JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.4650 of 2016
M/s SIS Corporation (Pvt.) Limited
Versus
Federation of Pakistan through Secretary, Ministry of Interior & others

Date of Hearing:	19.12.2016, 12.01.2017, 20.01.2017, 27.01.2017, 31.01.2017, 01.02.2017, 02.02.2017, 03.02.2017, 08.02.2017, 09.02.2017, 13.02.2017, 21.02.2017, 22.02.2017, 27.02.2017, 14.06.2017, and 03.07.2017.
Petitioner by:	M/s Asma Jahangir, Khurram M. Hashmi, and Salman Afirdi, Advocates,
Respondents by:	Ms. Sitwat Jahangir, learned Assistant Attorney-General. Mr. Babar Sattar, Advocate for respondents No. 2 to 7, M/s Mansoor Hassan Khan, and Saqib Majeed, Advocates for respondent No.9, Mr. Zulfiqar Khalid Maluka, Advocate for respondent No.10.

MIANGUL HASSAN AURANGZEB J:- Through this judgment, I propose to decide writ petition No.4650/2016 and writ petition No.295/2017 since they involve common questions of law and fact.

2. The petitioner in writ petition No.4650/2016, M/s S.I.S. Corporation (Pvt.) Ltd., is the local representative of Muhlbauer Group, which is based in Germany and specializes in the provision of high security documents and radio-frequency identification. The relief sought by the petitioner in the said petition is set out in Schedule-A hereto. The petitioner in the said petition shall hereinafter be referred to as "petitioner/S.I.S.".

3. The petitioner in writ petition No.295/2017, M/s Safran Identity & Security, is a company incorporated under the laws of the French Republic, and has a place of business in Pakistan. The petitioner is said to be a technology supplier to National Database and Registration Authority since 2004. The relief sought by the petitioner in the said petition is set out in Schedule-

B hereto. The petitioner in the said petition shall hereinafter be referred to as "petitioner/Safran".

4. The facts essential for the disposal of these petitions are that through a tender notice dated 10.10.2016, the Directorate General, Immigration and Passports, Government of Pakistan (respondent No.2), invited technical and financial proposals for the "Supply of e-Passport Personalization System on Turn-Key basis". The tender documents could be collected from the Logistics Section of respondent No.2. The proposals were required to be submitted on or before 14.11.2016. The technical bids were to be opened on 14.11.2016 at 1200 hours. Respondent No.2 reserved the right to cancel or reject the tenders under Rule 33 of the Public Procurement Rules, 2004 ("PPR, 2004").

5. The procedure adopted by respondent No.2 for the award of the contract for the Supply of E-Passport Personalization System was a "Two Stage-Two Envelope" procedure envisaged under Rule 36(d) of the PPR, 2004. Under this procedure a bidder's financial bid cannot be opened unless he is technically qualified by the procuring agency. As per clause 7.2 of the tender documents, the technical and financial evaluation was assigned weightage of 70% and 30%, respectively. In other words, upto 700 marks could be allocated to a bidder for its technical bid, and upto 300 marks could be allocated for its financial bid. Three parties namely (i) Muhlbauer ID Services GmbH ("Muhlbauer"), (ii) the petitioner/Safran and, (iii) M/s Gemalto Pakistan (Pvt.) Ltd., (who is respondent No.9 in writ petition No.4650/2016, and respondent No.8 in writ petition No.295/2017), participated in the bidding process. M/s. Gemalto Pakistan (Pvt.) Ltd., shall hereinafter be referred to as "respondent No.9".

6. The technical bids were opened on 14.11.2016, in the presence of all the bidders, whereas the financial bids were opened on 13.12.2016. In the evaluation of the bids, respondent No.9 emerged as the most responsive bidder. The bid evaluation

report was made public on 09.01.2017. The summary of the bid evaluation report is as follows:-

Name of Bidder	Marks		Total Marks	Rule/Regulation/SBD/ Policy/Basis for Rejection/Acceptance as per Rule 35 of PP Rules, 2004
	Technical (700)	Financial (300)		
M/S Gemalto Pakistan (Pvt) Ltd	690/700	253.16	943.16	* Secured highest total score. (Details at Annex-A)
M/S Muhlbauer ID Services	545/700	300	845	* Secured second highest total score. (Details at Annex-B)
M/S Safran Identity & Security	541/700	284.50	825.50	* Secured lowest total score. (Details at Annex-C)

7. Before respondent No.2 could take a formal decision regarding the award of the contract, the petitioner/S.I.S., on 19.12.2016 filed writ petition No.4650/2016, whereas the petitioner/Safran, on 26.01.2017 filed writ petition No.295/2017 before this Court.

AVAILABILITY OF AN ALTERNATIVE REMEDY UNDER RULE 48 OF PPR, 2004:-

8. Learned counsel for respondent No.2 as well as the learned counsel for respondent No.9 raised preliminary objections to the maintainability of the writ petitions. After making reference to Rule 48 of PPR, 2004, they submitted that the petitioners could not have filed the writ petitions before exhausting the alterative remedy of filing a complaint before a Grievance Redressal Committee ("G.R.C.") constituted by respondent No.2 under Rule 48 of PPR, 2004. They submitted that the G.R.C. could have granted relief to the petitioners, including the relief of suspension of the tender bidding process. In raising the said preliminary objection, learned counsel for respondent No.2 and respondent No.9 placed reliance on the law laid down in the judgments of the Hon'ble High Court of Sindh in the cases of Messrs KSB Pumps Company Ltd. Vs. Government of Sindh (2011 MLD 1876), Messrs M.K. International, Local Agent of Messrs Interman Trading FZE Vs. Sui Southern Gas Company (2016 CLC 1), and Maqbool Associates (Pvt.) Ltd. Vs. Pakistan Power Park Management Company Ltd. (2015 MLD

1794), and of this Court in the case of Maqbool Associates Vs. Federation of Pakistan (2016 MLD 2006).

9. In my opinion where an alternative and equally efficacious remedy is available to a litigant, he should pursue that remedy and may not invoke the special jurisdiction of the High Court for the issuance of a prerogative writ. Where it is open to the aggrieved petitioner to move another Court or a Tribunal for obtaining redress in the manner provided by a statute, the High Court will normally not entertain a petition under Article 199 of the Constitution, and will leave a petitioner to resort to the machinery set up by the statute for the redressal of his grievances. The question whether the alternative remedy is equally efficacious or adequate or not is a question of fact to be decided in each case and the onus lies on the petitioner to show that it is not adequate.

10. The existence of an alternative remedy is not an absolute bar to filing a petition under Article 199 of the Constitution, but it is factor to be taken into consideration by the High Court while entertaining a writ petition. The existence of an alternative remedy is a rule of policy, practice and discretion. The Superior Courts have time and again held that *"sub-Constitutional legislation cannot curtail or otherwise cut across the Constitutional mandates"*. Reference in this regard may be made to the judgment in the case of Airport Support Services Vs. The Airport Manager, Quaid-e-Azam International Airport (1998 SCMR 2268). Apart from this, where there is an infringement of fundamental rights, where alternative remedy cannot be said to be adequate or equally efficacious, and where the impugned order is *coram non judice,* wholly without jurisdiction or violative of the principles of natural justice, a writ petition under Article 199 of the Constitution can be entertained.

11. Rule 48 of the PPR, 2004 is reproduced herein below:-

> ***"48. Redressal of grievances by the procuring agency.*** *– (1) The procuring agency shall constitute a committee comprising of odd number of persons, with proper powers and authorizations, to address the complaints of bidders that may occur prior to the entry into force of the procurement contract.*

(2) Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written complaint concerning his grievances not later than fifteen days after the announcement of the bid evaluation report under rule 35.

(3) The committee shall investigate and decide upon the complaint within fifteen days of the receipt of the complaint.

(4) Mere fact of lodging of a complaint shall not warrant suspension of the procurement process.

(5) Any bidder not satisfied with the decision of the committee of the procuring agency may lodge an appeal in the relevant court of jurisdiction."

(Emphasis added)

12. Respondent No.2, along with its written comments in writ petition No.295/2017, filed a copy of office order dated 13.01.2017, issued by respondent No.2 in compliance with the requirement in Rule 48 of PPR, 2004. Vide the said office order, respondent No.2 constituted a five-member committee to address the complaints and grievances of the bidders participating in the tender in question. The chairman of the said committee was Mian Aurangzeb (Director NPZ). The members of the said committee were (i) Mr. Faiz Hussain (Deputy Director, A.J.K./G.B.), (ii) Mr. Nadeem Rehman (Database Specialist), (iii) Mr. Yasir Mehmood (System Incharge), and (iv) Mr. Altaf Khan (Assistant Director). The said office order is silent as to the *"powers and authorizations"* given by respondent No.2 to the said committee.

13. Under Rule 48(2) of PPR, 2004, a bidder can lodge a written complaint if aggrieved by an act of the procuring agency *"after the submission of his bid"*. In the case at hand, the bids were admittedly submitted on 14.11.2016. The petitioners' grievance against respondent No.2 began after they were informed on 08.12.2016 that they had been technically qualified but the technical evaluation report was not disclosed to them. There was no G.R.C. constituted by respondent No.2 at that stage for the petitioners to take their grievances to. The G.R.C. was constituted about a month after the bidders were informed that they had all been technically qualified. Respondent No.2 could

obviously not have informed the bidders about the fact that they had been technically qualified without having carried out the evaluation of their technical bids. It is an admitted position that on 13.12.2016, respondent No.2 verbally informed all the bidders about their respective technical scores.

14. The fact that respondent No.9's technical score was the highest added to the anxiety of Muhlbauer and the petitioner/Safran to have sight of the technical bid evaluation report. Learned counsel for respondent No.2 submitted that, bearing in mind the requirements of Rule 35 of PPR, 2004, respondent No.2 was under no obligation to reveal the bid evaluation report prior to ten days of the intended date for the award of the procurement contract. He further submitted that since respondent No.2 intended to award the contract in question on 19.01.2017 to respondent No.9, the bid evaluation report was made public on 09.01.2017. Now, if any bidder had a grievance with respect to the bid evaluation report, he had a period of only fifteen days to lodge a complaint in terms of Rule 48(2) of PPR, 2004. Under Rule 48(3) of the PPR, 2004, the G.R.C. is to investigate and decide upon a complaint within fifteen days of the receipt of the complaint. Assuming that a complaint is filed before the G.R.C. on the same very day on which the bid evaluation report is made public, given the fifteen-day period within which the G.R.C. is to investigate and decide upon the complaint, and given the fact that the contract is to be awarded on the tenth day after the bid evaluation report is made public, the aggrieved bidder would be faced with the situation where the decision of the G.R.C. will come after the contract has been awarded. Could, in such circumstances, it be said that a complaint before the G.R.C. is an adequate, alternative and equally efficacious remedy available to an aggrieved bidder. I would say, certainly not.

15. As mentioned above, the G.R.C. was notified by respondent No.2 on 13.01.2017. It is not disputed that bidders' grievances may arise with respect to various facets of a tender bidding process right from the time when the bids are submitted. Indeed

under Rule 48 (2) of PPR, 2004, a bidder feeling aggrieved by any act of the procuring agency *"after the submission of his bid"* may lodge a written complaint before the G.R.C. Although a complaint before the G.R.C. can be submitted not later than fifteen days of the announcement of the bid evaluation report, there is no prohibition for such a complaint being submitted prior to the bid evaluation report. Rule 48 of PPR, 2004, does not envisage the constitution of a G.R.C. only to address a bidder's complaint with respect to a bid evaluation report. A bidder's grievance or complaint against the procuring agency may not be confined to the bid evaluation report, but to a host of other matters after the submission of the bids.

16. For a G.R.C. constituted pursuant to Rule 48 of PPR, 2004, to be treated as an adequate alternative forum where a bidder can raise his grievance with respect to any matter regarding the tender bidding process, after the submission of the bid, it is essential that a G.R.C. be constituted by the procuring agency by the date when the bids are submitted. It is also imperative that the members of such a G.R.C. should have the requisite independence and seniority to review and set aside the procuring agency's senior management' s decisions which are questioned by a bidder before such a G.R.C. A G.R.C. could hardly be termed as an adequate alternative forum when its members do not have the requisite independence and seniority so as to enable them to set aside the decisions of the senior management of the procuring agency. This requirement, in my view, is implicit by the adoption of the words *"with proper powers and authorizations"* in Rule 48 (1) of PPR, 2004. Rule 48 (1) *ibid* does not obligate the procuring agency to constitute a G.R.C. comprising of its own employees/officials. A procuring agency will be well within its rights to constitute such a G.R.C. comprising of persons who may not be in its employment, and who are experts in the relevant field or have experience in adjudication, and are independent enough to strike down a decision of a procuring agency, including the decision to award a procurement contract to a particular bidder, without any fear of

reprisals by the senior management of the procuring agency whose decisions are subjected to challenge before it. I am of the view that the members of the G.R.C. constituted by respondent No.2 are not senior and independent enough to review or set aside decisions taken by the senior management of respondent No.2 with respect to the bidding process. A G.R.C. comprising of officials subordinate to the ones whose decision is subjected to a challenge by a bidder can hardly be termed as independent enough to unhesitatingly take a decision to set aside a decision taken by their superordinates.

17. Respondent No.2 did not bring any document on record showing that the G.R.C. constituted by it on 13.01.2017 had the necessary *"powers and authorizations"* to stay the procurement process if the circumstances so warranted. In the absence of such an authorization, it cannot be asserted that the G.R.C. had the power to stay the procurement process. Even otherwise, there is no prescription in the PPR, 2004 for a G.R.C. to enforce its interim decisions made before the final decision on the bidder's grievance petition.

18. As mentioned above, ordinarily writ jurisdiction is not available in cases where there is an adequate and specific remedy provided under a statute. However, in order for the High Court to decline the grant of *mandamus*, the remedy provided under the statute to the petitioner must be specific, adequate, equally convenient, beneficial and effective. It is the inadequacy and not the absence of the alternative remedy that would determine whether a writ petition should be entertained. In the case of Lt. Col. Nawabzada Muhammad Ameer Khan Vs. Controller of Excise Duty (PLD 1961 SC 119), it was held that the rule that a High Court will not entertain a writ petition when another appropriate remedy is available, is not a rule of law barring the jurisdiction of the High Court but rule by which the Court regulates its jurisdiction. The same view was taken by the Honourable Supreme Court of Pakistan in the cases of Murree Brewery Co. Ltd. Vs. Pakistan (PLD 1972 SC 279), and Town Committee, Gakhar Mandi Vs. Authority under the Payment of

Wages Act (PLD 2002 SC 452). In the case of Gatron (Industries) Pvt. Ltd. VS. Government of Pakistan and others (1999 SCMR 1072), it has been held as follows:-

> ***"15... it is well-settled that the rule about invoking the Constitution jurisdiction only after exhausting all other remedies, is a rule of convenience and discretion by which the Court regulates its proceedings and it is not a rule of law affecting the jurisdiction. A Constitution petition is competent if an order is passed by a Court or Authority by exceeding its jurisdiction even if the remedy of appeal/revision against such order is available, depending upon the facts and circumstances of each case."***

19. Muhlbauer, on 13.12.2016, submitted its grievance letters to respondent No.2 and the Minister for Interior, and on 19.12.2016, the petitioner/S.I.S. filed writ petition No.4650/2016. In the said letters dated 13.12.2016, Muhlbauer raised an objection with respect to results of the technical evaluation of Muhlbauer's bid. Muhlbauer requested for an immediate re-evaluation of its technical bid. It is my view that since respondent No.2 had not constituted a G.R.C. by the said date, Muhlbauer's grievances could not have been forwarded to a committee envisaged by Rule 48 of PPR, 2004. In such circumstances, for respondents No.2 and 9 to assert that Muhlbauer and or the petitioner/S.I.S. could not have invoked the constitutional jurisdiction of this Court without taking its grievance before the G.R.C., is untenable. The G.R.C. was constituted by respondent No.2 about a month after Muhlbauer had submitted its grievances to respondent No.2 vide letters dated 13.12.2016. Therefore, when there is no G.R.C. constituted by a procuring agency when a bidder's grievance arises, he cannot be faulted for invoking the jurisdiction of the High Court under Article 199 of the Constitution.

20. After the constitution of the G.R.C., respondent No.2 vide letter dated 13.01.2017, asked the petitioner/S.I.S. to submit its objections/grievances by 17.01.2017, and appear before the G.R.C. on 18.01.2017. This was admitted by the petitioner/S.I.S. in its reply to respondent No.9's application for the rejection of writ petition No.4650/2016. Vide letter dated 17.01.2017, the petitioner/S.I.S. informed respondent No.2 that it would not be

appearing before the G.R.C. By this stage, the petitioner/S.I.S. had already filed writ petition No.4650/2016 and had obtained injunctive relief.

21. The G.R.C. envisaged by Rule 48 of PPR, 2004 is neither a judicial nor a *quasi* judicial forum. It certainly does not have the power to issue an injunction. Therefore, given the facts of the case at hand, it is my view that the G.R.C. constituted by respondent No.2 could not be termed as an alternative forum which could remedy the petitioners' bidder's grievances in as adequate and efficacious a manner as this Court could in exercise of its jurisdiction under Article 199 of the Constitution. The judgments relied upon by the learned counsel for respondent No.2 and respondent No.9 are based on facts which are different to the facts in the instant case.

22. Learned counsel for respondent No.9 submitted that since the petitioner/Safran had filed a grievance petition before the G.R.C. and also participated in the hearing before the G.R.C., it could challenge the G.R.C.'s decision dated 07.02.2017 in accordance with Rule 48(5) of the PPR, 2004.

23. True, the petitioner/Safran, on 17.01.2017, submitted its grievances to respondent No.2 for consideration by the G.R.C. In its grievance petition, the petitioner/Safran expressed its apprehension regarding the ability/capacity, neutrality and impartiality of the G.R.C. constituted by respondent No.2. Respondent No.2 was alleged to have been partial and biased towards respondent No.9. The petitioner/Safran in its grievance petition, also took issue with respondent No.2 in giving less marks to the petitioner/Safran in the technical evaluation process with respect to eight items. It also expressed its reservation against respondent No.2's reluctance to release the technical evaluation report in a timely manner. The petitioner/Safran is said to have attended the hearing before the G.R.C. on 18.01.2017. On 07.02.2017, the G.R.C. concluded that the grievances raised by the petitioner/Safran were not valid, and that no violation of the evaluation criteria or the PPR, 2004 had been found. The G.R.C. did not find any evidence of collusion

between respondent No.2 and respondent No.9. The G.R.C. gave its findings on each of the eight specific objections raised by the petitioner/Safran to the technical evaluation of its bid. The G.R.C. gave its decision after the petitioner/Safran had filed writ petition No.295/2017.

24. Rule 48(5) of the PPR, 2004 is a unique provision, and for which I have not found any precedent or parallel. It provides a remedy of an appeal to *"the relevant Court of jurisdiction"* against the decision of a G.R.C. Now, what does this mean? A Court of the learned Civil Judge does not exercise appellate jurisdiction. Would *"the relevant Court of jurisdiction"* be the District Court? I would say no, simply because it is not so specified in the said Rule. The learned counsel for the contesting parties did not render any assistance worth the name regarding the manifest absurdity in the said Rule. It is not for this Court to hold that reference to *"the relevant Court of jurisdiction"* in Rule 48 (5) *ibid* means this Court or that Court unless the said Rule is suitably amended and clarity brought into it. For the present purposes, suffice it to say that given the language of the said Rule 48(5) *ibid*, I cannot hold that a substantive right of an appeal has been granted by law to a bidder dissatisfied with a decision of the G.R.C. Therefore, the contention of the learned counsel for respondent No.9 that writ petition No.295/2017 instituted by the petitioner/Safran was not maintainable because G.R.C.'s decision dated 07.02.2017 had not been challenged in an appeal under Rule 48 (5) *ibid*, does not appeal to me.

WHETHER WRIT PETITION NO.295/2017 WAS COMPETENTLY INSTITUTED BY THE PETITIONER/SAFRAN:-

25. Learned counsel for respondent No.9 raised an objection to the maintainability of the writ petition on the ground that the authorization dated 24.01.2017 issued by the petitioner/Safran in favour of Mr. Salman Ejaz, to engage counsel, and to institute a petition, and to defend the petitioner/Safran (who was respondent No.10 in writ petition No.4560/2016), had neither been notarized by a Notary Public in the country where the said document was executed, nor was it attested by Pakistan's

diplomatic mission in the country where the said authorization was made. Indeed, when writ petition No.295/2017 was filed on 26.01.2017, the copy of the said authorization dated 24.01.2017, filed along with the said writ petition was neither notarized nor attested by Pakistan's diplomatic mission. However, before the judgment was reserved, the original authorization dated 24.01.2017 duly notarized and attested by the third secretary of Embassy of Pakistan at Paris, was brought on record. This having been done, I do not find any merit in the said objection raised by the learned counsel for respondent No.9. At times a company incorporated abroad and having a place of its business in Pakistan has to invoke the jurisdiction of the Court in Pakistan on an emergent basis. In such circumstances to require such a foreign entity to have a power of attorney or a board resolution notarized and attested in the foreign country and then file such a document along with the petition or suit instituted in Pakistan, would be unreasonable and inequitable. As long as in the pleadings it is pleaded that the legal proceedings are being instituted with proper authorization/authority and that during the proceedings such authorization/authority, obtained prior to the institution of the proceedings, but notarized and consularized subsequently, is brought on the record, the proceedings cannot be considered to have been wrongfully instituted.

WHETHER THE WRIT PETITION NO.4650/2016 FILED BY THE PETITIONER/S.I.S. WAS MAINTAINABLE IN VIEW OF THE FACT THAT MUHLBAUER WAS NOT A PARTY TO SAID WRIT PETITION:-

26. Learned counsel for respondent No.9 strenuously objected to the maintainability of the writ petition No.4650/2016, instituted by the petitioner/S.I.S., on the ground that the said petitioner was neither a joint venture partner nor an adjunct of Muhlbauer. He submitted that the petitioner/S.I.S. did not have the *locus standi* to file the said writ petition on the basis of the "teaming agreement" dated 12.10.2016, between the petitioner/S.I.S. and Muhlbauer. He further submitted that the petitioner/S.I.S. being the local representative of Muhlbauer could not file a writ petition to challenge any step taken in the tender bidding process either

on Muhlbauer's behalf or in its own right. In making his submissions, learned counsel placed reliance on the law laid down in the cases of Province of Balochistan Vs. Murree Brewery Company Ltd. (PLD 2007 SC 386), Dalmia Cement Limited Vs. District Local Board, Karachi (PLD 1958 (W.P.) Karachi 211), Mian Muhammad Nawaz Sharif Vs. Federation of Pakistan (1994 CLC 2318), and Standard Vacuum Oil Company Vs. The Trustees for the Port of Chittagong (PLD 1961 Dacca 278).

27. Learned counsel for the petitioner/S.I.S. submitted that the petitioner/S.I.S. took part in the bidding process on its own behalf as well as on behalf of Muhlbauer; that the petitioner/S.I.S. was not a sub-contractor or an assignee, but a "tenderer" in its own right; that the petitioner/S.I.S., in its capacity as a "tenderer" and as the local representative of Muhlbauer, had the *locus standi* to invoke the constitutional jurisdiction of this Court against the actions of respondent No.2; that Muhlbauer had appointed the petitioner/S.I.S. as its local representative in the bidding process; that the Request for Proposal (R.F.P.) was purchased by the petitioner/S.I.S.; that the tender documents were prepared jointly by the petitioner/S.I.S. and Muhlbauer; that the tender documents did not debar two parties from submitting a joint bid; that respondent No.2 did not object to the arrangement between the petitioner/S.I.S. and Muhlbauer in submitting a joint bid; that Muhlbauer regularly trains the petitioner/S.I.S.'s staff for the projects in which they jointly participate in a bidding process; that on 12.10.2016, the petitioner/S.I.S. and Muhlbauer entered into a teaming agreement; that on 12.10.2016, Muhlbauer had given an authorization letter to the petitioner/S.I.S.; that the R.F.P.s were purchased by the petitioner/S.I.S.; and that the petitioner/S.I.S. was to supply "Goods" and "Services" if the contract was to be awarded to Muhlbauer.

28. The petitioner/S.I.S. is a private limited company incorporated under provisions of the Companies Ordinance, 1984. On 12.02.2013, the Securities and Exchange Commission of Pakistan issued the petitioner/S.I.S.'s certificate of

incorporation. Clause (vi) of the Terms and Conditions for submission of proposals permitted manufacturers and vendors to participate in the tender directly or through their authorized representative or partners. If such participation was to be through a local representative, the National Tax Number and the General Sales Tax Registration Certificates of the local representative were to be provided with the technical proposals. Clause 1.1.9 of the "General Instructions" in the tender documents defines "Contractor's Local Authorized Agent" as *"the agent appointed by the Contractor at Islamabad under intimation to the DG I&P to interact with the latter on behalf of the Contractor in the matters related to the Contract including maintenance of required backup spares as per Contract"*. Furthermore, clause 1.1.11 defines a "Contractor / Tenderer" as *"the individual(s) or firm(s) or company/companies supplying the goods under the Contract and includes the contractor's personal representatives, successors-in-interest and permitted assigns."*

29. It is my view that the abovementioned clauses only permit a bidder to submit its bid through a local representative. By doing so, the local representative does not become a "bidder". In the writ petition, the petitioner/S.I.S. has pleaded that it is Muhlbauer's local representative. Now, Muhlbauer has not invoked the constitutional jurisdiction of this Court. The writ petition instituted by the petitioner/S.I.S. was pending before this Court for considerable period. The case had also been fixed for rehearing. During the pendency of the petition, learned counsel for respondent No. 9 raised an objection to the effect that Muhlbauer was not a party in the writ petition. This objection did not prompt the petitioner/S.I.S. to implead Muhlbauer as a co-petitioner. Muhlbauer could have also applied to have been impleaded as a party to writ petition No.4650/2016. All this Muhlbauer did not do. If Muhlbauer was aggrieved by any decision taken by respondent No.2 with respect to the tender bidding process, there was nothing preventing Muhlbauer to have instituted a writ petition against respondent No.2. There is no document on record executed by Muhlbauer prior to the

institution of the said writ petition authorizing the petitioner/S.I.S. to file a writ petition on its behalf against respondent No.2. Even if there were, Muhlbauer should have been the petitioner itself, the person authorized to institute the petition. The petitioner/S.I.S. could not act as a surrogate for Muhlbauer.

30. The learned counsel for the petitioner/S.I.S. drew the attention of the Court to the pay order dated 01.10.2016, for an amount of Rs.5,000/- which was said to have been submitted by the petitioner/S.I.S. to respondent No.2 for purchasing the tender documents. Although in the tender documents submitted by Muhlbauer, it is mentioned that Muhlbauer was bidding for the tender together with the petitioner/S.I.S., whose company profile and financial statements had been submitted along with the bid, but all the essential documentation required to be submitted by a bidder pertain to Muhlbauer. It is Muhlbauer's credentials and past experience that was primarily scrutinized by respondent No.2 while evaluating its financial and technical bid.

31. Clause 3.1.1.12 of the tender documents required that an *"Integrity Pact in Annexure F duly filled in and signed by authorized person of the Tenderer and stamped"* shall be submitted by each bidder as a part of its technical proposal. Pursuant to the said requirement, the *"integrity pact"* was submitted by Muhlbauer, and not by the petitioner/S.I.S. Had the petitioner/S.I.S. been a "bidder" it would have executed the integrity pact jointly with the Muhlbauer. Similarly, clause (xii) of the tender documents required that *"a Tender Security equal to 5% of the tender price must be attached with the Financial Proposal in the form of a Pay Order/Demand Draft in favour of Project Coordinator MRP Project"*. It is an admitted position that the Tender Security as required by the tender documents was furnished by Muhlbauer, and not by the petitioner/S.I.S. In the same way, clause 2.4.9 of the tender documents required each bidder to submit an *"affidavit on legal stamp paper of Rs.50/- to the effect that tenderer has not been blacklisted by any of the Federal/Provincial Government organization"*. The affidavit pursuant to the said clause 2.4.9 was also provided by

Muhlbauer, and not by the petitioner/S.I.S. Clause 5.3.1 of the tender documents required the bidders to furnish tender security for an amount equivalent to 5% of the tender price. The tender security/bid bond for an amount of Rs.34,248,700/- was also furnished by the Muhlbauer, and not by the petitioner/S.I.S. All these factors clearly establish that Muhlbauer and the petitioner/S.I.S. were not "bidding together".

32. Learned counsel for the petitioner/S.I.S. placed emphasis on the teaming agreement executed on 12.10.2016 between the petitioner/S.I.S. and Muhlbauer to establish that the petitioner/S.I.S. was a bidder, and not just Muhlbauer's local representative. A copy of this agreement was filed along with writ petition No.4650/2016. This teaming agreement appears to have been executed in anticipation of the contract for the procurement of the E-Passport Personalization System being awarded to Muhlbauer. The said agreement distributes the obligations/works with respect to the said contract between the petitioner/S.I.S. and Muhlbauer. This teaming agreement cannot elevate the petitioner/S.I.S. from the status of a local agent to that of a bidder. Since the said agreement was only with respect to the distribution of works sought to be procured by respondent No.2, it was inherently contingent on the award of the contract in question to Muhlbauer. Since such an eventuality never materialized, the said teaming agreement loses all its significance.

33. Muhlbauer executed an authorization letter dated 12.10.2016, in favour of the petitioner/S.I.S. This authorization letter was sent to respondent No.2. The contents of this letter show that the petitioner/S.I.S. was authorized by Muhlbauer to act as its legal representative with respect to the tender in question. Furthermore, the Chief Executive Officer ("C.E.O.") of the petitioner/S.I.S. was authorized to represent Muhlbauer in issues related to the said tender and to participate in meetings until May, 2017. This authorization has been executed by Mr. Gerhard Maurer and Mr. Anton Brunner, the legal representatives of Muhlbauer, who refer to it as a "power of

attorney". This authorization letter or power of attorney, by whatever name called, cannot be considered as an authorization in favour of the petitioner/S.I.S. or its C.E.O. to institute legal proceedings in Pakistan on Muhlbauer's behalf. A principal can be said to have given only that power to an attorney which is specifically mentioned in the power of attorney. It is well settled that a power of attorney is to be construed strictly in accordance with its contents and nothing which was not expressly provided therein could be read into it. A power of attorney is not open to liberal interpretation. Reference in this regard may be made to the law laid down in the cases of Muhammad Yasin Vs. Dost Muhammad (PLD 2002 SC 71), and Maqsood Ahmad Vs. Salman Ali (PLD 2003 SC 31). Furthermore, the said authorization letter appears to have been executed abroad. For a power of attorney, to sustain the presumption under Article 95 of the *Qanoon-e-Shahadat* Order, 1984, the execution of the same has to be authenticated by the Pakistani diplomatic mission in the country where the power of attorney is executed. Reference in this regard may be made to the law laid down in the case of Muhammad Yaseen Siddiqui Vs. Tehseen Jawaid (2003 MLD 319), Aki Habara Electric Corporation (Pvt.) Limited Vs. Hyper Magnetic Industries (Pvt.) Limited (PLD 2003 Karachi 420), Nawabzada Mir Baloch Khan Vs. Appellate Election Tribunal (PLD 2003 Quetta 35), Surayya Kausar Vs. Muhammad Asmat Ullah (2000 MLD 507), and Zia uddin Siddiqui Vs. Rana Sultana (1990 CLC 645). At no material stage was a notarized and consularized power of attorney executed abroad authorizing the any person to institute a writ petition in Pakistan on Muhlbauer's behalf brought on record.

34. The petitioner/S.I.S. has taken a contradictory stance in its pleadings filed before this Court. The petitioner/S.I.S., in its writ petition pleaded that it was the local representative for the Muhlbauer Group. In its reply to C.M.No295/2017, the petitioner/S.I.S. pleaded that it had filed the said writ petition not on Muhlbauer's behalf. Even if it is assumed that the bid was submitted by the petitioner/S.I.S. and Muhlbauer jointly, or that

the two of them were co-tenderers, the fact remains that in Muhlbauer's absence, the petitioner/S.I.S. would stand nowhere. The petitioner/S.I.S. could not be allowed to plead the case of Muhlbauer, which was one of the three bidders, and which was not before the Court as a party to the *lis*. The petitioner/S.I.S.'s contention that in the event the contract was awarded to Mahlbauer, the petitioner/S.I.S. was to perform certain obligations under the contract is far-fetched an idea to consider it as an aggrieved party. In view of all the reasons mentioned above, as well as the case law relied upon by the learned counsel for respondent No.9, I hold that the petitioner/S.I.S. being Mahlbauer's local agent, was not a "bidder" and, therefore, had no *locus standi* to file the said writ petition. Furthermore, since Muhlbauer has not challenged the award of marks in the evaluation process carried out by respondent No.2, and since Mahlbauer being a necessary party to the writ petition No.4650/2016, has not been impleaded as a party by the petitioner/S.I.S., the said petition instituted by the petitioner/S.I.S. is liable to be dismissed.

THE PETITIONERS' OBJECTIONS *QUA* THE INCLUSION OF THE REQUIREMENT OF PRICING FOR THE IMAGE PERFORATION FEATURE IN THE TENDER DOCUMENTS:-

35. The petitioner/S.I.S. in its writ petition pleaded that the tender documents were replete with requirements that were tailor made to benefit respondent No.9. In the said writ petition, it has not been specified as to which particular requirement in the tender documents was incorporated for respondent No.9's benefit. In the said writ petition, the petitioner/ S.I.S. emphasized that the requirement of pricing for the image perforation feature in the Bulk Personalization Machine, was incorporated to benefit respondent No.9. The petitioner/Safran had taken a similar position.

36. On 26.10.2016 a pre-bid meeting had taken place between respondent No.2 and the abovementioned potential bidders. In this meeting, the representatives of Muhlbauer and the petitioner/S.I.S. expressed reservations regarding the requirement in the tender documents for pricing of Image

Perforation feature in the Bulk Personalization Machine. The said representatives took the position that Image Perforation was the patent of M/s IAI, which had collaborated with respondent No.9 in the tender in question. They were of the view that no one could have the pricing for this patent except respondent No.9, and that this was a violation of Rule 10 of the PPR, 2004. The petitioner/S.I.S. reduced these reservations in writing in its letter dated 26.10.2016 to respondent No.2. The removal of Image Perforation feature from the price schedule for the Bulk Personalization Machine was also sought.

37. Respondent No.2 addressed the reservations of Muhlbauer and the petitioner/S.I.S. by clarifying that the pricing for Image Perforation was an optional feature. Respondent No.2 had amended the "Price Schedule for Goods/Services Offered" in the tender documents by reserving to itself the right whether or not to choose the feature of Image Perforation in the Bulk Personalization Machine offered by the bidders. The petitioner/S.I.S. in its letter dated 26.10.2016 admits that requirement of Image Perforation had already been removed from the technical requirements in the tender documents. Prior to such removal, Clauses 18.3.29 and 18.3.30 of the unamended tender documents read as follows:-

> ***"18.3.29 The e-passport printer should be equipped with a ghost image module, comprised of high energy lasers able to perforate holes through the polycarbonate data page"***
> ***"18.3.30 The holes shall be perforated to form an image of the holder's portrait that becomes clearly visible to the naked eye when the document is held to the light, allowing easy verification."***

38. The amended tender documents issued by respondent No.2 did away with the abovementioned requirements. It was not disputed that the pricing of the Image Perforation feature was no longer a mandatory requirement in the tender documents, and was not to be considered during the technical and financial evaluation of the bids. This was explicitly stated in the Minutes of the pre-bid meeting dated 26.10.2016. This appears to have satisfied Muhlbauer and the petitioner/S.I.S., as there was no more communication on this matter from the said parties. But the

matter does not rest here. The petitioner/S.I.S. asserts that the inclusion of the Image Perforation feature in the price schedule showed respondent No.2's pre-existing propensity and inclination to award the contract to respondent No.9. However, it was not disputed that the petitioner/Safran had also quoted a price for Image Perforation in its bid. Since both the petitioners had signed the original tender documents and returned them to respondent No.2 without any demur or reservation to the terms and conditions contained therein (as required by Clause 3.1.1.16 of the tender documents), and since the Image Perforation feature was not to be considered for the purpose of technical and financial evaluation of the bids, for the petitioner/S.I.S. to assert that the requirement of pricing of the Image Perforation in the tender documents showed respondent No.2's tilt to award the contract to respondent No.9 is untenable and implausible. Laboring any further on this aspect of the case would be a futile academic exercise.

WHETHER RESPONDENT NO.9 SHOULD HAVE BEEN DISQUALIFIED BECAUSE THE OUTER ENVELOPE, CONTAINING RESPONDENT NO.9'S SEALED TECHNICAL AND FINANCIAL BIDS, WAS NOT SEALED:-

39. I next come to the contention of the learned counsel for the petitioners that respondent No.2 should have rejected respondent No.9's bid because the outer envelope, containing its technical and financial bids, was not sealed. Clause (xi) of the terms and conditions for submission of proposals (which is a part of the tender documents) reads as follows:-

> *"Technical and Financial Proposals should be submitted in separate envelopes, the words "Technical Proposal" or "Financial Proposal", as the case may be, being clearly written on the top left corner of the respective envelop. Both these envelopes shall then be placed into another larger sealed envelope again clearly marked as "Tender for Procurement of E-Passport Personalization System on Turnkey basis."*

40. Furthermore, Clause 3.2.5 of the tender documents provides that the inner envelopes shall be placed in an outer envelope and the outer envelope shall be sealed. The petitioners' grievance is also that respondent No.9's technical and financial bids were not sealed in one outer envelope as required by clause

3.2.5.3 of the tender documents, which is reproduced herein below:-

> "*If the outer envelope is not sealed and marked, D.G. I&P shall assume no responsibility for the misplacement or premature opening of the Tender, which if opened prematurely, shall be rejected by the D.G. I&P and returned to the Tenderer.*"

41. Vide letter dated 12.12.2016, Muhlbauer requested respondent No.2 to disqualify respondent No.9 because the outer envelope in which respondent No.9's sealed financial and technical bids were lying was not sealed. Muhlbauer also complained that clause 3.2.4 required the bidders to submit not more than two envelopes as hard copies (other than the original) of the tender document, whereas Muhlbauer submitted five envelopes containing the technical and financial proposals. Respondent No.2 did not respond to this letter. The petitioners assert that respondent No.2 did not take any action regarding the petitioners' grievance. The petitioners also assert that the adoption of the word "shall" in clause (xi) *ibid* made it mandatory for all the bidders to show compliance with the said requirement.

42. The contesting parties are in unison that respondent No.9's technical bids were opened/unsealed on 14.11.2016, in the presence of all the bidders. The petitioner's concern is that the outer envelope in which respondent No.9's sealed technical and financial bids were lying, was not sealed. It is, however, admitted that the non-sealing of the outer envelope containing respondent No.9's sealed technical and financial bids did not expose the contents of its bids. Now, the last date for the submission of the sealed bids, was 14.11.2016, and the technical bids were opened on the same very day. It is nobody's case that respondent No.9 tampered with the bids before their seal was opened. Since the technical bids were to be opened on the same very day on which they were submitted, therefore, the question of tampering with the contents of respondent No.9's technical bid after their submission and before their opening/unsealing does not arise.

43. The "tender" submitted by the bidders comprised of a technical bid and a financial bid. As mentioned above, the technical bids of all the bidders were unsealed in the presence of

all the bidders. Hence, this is not a case of premature opening of a sealed bid. The mere fact that the outer envelope was open did not expose the contents of respondent No.9's sealed technical and financial bids. The learned counsel for the petitioners could not come up with any convincing arguments as to how respondent No.9's unsealed outer envelope had prejudiced the petitioners. In the case of Poddar Steel Corporation Vs. Ganesh Engineering Works (AIR 1991 SC 1579), it has been held as follows:-

> ***"6. ... As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."***

44. Clause 7.1.7 of the tender documents provided that respondent No.2 may waive any minor informality or non-conformity or deviation. Since no prejudice was caused to the petitioners by the fact that the outer envelope, containing respondent No.9's sealed financial and technical bids, was unsealed, I am of the view that respondent No.2 committed no illegality by not disqualifying respondent No.9 for such a minor deviation.

WHETHER RESPONDENT NO.2 WAS CORRECT IN NOT DISCLOSING THE TECHNICAL EVALUATION REPORT UNTIL THE FINANCIAL EVALUATION WAS CARRIED OUT: -

45. Learned counsel for the petitioners submitted that even though the committees constituted by respondent No.2 had completed the technical evaluation of the bids by 08.12.2016, the bid evaluation report was not disclosed until 09.01.2017; that the delay on respondent No.2's part in disclosing the technical evaluation report vitiated the entire bidding process; that unwarranted delay of about a month in the disclosure of the bid evaluation report by respondent No.2 was a violation of the

norms of the tender bidding process; and that since upto 700 marks could have been awarded to a bidder for its technical bid, it was imperative for the technical evaluation report to have been disclosed after the technical evaluation process of the bids was completed.

46. On the other hand, learned counsel for respondent No.2 submitted that the provisions of the PPR, 2004, did not envisage the announcement of the technical evaluation report separately from the financial evaluation report; that Rule 35 of the PPR, 2004, required respondent No.2 to announce the "bid evaluation" in the form of a report at least ten days prior to the award of the contract; that after the financial evaluation of the bids was completed, respondent No.2 announced the "bid evaluation" in the form a report by posting it on PPRA's website on 09.01.2017; that the announcement of the bid evaluation as made by respondent No.2 was strictly in accordance with the law and did not prejudice any of the bidders; that respondent No.2 was required by Rule 41 of PPR, 2004, to maintain secrecy regarding the bids until the announcement of the bid evaluation in the form of a report; and that the premature disclosure of the results of the evaluation of the bidders' technical bids would be tantamount to a violation of Rule 47 of PPR, 2004.

47. As mentioned above, the last date of the submission of the technical and financial bids was 14.11.2016. The technical bids of the three bidders were opened in their presence on 14.11.2016. Respondent No.2 constituted a five-member evaluation committee for the evaluation of the technical bids through office order dated 14.11.2016. The said committee was required to complete the technical evaluation process and submit its report by 24.11.2016. Vide letters dated 08.12.2016, respondent No.2 informed all the three bidders that their bids had been found to be technically compliant. Furthermore, the bidders were requested to attend the opening of financial bids scheduled to be held on 13.12.2016.

48. After the bidders were informed by respondent No.2 through letter dated 08.12.2016 that their bids have been found

to be technically compliant, the petitioner/S.I.S., vide letters dated 09.12.2016, and 10.12.2016, requested respondent No.2 to announce technical scores of the bidders before the opening of the financial bids. Vide e.mail dated 09.12.2016, the petitioner/Safran requested respondent No.2 to provide the bidders with their technical score before the opening of the financial bids. Vide e.mail dated 11.12.2016, Muhlbauer also requested respondent No.2 to share the results and the ratings of the technical bids. Muhlbauer took the position that it would be essential and in the interest of transparency for technical evaluation results to be shared so that the bidders' concerns are addressed. On 13.12.2016, a legal notice was addressed on the petitioner/S.I.S.'s behalf advising respondent No.2 to stop further proceedings in the bidding process and to refrain from awarding the contract to any bidder. In the said legal notice, it was also asserted that it was incumbent upon respondent No.2 to have disclosed the technical scores given to each of the bidders prior to the opening of the financial bids. It was also asserted that the non-disclosure of the technical score contravened the provisions of PPR, 2004 and the norms of transparency.

49. On 13.12.2016, (i.e. the day on which the financial bids of the technically qualified bidders were to be opened), respondent No.2 verbally disclosed the bidders' technical scores. These scores were as follows:-

Respondent No.9	*690/700*
M/s Muhlbauer	*545/700*
Petitioner/Safran	*541/700*

50. Although the technical score of each bidder was disclosed on 13.12.2016, but respondent No.2 did not reveal the technical evaluation report. M/s Muhlbauer, in its letter dated 13.12.2016, to respondent No.2 expressed its grievances regarding the technical evaluation of the bids carried out by respondent No.2. In the said letter, M/s Muhlbauer asserted that the technical evaluation of the bids had not been carried out in a fair and transparent manner. It was also asserted that the award of the contract to respondent No.9 would cause the Government of

Pakistan to spend US dollars 700,000/- more than it should. It was requested that another technical evaluation committee should be constituted for the re-evaluation of the technical proposals.

51. Respondent No.2 has filed a copy of the "final evaluation report regarding procurement of E-Passport Personalization System on Turn-key Basis". This document is dated 06.01.2017. Respondent No.2 in its para-wise comments has pleaded that the bid evaluation report was released on 09.01.2017. Respondent No.2 has also brought on record the minutes of the meeting of the Technical Bid Evaluation Committee. Although these minutes are undated, they must have been compiled prior to 08.12.2016, i.e. when each of the three bidders were informed that they had been technically qualified. It is not known as to when respondent No.2 completed the financial evaluation of the bids. The results of the bid evaluation have been mentioned hereinabove. Although the bid evaluation report was made public on 09.01.2017, (i.e. during the pendency of writ petition No.4650/2016), the petitioner/S.I.S. chose not to amend the said writ petition so as to challenge the bid evaluation process in which lesser marks were given to it as compared to respondent No.9.

52. The position taken by respondent No.2 was that in view of Rule 35 of PPR, 2004, respondent No.2 was under no obligation to reveal the evaluation reports ten days prior to the award of the contract. Rule 35 of PPRA, 2004 reads as follows:-

> ***"35. Announcement of evaluation of reports**. – Procuring agencies shall announce the results of bid evaluation in the form of a report giving justification for acceptance or rejection of bids at least ten days prior to the award of procurement contract."*

53. Rule 35 of the PPR, 2004 requires the procuring agency to announce the results of bid evaluation in the form of a report at least ten days prior to the award of the procurement contract. Therefore, a procurement contract cannot be awarded to any bidder before the expiration of ten days from the date of the disclosure of the bid evaluation report. I do not find anything in

Rule 35 *ibid* which prohibits a procuring agency from revealing the bid evaluation reports once the same have been prepared. This is implicit in the employment of the words *"at least"* in Rule 35 *ibid*. Respondent No.2 would not have violated any provision of PPR, 2004, had the bid evaluation report been revealed soon after the completion of the bid evaluation process even if the intended date of the award of the contract was beyond ten days after the announcement of the bid evaluation results. The petitioners' anxiety to have sight of the technical evaluation report was understandable given the fact that 70% weightage in qualifying a bidder for the award of the contract in question was allocated to technical qualification, whereas 30% was to be based on financial qualification. However, Rule 41 of PPR, 2004 provides that the procuring agency shall keep all information regarding the bid evaluation confidential until the time of the announcement of the evaluation report in accordance with the requirements of Rule 35. Rule 35 *ibid* does not distinguish between a technical evaluation report and a financial evaluation report. Rule 35 read with Rule 41 contemplates the disclosure of one comprehensive bid evaluation report, and not a revelation of the bid evaluation report in a piecemeal manner. The documents on the record do not reveal as to when the financial bid evaluation committee constituted by respondent No.2 completed the financial evaluation process. For a procuring agency to keep the bid evaluation reports close to its heart after the completion of the said process is inappropriate. In such circumstances, a bidder will be well within its rights to approach the Court of constitutional causes so as to seek relief against aberrations in the tender bidding process. True, when the writ petition was instituted by the petitioner/S.I.S. the bid evaluation report had not been disclosed by respondent No.2. The said writ petition was instituted on 19.12.2016, whereas the bid evaluation report was posted on P.P.R.A.'s website by respondent No.2 on 09.01.2017. The announcement of the bid evaluation a month after the completion of the technical evaluation of the bids, caused no harm to the petitioner/S.I.S., as this Court granted

interim relief to the said petitioner when the said writ petition was filed. I have already held that the petitioner/S.I.S. was not entitled to relief prayed for in its writ petition on the basis of the grounds taken therein. Moreover, it has also been held that the petitioner/S.I.S., on its own, did not have the *locus standi* to file the writ petition.

WHETHER THE EVALUATION CRITERIA IN THE TENDER DOCUMENTS WAS FLAWED AND TAILORED SUCH SO AS TO AWARD THE CONTRACT TO RESPONDENT NO.9:-

54. As per the tender documents, all the tenders were to be evaluated in two steps. The first step was to ensure that the tenderers met the technical requirements. In the second step, the financial proposals of only those bidders that met the technical requirements were to be evaluated. Clause 7.2.6 of the tender documents made it explicitly clear that the tenders were to be evaluated in accordance with the technical and financial evaluation criteria and method given in the tender documents. Upto 700 marks were to be given to a bidder in the technical evaluation process, whereas 300 marks were to be given for the financial evaluation process. The criteria for the technical evaluation in the bid documents shows that different marks were to be given for different technical requirements. For instance, for a bidder's 'company profile and team', upto 200 marks could be given, and for 'domain experience and service' upto 225 marks could be given. The tender documents were structured such that the technical strength/score of the bidder was more crucial than its financial strength/score. Even if a certain bidder was awarded highest marks for its financial bid, he could nonetheless be denied the award of the contract on the ground that its technical bid was so deficient as to cause his total/combined financial and technical score to be less than a rival bidder's score due to the latter's higher technical score. In the instant case, Muhlbauer's financial score was 300, whereas that of respondent No.9 was 253.16. However, since Muhlbauer's technical score was 545, and that of respondent No.9 was 690, respondent No.9's bids turned out to be more responsive. Hence, respondent No.2 has expressed its intention to award the contract to respondent

No.9. Whether respondent No.2 awards the contract to respondent No.9 remains to be seen.

55. Learned counsel for the petitioners submitted that under the "Two Stage-Two Envelope" procedure, respondent No.2 could not have proceeded with the financial bid opening until all the bidders were at par regarding their technical proposals; and that the PPR, 2004 requires that all the bidders should be provided a level playing field. This cannot be stretched to mean that the bidders who technically qualified but obtained different marks should be treated at par with each other. The tender documents clearly provided that upto 700 marks could be awarded to each bidder based on the criteria set out in the tender document for the technical evaluation of the bid. A bidder who secures low marks in the technical evaluation can certainly not be treated at par with the bidder who obtained high marks. The import of the requirements in the tender documents were known to all the three bidders, who are prudent commercial persons of business. The fact that only the technically compliant bidders were to be evaluated financially did not mean that the marks obtained by each technically compliant bidder were to be discarded. Clause 10.2 of the tender documents provided that respondent No.2 shall award the contract to the successful tenderer whose tender had been determined to be substantially responsive and had been determined as “the best evaluated tenderer”. The best evaluated tenderer would obviously be the one whose bid is given the best/highest marks in the technical and financial evaluation of the bid.

56. The petitioners questioned the evaluation criteria for the technical proposals. It was *inter-alia* pleaded that the said evaluation criteria was *“inherently obscured/indefinable and ambiguous”*. Additionally, learned counsel for the petitioners submitted that the tender documents issued by respondent No.2 were tilted in respondent No.9’s favour; that the evaluation criteria for the technical proposals was unlawful as it gave respondent No.2 unlimited discretion to manipulate the bid results; that the evaluation criteria was in violation of Rule 29 of

PPR, 2004; that respondent No.2 and respondent No.9 were in collusion and therefore, the bidding process was vitiated under Rule 2(1)(f) of the PPR, 2004; and that the evaluation criteria was inherently obscure and ambiguous inasmuch as the manner in which the scores were to be given to the bidders was not provided anywhere in the tender document.

57. I feel that the objections to the tender documents raised by the petitioners in their writ petitions are an afterthought and designed to derail the process for the award of the contract in favour of the most responsive bidder. I have taken more time than necessary in going through the documents filed along with the writ petitions. Other than the objection regarding the requirement of pricing of the image perforation feature, the petitioner/S.I.S. and/or Muhlbauer did not object to any other requirement in the tender documents prior to the submission of the bids. The minutes of the pre-bid meetings also make no mention of such objections.

58. Clause 3.1.1.16 of the tender documents requires a bidder to submit a copy of the tender documents duly signed by an authorized person and bearing the bidder's stamp. It is not disputed that along with their bids, the bidders, through their authorized representatives submitted letters/certificates to respondent No.2, expressing their agreement to abide by all the terms and conditions mentioned in the tender inquiry.

59. It is to be noted that the tender notice was published on 10.10.2016. Admittedly, the bidders purchased the tender documents and were well aware of all the conditions contained therein. The petitioner/Safran and Muhlbauer submitted their bids by the cut-off date of 14.11.2016, fully knowing the implication of the conditions incorporated in the tender documents. They started crying foul after they realised that they scored less than respondent No.9 in the bid evaluation process. At no point in time, prior to the submission of the bids did the petitioners raise objections against the bid evaluation criteria or any of the tender conditions (save the requirement as to pricing for the Image Perforation). By their aforesaid conduct, they

accepted and acquiesced to the bid evaluation criteria in the tender documents. In such circumstances, it has to be necessarily held that the petitioners are estopped from questioning the bid evaluation criteria or any of the tender conditions.

60. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides*. It is well settled that the terms of the invitation to tender are not open to judicial scrutiny, and the Courts cannot whittle down the terms of the tender unless they are wholly arbitrary, discriminatory or actuated by malice. Reference in this regard may be made to the following case law:-

(i) In the case of Techno Time Construction Company Vs. Punjab Highway Department (2014 MLD 874), it has been held that the High Court cannot interfere with the terms and conditions as prescribed in Tender/Contract Documents unless it was established that the same were contrary to public interest.

(ii) In the case of TEZ Gas (Private) Limited Vs. Oil and Gas Development Authority (PLD 2017 Lahore 111), it has been held as follows:-

> ***"17. ... The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of a contract. Normally speaking, the decision to accept the tender or award the contract is reached through a process of negotiation and deliberations through several tiers. More often than not, such decisions are made qualitatively by experts and the government is free to settle the terms of the contract with the parties. In such cases, if the terms and conditions of the contract are not suited to a party, they need not participate in the tender process or accept the contract. However, if they choose to participate, they are bound by the terms offered to them...."***

(iii) In the case of Meerut Development Authority Vs. Association of Management Studies (2009) 6 SCC 171, it has been held that the terms of the invitation to tender cannot be open to judicial scrutiny but a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-

made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

(iv) In the case of Association of Registration Plates Vs. Union of India ((2005) 1 SCC 679 = AIR 2005 SC 469), it has been held that in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities. Furthermore, it was held that unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable.

61. In the case at hand, the petitioners, having agreed to the conditions contained in the tender documents, and having consciously participated in the tender bidding process are estopped from seeking any relief contrary to the said conditions. The tender conditions cannot be altered after the parties have entered into the arena. Even otherwise, neither do I find any illegality in the tender conditions in question nor are they opposed to any public policy.

62. Learned counsel for the petitioners had submitted that respondent No.2 colluded with respondent No.9 and tailored the bid evaluation criteria so as to ensure that respondent No.9 emerges as the most responsive bidder. In the case of Manzoor Hussain Vs. Muhammad Siddique (2000 CLC 623), it has been held that an element of fraud is in-built in the expression "collusion". The petitioners levelled sweeping allegations against respondent No.2, but there were no specific allegations of fraud or collusion. The term 'collusion' by definition means a deceitful agreement between two or more persons for some nefarious purpose such as to defraud a third party of his right. Collusion implies a commonality of purpose and intention between the colluding parties. In the case at hand, there is no evidence on the record in support of the petitioners' allegation of collusion between respondent No.2 and respondent No.9. The petitioners' pleadings are also silent as to the particulars reflecting collusion between the said respondents. It is well settled that the

petitioner cannot be permitted to make out a case beyond its pleadings.

WHETHER THE TECHNICAL BID EVALUATION COMMITTEES OF RESPONDENT NO.2 WERE CORRECT IN AWARDING 545/700 TO MUHLBAUER, AND 541/700 TO THE PETITIONER/SAFRAN:-

63. Since I have already held writ petition No.4650/2016, instituted by the petitioner/S.I.S., not to be maintainable, I do not feel the need to go into the question whether the technical bid evaluation committee was correct in awarding 545/700 marks to Muhlbauer.

64. Learned counsel for the petitioner/Safran complained that even though the petitioner/Safran's technical solution was the same as that of respondent No.9, M/s Safran secured 541 marks out of 700 for its technical bid, whereas respondent No.9 secured 690 marks.

65. The petitioner/Safran is a single member company incorporated under the laws of the French Republic, and is registered with the Securities and Exchange Commission of Pakistan under Sections 151 and 152 of the Companies Ordinance, 1984. The petitioner/Safran is also registered as an investor with the Board of Investment. The petitioner/Safran, being a person in Pakistan, is entitled to enjoy the protection of law and to be treated in accordance with the law under Article 4 of the Constitution. There was no serious challenge made to the petitioner/Safran's right to invoke the constitutional jurisdiction of this Court. Unlike the petitioner/S.I.S., the petitioner/Safran filed a formal complaint/grievance petition before the G.R.C. after the evaluation reports were revealed by respondent No.2 on 09.01.2017. In response to the notice from the G.R.C., representatives of the petitioner/Safran appeared before the G.R.C. The petitioner/Safran had filed its grievance petition on 17.01.2017. On 07.02.2017, the G.R.C. issued its report regarding the petitioner/Safran's grievances. By this time, the petitioner/Safran had already filed writ petition No.295/2017. I have held earlier that given the composition of the G.R.C; its delayed constitution; the absence of proper authorizations on the record; and its lack of power to grant interim relief, it could

not be termed as an adequate alternate remedy to disentitle a person from invoking the jurisdiction of the Court with respect to matters concerning a procurement process. The fact remains that the petitioner/Safran did indeed file a grievance petition after the bid evaluation report was made available to it.

66. The petitioner/Safran questioned the entertainment of respondent No.9's bid on the ground that the outer envelope containing respondent No.9's sealed technical and financial bid was not sealed. I have already given my views with respect to the said objection. The petitioner/Safran also questioned the bid evaluation criteria in the tender documents. I have already held that since the bid evaluation criteria contained in the tender documents was known to all the bidders prior to their participation in the tender bidding process they could not object to the same after they have turned out to be unsuccessful in the bidding process. The petitioner/Safran's objections regarding the requirement of image perforation has also been eluded to.

67. Other than the said objections, the petitioner/Safran took issue with the low marks given by the bid evaluation committee to the petitioner/Safran's technical bid. Under most of the heads in the petitioner/Safran's technical bid, it secured very good marks. However, under the head of personalization machine, it secured zero out of 90 marks. Under the technical bid evaluation criteria, a bidder was to be given 70 marks for one reference regarding execution for the supply and installation of E-passport Bulk Personalization Machine in the past five years, whereas 90 marks were to be given for more references. Learned counsel for the petitioner/Safran submitted that since the project executed by the petitioner/Safran in The Netherlands was an ongoing project, the same should have been taken into account by respondent No.2 while awarding marks. Learned counsel for respondent No.2 submitted that the year when the project was awarded was to be taken into consideration, and not the period during which the machines installed were being operated.

68. The ground on which no marks were given under the said head was that no E-passport Bulk Personalization Machine of

similar configuration, specification and brand had been deployed by the petitioner/Safran in less than the past five years. The petitioner/Safran, in its technical bid, had mentioned a project executed by it in The Netherlands, but this project was executed in the year 2006, whereas the requirement in the tender documents for the deployment of machine was in the previous five years. Since the initial contract was executed by the petitioner/Safran on 26.08.2006, that was the determinative date to be considered in the bid evaluation process. Therefore, I do not find any illegality in the award of zero marks to the petitioner/Safran under the said head.

69. Respondent No.2 had reason to doubt the capacity of the Bulk Personalization Machine installed by Safran in The Netherlands. As per the verified documents from the customer in The Netherlands, the said machine had the contracting volume of 10 million E-Passports for the period 2006 to 2011, i.e. 2 million E-Passports per year. In the clarification given by the petitioner/Safran, the said machine had the personalization capacity of 3.5 million per year. In the bid submitted by the petitioner/Safran, it represented that the said machine had the personalization capacity of producing 6.5 million E-Passports per year. Given these discrepancies, the bid evaluation committee cannot be faulted in giving no marks to the petitioner/Safran since in the past five years the petitioner/Safran had not entered into a contract for the supply and installation of E-passport Bulk Personalization Machines.

70. I do not intend sitting in appeal over the decision of the bid evaluation committee of respondent No.2, which awarded marks in the bid evaluation process to the bidders. This Court in exercise of its power of judicial review cannot undertake such an exercise and substitute its views with those of experts unless there is a glaring illegality, irrationality or procedural irregularity, which is apparent from the record. I have found no such infirmity in the process of bid evaluation. This Court is neither competent nor equipped to substitute its views with those taken by experts evaluating the bids.

71. A position well settled by a catena of judicial pronouncement is that this Court, while exercising its powers of judicial review of administrative action, does not sit as a Court of appeal but only reviews the manner in which the decision in question is arrived at. Judicial review is concerned with reviewing not the merits of the decision which is challenged in a writ petition, but the decision making process. In Chief Constable of the North Wales Police v. Evans, (1982) 3 All.ER 141, Lord Brightman said:-

> ***"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial Review is concerned, not with the decision, but with the decision making process. Unless that restriction the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."***

72. In the case of Tata Cellular Vs. Union of India (1994) 6 SCC 651, the Indian Supreme Court after a detailed examination of the law on the subject opined that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. The view taken by the said Court was that judicial review was concerned with reviewing not the merits of the decision under challenge in a writ petition, but the decision-making process itself. It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision for the one under challenge. The Hon'ble Supreme Court of Pakistan has quoted the said judgment with approval in several occasions.

73. Taking the totality of facts and circumstances of the case into consideration, I come to the inevitable conclusion that the petitioners have not been able to establish their claim for the relief prayed for by them. The process culminating in the award of highest marks to respondent No.9 in the bid evaluation process conducted by bid evaluation committees constituted by respondent No.2 cannot be said to be illegal, irrational or

procedurally improper which may warrant interference in the writ jurisdiction of this Court. Resultantly, the petitions are dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

APPROVED FOR REPORTING

Sultan*

SCHEDULE-A

i. The Respondent No.2 be prohibited from considering awarding a contract under the Tender to the Respondent No.9, or any other bidder;

ii. The Respondent No.2's decision to affirm the Respondent No.9 Technically Responsive be declared illegal, void and against the principles of fairness and transparency;

iii. The Respondent No.9 be disqualified from the bidding;

iv. The Technical scores given to the Petitioner be declared baseless, illegal, void and against the principles of fairness and transparency;

v. The Technical scores given to the Respondent No.9 be declared colluded, illegal, void and against the principles of fairness and transparency, and in violation Rule 36(d) of PPR 2004;

vi. The awarding of the highest aggregate marks in favour of the Respondent No.9 to be declared colluded, illegal, void and against the principles of fairness and transparency;

vii. The Respondent No.2 to 7 be compelled to provide the detailed evaluation report to the Petitioner;

viii. The Court may constitute an autonomous and impartial body to conduct a re-evaluation of the technical proposals, without the involvement of the Respondent's No.2 to 7;

ix. The Respondent No.2 be directed that the be declared Petitioner as the successful bidder being the lowest financial bidder and being fully technically qualified;

x. Any other relief consistent with the facts of the case may also be awarded.

SCHEDULE-B

i. It be declared that the respondent No.2's decision to affirm the Respondent No.8 Technically Responsive be declared illegal, void and against the principles of fairness and transparency and thus the said respondent be prohibited from awarding the contract under the Tender to the respondent No.8 or any other bidder, except the petitioner;

ii. The Technical scores awarded to the Petitioner be declared baseless, illegal, void and against the principles of fairness and transparency and consequently the Technical scores given to the Respondent No.8 be declared colluded, illegal, void and against the principles of fairness and transparency, and in violation of PPRA 2004;

iii. In view of the partial, biased and one-sided leanings and conduct of the respondents No.2-7, this Hon'ble Court may graciously constitute an autonomous and impartial body to conduct a re-evaluation of the technical proposals, without the involvement of the said respondents;

iv. The Respondent No.2 be directed that to declare Petitioner as the successful bidder being the lowest financial bidder and being fully technically qualified and thus entitled to award of the contract; and

v. Any other relief which this Hon'ble Court deems fit and proper and consistent with the facts of the case may also be awarded.