DG, CAA on contract for a period of two years with immediate effect as per Establishment Division Notification No. 1/60/206-E-6 dated 07.05.2011. The said officer assumed charge of the post of DG, CAA on 13.05.2011. Subsequently, Cabinet Secretariat / Establishment Division vide its notification No. 1/38/2012-E-6 dated 24.03.2012 terminated his contract of

appointment. During his tenure, the officer focused on mega projects of CAA i.e. New Benazir Bhutto International Airport; Extension of Multan International Airport; New Gwadar International Airport due to which normal functions as DGCAA might have been slightly overlooked. The Ministry of Defence (Defence Division) Government of Pakistan *vide* notification No. 2-2/CAA/2012 dated 18.07.2012, has conveyed HQCAA that Air Marshal (Retd) Khalid Choudhry was appointed as Chief Coordinator (Mega Projects) in CAA on contract basis for a period of two years with immediate effect and until further orders. It was further intimated that his terms & conditions of appointment shall be notified separately. Furthermore, Ministry of Defence *vide* its letter No. 2-2/2012-CAA dated 23.07.2012 required HQCAA that the draft terms and conditions of above named officer's appointment including his pay package may be forwarded for obtaining approval of Competent Forum. Besides, mode of payment of the Pay Package from different Mega Projects was also required to be indicated. It was further apprised by the Competent Authority that issue of delegation/devolution of the administrative/financial powers of DG, CAA to Chief Coordinator (Mega Projects) of CAA be presented in the next CAA Board Meeting for consideration/decision.

43. It was further stated in the comments that Air Marshal (Retd.) Khalid Chaudhry is not a qualified Engineer and the directive of Pakistan Engineering Council to all Government Organization is available in this regard. Appointment of the said officer as Chief Coordinator, Mega Projects (CCMP) is thus apparently in contravention of directive of Pakistan Engineering Council. It is also correct that the project is always looked after in all respects by the Project Director or

Project Manager (as the case may be) who are always Civil Engineers having professional Degrees of Civil Engineering and registered with Pakistan Engineering Council. In fact, all the ongoing projects are being managed by the qualified engineers in CAA. As per Appendix "B" to CAA Service Regulations 2000, CAA has adopted Pay Groups 01 to 11 for its employees including posts in Ex-Cadre C, B, & A (Equivalent to Pay Groups 09, 10). There are, in addition, only two pay scales against which DG CAA and Deputy DG CAA are appointed i.e. M-I & (Mega Projects)-II, respectively.

44. Respondent No.3 in his reply has submitted that the New Benazir Bhutto International Airport was initially planned to be completed by December, 2010 i.e. six months before his appointment as DG, CAA. However, the Project has indeed suffered from delays and cost over runs. The NBBIAP Project could not have been completed in December, 2011 because the design for the Passenger Terminal Building (PTB) was finalized in December, 2009 and the selection of the "Contractor" (China State Construction and Engineering Company) for the PTB was finalized in March, 2011 i.e. 02 months before his appointment as DG, Civil Aviation on 13.05.2011. The contract was formally signed in June, 2011 with a completion time of 27 months i.e. by September, 2013, but he was removed from the post of DG, CAA in March, 2012. According to the Respondent No.3, the work on the PTB slowed down in 2012, because an alternate option was being explored between the Chinese Construction Company and CAA for awarding all remaining contracts to the former along with complete financing for the same. The proposal, however, did not materialize but the progress on the PTB took a serious blow. When he (respondent No.3) was re-

appointed as DG, CAA on 05.11.2012, the progress on the PTB was 5% as against the scheduled progress of 60%. On assuming charge again, he wrote a severe warning letter to be sent to the Chairman China State Construction and Engineering Company. On hearing of the plan to dispatch the said letter, the President of the Company (Bureau-3) flew in to Pakistan on three day notice. He accepted the problems, and gave a written assurance to complete his (CSCEC) share of work by March, 2014 with all liabilities towards the company. The progress today is 32% and the work is progressing on schedule as assured by the President CSCEC. All present work on the Project is planned to be completed by 31.07.2014 after which systems testing and dry run by CAA will take place. It was claimed that the airport will open for real operations by the end of October, 2014.

45. On 25.09.2013, upon the Court's direction, a statement has been filed in the Court on behalf of the Project Director, CAA which reads as follows: -

"1. That the New Benazir Bhutto International Airport Project ("The Project") from its very inception was not conceived and planned properly.

2. That to start with, the selection of the Project Site was faulty and to date there is no water availability for the Project. Initially, it was planned that water would be brought from the nearby Shahpur Dam which is approximately twenty-one (21) kilometers away from the Project Site. More perplexingly, there is not enough water in the Shahpur Dam, hence, the plan now is to construct small dams by harvesting rain water.

3. That the PC-1 of the Project was approved at all levels without the design and other essential components

relating to different aspects of the Project. Importantly, the work on the Project was started without any design.

4. That the Project was divided into seventeen (17) packages which created enormous interface/integration issues resulting in delay and cost overruns.

5. That strangely enough, separate packages for piling and pile-caps were created and, that too, without the design of the Passenger Terminal Building.

6. That all payments to the Contractors were made in strict conformity with applicable contractual provisions (clause 67.1 of the Special Conditions of Contract) where under CAA was bound to forthwith give effect to PMC (Engineer)'s decisions regardless of final resolution of a disputed payment. Failing to give effect to the PMC's decision was to result in accruing of interest on the pending payment in addition to the contractor's right to suspend works.

7. That be that as it may, the Federal Government is fully cognizant of the importance and gravity of the matter and has already referred the same to the Federal Investigation Agency which has already nominated a team of competent officers to investigate the matter.

8. That meanwhile, the Federal Government is fully committed and determined to complete the Project and has passed instructions to this effect. At present, around sixty-seven percent (67%) of the works of the Project are complete with approximately ninety-two percent (92%) airside infrastructure complete and approximately fifty-five percent (55%) of the Passenger Terminal Building.

9. That the Contractors are being pushed for timely completion of their scope of works and penal action against Contractors is also being taken where necessary. For

example, two contracts i.e. Package-8B (Electric Power & Telecommunication) and Package-8C1 (ATC Complex) have been terminated and their respective scope of work is to be completed at the risk and cost of the terminated Contractors as per the scheme of contract. Early completion is the utmost desire of the Government”.

The above report is, *prima facie*, not acceptable as correct.

46. It is well settled by now that this Court has wide powers in terms of Article 184(3) of the Constitution to ensure that acts/actions of the other organs of the State, namely, Executive and Legislature do not breach the fundamental rights guaranteed by the Constitution. Under the principle of trichotomy of powers, the Judiciary is entrusted with the responsibility of enforcement of Fundamental Rights, which calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society. The discharge of constitutional duty by the State functionaries in deviation to the spirit of the Constitution is anathema to the Constitution and is challengeable on diverse grounds including *mala fide* and colourable exercise of power for ulterior motive. It is not possible for judiciary to confer validity and immunity to the acts or actions which suffers from *mala fide* in exercise of power of judicial review. Reference in this behalf may be made to the cases of Miss Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416), Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473), Wasey Zafar v. Government of Pakistan (PLD 1994 SC 621), Sabir Shah v. Federation of Pakistan (PLD 1994 SC 738), Al-Jehad Trust v. Federation of Pakistan (PLD

1996 SC 324), Asad Ali v. Federation of Pakistan (PLD 1998 SC 161), Benazir Bhutto v. President of Pakistan (PLD 1998 SC 388), Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan (PLD 1998 SC 1263), Farooq Ahmad Khan Leghari v. Federation of Pakistan (PLD 1999 SC 57), Liaqat Hussain v. Federation of Pakistan (PLD 1999 SC 504), Khan Asfandiyar Wali v. Federation of Pakistan (PLD 2001 SC 607), In the matter of Reference No.2 of 2005 By the President of Pakistan (PLD 2005 SC 873), Javed Jabbar v. Federation of Pakistan (PLD 2003 SC 955), Iqbal Haider v. Capital Development Authority (PLD 2006 SC 394), Muhammad Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 602), Wattan Party v. Federation of Pakistan (PLD 2006 SC 697), Pakistan Muslim League (N) v. Federation of Pakistan (PLD 2007 SC 642), Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879), Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265), Bank of Punjab v. Haris Steel Industries (Pvt) Ltd. (PLD 2010 SC 1109), Shahid Orakzai v. Pakistan (PLD 2011 SC 365), Munir Hussain Bhatti v. Federation of Pakistan (PLD 2011 SC 407), Federation of Pakistan v. Munir Hussain Bhatti (PLD 2011 SC 752), Watan Party v. Federation of Pakistan (PLD 2011 SC 997) and Maulana Abdul Haque Baloch v. Government of Balochistan (PLD 2013 SC 641). There is no unfettered power in public law. A public authority possesses powers only to use them for public good. This imposes duty to act fairly. [Food Corporation of India v. Kamdhenu Cattle Feed Industries (AIR 1993 SC 1601) = (1993) 1 SCC 71]. In matters in which the Government bodies exercise their contractual powers, the principle of judicial review cannot be denied. However, in such matters, judicial review is intended to prevent

arbitrariness or favouritism and it must be exercised in larger public interest. It has also been held by the Courts that in matters of judicial review the basic test is to see whether there is any infirmity in the decision making process. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its decision for that of the decision maker. The interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by mala fides. See: Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489 = AIR 1979 SC 1628]; Tata Cellular v. Union of India [AIR 1996 SC 11 = (1994) 6 SCC 651 =]; Raunaq International Ltd. v. I.V.R. Construction Ltd. [(1999) 1 SCC 492 = AIR 1999 SC 393]; Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617 = AIR 2000 SC 801]; Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd. [(2007) 8 SCC 1], and Suo Motu Case No.13 of 2009: In the matter of Joint Venture Agreement between CDA and Multi-Professional Cooperative Housing Society (MPCHS) for development of land in Sector E-11 Islamabad (PLD 2011 SC 619). In the last mentioned judgment it has further been held that the Governmental bodies are invested with powers to dispense and regulate special services by means of leases, licences, contracts, quotas, etc., where they are expected to act fairly, justly and in a transparent manner and such powers cannot be exercised in an arbitrary or irrational manner. Transparency lies at the heart of every transaction entered into by, or on behalf of, a public body. To ensure transparency and fairness in contracts, inviting of open bids is a prerequisite. The reservations or restrictions, if any, in

that behalf should not be arbitrary and must be justifiable on the basis of some policy or valid principles, which themselves are reasonable and not discriminatory. It was further observed that any transaction, which is not transparent, and goes against the interests of the general public constitutes violation of Article 9 of the Constitution, which guarantees right to life to all persons.

47. It is to be noted that the duty of the Court is to confine itself to the question of legality. Its concern should be whether a decision-making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable tribunal would have reached; or abused its powers. Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly, put, there are three grounds upon which an administrative action is subject to control by judicial review; namely, illegality which means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it; irrationality which means unreasonableness; and procedural impropriety. These are only the broad grounds but it does not rule out addition of further grounds in course of time. [*Tata Cellular v. Union of India* (1994) 6 SCC 651]. The judicial review is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose. [see: *Asia Foundation and Construction Ltd. v. Trafalgar*

House Construction [(1997) 1 SCC 738]. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Constitutional provisions if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review, which is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. [see: Tata Cellular v. Union of India (AIR 1996 SC 11) = [(1994) 6 SCC 651]. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in

respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of the Constitution, the Courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision. [see: Sterling Computers Ltd. v. Messrs. M. and N. Publications Ltd (AIR 1996 SC 51)].

48. There is no cavil with the proposition that as far as transparency in the implementation of the policy, if available, the process of awarding contract is concerned, it squarely falls within the jurisdiction of this Court available to it under the Constitution and the power of judicial review. Reference in this behalf may be made to the cases of Iqbal Haider v. Capital Development Authority (PLD 2006 SC 394), Matter of Privatization of Pakistan Steel Mill (PLD 2010 SC 759), HRC No. 4688/06 (PLD 2001 SC 619), In the matter of: Alleged Corruption in Rental Power Plants etc. (2012 SCMR 773). Ramana Dayaram Shetty v. International Airport Authority of India [ibid]; Tata Cellular v. Union of India [ibid]; Raunaq International Ltd. v. I.V.R. Construction Ltd. (ibid); Air India Ltd. v. Cochin International Airport Ltd. [ibid] and Reliance Energy Ltd. v. Maharashtra State Road Development Corp. Ltd. [ibid]. It is duty of the Court to ensure that the relevant laws are adhered to strictly to exhibit transparency. It is universally recognized principle that transactions involving public money must be made in transparent manner for the satisfaction of the people, who are the virtual owners of the national exchequer, which is being invested in these projects. [M/s Airport Support Services v. The

Airport Manager, Quaid-e-Azam International Airport, Karachi (1998 SCMR 2268), M/s Ramna pipe and General Mills (Pvt.) Ltd. v. M/s. Sui Northern Gas Pipe Lines (Pvt) Ltd. (2004 SCMR 1274) and In re: Action regarding huge loss to public exchequer in awarding LNG Contract. (PLD 2010 SC 731)]

49. It is to be noted that a total number of seventeen (17) contracts were awarded during the construction of New Benazir Bhutto International Airport Project (NBBIAP). Unfortunately, due to extremely poor performance of Project Management Consultant, coupled with mismanagement and favouritism to selected contractors by the concerned officials of Civil Aviation Authority, the project right from its onset has suffered tremendous setback, causing grave loss of national exchequer, as depicted in the Inquiry report. Apart from what has been mentioned in the report the following irregularity has been noticed. During the construction of NBBIAP, the following joint ventures (JVs) were formed: -

- M/s Louis Berger Group USA & ECIL
Later on, ECIL was replaced by NESPAK without any procedure.
- M/s ADPI France & NESPAK
- M/s Logan – Husnain
Later on, JV was transformed as Logan – Tapl & Habib without any procedure.
- M/s Beixin – Gammon
- M/s Sambu – Sachal
- M/s CSCEC – FWO

In gross violation of laid down Pakistan Engineering Council Rules and procedure, it has been observed that in most of the above JVs, the

leading foreign companies (lead partner) either remained absent or did not participate with men and material as per the contract most probably in collusion with their supporting Pakistani companies (local partners). In most of the JVs the joint venture has not performed in true sense. The documents reveal that at the time of prequalification because of the joint venture with a foreign company extra points are given resultantly the tender is won. Similarly, the bidder also commits to provide expatriate technical staff & equipment in its bidding document. For example, M/s Louis Berger participated as the "lead partner" during the PQ stage and thus won the tender. They were supposed to provide key persons i.e. qualified project and construction managers and various specialists and engineers, in all about twenty of them as per appendix C-I of the original contract. However, only some actually appeared on the ground whereas others came for a very short period even for months and some were not even qualified enough, but most of the positions remained vacant till date. The main job was done by unqualified people of the local supporting partner with insufficient capacity and capability, thus damaging the project. In spite of all this the CAA and PMU failed to implement the contract clauses in its true spirit, they even did not terminate the contract, thus the project suffered heavy losses. The Inquiry Report is very clear on the mismanagement and corruption in the project for which CAA & PMU are responsible.

50. Notwithstanding the inquiry being conducted by FIA as it has been directed in the short order of even date, the PD and the concerned officials of project management unit of the under construction airport should be replaced with competent officials and if

such personnel are not available within CAA, then they should be taken on deputation from other department(s). The Secretary aviation should evolve a strategy by making a steering committee to monitor the project and to ensure that all procurements hence forth are as per specification and PPRA rules and should not be left alone to the PMC and PMU.

51. Now it would be examined that whether Air Marshal (R) Khalid Ch., Respondent No.3 has been appointed as DG, CAA in accordance with section 9 of Civil Aviation Authority Ordinance, 1982 read with schedule attached to the Recruitment Rules for Civil Aviation Class-I Posts, issued by the Ministry of Defence (Aviation Division), Karachi vide SRO 822(IC)/70 dated 08.08.1970. In this regard it may be noted that respondent Khalid Chaudhry was working as Chief Coordinator Mega Projects of CAA and his duties included supervision of construction of NBBIAF and Multan Airport, from where he was appointed as DG, CAA on 13.05.2011 but the contract was signed in June, 2011; thereafter, he was removed from the said post in March, 2012 and re-appointed on 5.11.2012.

52. The Petitioner emphasized that appointment of Respondent No. 3 Khalid Chaudhry was not made on merit as the law and the rules on the subject were not adhered to. And according to him, the favour shown by the competent authority by appointing him in a non-transparent manner has cost a massive losses to the public exchequer. To substantiate his plea, he referred to the relevant provisions of rules and also vehemently contended that irregularities, illegalities, corrupt practices in awarding contract, etc., of the project were noticed in his

(Khalid Chaudhry's) presence by General (R) Shahid Niaz as he himself was the member of the Inquiry Committee and on filing of the report, which has been relied upon by him, he could not himself step down because of his alleged involvement in corruption and corrupt practices, due to which, besides the losses to the public exchequer, a delay has also been caused in the completion of the airports.

53. On the other hand learned counsel for Air Marshal (R) Khalid Chaudhry contended that he has already completed construction of Multan Airport and due to his presence, after having taken over the charge of post of DG, CAA on 5.11.2012, he had the project work accelerated. Otherwise, there was likelihood of enormous sufferings on account of losses by the CAA. He further stated that Respondent No.3 had an experience to his credit being Air Marshal in Pakistan Air Force, so he was subject-related expert and was duly capable to deal with affairs of the CAA. It has also been averred that during his tenure, the authority generated billions of rupees worth of business and funds.

54. Learned Additional Attorney General at the initial stage supported to the appointment of Respondent No.3 through his categorical statement. However, when the documents/files were called from the Ministry he confined himself to the documents thereto, without advancing further arguments.

55. It is to be noted that in the cases of Muhammad Ashraf Tiwana v. Pakistan and others (2013 SCMR 1159) and Khawaja Muhammad Asif v. Federation of Pakistan (2013 SCMR 1205) this Court in exercise of powers under Article 184(3) of the Constitution

has concluded that in the public interest and also to enforce their Fundamental Rights, appointments must be made on merit, lest it should cause damage to the institutions responsible for running different affairs of the Government and also generating funds for the purpose of spending on the welfare of the citizens with a view to improve standard of their life in terms of Article 9 of the Constitution. If there is corruption and corrupt practices on account of appointment of the concerned functionaries, including in pursuance of unlawful exercise of power or by causing loss in running of the affairs of public institutions, the citizens are bound to be affected directly or indirectly. Therefore, their Fundamental Rights under Article 9 of the Constitution are not enforced in letter and spirit.

56. It is admitted fact that Respondent No. 3 being Air Marshal had joined CAA as Coordinator in charge and in this capacity he had obligation to coordinate the construction of Mega Projects of CAA named above. However, as far as construction work essentially relates to engineering discipline. Respondent No.3 admittedly was not an engineer. Therefore, before making his appointment it was necessary to apply the test of 'fit and proper' person capable to supervise the construction of two Mega Projects. It is not understandable what were the reasons which persuaded the Federal Government to make his appointment as a Coordinator in charge. However, as the same is not under challenge and noting about this aspect of his qualification is mentioned to infer that his appointment as Coordinator cannot be considered as an added qualification. Strictly speaking, plain reading of the section 8 of the Ordinance 1982 reveals that no qualification for the appointment of the Director General has been mentioned.

Therefore, reference is required to be made to the Schedule appended with Recruitment Rules, 1970, which prescribe the appointment of DG, Civil Aviation Authority in the following terms: -

“From the incumbents of the next lower posts in any technical Branch of the Department with minimum 15 years Class 1 Service

Or

An officer of proven executive ability with a minimum of 18 years Class 1 Service in any Govt aeronautical Organization or service preferably with experience as Pilot in command”.

A perusal of above rule suggest that there was possibility to make the promotion of next lower post in any technical branch of the Department and the Ministry while moving summary for his appointment to the Chief Executive. However, in the summary moved by Lt. Gen (R) Asif Yasin Malik, Secretary Defence, it is mentioned as follows: -

“3. In the above perspective and as desired, it is proposed that the present incumbent DG CAA may be reverted back to his parent department i.e. PIAC and in his place Air Marshal (R) Khalid Chaudhry may be appointed as DG CAA on contract basis for a period of two years with immediate effect and until further orders on the basis of the following: -

a. Air Marshal (Retd) Khalid Chaudhry has earlier served as DG, CAA w.e.f.13 May 2011 to 01 April 2012. By virtue of his previous appointment as Air Marshal in PAF and as DG CAA, he has vast experience in the field of aviation industry and his services would be very beneficial for CAA.

b. the above named officer is currently serving as

Chief Coordinator (Mega Projects) of CAA, which is an additional experience best suited to the post of DG CAA. However, his present appointment would cease with effect from the date he assumes the charge of DG CAA."

57. It is important to note that in case of non-availability of departmental candidate, the Department could have appointed an officer as prescribed in Column-4 of the Rules, reproduced hereinabove.

58. From perusal of the summary reproduced hereinabove, it seems that, on the desire of Prime Minister Respondent No. 3's summary was moved and he has been appointed without following the principle of transparent appointment, at least by applying judicial mind keeping in view the rules and regulations.. This principle has been highlighted in Khawaja Asif's case (*ibid*), wherein it has been held that, "all public appointments must be governed by the overriding principle of selection based on merit, out of individuals who through abilities, experience and qualities have a proven record that they best match the need of the public body in question. No public appointment must take place without first being recommended by the Commission. The appointments procedures should be subjected to the principle of proportionality, that is, what is appropriate for the nature of the post and the size and weight of its responsibilities. Those, selected must be committed to the principles and values of public service and perform their duties with highest level of integrity. The information provided about the potential appointees must be made public. ..."

59. Thus, it is held that appointment of Air Marshal (R) Khalid Chaudhry has been made in non-transparent manner as is evident from

the discussion made hereinabove. We are not in agreement with the learned counsel appearing for him that after having taken over the charge he had brought improvement in the CAA because learned counsel is persuading us to believe about the objective achievements of Respondent No.3 during his tenure as DG, CAA without substantiating the same. Be that as it may, if it is accepted for sake of argument that contention of the learned counsel is correct but despite that, his appointment was required to be made in transparent manner after applying the rules noted hereinabove, not on the basis of ambition and desire of someone else, who was interested in his appointment.

60. Therefore, in view of the above discussion, we are inclined to hold that contracts awarded to 17 contractors and their subsequent performance as it has been noted in the Inquiry Report and Audit Report is not transparent and thus militates against fundamental rights of general public/tax payers.

61. These are the reasons of our short order of even date, concluding Paras therefrom are reproduced hereinbelow: -

- “(i) That the appointment of Air Martial (Retd.) Khalid Chaudhry has been made in a non-transparent manner as well as without strictly following the available law on the subject. Therefore, the notification of appointment of Air Martial (Retd.) Khalid Chaudhry dated 18th July, 2012 is declared illegal, *void ab initio* and of no legal consequence.
- (ii) As the appointment of the DG, CAA has been declared *void ab initio*, illegal being made in non-transparent manner, therefore, the Federal Government is directed to appoint DG, CAA as early as could be possible by following the law and rules on the subject as well as the principles of transparency.
- (iii) The project of the New Benazir Bhutto International Airport Project, Islamabad (NBBIAP), *prima facie*,

suffers from illegalities, irregularities, corruption and corrupt practices and the delay caused in its completion on account of illegal deeds, omissions and commissions of the consultants Louis Burger and all other concerned persons who were responsible for selecting the site, preparing the designs and also awarding contracts to the contractors.

- (iv) The Contractors responsible for the completion of different respective projects except Al-Tariq Pvt. Ltd., *prima facie* are responsible for causing the delay in the completion of the projects as on account of their such conduct the value/prices of the projects has increased inasmuch as raising its cost from Rs.37 billion to Rs.73 billion. There is no possibility to complete the project in the near future except a tentative assessment by the respondents that the project may be completed in the year 2014-2015. Therefore, subject to all just exceptions, this case requires a thorough probe on the basis of tentative assessments made in the Committee's report of Let. Gen. (Retd.) Shahid Niaz as well as the audit report prepared by the Auditor General of Pakistan and the stance taken by the Project Director reference to which, with certain exceptions, have already been made hereinabove.
- (v) The Government of Pakistan had already made the reference for conducting inquiries/investigations and to fix criminal liabilities upon all the concerned persons/contractors, therefore, we direct the DG Investigation, FIA to supervise the inquiries/investigations himself and to complete the same expeditiously.
- (vi) The Federal Government is required to take all necessary steps to ensure the completion of the project as early as could be possible. However, it is made clear that subject to the contractual agreements the consultants, designers and all other Contractors to whom contracts have been awarded, shall continue to complete the work and the competent authority if need be, proceed against any one of them for the purpose of ensuring completion of the work as early as possible and if so required, to constitute a committee headed by a senior officer to supervise the completion of work and to remove any and all difficulties in this way.
- (vii) As regards report of the Auditor General in respect of over-payment of Rs.1556.47 million is concerned, this audit objection so far has not been removed, therefore, LTH(JV) is required to deposit this amount with the Exchequer within a period of seven days subject to intimation to the Registrar for our perusal in Chambers.
- (viii) As all the respondents have cooperated with the Court by making their appearance through counsel,

therefore, the passports which were deposited by them with the Registrar, shall be returned back to them subject to furnishing undertaking that whenever they are required to appear before the FIA or any other Agency/Committee for the purpose of inquiry or investigation, they shall cooperate without any hesitation and in case of non-cooperation, the FIA shall be free to undertake any steps under the law to enforce their attendance.

- (ix) The FIA is directed that inquiry process must be completed in the shortest possible time. Subject to outcome of inquiry by the FIA or any other Agency/Committee constituted by the Government, the LTH(JV) Pvt. Ltd. shall be entitled to adjust the amount which has been deposited if payments are cleared by the competent authority in accordance with law and rules and in view of the observations made herein above.

8. The instant matter stands disposed of. The parties are left to bear their own costs."

Chief Justice

Judge

Judge

Islamabad, the
25th September, 2013
Nisar/*

Approved for Reporting