

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE ANWAR ZAHEER JAMALI, CJ

MR. JUSTICE AMIR HANI MUSLIM

MR. JUSTICE SH. AZMAT SAEED

CIVIL PETITION NO.2222 OF 2016

(On appeal from judgment dated 31.5.2016, passed by the Lahore High Court, Lahore, in W.P. No.12535/2016 and ICA No.1114/2016)

M/s. Power Construction Corporation of China Limited (previously Sinohydro Group Limited) through its duly authorized representative Mr. Dai Daliang, No.22, Chegongzhuang West Road Haidian District, Beijing 100048, P.R. China, having a Branch Office at House No.510, Street No.9, F-10/2, Islamabad, Pakistan

... Petitioner

Versus

Pakistan Water & Power Development Authority through its Chairman WAPDA House, Mall Road, Lahore and 2 others

... Respondents

For the Petitioner : Mr. Salman Aslam Butt, Sr. ASC
Mr. Mehr Khan Malik, AOR (absent)

For Respondents 1-2 : Mr. Shahzada Mazhar, ASC with
Ch. Akhtar Ali, AOR
Shahzad, Director (Legal) WAPDA and
Inayat Ali, Chief Engineer, WAPDA

For Respondent No.3 : Rana Waqar Ahmed, DAG

Date of Hearing : 25.10.2016

JUDGMENT

SH. AZMAT SAEED, J.- This Civil Petition for
Leave to Appeal is directed against the impugned

judgment dated 29.6.2016, passed by a learned Division Bench of the Lahore High Court, Lahore, whereby an Intra Court Appeal bearing No.1114 of 2016, filed by the present Petitioner against the judgment dated 31.5.2016, passed in Writ Petition No.12535 of 2016, was dismissed.

2. The brief facts necessary for adjudication of the *lis* at hand are that the Petitioner is a Company established under the laws of the People's Republic of China, with a place of business/branch office at Islamabad. The Petitioner Company was apparently established in 1950 and claims experience and expertise in the business of the construction of Hydropower Projects.

3. The Respondent/WAPDA initiated the process to establish and construct a Hydropower Project on the River Indus at Dasu in the Province of Khyber Pakhtunkhwa. The said Project is being partially funded by the International Development Association (IDA), which forms a part of the World Bank Group and, in this behalf, a Finance Agreement was executed between the Government of Pakistan and the IDA on 25.08.2014. Respondent/WAPDA in pursuance of its intention to undertake the project published Specific Procurement Notices (SPNs) inviting participation in the Project

initially through pre-qualification. The clause (4) of SPNs provided that such pre-qualification would be effected through "The Procurement of Goods, Works and Non-Consulting Services under the IBRD loans and the IDA Credits & Grants by the World Bank Borrowers" (the World Bank Guidelines). Subsequently, in August, 2014 Respondent No.2 issued Pre-qualification Document (PDQ) for ICB No.DASU-MW-02-Procurement of Main Works, Main Hydraulic Structure, Spillway and Hydraulic Steel Structures (the Main Works-01) and for Hydraulic Steel Structures (the Main Works-02) inviting applications from interested parties for the purposes of pre-qualification. The Petitioner Company submitted two separate applications both dated 28.05.2015 seeking pre-qualification for the aforesaid Main Works-01 and 02. The said applications were processed, with Respondent No.2 i.e. General Manager/Project Director, Dasu Hydropower Project, WAPDA, seeking clarifications and further documentation whereafter the Respondent No.1 i.e. WAPDA appeared to be satisfied and included the name of the Petitioner Company in the list of pre-qualified bidders and transmitted the said list to the IDA as rendered by the World Bank Guidelines. The IDA intimated the Respondent No.1/WAPDA to delete the

name of the Petitioner Company from the list of pre-qualified bidders, purportedly in terms of clause 2(a) of the Appendix-I of the World Bank Guidelines.

4. In the above backdrop, Respondent No.2 issued a disqualification notice dated 12.02.2016 to the Petitioner Company with respect to Main Works-01 and 02. The Petitioner Company approached the Respondent No.1/WAPDA to disclose the reasons for such disqualification. Upon failure to receive a satisfactory reply to its application, in this behalf, the Petitioner Company invoked the Constitutional jurisdiction of the learned Lahore High Court, Lahore by filing Writ Petition No.6625 of 2016, which was disposed of vide Order dated 01.03.2016 directing the Respondent No.2 to decide the aforesaid pending application of the Petitioner Company and to act in accordance with law by affording an opportunity of hearing to the Petitioner Company. On 30.03.2016, the Respondent No.2 again held the Petitioner Company to be disqualified from the process of pre-qualification in view of the directions issued by the IDA. The Petitioner Company challenged the aforesaid Order dated 30.03.2016 alongwith the earlier disqualification notice dated 12.06.2016 before the learned Lahore High Court through Writ Petition

No.12535 of 2016, which was dismissed vide judgment dated 31.05.2016. Whereafter, the Petitioner Company filed an appeal i.e. Intra Court Appeal No.1114 of 2016 in terms of Section 3 of the Law Reforms Ordinance, 1972, which was also dismissed vide judgment dated 29.06.2016, and the same has been impugned through the instant Civil Petition for Leave to Appeal.

5. The matter came up for hearing before this Court and the notices were issued to the Respondents. On 25.08.2016, the learned counsel for the Petitioner Company referred to para 12 of the judgment of the learned Single Judge, dated 31.05.2016 to indicate the existence of a remedy before the World Bank in terms of Clauses 11, 12, 13 and 14 of the Appendix-III to the Guidelines and sought time to avail the same. The Petitioner Company failed to obtain the desired result.

6. It is contended by the learned counsel that the Petitioner Company is involved in the business of construction of Hydropower Projects for the last more than 60 years and has to its credit the construction of some of the most iconic projects, in this behalf, including the Three Gorges Dams in the People's Republic of China. The Petitioner Company, it is contended, has the requisite experience and expertise for the construction of

the Main Works-01 and 02 of the Dasu Hydroelectric Power Project. The Petitioner Company submitted its bid for pre-qualification, which was complete in all respects supported by the relevant and requisite documentation. The Respondent No.1/WAPDA and its officials, including Respondent No.2 sought various clarifications, which were duly provided. Some further documentation was required, which too was effected, whereafter Respondent No.1/WAPDA and its officials were fully satisfied that the Petitioner Company was entitled to pre-qualification and informed the Petitioner Company accordingly. The subsequent disqualification of the Petitioner Company was without any legal justification, hence, not sustainable.

7. It was urged that pursuant to Article 4(1) of the Constitution of the Islamic Republic of Pakistan, 1973, it is an inalienable right of every person for the time being within Pakistan to be treated in accordance with law, including the law as laid down by this Court. Furthermore, Article 10-A of the Constitution also reinforces equal protection, due process and non-discrimination. The Petitioner Company is functioning within Pakistan and the *lis* at hand pertains to the award of a contract within Pakistan, hence, the Petitioner

Company was entitled to the protection of Articles 4(1) and 10-A of the Constitution. It was further contended that all State Authorities, including the Respondents/WAPDA and its officials, with regard to discharge of their statutory obligations and functions, more particularly, administrative nature, including with reference to the award of a public contract, are obliged to act in a reasonable, fair, transparent, rational, just, non-arbitrary and non-discriminatory manner. Such is the settled law, it is contended, as has been consistently laid down by this Court in its various pronouncements. The impugned judgment dated 31.05.2016, disqualifying the Petitioner Company can by no stretch of imagination, be deemed to be fair, just, transparent or non-discriminatory, hence, not sustainable in law. It was next contended that paragraph 2(a) of the Appendix-I to the World Bank's Guidelines, at best, only confer upon the IDA. The privilege of making "a reasonable request" to WAPDA to modify the list of pre-qualified bidders or making deletions therefrom. The IDA is not conferred with the power or authority to unreasonably dictate, force or coerce WAPDA to make such deletion from the list of pre-qualified bidders nor is WAPDA bound to blindly follow any such direction, which is not reasonable. In the

circumstances, the Respondent/ WAPDA and its officials cannot abdicate their Constitutional and Statutory Obligations in terms of the Articles 4(1) and 10-A of the Constitution to the prejudice and detriment of the rights of the Petitioner Company. It was next contended that by way of the impugned judgments, the learned High Court has misconstrued the Guidelines of the World Bank to illegally conclude that Respondent/WAPDA and its officials are bound by the dictates of the IDA in each and every eventuality. It was further contended that by way of the impugned judgments, it has been illegally implied that the Guidelines override the laws of Pakistan, the Constitution and the rights guaranteed therein. The learned counsel for the Petitioner further contended that in the facts and circumstances of the case, the Petitioner Company claimed relief against the Respondent/WAPDA and its officials so as to ensure that the said Respondents acted in accordance with law, as laid down by this Court with regard to the award of the contracts. The Order dated 30.06.2016 of the Respondent/WAPDA is a clear violation of such law and is not sustainable and liable to be set aside. The learned High Court, in fact, it is contended, has failed to exercise the jurisdiction conferred upon it by the Constitution to protect the rights

guaranteed by the Constitution, hence, the impugned judgments are liable to be set aside. In support of his contentions, the learned counsel relied upon the judgments, reported as Habibullah Energy Limited and another v. WAPDA through Chairman and others (PLD 2014 SC 47), Maulana Abdul Haque Baloch and others v. Government of Balochistan through Secretary Industries and Mineral Development and others (PLD 2013 SC 641), Messrs Elahi Cotton Mills Ltd and others v. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others (PLD 1997 SC 582) and Karachi Building Control Authority and 3 others v. Hashwani Sales and Services Limited and 3 others (PLD 1993 SC 210).

8. The learned counsel for the Respondents No.1 and 2 controverted the contentions raised on behalf of the Petitioner Company by contending that the Dasu Hydropower Project is of vital importance for the State of Pakistan in view of the current power shortages. The role of IDA is critical to the Project at hand. In addition to the direct funding of US\$ 588.4 million, a Partial Credit Guarantee of US\$ 460 million has also been provided whereagainst loans are being obtained from Commercial Banks. In the absence of such funding by the IDA, the

very project would be jeopardized and its construction and completion difficult.

9. Such funding by the IDA is subject to the various conditionalities, including the World Bank Guidelines for the award of contracts, including the pre-qualification of bidders. Such conditionalities for procurement and award of contracts are catered for by Rule 5 of the Public Procurement Rules, 2004, hence, not only applicable to the bidding process for the award of the contracts but also to the pre-qualification of interested bidders. The applicability of the Guidelines of the World Bank formed part of the bidding documents and were known to the Petitioner Company.

10. It is further contended that the Petitioner Company did not possess the requisite experience and expertise and attempted to rely, in this behalf, upon some allied or sister companies. In such an eventuality, a Joint Venture Agreement was a *sine qua non* as is mentioned in the World Bank Guidelines. The Petitioner Company chose to file only an Implementation Agreement. It is the case of the Respondent/WAPDA that the Petitioner Company was aware that such an Implementation Agreement alone in the absence of a Joint Venture Agreement would not be acceptable in terms of the World

Bank Guidelines as the Petitioner Company had earlier filed a similar Implementation Agreement while seeking pre-qualification for other World Bank Funded Projects i.e. "KKH-2" and RAR-2", where the Petitioner Company was not pre-qualified. Thus, the entire litigation initiated by the Petitioner Company is not only without merit but also *mala fide*, hence, no exception can be taken to the impugned judgment dated 31.05.2016.

11. It was next contended that the Petitioner Company was conditionally pre-qualified by the Respondent/WAPDA and such pre-qualification was subject to the provisions of Clause 2(a) of the Appendix-I to the said Guidelines. The IDA, in this behalf, exercised its privilege to ensure fair and effective interpretation of the Project. It was further contended that Clause 2(a) of the Appendix-I to the World Bank Guidelines has been correctly interpreted by the learned High Court and no exception can be taken thereto.

12. Furthermore, in pith and substance, the grievance of the Petitioner Company is actually against IDA which is not a party to the present proceedings, therefore, no relief can be granted to the Petitioner Company. Moreover, the IDA/World Bank is not a person as defined by Article 199(4) of the Constitution of the

Islamic Republic of Pakistan, 1973, therefore, could not be subjected to the Constitutional jurisdiction of the learned High Court, as has been correctly held by the learned High Court by way of the impugned judgment. It was added that there was an alternate remedy, which the Petitioner Company could avail in the fullness of time, as has been indicated in the impugned judgment of the learned Single Judge. Consequently, the Petition being without merit was liable to be dismissed.

13. The learned Deputy Attorney General for Pakistan supported the impugned judgment. It was his case that in pith and substance, the Petitioner Company has challenged the decision of the IDA/World Bank, which had immunity in view of the provisions of the International Monetary Fund and Bank Act, 1950, hence, the Constitution Petition was not maintainable and was rightly dismissed.

14. In rebuttal, the learned counsel for the Petitioner Company has reiterated the arguments by contending that the Implementation Agreement constituted a compliance of the requirement of the bidding documents and no reasonable ground existed for the disqualification of the Petitioner Company especially where another Chinese Company has been pre-qualified

in identical circumstances. He reiterated that it is the decision of the Respondent/WAPDA, which has been called into question and in the facts and circumstances of the case, the demand of IDA to delete the name of the Petitioner Company from the list of the proposed pre-qualified bidders was not "reasonable" and the Respondent/WAPDA was obliged by law not to accede to the same. Furthermore, in such circumstances, the action of the Respondent/WAPDA was justiciable by the learned Lahore High Court in the light of the judgments relied upon.

15. The learned counsel for the parties and the learned Deputy Attorney General for Pakistan have been heard and with their assistance the available record perused.

16. Before considering the rival contentions advanced by the learned counsels from both sides of the aisle, it would perhaps be appropriate to contextualize the same by referring to the factual backdrop so that the real matter in controversy requiring adjudication may be brought into sharper focus. A Hydropower Project on the river Indus at Dasu was contemplated by the Respondents. In order to raise funds therefor a Finance Agreement was executed between the Government of

Pakistan and IDA an organization, which is an integral part of the World Bank Group. Such Agreement was executed on 25.08.2014. It contemplated both a direct line of credit as well as guarantee whereagainst loans could be obtained from Commercial Banks. We are informed that some of such loans have been raised, while the other such facilities are under process. The IDA is to provide a portion of the funds requisite for a rather large project for generation of electricity, which is obviously of a great importance to the State of Pakistan in this age of power shortages. The Finance Agreement contemplated that the award of contracts, including the pre-qualification of the Contractors would be effected through a bidding process in terms of the World Bank Guidelines.

17. In terms of the aforesaid Guidelines, the IDA was directly involved in the preparation of the bidding process. In terms of Para 2(a) of the Appendix-I of the Guidelines, the IDA had a right or a privilege of making a reasonable request for the modification of or deletions from the list of the pre-qualified Contractors. Paragraph 2(a) is reproduced hereunder for ease of reference:

“2. With respect to all contracts 77 which are subject to the Bank's prior review:-

(a) In cases where prequalification is used, the Borrowers shall before prequalification submission are invited, furnish the Bank with the draft documents to be used, including the text of the invitation to prequalify, the prequalification questionnaire, and the evaluation methodology, together with a description of the advertising procedures to be followed and shall introduce such modifications in said procedure and documents as the Bank shall reasonably request. The report evaluating the applications received by the Borrower, the list of proposed prequalified bidders, together with a statement of the qualification and of the reason for the exclusion or any applicant for prequalification, shall be furnished by the Borrower to the Bank for its comments before the applicants are notified of the Borrower's decision, and the Borrower shall make such additions to deletion from or modifications in the said as the bank reasonably requested."

18. The process was commenced in terms of the said Finance Agreement and the Guidelines referred to above and in this regard Specific Procurement Notices were issued inviting interested parties for pre-qualification. The Petitioner Company participated in the said process.

19. It appears from the record that IDA concluded that the Petitioner Company had applied on a stand alone basis and did not possess the requisite expertise and experience for the Project as the experience and the

expertise of the other Companies could not be taken into account as such Companies did not join the Petitioner Company in seeking pre-qualification in view of the absence of an *inter se* Joint Venture Agreement. Though the Respondents No. 1 and 2 suggested that the Petitioner Company was entitled to be pre-qualified but pursuant to the opinion of the IDA the Petitioner Company was disqualified by the Respondent/WAPDA. Such disqualification is recorded in the two documents dated 12.02.2016 and 13.03.2016.

20. It is in the above background that the Petitioner Company invoked the Constitutional jurisdiction of the learned Lahore High Court through Writ Petition, which on examination reveals that in essence the aforesaid two documents i.e. the Order dated 13.03.2016 and the disqualification Notice dated 22.02.2016 of the Respondent/WAPDA, which have been challenged. It has been noticed that the decision of the IDA concluding that the Petitioner Company was disqualified was not challenged. Even otherwise, the IDA has not been impleaded as a party to the present proceedings. Furthermore, it is no one's case that IDA is a "person" as contemplated under Article 19(4) of the Constitution, susceptible to the jurisdiction of the learned High Court,

in this behalf. The aforesaid leads to an irresistible conclusion that the decision of the IDA and the conclusion drawn by it, that the Petitioner Company was disqualified and not entitled to pre-qualification, was not the subject matter of the *I/s* before the learned High Court nor this Court.

21. Admittedly, the IDA is an International Financial Institution. It is also not disputed that the Finance Agreement has been exceeded between the IDA and the Government of Pakistan with respect to the Project in question. It is also evident that the Finance Agreement provides that the bidding process with respect to selection of Contractors for the Project would be conducted in accordance with the World Bank Guarantees which includes Para 2(a) of the Appendix-I thereof. The compliance with such Guidelines is contemplated by law of Pakistan, more particular, Rule 5 of the PPRA Rules, 2004, which is reproduced hereunder for ease of reference:-

"5. International and inter-governmental commitments of the Federal Government. – Whenever these rules are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State or States, or any international financial institution the provisions of such international

treaty or agreement shall prevail to the extent of such conflict.”

22. The main thrust of the arguments of the learned counsel for the Petitioner Company is that Respondent/WAPDA, in the facts and circumstances of the case, should not have accepted the decision/request of the IDA to delete the name of the Petitioner Company from the list of pre-qualified Contractors as such request was not “Reasonable” as envisaged by paragraph 2(a) of the Appendix-I of the World Bank Guidelines. While we may not be in total agreement with the learned counsel for the Petitioner Company yet what is apparent is that the Respondent/WAPDA choose not to cross swords with the IDA, in this behalf, at the behest of the Petitioner Company. It is this decision of the Respondent/WAPDA not to agitate the matter with the IDA and to accept and comply with its “request” which in fact is the real matter in issue requiring adjudication.

23. The question, which floats to the surface is whether such a decision by the Respondent/WAPDA can be subjected to Judicial Review by the Courts in the exercise of their Constitutional Jurisdiction.

24. The Indian Supreme Court was confronted with not too dissimilar a situation and held in the judgment,

reported as Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Ltd. and others [(1997) 1 Supreme Court Cases 738], as under:-

"It is well known that it is difficult for the country to go ahead with such high cost projects unless the financial institutions like the World Bank or the Asian Development Bank grant loan or subsidy, as the case may be. When such financial institutions grant such huge loans they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the valuation bids of the appellant and Respondent 1 together with the consultant's opinion after the so-called corrections made the conclusion of the bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring court's interference in the matter of an award of contract. There was some dispute between the Bank on one hand and the consultant who was called upon to evaluate on the other on the question whether there is any power of making any correction to the bid documents after a specified period. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the

permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant."

25. The aforesaid passage was quoted with approval by this Court in its judgment, reported as Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 SCMR 455), wherein it was observed as follows:-

"Even otherwise, we are living in a globalized world of interdependence; a world where countries and international financial institutions assist and aid the developing countries in their march towards economic progress. International Monetary Fund is one of those institutions which has played its role in several countries. Though its policies some times may be open to criticism but that is for the concerned economists in the government or academics to examine and opine but once the Competent Authority in the government has taken a decision backed by law, it would not be in consonance with the well established norms of judicial review to interfere in policy making domain of the executive authority."

26. Developing countries like Pakistan may need to invest in a large infrastructure projects to ensure its economic and social development. Such projects are usually very expensive and may require huge funds which may have to be raised through loans. Such loans

may be obtained from International Financial Institutions, which are a reality in today's world and are catered for in the law i.e. International Monetary Fund and Bank Act, 1950.

If the loans are obtained from International Financial Institutions like the IDA, the same come coupled with conditionalities, which includes the mod and method of the award of contracts for the Projects and the process of pre-qualifications of bidders. Such conditionalities are also catered for in the law, as is evident from Rule 5 of the PPRA Rules, 2004, reproduced herein above. Thus, obviously, the World Bank Guidelines, including paragraph 2(a) of the Appendix-I thereof and its enforceability and effectiveness are contemplated in law.

27. In the instant case, the decision of the IDA to pre-qualification of the Petitioner Company and make a "reasonable request" for deletion of its name from the list of pre-qualified bidders is not the subject matter of the instant *lis*, in as much as, the said decision and request by the IDA was not challenged in the Constitutional jurisdiction nor was the IDA impleaded as a party to the proceedings. In the absence of any finding, in this behalf, it is legally impossible to adjudicate upon the

reasonableness or otherwise of the "request" by the IDA or to determine whether the Respondent/WAPDA was obliged to accede to such request. The decision of the Respondent/WAPDA not to agitate the matter further with the IDA at the behest of the Petitioner Company is not too difficult to discern. It appears that a pragmatic commercial decision was taken not to jeopardize the funding from the IDA and thereby putting the entire project at risk. Such decision falls within the realm of the Public Policy and the Courts in the exercise of their powers of Judicial Review, ordinarily, do not interfere therewith and exercise judicial restraint, as has been held by this Court not only in the case, reported as Dossani Travels Pvt. Ltd and others v. Messrs Travels Shop (Pvt) Ltd. and others (PLD 2014 SC 1) but also in the judgment, reported as Cutting of Trees for Canal Widening Projects, Lahore: In the matter of Suo Motu Case No.25 of 2009 (2011 SCMR 1743). While we may not totally agree with the interpretation of the paragraph 2(a) of the Appendix-I of the Guidelines, as has been done by the learned High Court by way of the impugned judgments but such an exercise is not necessary by this Court, as in our opinion, the Constitutional Petition filed by the Petitioner Company was not maintainable, as it

sought to encroach into the domain of the Policy Matters in respect whereof the judicial restraint is to be exercised.

28. Consequently, we are not persuaded to agree with the contentions raised on behalf of the Petitioner Company or to set aside the impugned judgments. Hence, this Civil Petition is liable to be dismissed and leave declined.

29. These are the reasons of our short Order of even date, which is reproduced as under:-

“Learned ASCs for the parties and learned Addl.AG have concluded their arguments. For reasons to be recorded separately, leave is refused and the petition is dismissed.

Chief Justice

Judge

Islamabad, the
25th October, 2016

Judge

‘NOT APPROVED FOR REPORTING’

Safdar & Mahtab