

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

W.P.No.3094/2018  
Gemalto Middle East FZ-LLC

**Versus**

Federation of Pakistan through Secretary, Finance Division and  
others

**Date of Hearing:** 27.09.2019  
**Petitioner by:** M/s Mansoor Hassan and Saqib Majeed,  
Advocates.  
**Respondents by:** Mr. Muhammad Nadeem Khan Khakwani,  
learned Assistant Attorney-General.  
Mr. Asim Shafi, Advocate for respondents  
No.3 and 4.  
M/s Babar Sattar and Zainab Janjua,  
Advocates for respondent No.6.  
Mr. Muhammad Khursheed, Deputy  
Director, P.P.R.A.

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**MIANGUL HASSAN AURANGZEB, J:-** Through the instant writ petition, the petitioner, Gemalto Middle East FZ-LLC, seeks a declaration to the effect that the process for the procurement for e-data pages has been conducted by respondent No.3/National Security Printing Company (Pvt.) Ltd. ("N.S.P.C.L.") in violation of the Public Procurement Rules, 2004 ("the 2004 Rules") and in a non-transparent manner. The petitioner also seeks a direction to N.S.P.C.L. to scrap the current procurement process and to invite fresh tenders.

**CHRONOLOGY OF FACTS:-**

2. The facts essential for the disposal of the instant petition are that through an advertisement dated 22.10.2017 published in the daily Dawn, N.S.P.C.L. invited applications from local and foreign manufacturers of smart cards for prequalification for the supply of ID-1 cards and ID-3 cards. ID-1 cards are generally used for the national identity cards, driving licenses etc. whereas ID-3 cards are used for passports. The eligible applicants could obtain further information from the prequalification documents which could be purchased from N.S.P.C.L. The applicants were required to submit their proposals on the prescribed prequalification documents / forms in a sealed envelope by 28.11.2017.

3. Clause 11 of the “Specification and Terms and Conditions for Prequalification” issued by N.S.P.C.L. provided that “[t]he bidder should have at least shipped more than 5.0 million ID3 and 2.0 million ID1 over the last three years which were used as international travelling and identification documents respectively.” On 03.11.2017, a corrigendum was published in the daily Dawn whereby clause 11 was amended to read thus: “[t]he bidder should have at least shipped more than 2.0 million ID1 and 2.0 million ID3 over the last three years which were used as National (Identification / Driving License? Arm License / Vehicle Registration) document and International travelling document respectively.”

4. The petitioner, along with five other bidders, submitted their prequalification documents by 28.11.2017. The technical evaluation committee constituted by N.S.P.C.L., after going through the technical specifications provided by each of the bidders, “verified” the specifications provided by the six bidders namely (i) M/s Gemalto Middle East FZ-LLC/petitioner, (ii) M/s Mühlbauer GmbH & Co. KG (“M/s Mühlbauer”)/respondent No.6, (iii) M/s IDEMIA Identity and Security (“M/s IDEMIA”)/respondent No.7, (iv) M/s IN CONTINU ET Services (“M/s IN CONTINU”)/respondent No.8, (v) M/s Future Card Industries and (vi) M/s Card Logix. This is apparent from the technical evaluation committee’s report dated 26.01.2018. It is an admitted position that N.S.P.C.L., vide letters dated 30.01.2018, informed all the “verified” bidders, including the petitioner, that their proposals had been “technically evaluated and found technically compliant.” Furthermore, they were all informed that they had been prequalified for a period of one year.

5. Clause 16 of the terms and conditions of the prequalification documents issued by N.S.P.C.L. provided that the prequalified bidders will have to provide fifty polycarbonate ID-1 and ID-3 sample cards (with or without a chip) to check their compatibility with N.S.P.C.L.’s machines and equipment. Clause 19 of the said documents provided that no sample is required to participate in the prequalification process. Accordingly, vide letter dated

22.02.2018, N.S.P.C.L. requested the prequalified bidders to provide samples of ID-3 cards with the specifications given in the said letter. These samples were required to be provided by 09.03.2018. It is not disputed that the petitioner had provided the required samples to N.S.P.C.L. within the specified time period.

6. The samples of ID-3 cards provided by the prequalified bidders were used in machine trials. As a result of the machine trials, four applicants were prequalified whereas the prequalification documents of M/s Future Card Industries and M/s Card Logix were rejected. Thereafter, a revised technical evaluation report was issued on 22.03.2018 according to which four bidders, including the petitioner, M/s Mühlbauer, M/s IDEMIA and M/s IN CONTINU, were prequalified for the supply of ID-3 cards only. The machine trials of ID-1 cards could not be performed due to the unavailability of the required machines. Since the machines for testing ID-1 cards were not available, N.S.P.C.L. decided to postpone the procurement of ID-1 cards. The procurement process initiated through the said advertisement continued only for ID-3 cards.

7. Vide letter dated 27.03.2018, N.S.P.C.L. called upon the prequalified bidders to submit their financial quotations/bids in sealed envelopes for 500,000 ID-3 cards. These bids were required to be valid for a period of 60 days and submitted by 10.04.2018. It is not disputed that the prequalified bidders had submitted their financial bids for 500,000 ID-3 cards on 10.04.2018 and were opened on the same day.

8. M/s IN CONTINU and M/s Mühlbauer had both quoted the unit price (Free on Board) of Euros 4.6 which, along with freight and other charges, came to Euros 2,320,000/- (equivalent to Rs.3,29,648,800/-) for 500,000 ID-3 cards whereas the petitioner quoted the highest unit price of Euros 4.894 which, along with freight and other charges, came to Euros 2,500,000/- (equivalent to Rs.3,55,225,000/-). M/s IDEMIA had also quoted a unit price of Euros 4.6 which, along with substantially higher freight and other charges, came to Euros 2,493,464/- (equivalent to Rs.3,54,296,300/-).

9. Vide letter dated 17.04.2018, the petitioner expressed its intention to challenge the procurement process before the Grievance Redressal Committee (" the G.R.C.") under Rule 48(1) of the 2004 Rules, and asked N.S.P.C.L. for the names of the G.R.C.'s members. The petitioner also asked for a copy of the evaluation report to be issued by N.S.P.C.L. under Rule 35 of the 2004 Rules.

10. A financial evaluation report setting out the above figures was issued by N.S.P.C.L. on 11.05.2018. Subsequently, another undated financial evaluation report was issued by N.S.P.C.L. in which the name of M/s IN CONTINU was missing. Learned counsel for N.S.P.C.L. explained this by submitting that since M/s IN CONTINU's response to certain technical clarifications sought by N.S.P.C.L. had not been found to be satisfactory, it had been disqualified on 26.06.2018 from further participation in the tendering process. M/s IN CONTINU did not challenge its disqualification. Be that as it may, as a result of M/s IN CONTINU's disqualification, M/s Mühlbauer's financial quotation emerged to be the lowest.

11. On 21.05.2018, a complaint under Rule 48 of the 2004 Rules was submitted on the petitioner's behalf to the G.R.C. and the Chairman of N.S.P.C.L. In the said complaint, it was alleged that the norms of transparent tender bidding process as well as Rules 15, 27, 36, 37 and 42(b) of the 2004 Rules had been violated. The said complaint was responded to by N.S.P.C.L.'s Purchase Incharge vide letter dated 24.05.2018, wherein the position taken was that no provision of the 2004 Rules had been violated and that the petitioner had participated in the bidding process by submitting its quotation without any reservation.

12. Vide letter dated 21.06.2018, N.S.P.C.L. requested the prequalified bidders to extend the validity of their quotations and the bid bonds up to 05.08.2018. Although M/s IDEMIA and M/s Mühlbauer extended the validity of their quotations and bid bonds up to 05.08.2018, the petitioner, vide letter dated 29.06.2018, informed N.S.P.C.L. that since the validity of its financial bid had expired on 09.06.2018, and since the bidders had not been asked

to extend the validity of their bids prior to the expiry of the original bid validity period, the bids submitted by all the bidders had become invalid on 09.06.2018 and N.S.P.C.L. was obliged to terminate the procurement process.

13. N.S.P.C.L., vide letter dated 04.07.2018, informed the petitioner *inter alia* that under Rule 26(3) of the 2004 Rules, the procuring agency could, under exceptional circumstances and for reasons to be recorded in writing, ask all those who submitted their bids to extend the bid validity period. The petitioner was asked once again to extend the validity of its bid and bid bond by 05.07.2018.

14. On 03.07.2018, N.S.P.C.L. asked the Public Procurement Regulatory Authority ("P.P.R.A.") to clarify whether in terms of Rule 26(3) of the 2004 Rules, N.S.P.C.L. could ask for an extension of bid validity during the process of financial evaluation. N.S.P.C.L., in its letter dated 03.07.2018, had taken the position that the financial evaluation process could not be completed in the original bid validity period of sixty days due to *"complexity of the project and legal notices issued by one of the participants"*. Vide letter dated 05.07.2018, P.P.R.A. informed N.S.P.C.L. that under Rule 36(b)(viii) of the 2004 Rules, the technical and financial proposals are required to be opened within the stipulated bid validity period, and that under Rule 26(3) of the said Rules, bid validity cannot be extended further and that the delay in the technical and financial evaluation was on the part of the procuring agency. It was opined that *"the procuring agency after thorough deliberation may take a decision in the instant case to extend the bid validity period with consent of the participated bidders."* It was also opined that the bidder who does not agree to extend the bid validity period shall be allowed to withdraw its bid without the forfeiture of bid bond or security in terms of Rule 26(4)(c) of the 2004 Rules.

15. On 12.07.2018, N.S.P.C.L. sent the bid evaluation report regarding the procurement of ID-3 cards to P.P.R.A. As per this report, M/s Mühlbauer, with a bid of Euros 2,320,000, was the lowest technically compliant bidder whereas the petitioner, with a

bid of Euros 2,500,000, was stated to have also been technically compliant but not the lowest bidder. It was also stated that the petitioner had not extended its bid validity. M/s IDEMIA, with a bid of Euros 2,493,464, was stated to have been technically compliant but not the lowest bidder. This evaluation report was published on P.P.R.A.'s website on 16.07.2018.

16. Vide letter dated 17.07.2018, the petitioner complained to N.S.P.C.L. that despite a complaint having been filed on 21.05.2018, the G.R.C. had not conducted any hearing. It was requested that the G.R.C. should adjudicate upon the petitioner's complaint and issue appropriate directions for the suspension of the procurement process until the final outcome of the complaint. The petitioner asked N.S.P.C.L. to provide the names of the G.R.C.'s members so that the petitioner could directly address its complaint to them. It was also asserted that the evaluation report published on P.P.R.A.'s website on 16.07.2018 was *"marred with serious illegalities and irregularities"*.

17. Vide letter dated 18.07.2018, N.S.P.C.L. informed the petitioner that a G.R.C. had been constituted pursuant to Rule 48(1) of the 2004 Rules. Furthermore, the names of the G.R.C.'s members were also mentioned in the said letter. After the petitioner, vide letter dated 19.07.2018, raised objections to the presence of two members on the G.R.C., N.S.P.C.L., vide letter dated 23.07.2018, reconstituted the G.R.C. by excluding therefrom the two members against whom objections had been raised by the petitioner.

18. The Ambassadors of the Republic of France and the Kingdom of Netherlands had met with the Finance Secretary on 12.07.2018 and had complained about a lack of transparency in the procurement process conducted by N.S.P.C.L. and about the discriminatory treatment meted out to the petitioner. The petitioner's C.E.O. had accused the Managing Director of N.S.P.C.L. of threatening to blacklist the petitioner if it did not stop complaining. Vide letter dated 24.07.2018, the Finance Division (Internal Finance Wing) directed N.S.P.C.L. to submit a comprehensive report on the matter within a period of seven days.

19. On 31.07.2018, N.S.P.C.L. submitted a strongly worded report to the Finance Division refuting the accusations hurled by the petitioner against N.S.P.C.L., and setting out the chronology of facts leading to the issuance of the bid evaluation report. In the said report, it was also mentioned that the petitioner had been irked by N.S.P.C.L.'s rejection of the petitioner's proposal to enter into a joint venture agreement with it. It was also stated that the petitioner had unnecessarily raised objections to the procurement process regarding the Smart Card Manufacturing System in which the petitioner had not even participated. N.S.P.C.L. believed that the petitioner was trying to pressurize N.S.P.C.L. by involving the Ambassadors after it was known to all that the petitioner's financial bid had been evaluated to be the highest.

20. On 03.08.2018, the G.R.C. decided that N.S.P.C.L. had conducted the prequalification process in a fair and transparent manner by following the requirements of the 2004 Rules. Apparently, the Finance Division had given verbal directions to halt the procurement process. N.S.P.C.L., vide letter dated 10.08.2018, informed the Finance Division that N.S.P.C.L. and the Director General, Immigration and Passports ("D.G.I.&P.") were suffering financial losses due to the delay in the procurement process. In the said letter, it was specifically mentioned that the procurement process had been halted due to the Finance Division's verbal instructions.

21. On 09.08.2018, the petitioner filed the instant writ petition. Along with the said writ petition, the petitioner had also filed an application for interim injunction, praying for restraining N.S.P.C.L. from proceeding with the award of the contract. Vide order dated 09.08.2018, this Court ordered that the procurement process may continue but the same shall be subject to the final outcome of this petition.

22. On 28.09.2018, N.S.P.C.L. issued a purchase order to M/s Mühlbauer for 500,000 electronic data pages for electronic passports. 40% of the payment was to be made in advance through an irrevocable Letter of Credit and 60% after delivery. In the said purchase order, it was noted that the same was subject to

the decision of this Court and that if the Court decided against N.S.P.C.L., the purchase order would be considered as cancelled. Despite this purchase order, N.S.P.C.L. has not made any payment to M/s Mühlbauer.

**CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:-**

23. Mr. Mansoor Hassan Khan, A.S.C., learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that the procuring agency/N.S.P.C.L. could not have intermingled the prequalification process with the technical evaluation process; that after completing the prequalification process envisaged by Rules 15 and 16 of the 2004 Rules, the procuring agency was supposed to require the prequalified bidders to submit their technical and financial bids; that the terms and conditions for prequalification of ID-1 and ID-3 cards issued by N.S.P.C.L. were flawed inasmuch as the prequalified bidders were also to be treated as technically qualified for the consideration of their financial quotations; that N.S.P.C.L. had carried out the technical evaluation in the garb of the prequalification process; that Rule 29 of the 2004 Rules requires the procuring agency to formulate an evaluation criteria listing all the relevant information against which the bid is to be evaluated; that the evaluation criteria is required to be a part of the bidding documents; that Rule 30 of the 2004 Rules requires that all bids shall be evaluated in accordance with the evaluation criteria and other terms and conditions set forth in the prescribed bidding documents; that failure to provide for an unambiguous evaluation criteria in the bidding documents amounts to misprocurement; that in the instant case, the evaluation criteria provided in the prequalification documents was vague and ambiguous inasmuch as it simply provided that *“technically evaluated responsive proposals/offers as per our specification/requirement and meeting terms and conditions of prequalification documents”*; that N.S.P.C.L. did not give any marks to the bidders in the prequalification process; that the prequalified bidders had not been asked to submit their technical



bids; that after the prequalification of the bidders, N.S.P.C.L. asked the bidders to submit their financial bids only; and that N.S.P.C.L. should have required the prequalified bidders to submit technical bids as well.

24. Learned counsel for the petitioner further submitted that according to N.S.P.C.L.'s technical evaluation report dated 26.01.2018, six bidders were prequalified; that subsequently, revised technical evaluation report dated 22.03.2018 was issued according to which two out of the six bidders were disqualified; that M/s Mühlbauer and M/s IN CONTINU had submitted collusive bids; that when the financial proposals were opened on 10.04.2018, it was found that M/s Mühlbauer and M/s IN CONTINU's bids were exactly the same, i.e. Euros 2,320,000/-; that although M/s IN CONTINU had earlier been prequalified, however, after the submission of its financial bid, N.S.P.C.L. disqualified it on the pretext that it had failed to make certain clarifications; that as a result of M/s IN CONTINU's disqualification, M/s Mühlbauer became the lowest evaluated bidder; and that the mere fact that M/s IN CONTINU did not object to its disqualification shows that it had submitted a collusive bid with M/s Mühlbauer.

25. Furthermore, it was submitted that on 21.05.2018, the petitioner had submitted its first complaint to N.S.P.C.L. as well as to the G.R.C.; that the petitioner submitted its second complaint on 17.07.2018; that two months after the petitioner's initial complaint, a G.R.C. was constituted by N.S.P.C.L.; that the G.R.C. gave its decision against the petitioner on 03.08.2018; that the petitioner was not afforded an opportunity of a hearing by the G.R.C.; that the G.R.C.'s said decision is bereft of reasons; that the petitioner's ground that the bidders could not have been asked to extend the bid validity after its expiry on 09.06.2018 was not addressed in the G.R.C.'s decision; that the petitioner was under no obligation to renew its bid bond or to extend the validity of its bid; that N.S.P.C.L.'s requirement for the extension of the bid validity was in violation of Rule 26(3) of the 2004 Rules; that Guidance Note 9 in the Standing Operating Procedure ("S.O.P.")

No.21 of the Manual of Procurement Policies issued by P.P.R.A. also requires that a request for the extension of bid validity should be made before the expiry of the bid validity; and that P.P.R.A.'s opinion, in its letter dated 05.07.2018, that a bidder who does not agree to extend the bid validity should be allowed to withdraw its bid, is contrary to the said S.O.P. as well as Rule 26 of the 2004 Rules.

26. Learned counsel further submitted that M/s Mühlbauer could not have been technically qualified since it had not satisfied clause 11 of the terms and conditions of the prequalification documents which required a bidder to have shipped more than two million ID-3 cards over the last three years; that on 28.11.2017, M/s Mühlbauer submitted its proposal in response to the prequalification notice; that the invoices submitted by M/s Mühlbauer along with its proposal purportedly showed that it had shipped 2,000,326 ID-3 cards over the last three years; that M/s Mühlbauer resubmitted copies of invoices to N.S.P.C.L. along with the clarifications made in its letter dated 17.05.2018; that a careful examination of these invoices submitted by M/s Mühlbauer along with its prequalification documents show that the total number of ID-3 cards shipped by it over the last three years were 1,859,826; that since there was a shortfall of 140,174 ID-3 cards, M/s Mühlbauer had not satisfied the essential condition for prequalification; that compliance with the requirement of clause 11 was most crucial since N.S.P.C.L. had disqualified M/s IN CONTINU on account of not providing an adequate clarification for satisfying the requirements of *inter alia* clause 11 of the terms and conditions of the prequalification documents; that through application (C.M.No.2040/2019) filed on 15.05.2019, M/s Mühlbauer gave a breakdown of 3,354,591 ID-3 cards purportedly shipped between November 2014 and November 2017; that the invoices annexed at pages 11 to 26 of the said application were not a part of M/s Mühlbauer's proposal submitted in response to the prequalification notice; that Rule 31 of the 2004 Rules does not permit such subsequently filed documents to be taken into consideration in a tender bidding process; and that since the

evaluation reports did not contain the details regarding M/s Mühlbauer's satisfaction as to clause 11 of the prequalification documents, the petitioner came to know about the deficiency in M/s Mühlbauer's proposal after the filing of the writ petition. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

**CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENTS NO.3 AND 4:-**

27. On the other hand, Mr. Asim Shafi, Advocate, learned counsel for respondents No.3 and 4/N.S.P.C.L., submitted that the procurement process for ID-3 cards had been conducted by N.S.P.C.L. strictly in accordance with the 2004 Rules; that on 21.06.2018, the prequalified bidders had been asked to extend the bid validity in accordance with Rule 26(3) of the 2004 Rules; that the "*exceptional circumstances*" which caused N.S.P.C.L. to request the bidders to extend the validity of their bids was (i) the correspondence between N.S.P.C.L. and M/s IN CONTINU leading to the latter's disqualification, and (ii) the Finance Division had directed N.S.P.C.L. to halt the procurement process; that vide letter dated 10.08.2018, N.S.P.C.L. had brought to the notice of the Finance Division that the directions to halt the procurement process had delayed the e-passport project resulting in a financial loss to N.S.P.C.L. as well as D.G.I.&P.; that P.P.R.A. had, vide letter dated 05.07.2018, clarified that a bidder who does not extend the validity of its bid could be allowed to withdraw its bid; that the requirement in Rule 26(3) of the 2004 Rules to extend the bid validity prior to its expiry is directory and not mandatory; that the essential reason why the petitioner did not extend the validity of its bid was because it was known to all that the petitioner's financial bid was the highest; and that since the petitioner's financial bid was not the lowest, it did not have the *locus standi* to file the instant writ petition.

28. Learned counsel further submitted that the G.R.C. was formed on 18.07.2018; that the petitioner had filed its complaints and objections to the constitution of the G.R.C. on 21.05.2018, 17.07.2018 and 19.07.2018, respectively; that the G.R.C. was

reconstituted on 23.07.2018 after the petitioner raised objections against two members of the G.R.C.; that the G.R.C.'s well reasoned decision dated 03.08.2018 against the petitioner does not suffer from any jurisdictional infirmity; that N.S.P.C.L. had not extended undue favour to M/s Mühlbauer; that it was a mere coincidence that M/s Mühlbauer's financial bid was exactly the same as that of M/s IN CONTINU; that the petitioner had not been discriminated against; that if at all there was any irregularity in the bidding process, the same was of a minor nature and curable; that due to this litigation, the petitioner had caused a loss to the exchequer; and that the contract price is denominated in Euros which has strongly appreciated in the recent past against the Pakistan Rupee. Learned counsel for respondents No.3 and 4 prayed for the writ petition to be dismissed.

**CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENT No.6:-**

29. Mr. Babar Sattar, A.S.C., learned counsel for respondent No.6 / M/s Mühlbauer, raised a preliminary objection to the maintainability of the instant petition on the ground that the petitioner is a foreign company incorporated in the United Arab Emirates and was barred from instituting the instant petition due to Section 441 of the Companies Act, 2017; that the petitioner has a place of business in Pakistan; that since the petitioner has not complied with its obligations under Sections 435 and 436 of the Companies Act, 2017 it could not have instituted the instant writ petition. In raising this preliminary objection, learned counsel for M/s Mühlbauer placed reliance on the law laid down in the cases of Trek Technologies Limited Vs. Icondor Telecom (Private) Limited (2018 CLD 668), Hala Spinning Mills Ltd. Vs. International Finance Corporation (2002 SCMR 450), Abdul Haque Baloch Vs. Government of Balochistan (PLD 2013 S.C. 641) and China Annag Construction Corporation Vs. K.A. Construction Co. (2001 SCMR 1877).

30. Learned counsel for M/s Mühlbauer further submitted that the petitioner had participated in the prequalification process and had submitted its quotations for the 500,000 ID-3 cards without

any demur or reservation; that the two bidders that had been disqualified had not challenged their disqualification before any forum; that at the prequalification stage, the technical qualification of the bidders was carried out; that the prequalification process was so comprehensive that there was no need to carry out the technical evaluation of the bids; that the petitioner started raising objections to the tendering process after the bids were opened and it realized that its financial bid was the highest; and that after realizing that an award of the contract in its favour was not likely, the petitioner refused to extend the validity of its bid.

31. Learned counsel further submitted that the petitioner tried to exert pressure through the Ambassadors of the Republic of France and the Kingdom of Netherlands on N.S.P.C.L. to award the contract in the petitioner's favour; that the reason why a decision to award the contract could not be taken in the original bid validity period was because the Finance Division had directed N.S.P.C.L. to halt the procurement process; that it is an admitted fact that the personalization machine had been supplied by the petitioner; that the petitioner had supplied 100,000 ID-3 cards free of cost to D.G.I.&P. during the procurement process knowing well that if the cards supplied by the petitioner were used, it would be difficult for N.S.P.C.L. to use the cards supplied by other suppliers; and that the cards supplied by different suppliers are not identical whereas all passports are required to be identical.

32. It was further submitted that the prequalification did not specify with clarity the three-year period during which a bidder was required to have shipped two million ID-3 cards; that M/s Mühlbauer understood the three-year period to commence from the year 2014; that the petitioner raised the objection regarding the deficient number of ID-3 cards shipped by M/s Mühlbauer for the first time before this Court; that the petitioner had satisfied the essential requirement of shipping two million ID-3 cards in the three-year period commencing from 2014; and that from November, 2014 to November, 2017, M/s Mühlbauer had supplied

3.4 million ID-3 cards. Learned counsel for M/s Mühlbauer prayed for the writ petition to be dismissed.

33. The learned Assistant Attorney-General submitted that the petitioner's intermittent complaints caused the bid validity period to lapse; that the omission to process or evaluate the bids within the bid validity period is not a serious lapse; and that there was no evidence of any collusion between M/s Mühlbauer and M/s IN CONTINU. The learned Assistant Attorney-General prayed for the writ petition to be dismissed.

34. I have heard the contentions of the learned counsel for the contesting parties as well as the learned Assistant Attorney-General and have perused the record with their able assistance.

35. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 22 above, and need not be recapitulated.

36. In the first instance, I propose to deal with the preliminary objection to the maintainability of the instant petition raised by the learned counsel for M/s Mühlbauer, that since the petitioner is a foreign company which has not complied with the requirements of Sections 435 and 436 of the Companies Act, 2017, it could not have filed the instant petition by reason of the disability provided under Section 441 of the said Act.

37. Section 435 of the said Act requires every foreign company which establishes a place of business in Pakistan to deliver to the Registrar the documents listed in Section 435(1)(a) to (f) whereas Section 436 requires a foreign company whose documents are altered to deliver returns to the Registrar. Section 441 of the said Act provides *inter alia* that failure by a foreign company to comply with any of the requirements of Section 435 or 436 shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof; but the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceedings in respect of any such contract, dealing or transaction until it has complied with the provisions of Sections 435 and 436.

38. In the instant writ petition, the petitioner has not described itself but it is admittedly a company established in the United Arab Emirates. It is also an admitted position that the petitioner has not complied with the requirements of Sections 435 and 436 of the Companies Act, 2017. Since Section 441 of the said Act places a disability on a foreign company *“to bring any suit, claim any set-off, make any counter-claim or institute any legal proceedings in respect of any such contract, dealing or transaction, until it has complied with the provisions of Sections 435 and 436”*, the said Section has to be construed strictly. The disability provided in Section 441 of the Companies Act, 2017 is with respect to legal proceedings etc. in respect of any contract, dealing or transaction. It is my view that participation in a tender bidding process does not come within the meaning of a contract, dealing or transaction. As per the Black’s Law Dictionary (Fifth Edition), *“dealings”* means transactions in the course of trade or business; and *“transaction”* is given the following meaning:-

*“Act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, any by which the legal relations of such persons between themselves are altered. It is a broader term than “contract”.”*

39. Even otherwise, I am of the view that if the term *“any legal proceedings”* is to include a writ petition, a sub-constitutional legislation cannot impose a disability on a person from invoking the Constitutional jurisdiction of this Court. The instant petition has been filed under Article 199 of the Constitution, seeking the issuance of a writ of mandamus and prohibition. In the said petition, the petitioner has attempted to bring to the fore aberrations in the tender bidding process adopted by N.S.P.C.L. for the procurement of ID-3 cards. Since the petitioner has not sought the relief of the award of the contract in its favour, and since its participation in the tender bidding process could not be termed as a contract, dealing or transaction, the institution of the instant petition is not hit by Section 441 of the Companies Act,

2017. Therefore, the preliminary objection taken by the learned counsel for M/s Mühlbauer to the maintainability of this petition is spurned. In holding so, reliance is placed on the judgment in the case of Arshad Mehmood Vs. Commissioner/Delimitation Authority (PLD 2014 Lahore 221), wherein the Full Bench of the Hon'ble Lahore High Court held as follows:-

*“It is axiomatic and by now a judicial cliché, that sub-constitutional legislation cannot curtail or abridge the constitutional jurisdiction of this Court. Legislature, being the creature of the Constitution cannot take away the jurisdiction of a constitutional Court conferred by the Constitution. “Shortly stated, an ordinary statute or a sub-constitutional legislation is incapable of ousting, curtailing or limiting the constitutional jurisdiction of the Supreme Court or the High Courts and the words 'no court' in an ouster clause in a statute do not, therefore, include the High Courts or the Supreme Court so far as their constitutional jurisdiction (e.g. under Article 199 and Article 184 of the Constitution) is concerned.” This well settled constitutional principle loudly resonates through our jurisprudence: Khan Asfandiyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others (PLD 2001 SC 607), Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others (PLD 1996 SC 632), Malik Muhammed Mukhtar, through Legal Heirs v. Province of Punjab through Deputy Commissioner (Collector) Bhawalpur and others (PLD 2005 Lah. 251), Miss Asma Jilani v. The Government of the Punjab and another (PLD 1972 SC 139), Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14) and Federation of Pakistan and another v. Malik Ghulam Mustafa Khar (PLD 1989 SC 26).”*

I shall now proceed to decide the case on merits.

**WHETHER THE PETITIONER COULD CHALLENGE THE MODE ADOPTED BY N.S.P.C.L. FOR THE PROCUREMENT PROCESS AFTER PARTICIPATING IN THE SAME:-**

40. As regards the contention of the learned counsel for the petitioner that after the prequalification process had been completed, N.S.P.C.L. should have required the prequalified bidders to submit their technical and financial bids and that the technical evaluation process should have been carried out independently after the prequalification process, suffice it to say that the petitioner, as a prudent person of business and well aware of the contents of the prequalification documents, participated in the tender bidding process for the procurement of ID-3 cards right up to the opening of the financial bids without any protest, demur or reservation. After N.S.P.C.L., vide letter dated



27.03.2018, required the prequalified bidders, including the petitioner, to submit their financial quotations by 10.04.2018, the petitioner was well aware that there was going to be no technical evaluation process independent of the prequalification process. The petitioner did not take any issue with this and submitted its financial bid in response to N.S.P.C.L.'s said letter dated 27.03.2018.

41. Once the financial bids submitted by the four prequalified bidders were opened on 10.04.2018 and the petitioner came to know that its bid was the highest and therefore most unlikely to be accepted, it decided to raise objections with respect to a process in which it had participated voluntarily and alleged that the tendering process adopted by N.S.P.C.L. was in gross violation of the public procurement laws. Therefore, I am of the view that the petitioner is estopped by conduct to raise objections to the procedure for the procurement process adopted by N.S.P.C.L. Recently, in the case of JDW Sugar Mills Ltd. Vs. Province of Punjab (PLD 2017 Lahore 68), it has been held that when a party takes an inconsistent position in the same case or in a prior case, the principle of judicial estoppel, which precludes the party from taking inconsistent positions, should be applied. Additionally, in the case of S.I.S. Corporation (Pvt.) Ltd. Vs. Federation of Pakistan (PLD 2018 Islamabad 150), this Court held as follows:-

*“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.”*

*“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.”*  
(Emphasis added)

**WHETHER N.S.P.C.L. WAS UNDER AN OBLIGATION TO REQUIRE THE PREQUALIFIED BIDDERS TO SUBMIT TECHNICAL BIDS:-**

42. Although the documents pertaining to the said tender issued by N.S.P.C.L. i.e., the “Specification and Terms and Conditions for Prequalification” are not as detailed as they should have been for a project of this magnitude but they are not wanting in essential particulars. The detailed specifications of the polycarbonate e-data page ID-3 cards body are clearly provided in these documents. The security features on the e-data page and the specifications of imbedded contactless RFID chip and antenna are also clearly mentioned in these documents.

43. Learned counsel for N.S.P.C.L. had submitted that N.S.P.C.L. had adopted a single stage-one envelope procedure, which was permissible under Rule 36(a) of the 2004 Rules. The said Rule provides *inter alia* that each bid shall comprise of one envelope containing a separate financial proposal and technical proposal (if any). There was nothing preventing N.S.P.C.L. to have required the prequalified bidders to submit their technical bids, if the technical evaluation process was to be different from the prequalification process. However, where the prequalification process includes the process of assessing the technical suitability of the bidders for participation in the procurement process, the 2004 Rules do not obligate the procuring agency to carry out the technical evaluation of the prequalified bidders. Learned counsel for the petitioner could not assist the Court on the question as to whether after the bidders had been subjected to a thorough prequalification process, what is it that was left to be carried out in a subsequent technical evaluation process. A glance at the technical evaluation documents dated 26.01.2018 and 22.03.2018 show that the applicants had been prequalified by the technical evaluation committee of N.S.P.C.L., after going through the specifications, received from different suppliers and subsequent clarifications. Therefore, I am of the view that N.S.P.C.L. did not

violate any provision of the 2004 Rules by requiring the prequalified bidders to submit their financial quotations only. This process was in accordance with the single stage-one envelope procedure which was envisaged by Rule 36(a) of the 2004 Rules. In holding so, I place reliance on the following case law:-

- (i) In the case of Shaheen Construction Company Vs. Pakistan Defence Officers Housing Authority (2012 CLD 1445), wherein Rule 36(a) of the 2004 Rules providing for single stage-one envelope procedure was interpreted in the following terms:-

*“In procedure-A words “if any” after the words “Technical proposal” are very significant and of course refers to a situation where there is no need of obtaining technical proposal from the prospective bidders or where such procedure has already been undertaken. Whereas, Procedure-B is to be adopted in cases where the prospective bidders have to simultaneously submit their technical proposal as well as financial proposal and it is only when their technical proposal is accepted their financial proposal is considered. In the instant case procuring agency for a specified civil work had engaged contractors and even those who were enlisted in “A” Category in prequalification process and further against the spirit of Rule 16 of 2004 instead of charging cost of printing of prequalification documents have charged hefty amounts under the garb of such prequalification engagement, therefore, could not be adopting Procedure “B” without lawful justification oust the prequalified contractor by providing different qualification criteria. I am of the firm view that such prequalified contractor had vested right unless disqualified or blacklisted in terms of Rules 18 and 19 of Rules, 2004 to directly compete in financial bidding and for this reason Procedure-A after the words Technical Proposal provides “if any”.”*

**(Emphasis added)**

The Hon'ble Mr. Justice Sajjad Ali Shah, who authored the said judgment, rose to grace the Hon'ble Supreme Court. Therefore, the said judgment deserves respect and reverence.

- (ii) In the case of Pakistan Defence Officers Housing Authority Vs. Shaheen Construction Company (2013 CLC 476), the Division Bench of the Hon'ble High Court of Sindh, after making reference to the judgment authored by the Hon'ble Mr. Justice Munib Akhtar in the case of Shaheen Construction Company Vs. Pakistan Defence Officers Housing Authority (2012 CLC 1434), held as follows:-

*“16. Mr. Justice Munib Akhtar has observed that (as quoted above) the procuring agency must have same element of discretion, even after prequalification has taken place. We cannot find fault with the observation made by Mr. Justice Munib Akhtar. In order to elaborate our point. Let us take an example: a procuring agency wants to procure a ship. At the prequalification stage it will consider whether shipyard has technical capability, financial strength, equipment availability and personnel depth to build the ship. This would be prequalification stage. Let us say a number of shipyards are prequalified and they are then asked to submit two bid envelopes. These bids would be technical and financial, technical bids will be evaluated no longer from the point of financial soundness, personnel depth, equipment availability etc., of the bidder but from the point of view design of the ship submitted by the bidder. Therefore at this stage technical evaluation would be different in scope from technical evaluation conducted at the pre-bidding stage. Therefore in such like situations it would be available for the procuring agency to, even after prequalification, invite separate technical and financial bids. Therefore contention of Mr. Shahenshah Hussain that in no case after prequalification has taken place can the technical bids be invited. Same holds true of let us, say multiple storey building being constructed. If at the stage of prequalification technical capability, equipment availability, personnel depth and financial soundness has already been evaluated and design of the building is provided by the consultant, then obviously there would be no scope for inviting separate technical and separate financial bids. Having considered the parameters adopted at the time of prequalification of contractors and the parameters which are now sought to be included in technical evaluations to us a comparison of the two indicates that they are exactly the same and identical to each other and in the facts and circumstances of the case no ground for fresh technical evaluation was made out.”*  
**(Emphasis added)**

**WHETHER A TENDERING PROCESS IS LIABLE TO BE SCRAPPED IF THE BIDS ARE NOT PROCESSED AND EVALUATED WITHIN THE STIPULATED BID VALIDITY PERIOD?**

44. Rule 26(1) of the 2004 Rules provides that a procuring agency, keeping in view the nature of the procurement, shall subject the bid to a bid validity period. Furthermore, Rule 26(2) of the said Rules provides that bids shall be valid for a period of time specified in the bidding document. In the case at hand, although the terms and conditions of the prequalification documents did not require that the financial quotations/bids to have a certain validity period, N.S.P.C.L., vide letter dated 27.03.2018, invited the prequalified bidders to submit their quotations for the supply

of 500,000 ID-3 cards for e-passports. These quotations were required to be valid for a period of sixty days from the date on which they are opened. It is an admitted position that the quotations/financial bids submitted by the prequalified bidders were opened on 10.04.2018 and therefore they were to be valid until 09.06.2018 (i.e., for a period of sixty days from the date of their opening).

45. It is not disputed that by 09.06.2018, the bid evaluation process had not been completed by N.S.P.C.L. Indeed, N.S.P.C.L., vide letters dated 24.05.2018, 21.06.2018 and 03.07.2018, informed the petitioner that the financial evaluation of the bids was still under process. Admittedly, the bid validity period expired on 09.06.2018 without the bid evaluation process having been completed. It was not until 21.06.2018 (i.e., eleven days after the lapse of the bid validity) that N.S.P.C.L. requested the petitioner to extend the validity of its quotation and bid bond up to 05.08.2018.

46. The petitioner's stance is that with the lapse of the bid validity on 21.06.2018, the procurement process for ID-3 cards stood aborted and that the only option before N.S.P.C.L. in these circumstances was to have initiated the procurement process anew. Now, under Rule 26(3) of the 2004 Rules, it is permissible for the procuring agency to ask the bidders to extend their respective bid validity period but only "*under exceptional circumstances*" and "*for reasons to be recorded in writing*". For the purposes of clarity, Rule 26(3) of the said Rules is reproduced herein below:-

*"The procuring agency shall ordinarily be under an obligation to process and evaluate the bid within the stipulated bid validity period. However under exceptional circumstances and for reason to be recorded in writing, if an extension is considered necessary, all those who have submitted their bids shall be asked to extend their respective bid validity period. Such extension shall be for not more than the period equal to the period of the original bid validity."*

**(Emphasis added)**

47. In the case of Kitchen Cuisine (Pvt.) Ltd. Vs. Pakistan International Airlines Corporation (PLD 2016 Lahore 412), the Hon'ble Mr. Justice Shahid Karim interpreted Rule 26(3) of the 2004 Rules in the following terms:-

*“18. The contexture and setting of rule 26 may be stated thus. A reading of rule 26 above makes it clear that a procuring agency shall evaluate the bid to a bid validity period. It is admitted on all hands that the validity period in the instant case was ninety days. By virtue of sub-rule (3) of rule 26, the procuring agency shall ordinarily be under an obligation to process and evaluate the bid within the stipulated bid validity period that is ninety days in the instant case. However, under exceptional circumstances and for reasons to be recorded in writing, if an extension is considered necessary, all those who have submitted their bids shall be asked to extend their respective bid validity period. Such extension shall not be for more than the period equal to the period of the original bid validity. From the tenor and the context of sub-rule (3) of rule 26, the terms of the said rule seems to be obligatory and mandatory in nature and must be complied with. This is the very essence of the procurement procedure and the good faith which must permeate the entire procedure. In this regard, it may be stated that the bids were submitted on 26.3.2015 and the evaluation report was made on August 20, 2015 i.e after more than five months. The contract was admittedly awarded on 01.03.2016 i.e. after almost one year of the tender for the bids. Clearly, the mandate of rule 26 has not been complied with and has been contravened. The learned counsel for PIA does not deny the fact that bid validity period was not extended by a speaking order and the bidders were thus not asked to extend their respective bid validity period. The non compliance of rule 26(3), in my opinion, renders the subsequent acts of submission of the evaluation report as also the award of contract as ultra vires and void.”*

**(Emphasis added)**

48. N.S.P.C.L., in its letter dated 03.07.2018, asked P.P.R.A. to clarify whether the former could extend the bid validity since the process of financial evaluation was still in progress. In the said letter, the reasons put forth by N.S.P.C.L. for the extra time taken by the financial evaluation were *“complexity of the project and legal notices issued by one of the participants”*. P.P.R.A., in its reply dated 05.07.2018, opined *inter alia* that *“the procuring agency after thorough deliberation may take a decision in the instant case to extend the bid validity period with consent of the participated bidders.”* It was also opined that the bidder who does not agree to extend the bid validity period shall be allowed to withdraw its bid without the forfeiture of bid bond or security in terms of Rule 26(4)(c) of the 2004 Rules.

49. It is my view that P.P.R.A.’s said letter dated 05.07.2018 is not in conformity with the requirements of Rule 26(3) of the 2004 Rules. This letter gives a carte blanche to N.S.P.C.L. to take a decision to extend the bid validity period with the consent of the

bidders after thorough deliberation. In giving the said opinion, the regulator has clearly erred by not appreciating that under Rule 26(3) of the said Rules, bidders can be asked to extend the validity of their bids beyond the bid validity period under “*exceptional circumstances*”. In the case of Independent Media Corporation (Pvt.) Ltd. Vs. Shoaib Ahmed Sheikh (2015 CLD 1448), the Hon'ble High Court of Sindh in the context of Section 28(1) of the Trade Mark Ordinance, 2001 held that “exceptional circumstances” are circumstances of such a rare or unusual nature as would warrant departure from the main rule. Furthermore, it was held that a provision of law that can be applied only in exceptional circumstances cannot become a matter of routine. In the case of Shafiq Traders Vs. Collector of Customs (2007 PTD 2092), the Hon'ble Lahore High Court in the context of Section 81 of the Customs Act, 1969 held that “exceptional circumstances” are a bundle of facts which rendered it impossible for the concerned officer to make a final assessment the prescribed limitation.

50. It is my view that “*complexity of the project*” could certainly not constitute an “*exceptional circumstance*”. N.S.P.C.L. was aware as to the scope and magnitude of the project and its complexity, if any, right from the inception. The 2004 Rules do not specify a fixed validity period. All that Rule 26(1) of the said Rules requires is that a procuring agency shall subject the bid to a bid validity period keeping in view the nature of the procurement. Had N.S.P.C.L. been vigilant and had kept the nature of the procurement in mind, it would not have consciously fixed sixty days as a bid validity period in the invitation for quotations dated 27.03.2018. This lack of foresight by N.S.P.C.L. cannot be accepted as an “*exceptional circumstance*” justifying it to ask the prequalified bidders to extend the validity of their bids. Whether “*legal notices issued by one of the participants*” is a valid reason for asking the bidders to extend the validity of their bids will be discussed at a later stage in this judgment.

51. Rule 26(4)(c) of the 2004 Rules provides that bidders who do not agree to an extension in the bid validity period shall be allowed to withdraw their bids without forfeiture of their bid bonds or

securities. N.S.P.C.L. was informed by P.P.R.A. in its letter dated 05.07.2018 about the said Rule. However, it appears to have escaped P.P.R.A.'s attention that a prerequisite for requiring the bidders to extend the validity of their bids is the existence of "*exceptional circumstances*". Once a procuring agency complies with the requirements of Rule 26(3) of the 2004 Rules by recording the existence of such circumstances in writing, the bidders could be asked to extend the validity of their bids.

52. The Manual of Procurement Policies issued by P.P.R.A. provides *inter alia* that where an extension to the validity of tenders is required, all bidders should be requested, in writing, to extend the validity of their tenders for an additional specified period of time. Furthermore, it provides that such a request should be made within a reasonable period before the expiry of the validity of tenders so as to give sufficient time for responses to be received. P.P.R.A. while giving its advice/opinion to N.S.P.C.L. vide letter dated 05.07.2018, appears to have lost sight of the requirement of its own Manual of Procurement Policies. A public sector organization must profess to abide by its own policies. In the case at hand, N.S.P.C.L.'s request for an extension in the validity of the bids was made on 21.06.2018 i.e., eleven days after the expiry of the bid validity. The advice/opinion given by P.P.R.A. did not take this crucial aspect of the case into account. This shows that P.P.R.A. has given little credence to its own policy in this case.

53. Another crucial requirement in Rule 26(3) of the 2004 Rules is that bidders could be asked to extend the validity of their bids for "*reasons to be recorded in writing*". It goes without saying that the reasons recorded pursuant to Rule 26(3) of the said Rules would be justiciable. The recorded reasons ought to be such as would make out a case for a necessity in the extension in the bid validity period. No document was brought on record by N.S.P.C.L. to show that prior to 21.06.2018 reasons were recorded in writing for requiring the bidders to extend the validity of their bids.

54. On 16.05.2019, after the arguments in this case were partly heard, an application for additional documents (C.M.



No.2035/2019) was filed on behalf of N.S.P.C.L. At pages 20 and 21 of the said application is a document dated 11.07.2018 signed by the Purchase Committee of N.S.P.C.L. setting out the facts leading to N.S.P.C.L.'s request to the bidders for the extension of the bid validity period. This document, in my view, does not satisfy the requirements of Rule 26(3) of the 2004 Rules inasmuch as it post-dates by almost three weeks N.S.P.C.L.'s letter dated 21.06.2018 requiring the bidders to extend the validity of their bids. In paragraph 10 of the said document, it is stated that the officials of N.S.P.C.L., in their meeting convened on 20.06.2018, *“decided to ask all the participated bidders for the extension of their bid validity upto 5<sup>th</sup> August, 2018”*. Furthermore, in paragraph 13 of the said document, it is stated that the officials of N.S.P.C.L. in their meeting convened on 06.07.2018 *“decided that the bid validity period may be extended”*. N.S.P.C.L. has come up with different dates on which a decision is said to have been taken to ask the bidders to extend the validity of their bids. Suffice it to say that no decision in writing prior to 21.06.2018, setting out the reasons why it was considered necessary to require the bidders to extend the validity of their bids, was brought on record. Even if it is assumed that such a decision was taken on either 06.07.2018 or 20.06.2018, the same was not reduced into writing. The requirement to record reasons in writing is explicitly required by Rule 26(3) of the said Rules which have been framed by the Federal Government in exercise of the powers conferred by Section 26 of the P.P.R.A. Ordinance, 2002 and therefore have a statutory force. In *suo motu* case No.5/2010 (Action regarding huge loss to public exchequer by ignoring lowest bid of Fauji Foundation and Multinational Energy from Vitol by Awarding LNG Contract) (PLD 2010 S.C. 731), it was observed *inter alia* that it was the duty of the Court to ensure that the requirements of the P.P.R.A. Ordinance, 2002 read with the 2004 Rules are adhered to strictly to exhibit transparency. Recently, in the case of Kitchen Cuisine (Pvt.) Ltd. Vs. Pakistan International Airlines Corporation (*supra*), it was held as follows:-

*“20. Fairness, transparency, value for money, and the process being efficient and economical lie at the heart of the procurement process. None of these factors can be nullified or brushed under the carpet to the detriment of the process and those who offer their tenders for the procurements. Since the promulgation of PPRA Rules, superior courts have proactively and vigorously sought their enforcement so that they are not reduced to a painting, to be looked at only. A cluster of case-law signifies the overreaching policy of the courts in such matters and that policy is driven by the concept of public trust and that it be preserved inviolate. Thus it is immutable rule now that all public bodies making contracting or procurement decisions must adhere to the statutory scheme of things and chime with the intent and the purpose of the law, so that these are not tainted with invidious discrimination.”*

*21. It will be noticed from the entire reading of PPRA Rules that the word 'shall' has been used to denote and accentuate the mandatory nature of the duty as against permissive words which grant distinction. This runs through the length and breadth of the Rules.”*

**(Emphasis added)**

55. Learned counsel for N.S.P.C.L., in his written as well as oral submissions, took the position that the main reasons for requesting the bidders to extend the validity of their bids were: (i) delay in financial evaluation due to the initiation of the process for M/s IN CONTINU's disqualification; (ii) continuous legal notices from the petitioner; and (iii) undue interference in the procurement process by the petitioner through various channels, including the Finance Division. I shall now deal with each of these grounds.

**(i) Delay in financial evaluation due to the initiation of the process for M/s IN CONTINU's disqualification:-**

56. Accepting the contention of the learned counsel for N.S.P.C.L. that the technical evaluation process had been carried out at the prequalification stage, N.S.P.C.L. had since 28.11.2017 (when the prequalification documents was submitted by the bidders) to complete the said process. One would indeed assume that once the names of the six prequalified bidders were declared on 26.01.2018, this process was completed. After the samples of ID-3 cards were provided by the six prequalified bidders, two of them (M/s Future Card Industries and M/s Card Logix) were disqualified. M/s IN CONTINU was one of the four prequalified bidders declared by N.S.P.C.L. in its revised report dated 22.03.2018. Now, clause 19 of the prequalification documents

provided that no sample is required to participate in the prequalification process. This shows that the scheme envisaged by the prequalification documents issued by N.S.P.C.L. was that the bidders would be required to provide samples of ID-3 cards after prequalification stage had come to an end.

57. After M/s IN CONTINU had been prequalified on two occasions and more than a month after the opening of the financial bids, when it was known to all that the financial bids submitted by M/s Mühlbauer and M/s IN CONTINU was for the same amount, N.S.P.C.L. addressed e.mail dated 16.05.2018 to M/s IN CONTINU requesting information on the following matters:-

- “• *As communicated earlier in pre-qualification specifications “The manufacturer must have minimum 03 prior references for laser engravable ID-3 polycarbonate cards for Passports used in valid travel documents issued by sovereign states.*
- *Bidder has to provide the customer satisfaction letter/certificate for the supply of ID-3 polycarbonate cards.*
- *The Proposed technology is not the patent and will be available in the market without any limitation.*
- *The bidder should have at least shipped more than 5.0 Million ID-3 cards in last three years which were used as international travelling and identification documents respectively.”*

58. In response to the said e.mail, M/s IN CONTINU, vide e.mail dated 17.05.2018, informed N.S.P.C.L. that the required information had already been provided. N.S.P.C.L.’s e.mail dated 29.05.2018 shows that M/s IN CONTINU had not been qualified for the supply of ID-3 cards. It is pertinent to note that N.S.P.C.L.’s revised report regarding the prequalification of the four bidders shows that M/s IN CONTINU had complied with the requirement of providing customer satisfaction letter/certificate for the supply of both ID-1 and ID-3 cards. It was also shown to have complied with the requirement of having shipped more than two million ID-3 cards in the last three years. Be that as it may, if M/s IN CONTINU did not have a minimum of three prior references for laser engravable ID-3 polycarbonate cards for passports, the question that crops up in the mind is why was it prequalified on two occasions i.e., on 26.01.2018 and on 22.03.2018? This just goes to show that N.S.P.C.L.’s technical evaluation committee did not

carry out the prequalification process with a diligent application of mind. Since M/s IN CONTINU has not questioned its ouster from the bidding process, I shan't delve deeper into the legality or propriety of N.S.P.C.L.'s decision to disqualify it. Suffice it to say that the e.mail correspondence between N.S.P.C.L. and M/s IN CONTINU leading to the latter's disqualification could not, in my view, qualify as an "*exceptional circumstance*" warranting an extension in the validity of the bids. Such correspondence was with respect to the technical aspects of M/s IN CONTINU's prequalification documents and could not have caused N.S.P.C.L. to halt the financial evaluation process. In any case, negligence on the part of N.S.P.C.L.'s technical evaluation committee in not disqualifying M/s IN CONTINU prior to the issuance of the report dated 26.01.2018, and the revised report dated 22.03.2018 was no plausible reason for seeking an extension in the bid validity period.

**(ii) Continuous legal notices from the petitioner:-**

59. After the opening of the financial bids the petitioner, vide letter dated 17.04.2018, *inter alia* expressed its intention to challenge the procurement process before the G.R.C. under Rule 48(1) of the 2004 Rules, and asked N.S.P.C.L. for the names of the G.R.C.'s members. By this stage, N.S.P.C.L. had not constituted the G.R.C. Vide letter dated 20.04.2018, N.S.P.C.L. informed the petitioner that the financial evaluation of the bids was under process. On 21.05.2018, a complaint under Rule 48 of the 2004 Rules was addressed on the petitioner's behalf to the G.R.C. and the Chairman of N.S.P.C.L. N.S.P.C.L., in its letter dated 24.05.2018, took the position that under Rule 48(2) of the 2004 Rules, 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 of the said Rules. In the said letter, it was also stated that the financial evaluation of the bids was still under process and information with respect to the same could not be shared till the announcement of the evaluation report. As late as 12.07.2018,

N.S.P.C.L. sent its single-page evaluation report to P.P.R.A. It took N.S.P.C.L. more than three months from the date of the opening of the financial bids to issue the evaluation report.

60. The G.R.C. was constituted by N.S.P.C.L. on 18.07.2018. Had N.S.P.C.L. constituted the G.R.C. in time, the petitioner's complaints could have been dealt with by the G.R.C. N.S.P.C.L. ought to have constituted the G.R.C. after the opening of the bids, and should not have waited until the submission of the evaluation report to P.P.R.A. In the case of SIS Corporation (Pvt.) Limited Vs. Federation of Pakistan (2018 CLD 48), this Court held as follows:-

*“15. ... 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. ...”*

61. N.S.P.C.L. was well aware of the law laid down in the case of SIS Corporation (Pvt.) Limited Vs. Federation of Pakistan (supra). I say this because the learned counsel for N.S.P.C.L. had submitted that N.S.P.C.L. had waited for the judgment of the Court in the said case before initiating the process for the procurement of ID-3 cards. Indeed, the samples of ID-3 cards provided by the prequalified bidders were tested on machines that were supplied pursuant to the award of the contract after the said judgment.

62. N.S.P.C.L. cannot be given any advantage over its omission to constitute a G.R.C. soon after the bids were submitted.

Therefore, the legal notices/complaints submitted by the petitioner after the opening of the financial bids cannot be termed as an *“exceptional circumstance”* for an extension in the bid validity period.

(iii) Undue interference in the procurement process by the petitioner through various channels, including the Finance Division:-

63. It ought to be borne in mind that N.S.P.C.L. had asked the bidders to extend the validity of their bids on 21.06.2018. After this, on 12.07.2018, the Ambassadors of the Republic of France and Kingdom of Netherlands met the Finance Secretary to voice concerns regarding the procurement process on behalf of the petitioner. I am pleased to note that N.S.P.C.L. is bold enough to have taken a position in writing that there was *“undue interference in process of procurement from the petitioner through various channels, including Finance Division”*. It is not disputed that N.S.P.C.L.’s Memorandum and Articles of Association do not obligate N.S.P.C.L. to act on such directions/instructions issued by the Finance Division. N.S.P.C.L. is an autonomous body and its scope of functions are circumscribed by its constitution. Interference by the Finance Division in its functioning must be deprecated. In the written comments filed by the Finance Division, it has clearly been pleaded that N.S.P.C.L. is autonomous in its functions. N.S.P.C.L. was incorporated as a private limited company on 17.04.2017 with the mandate of printing all types of security documents. On behalf of the Finance Division, it was pleaded that the petitioner had forwarded complaints to the Finance Division with respect to the procurement of e-data pages being carried out by N.S.P.C.L. The Finance Division is said to have requested P.P.R.A. to inquire into the matter and to ensure that the public procurement laws have been followed by N.S.P.C.L. According to the Finance Division’s written comments, P.P.R.A. had not observed *“any serious violations/lapses in the procurement process”*. Furthermore, it was pleaded that *“N.S.P.C. had not deliberately violated some of the P.P.R.A. Rules rather it was due to the lack of clarity and understanding of the P.P.R.A. Rules 2004 by its related staff”*.

64. Neither does the Finance Division's letter dated 24.07.2018 to N.S.P.C.L. contain any direction to stop the procurement process nor does N.S.P.C.L.'s reply dated 31.07.2018 make reference to any such direction. However, N.S.P.C.L., vide letter dated 10.08.2018, informed the Finance Division that due to its verbal directions, the procurement process halted. For the purposes of clarity, the operative part of the said letter is reproduced herein below:-

*"With reference to our previous letter # NSPC/MOF-Gemalto/FN-023&074/18-01 dated 31<sup>st</sup> July 2018 for the subject captioned above, I am directed to convey you on behalf of Chairman & MD-NSPC for the early resolution of the issue. Because of litigation and on your verbal directions, procurement process is at halt, resultantly, delaying e-Passport project due to which both NSPC and DGI&P are facing huge financial losses."*

65. The Finance Division may well have given verbal directions to N.S.P.C.L. to halt the procurement process but I find no truth in the stance taken by N.S.P.C.L. that the bidders had been asked to extend the bid validity due to the delay in the bid evaluation caused by such directions of the Finance Division. This is because N.S.P.C.L. had asked the bidders to extend the validity of their bids on 21.06.2018 whereas the meeting between the Finance Secretary and the Ambassadors of Republic of France and Kingdom of Netherlands took place on 12.07.2018. The letters from the Finance Division to N.S.C.P.C. and/or D.G.I.&P. were sent after the meeting between the Ambassadors and the Finance Secretary. N.S.P.C.L., in its written arguments, did not mention the date on which the Finance Division had directed N.S.P.C.L. to halt the procurement process. There is nothing on the record to show that such directions were given prior to 21.06.2018 when N.S.P.C.L. called upon the bidders to extend the validity of their bids. Furthermore, N.S.P.C.L., in its written comments, did not plead that the reason for requiring the bidders to extend the validity of their bids was due to the Finance Division's directions to halt the procurement process. The Superior Courts have time and again indicated that no party should be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the party in support of the case set up by it.

It is also settled law that parties are bound by the pleadings. Pleadings are treated as a foundation of a case especially in civil matters, and a fact having not been pleaded cannot be allowed to be taken or agitated at a subsequent stage. The maxim "*secundum allegata et probata*" (according to what is alleged and proved) can be aptly pressed into service here. For N.S.P.C.L. to assert that one of the reasons for requiring the bidders to extend the validity of their bids was undue interference by the Finance Division at the behest of the petitioner is nothing but a baseless afterthought.

66. N.S.P.C.L. had ample time after the opening of the financial bids to complete the evaluation process within the original bid validity period, i.e. by 09.06.2018. I have already held that the legal notices from the petitioner and the process to disqualify M/s IN CONTINU after it had been prequalified by N.S.P.C.L. do not come within the meaning of "*exceptional circumstances*" warranting N.S.P.C.L. to request the bidders for an extension in the validity of their bids. Therefore, it is safe to hold that N.S.P.C.L.'s letter dated 21.06.2018 requesting the bidders to extend the validity of their bids was not in conformity with the requirements of Rule 26(3) of the 2004 Rules. Consequently, the petitioner was well within its rights not to extend the validity of its bid in response to N.S.P.C.L.'s letter dated 21.06.2018. It is quite a different matter that by 21.06.2018, the petitioner was well aware that its financial bid was higher than three other bidders and therefore unlikely to have been accepted. The consequences that ensue from the extension in the bid validity period being without the fulfillment of the requirements in Rule 26(3) of the 2004 Rules or the expiry of the bid validity period without the bid evaluation process having been completed are the same as held by the North Gauteng High Court, Pretoria, South Africa in the case of Telkom SA Limited Vs. Merid Training (Pty) Ltd. (case No.27974/2010). In the said case, Telkom invited proposals for the provision of network services. The tender documentation contained a provision that the proposals were to remain valid for acceptance for 120 days. Just like in the case at hand, after the expiry date,



Telkom invited the shortlisted bidders to extend the validity of their proposals. Only some of the bidders responded. Telkom awarded the tender to 6 of the shortlisted bidders. Some unsuccessful bidders lodged complaints. Telkom applied to North Gauteng High Court to have the awards set-aside. Southwood J. set-aside the award of the contract for providing telecom network services on the ground that the award of the said contract was beyond the bid validity period. It was held that the purported extension of the bid validity period, after the validity period lapsed, was unlawful; that as soon as the bid validity period had expired, without having made an award, the tender process is complete, albeit unsuccessfully; that the institution is no longer free to negotiate with the shortlisted bidders; and that any negotiations to extend the bid validity period after its expiry lacks transparency and is neither equitable nor competitive. Paragraph 14 of the said judgment is reproduced herein below:-

*“The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive. In my view the first and fifth respondent’s reliance only on rules of contract is misplaced.”*

**WHETHER THE PETITIONER’S OFFER TO SUPPLY 100,000 ID-3 CARDS TO D.G.I.&P. DURING THE PROCUREMENT PROCESS AMOUNTS TO UNETHICAL BUSINESS PRACTICE:-**

67. Apparently, during the bidding process, the petitioner had offered to supply 100,000 ID-3 cards free of cost to the D.G.I.&P. Learned counsel for N.S.P.C.L. as well as the learned counsel for M/s Mühlbauer had stressed that the petitioner, by offering to supply 100,000 ID-3 cards to D.G.I.&P. free of cost, was attempting to interfere with an independent and transparent

procurement process. D.G.I.&P.'s letter dated 08.12.2017 to N.S.P.C.L. shows that it was intended to initially "*proceed with sample data pages provided by the vendor*". The minutes of the meeting held on 01.02.2018 between the officials of N.S.P.C.L. and D.G.I.&P. show that the initial supply of 100,000 cards was to be supplied to N.S.P.C.L. by D.G.I.&P., and later on N.S.P.C.L. would make procurement on its own.

68. On behalf of M/s IDEMIA, their counsel addressed letter dated 31.01.2018 to D.G.I.&P., wherein concerns were voiced regarding the free of cost supply of 100,000 cards. In the said letter, it was asserted that the security and software features of the e-data page are unique and distinct to each supplier and that once a particular e-data page provided by one supplier is used, the same has to be used for all future e-passports produced in the country in order to ensure uniformity of design and security features. The petitioner's proposed action of providing free e-data pages was stated to be with the purpose to lock N.S.P.C.L. into using the same e-data pages provided by the petitioner for any future production of e-passports.

69. Vide letter dated 04.03.2019, M/s Mühlbauer's legal counsel cautioned N.S.P.C.L. not to accept the 100,000 e-data pages which were being offered free of charge by the petitioner. In the said letter, it was asserted that acceptance of the petitioner's said proposal would be a flagrant violation of the 2004 Rules and the vested rights that had accrued in M/s Mühlbauer's favour on account of being the lowest evaluated bidder.

70. N.S.P.C.L., in its letter dated 18.03.2019 to the D.G.I.&P. and letter dated 21.03.2019 to the Finance Division, took the position that the offer made by the petitioner to the D.G.I.&P. to supply 100,000 e-data pages free of cost during the procurement process was a violation of the 2004 Rules. Additionally N.S.P.C.L., in its letters dated 24.05.2018 and 31.07.2018, had accused the petitioner of an attempt to unfairly interfere with the independent and transparent procurement process by supplying approximately 100,000 ID-3 cards free of cost to the D.G.I.&P.,

who in turn had requested N.S.P.C.L. to use these cards in the production of e-passports.

71. Rule 4 of the 2004 Rules obligates a procuring agency to *“ensure that the procurements are conducted in a fair and transparent manner”*. Ethics is the basis on which most of the procurement-related principles, such as fairness, integrity, and transparency, are based. Procurement agencies must maintain integrity and show transparency in their behavior. A procuring agency and/or its employees ought not to accept gifts of items sought to be procured through a tender or for that matter any gifts from suppliers during a procurement process. The making of gifts and gratuities by bidders to procuring agencies or their officers during the procurement process is most certainly an unethical business practice which merits condemnation in the strongest terms. A gift made by a supplier to the procuring agency may not be with the intention of securing a contract but it certainly creates a perception of being unethical.

72. The prohibition on bidders to make gifts to procuring agencies or their employees and on the procuring agencies or their employees from accepting gifts from bidders during a procurement process is implicit in Rule 4 of the said Rules. Such gifts influence procurement decisions in order to secure contracts. Bidders making gifts to procuring agencies or their employees breach the requirements of fairness and transparency in Rule 4 of the 2004 Rules and expose themselves not just to be taken to task by the law enforcing agencies but also to be disqualified from further participation in the procurement process.

73. Although the 2004 Rules are a codification of the norms of fair and transparent tender bidding process, they are certainly not exhaustive on the subject of tender bidding. Anything not specifically prohibited by the 2004 Rules does not imply that it is permissible or cannot be a ground before a Court of Constitutional causes for questioning the reasonableness, fairness or propriety of a tender bidding process adopted by a procuring agency. In the

case of Mia Corporation (Pvt.) Ltd. Vs. Pakistan PWD (PLD 2017 Islamabad 29), this Court had the occasion to hold as follows:-

*“PPRA Rules are not exhaustive and do not cater for each and every eventuality that can be thought of in the realm of tender-bidding. The PPRA Rules are codified norms and requirements of a fair, open, competitive and transparent tender bidding required to be conducted by the Government or Public Sector Organizations. The mere fact that a certain process adopted for bidding by a procuring agency is not expressly prohibited by the PPRA Rules will not pose as an obstacle before this Court to examine the process on the touchstone of fairness, reasonableness and transparency. These requirements are also stipulated in Rule 4 of the PPRA Rules, which provides that procuring agencies, while engaging in procurements, shall ensure that the procurements are conducted in a fair and transparent manner, the object of the procurement brings value for money to the agency and the procurement process is efficient and economical.”*

74. In the case at hand, it is the D.G.I.&P. that had required the petitioner to supply 100,000 ID-3 cards free of charge. This is explicitly mentioned in the letter of intent dated 20.11.2017 issued by the D.G.I.&P. to the petitioner with respect to the supply of the e-passport personalization system on turn key basis. The contract dated 13.12.2017 for the supply of the said system by the petitioner to D.G.I.&P. obligates the former to supply 100,000 sample e-data pages free of cost. Since the matter regarding the supply of 100,000 ID-3 cards was pursuant to the terms of the letter of intent dated 20.11.2017 and the contract dated 13.12.2017 and not pursuant to an unsolicited offer made by the petitioner, the petitioner cannot be said to have committed any unethical conduct in this respect. It is not disputed that thus far only 10,000 ID-3 cards had been supplied free of cost by the petitioner to the D.G.I.&P. N.S.P.C.L. was correct in not accepting these cards since it was possible for the contract for the supply of 500,000 ID-3 cards to be awarded to another bidder and it was essential for all ID-3 cards to be used in Pakistani passports to be identical.

**WHETHER THE BIDS SUBMITTED BY M/S MUHLBAUER AND M/S IN CONTINU WERE COLLUSIVE:-**

75. M/s IN CONTINU had submitted its prequalification documents as far back as 28.11.2017. After a technical evaluation process stretching over a period of two months, M/s IN CONTINU

was prequalified by N.S.P.C.L. on 26.01.2018. After the prequalified bidders were asked to submit fifty samples of ID-3 cards pursuant to clause 16 of the prequalification documents, M/s IN CONTINU was again prequalified by N.S.P.C.L. on 22.03.2018. The financial bids were submitted by the prequalified bidders on 10.04.2018. On 11.05.2018, N.S.P.C.L. issued a document setting out the financial bids of each of the technically compliant bidders, out of whom one was M/s IN CONTINU. This document shows that M/s IN CONTINU's financial bid was exactly the same as that of M/s Mühlbauer (i.e., Euros 2,320,000).

76. After M/s IN CONTINU had been technically qualified, and submitted its financial bid, N.S.P.C.L., vide e.mail dated 16.05.2018, posed four questions to it. Learned counsel for the petitioner had submitted that these questions were posed by way of seeking clarifications under Rule 31 of the 2004 Rules which provides *inter alia* that a procuring agency may seek and accept clarifications to the bid that do not change the nature of the bid. What is most intriguing is that the "*clarifications*" sought by N.S.P.C.L. from M/s IN CONTINU were matters on which the latter had already been prequalified on two occasions. After M/s IN CONTINU gave its "*clarifications*" vide e.mail dated 17.05.2018, N.S.P.C.L., in its e.mail dated 29.05.2018, stated that M/s IN CONTINU was not qualified for the supply of ID-3 cards.

77. It was after the opening of the financial bids that M/s IN CONTINU was found to be technically disqualified by applying the very same criteria under which it was earlier prequalified on two occasions. The mere fact that M/s IN CONTINU was disqualified after the opening of the financial bids and after it had been prequalified twice goes to show that M/s IN CONTINU's prequalification and/or the technical evaluation process conducted by the technical evaluation committee of N.S.P.C.L. prior to the opening of the financial bids was a product of negligence and/or incompetence. This negligence and/or incompetence on N.S.P.C.L.'s part could most certainly not come under the rubric of "*exceptional circumstance*" justifying an

extension in the bid validity period. It is, however, highly exceptional and out of the ordinary that M/s IN CONTINU did not take an issue or raise a whimper against its technical disqualification after being prequalified twice. After M/s IN CONTINU's disqualification, M/s Mühlbauer became the lone lowest bidder.

78. One would have expected N.S.P.C.L. to have inquired into the matter as to how the financial bids of two prequalified bidders came to be exactly the same. Instead of inquiring into the matter, N.S.P.C.L. brushed it aside as a "*mere coincidence*". True, three bidders (i.e., M/s IN CONTINU, M/s Mühlbauer and M/s IDEMIA) had quoted the same unit price of Euros 4.6 (F.O.B.) but the "*air freight and other charges*" of two bidders (i.e., M/s IN CONTINU and M/s Mühlbauer) happened to be the same, i.e. Euros 20,000 whereas those of M/s IDEMIA and the petitioner were Euros 193,464 and Euros 53,000, respectively. Although M/s IN CONTINU and M/s Mühlbauer's financial bids of identical figures cannot be termed as collusive by this Court in exercise of its Constitutional jurisdiction, it is most definitely an eyebrow raiser. This would be a matter of evidence and to be inquired into by the appropriate forum/agency. Be that as it may, the fact that M/s IN CONTINU and M/s Mühlbauer submitted their financial bids for an identical amount coupled with the fact that M/s IN CONTINU did not question N.S.P.C.L.'s decision to technically disqualify it after being prequalified twice leads me to hold that N.S.P.C.L.'s decision to award the contract in question to M/s Mühlbauer does not satisfy the test of fairness, reasonableness or propriety.

**WHETHER M/S MUHLBAUER'S BID WAS LIABLE TO BE REJECTED FOR NOT HAVING SATISFIED CLAUSE 11 OF THE TERMS AND CONDITIONS OF THE PREQUALIFICATION DOCUMENTS:-**

79. The advertisement inviting applications for prequalification was published on 22.10.2017. In the said advertisement, it was stated *inter alia* that the "*eligible applicants*" having the relevant experience may obtain further information and purchase the prequalification documents from N.S.P.C.L. Clause 11 of the

Terms and Conditions of the prequalification documents issued by N.S.P.C.L. provided as follows:-

*“The bidder should have at least shipped more than 5.0 million ID3 and 2.0 million ID1 over the last three years which were used as International travelling and identification documents respectively.”*

80. Through a corrigendum published on 03.11.2017, clause 11 was amended to read as follows:-

*“The bidder should have at least shipped more than 2.0 million ID1 and 2.0 million ID3 cards over the last three years which were used as National (Identification / Driving License / Arm License / Vehicle Registration) documents and International travelling documents respectively.”*

81. The said advertisement required the prequalification documents to be submitted by the bidders by 28.11.2017. M/s Mühlbauer, in its prequalification documents submitted on 28.11.2017 had clearly stated that it had delivered 2,000,326 ID-3 cards in the last three years. Along with its prequalification documents, M/s Mühlbauer had also submitted a complete set of commercial invoices with respect to the delivery of the cards. The quantity of ID-3 cards and the countries to which they were delivered were set out in a table in M/s Mühlbauer’s prequalification documents which is reproduced herein below:-

#	Country	Volume
1	South Sudan	361,500
2	Congo	298,718
3	Tajikistan	1,288,393
4	Central African Republic	51,715
TOTAL		2,000,326

82. The invoices submitted by M/s Mühlbauer along with its prequalification documents also include its invoice dated 22.08.2014 for 17,500 ID-3 cards, invoice dated 22.06.2014 for 32,500 ID-3 cards, invoice dated 10.02.2014 for 82,500 ID-3 cards submitted to Tajikistan, and invoice dated 30.08.2014 for 8,000 ID-3 cards submitted to the Central African Republic. These invoices were raised by M/s Mühlbauer prior to 22.10.2014 (i.e. the date when the three-year period preceding the date of the advertisement commenced) or 28.11.2014 (i.e. the date when the three-year period preceding the last date for the submission of the prequalification documents commenced) and therefore could not

have been taken into consideration by N.S.P.C.L. while determining whether M/s Mühlbauer had shipped two million ID-3 cards in the three-year period preceding 22.10.2014 or 28.11.2017. Since as per the prequalification documents submitted by M/s Mühlbauer on 28.11.2017, the total quantity of ID-3 cards delivered by M/s Mühlbauer in the three year-period came to 1,859,826 cards, it did not satisfy the required threshold of two million cards. This was something to which N.S.P.C.L.'s technical bid evaluation committee turned a blind eye.

83. Since the initial advertisement was published on 22.10.2017, the term *“over the last three years”* would certainly mean the three calendar years preceding 22.10.2017. *“Year”* has been defined in Section 3 (59) of the General Clauses Act, 1897 to mean *“a year reckoned according to the British Calendar”*. Through the corrigendum dated 03.11.2017, an amendment was made in the advertisement dated 22.10.2017. The required quantity of ID-3 cards to be shipped in the last three years was reduced from five million to two million. Furthermore, the use that the cards in question should have been subjected to was also clarified by an amendment in clause 11. This corrigendum cannot be interpreted to make the three-year period to be the period preceding the date of the corrigendum. Had it been N.S.P.C.L.'s intention that the term *“last three years”* to be the period preceding the date of the corrigendum, it would have been specifically so stated in the corrigendum. Therefore, the invoices for ID-3 cards before 22.10.2014 (i.e. three years before the date of the advertisement, dated 22.10.2017) could not have been taken into consideration by N.S.P.C.L. in order to determine whether M/s Mühlbauer satisfied the requirement of having shipped at least more than two million ID-3 cards over the last three years. If M/s Mühlbauer's invoices raised before 22.10.2014 and after 22.10.2017 are taken out of the equation, the number of ID-3 cards shipped by M/s Mühlbauer in the three years preceding 22.10.2017 would fall short of the required quantity of two million ID-3 cards by 140,174 cards. This would also be the case if the three-year period



referred to in clause 11 of the prequalification documents is to be considered as the period preceding 28.11.2017.

84. Learned counsel for the petitioner had contended that in the period of three years (i.e., between October 2014 and October 2017) M/s Mühlbauer had shipped 1,859,826 ID-3 cards which were short of the required quantity of two million. M/s Mühlbauer's stance was that between November 2014 and November 2017, it had shipped 3,354,591 ID-3 cards and to substantiate this, copies of the relevant purchase orders/invoices were brought on record through application (C.M. No.2040/2019). The documents annexed at pages 11 to 26 of the said application indeed show that between November 2014 and November 2017, M/s Mühlbauer had raised invoices for 3,354,591 ID-3 cards. However, these documents did not form a part of M/s Mühlbauer's bid/prequalification documents submitted in response to the prequalification notice. In other words, in order to show that the requirement in clause 11 of the prequalification documents had been satisfied, M/s Mühlbauer relied on documents which had not been submitted by it along with its prequalification documents. These documents could not have been taken into consideration by N.S.P.C.L. If at all they were taken into consideration by N.S.P.C.L., it would amount to permitting M/s Mühlbauer to alter or modify its bid/prequalification documents after the same had been opened. This is not permissible under Rule 31(i) of the 2004 Rules which provides that no bidder shall be allowed to alter or modify his bid after the bids have been opened. It also provides that the procuring agency may seek to accept clarifications to the bid that do not change the substance of the bid.

85. Where a procuring agency requires bids or prequalification documents to be submitted within a stipulated deadline, a bidder cannot be permitted to satisfy the essential requirements of the tender by supplementing its bid or prequalification documents along with documents filed after the deadline. On the question whether M/s Mühlbauer had satisfied the requirement in clause 11 of the terms and conditions of the prequalification documents, it had to be judged on the basis of its explicit position in its

prequalification documents that it had shipped 2,000,326 ID-3 Cards and the invoices/purchase orders filed along with its prequalification documents on 28.11.2017? If M/s Mühlbauer's claim subsequently made that it had shipped 3,354,591 ID-3 Cards in the past three years is to be accepted, the question that crops up in the mind is why were the purchase orders/invoices for the said quantity not filed with the prequalification documents by 28.11.2017. This question remained unanswered by the learned counsel for M/s Mühlbauer. Even if N.S.P.C.L. had sought "clarifications" from M/s Mühlbauer after 28.11.2017, the invoices (not filed with the prequalification documents) showing that it had shipped 3,354,591 ID-3 Cards in the three-year period could not have been snuck in by M/s Mühlbauer or accepted by N.S.P.C.L. In the case of Muhammad Ayub and Brothers Vs. Capital Development Authority (PLD 2011 Lahore 16), the bidding documents required the bid security to be in the form of Deposit at Call or bank guarantee. One of the bidders was allowed by the procuring agency to substitute its insurance guarantee with a Deposit at Call after the opening of the tender. The argument that the substitution of the insurance guarantee with a Deposit at Call was a case of clarification rather than alteration or modification in the bid was held by the Division Bench of the Hon'ble Lahore High Court to be misconceived and untenable. Furthermore, it was held that once the bids had been opened, the procuring agency could not allow any bidder to amend its bid so as to gain an unfair and undue advantage over others, as any such indulgence was contrary to the norms of bidding and prohibited by Rule 31 of the 2004 Rules. Additionally, in the case of Ram Gajadhar Nishad Vs. State of U.P. (1990) 2 SCC 486, a bidder who had not submitted a solvency certificate within the time specified in the tender notice but much later was held to have not fulfilled the requirements of the tender notice, and therefore not entitled for his bid to be opened. In the case of Monarch Infrastructure (Pvt.) Ltd Vs. Commissioner, Ulhasnagar Municipal Corporation (2000) 5 SCC 287, one of the conditions of the notice inviting tenders was that the tender should be accompanied by a demand draft/pay order

or cash of Rs.1.70 crores. The Municipal Corporation was held to have been justified in rejecting the tender made by a party whose tender was accompanied by a cheque for Rs.1.70 crores and therefore not fulfilling the conditions of the notice inviting tenders.

86. True, in its grievance petition and in this petition, the petitioner had not raised an objection as to the short delivery of ID-3 cards by M/s Mühlbauer in the three-year period preceding 28.11.2017 but I am of the view that this matter, which goes to the root of the case, ought to have been adverted to by N.S.P.C.L. before prequalifying M/s Mühlbauer. This is even moreso since one of the grounds on which N.S.P.C.L. disqualified M/s IN CONTINU after it had been prequalified on two occasions was non-compliance with clause 11 of the prequalification documents. One of the questions asked to M/s IN CONTINU by N.S.P.C.L. after the submission of its financial bid was whether it had shipped at least two million ID-3 cards in the last three years. The asking of this question and M/s IN CONTINU's subsequent disqualification shows the importance of the requirement in the prequalification documents for a bidder to have shipped the said quantity of ID-3 cards in the said period. In the case of Siemens Public Communication Networks Private Limited Vs. Union of India (2008) 16 SCC 215, it was held *inter alia* that international bidding, being highly competitive, was expected to be extremely precise, and a high degree of care and meticulous adherence to the requirements of the bid was inherent in such a bidding. Furthermore, it was held that it was incumbent on such a body to ensure that no different yardsticks are adopted for any of the vendors and at the same time to ensure that there was not the remotest possibility of discrimination, arbitrariness or favouritism.

87. Requirements in the bid documents like the one in clause 11 of the terms and conditions of the prequalification documents are a benchmark for determining the eligibility of a bidder to participate in the bidding process. A bidder that does not satisfy such a requirement cannot claim entitlement for further participation in the bidding process much less to be awarded that contract. The mere fact that no other bidder had brought the

factum as to the ineligibility of a rival bidder to the notice of the procuring agency does not absolve such an agency to meticulously scrutinize the bidding/prequalification documents to ensure that the bidder complies with the requirements of the terms and conditions of the prequalification documents. In the case of AIR CIRO Vs. Civil Aviation Authority (2017 CLC 126), the Hon'ble Lahore High Court held that compliance with the essential terms in the tender documents was mandatory, especially where the tender documents do not reserve any discretion in the matter with the procuring agency. Additionally, in the case of West Bengal State Electricity Board Vs. Patel Engineering Company Limited (2001) 2 SCC 451, it was held as follows:-

*“24. ... where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values.”*

88. The requirement in clause 11 of the terms and conditions of the prequalification documents is most certainly an essential requirement with which strict compliance was to be demonstrated by the bidders from their prequalification documents filed by the deadline of 28.11.2017. Failure on the part of any bidder to satisfy such a requirement would result in its bid/prequalification documents to be rejected. In the unreported judgment dated 26.01.2018 passed by the Hon'ble Supreme Court in civil petitions No.4941 and 5135/2017, the Hon'ble Supreme Court upheld the decision of the procuring agency not to award any marks in the technical evaluation process to a bidder who had failed to satisfy the requirement in the bid documents of providing a reference for deployment of similar equipment less than five years from the date of submission of the bid. In the said judgment, it was held as follows:-

*“10. We had heard the learned counsel for the Petitioners and gone through the record. The facts of the case are clear and simple. The only point argued by the learned counsel in his case is that the Petitioners were unlawfully deprived of at least 70 points by reason of rejection of the references provided by them showing supply of the relevant equipment in the year 2011 which fell within the period of five years as envisaged in the contract*

*documents. We have carefully examined the tender documents which indicate that the tenderor or any of its affiliates were required to provide at least one recent reference for deployment of similar equipment less than five years from the date of submission of the bid. One such reference would have entitled the tenderor to 70 marks and more than one such reference would have fetched 90 marks. The document issued by the Ministry of Interior and Kingdom Relations, The Netherlands indicates that said system was supplied by the Petitioners in 2006 under a contract. The duration of the contract was from 2006 to 2011 for 10 million e-Passports and 7.5 million ID documents. The said contract was extended for the period from 2011 to 2021 for preparation of 15 million e-Passports and 12 million ID documents. It is not the case of the Petitioners that the equipment in question was supplied in 2006 and additional equipment was supplied in 2011 through a separate contract. The stance taken by them is that the requirement of the contract documents was deployment of the equipment which meant supply, installation and operation.*

*11. The learned counsel has vehemently argued that the equipment may have been supplied in 2006 but since it was operated from 2006 to 2011 for production of certain number of e-Passports and ID documents and thereafter another contract was awarded covering the period from 2011 to 2021 for preparing 15 million e-Passports and 12 million ID documents, it meant that the equipment in question had been in the process of deployment during the said period. As such, the evaluation committee was not justified and acted illegally and in violation of the terms of the tender documents in refusing to grant any point to the Petitioners.*

*12. We have considered the argument of the learned counsel for the Petitioners and find it misconceived. It is clear and obvious that the rationale, purpose and object of requiring past references was that the supplier was supposed to show that it had supplied and installed equipment similar to the one required by the owner within past five years. The Petitioners were therefore required to establish through the requisite documents that they had supplied the equipment to its customers and installed the same in 2011 or thereafter which they were unable to do. There is nothing on record and it has not even been argued before us that the Petitioners had actually supplied and installed any equipment in 2011. By no stretch of the language, can it be said that the word deployment means operation of the equipment or that deployment continues to operate. The word "deploy" as defined in Chambers 21<sup>st</sup> Century Dictionary means "to spread out and position (troops) ready for battle, to organize and bring (resource, arguments) into use." In the Oxford English Dictionary it has been defined as "to unfold, display". In the context of the present contract, in our opinion, it means to supply and install. The meaning and construction of the word canvassed by learned counsel for the Petitioners would not only be absurd but also defeat the apparent and obvious purpose for which the conditions in question had been incorporated in the tender documents namely proof of the fact the company had supplied and installed such equipment in the previous five years for its customers. We are therefore in no manner of doubt that the reason for which points were denied to the Petitioners by the*

*evaluation committee, namely that it had not supplied and installed any e-Passport bulk personalization machine of similar configuration and brand for its customer(s) in less than the past five years was valid and in line with the language, intent and purpose of the tender documents.”*

89. Having said all this, I am of the view that M/s Mühlbauer's prequalification was in violation of clause 11 of the terms and conditions of the prequalification documents issued by N.S.P.C.L. Since M/s Mühlbauer could not have been prequalified for not having satisfied the criteria of shipping two million ID-3 cards in the three years preceding 28.11.2017, it could not have been prequalified by N.S.P.C.L. Consequently, the award of the contract/purchase order dated 28.09.2018 in favour of M/s Mühlbauer is liable to be declared unlawful and of no legal consequence.

90. The Superior Courts, in the cases of Habibullah Energy Limited Vs. WAPDA through Chairman (PLD 2014 SC 47), Khawaja Muhammad Asif Vs. Federation of Pakistan (PLD 2014 SC 206), Ramna Pipe and General Mills (Pvt.) Ltd. Vs. Sui Northern Gas Pipelines (2004 SCMR 1274), Iqtedar Ali Khan Vs. Department of Mines and Minerals (PLD 2004 SC 773), Kay Bee International (Pvt.) Ltd. Vs. Secretary to the Government of Punjab (PLD 2002 SC 1074), Ittehad Cargo Service Vs. Syed Tasneem Hussain Naqvi (PLD 2001 SC 116), Airport Support Services Vs. The Airport Manager, Quaid-i-Azam International Airport, Karachi (1998 SCMR 2268), Huffaz Seamless Pipe Industries Ltd. Vs. Sui Northern Gas Pipelines Ltd. (1998 CLC 1890), and Pacific Multinational (Pvt.) Ltd. Vs. Inspector-General of Police, Sindh Police Headquarters (PLD 1992 Karachi 283), have time and again enunciated that violations of law in a tender bidding process renders the resultant contract liable to be set-aside in the Constitutional jurisdiction of this Court.

**WHETHER THE DECISION TAKEN BY THE GRIEVANCE REDRESSAL COMMITTEE ON THE PETITIONER'S COMPLAINT WAS SUSTAINABLE IN LAW:-**

91. The instant petition was filed on 08.08.2018 and was first taken-up for hearing on 09.08.2018. Even though the G.R.C. had given its decision on 03.08.2018, the petitioner chose not to

challenge the same in this petition. Now, the delay in the formation of the G.R.C. has been discussed in paragraph 60 above. N.S.P.C.L. constituted the G.R.C. on 18.07.2018. After the petitioner took objections to its membership, the G.R.C.'s composition was changed on 23.07.2018. The complaints submitted by the petitioner under Rule 48 of the 2004 Rules were said to have been considered by the G.R.C. The G.R.C., vide decision dated 03.08.2018, dismissed the petitioner's complaint. Perusal of the G.R.C.'s said decision shows that it gives the narration of facts from the date of the issuance of the prequalification report to the date when P.P.R.A. posted N.S.P.C.L.'s evaluation report on its website. After this, the following conclusion was recorded by the G.R.C.:-

*“After reviewing the case in details the Grievance Redressal Committee comes to the conclusion that NSPC had adopted a very competitive bidding process for pre-qualification with very detailed technical specifications in a very transparent and fair manner to attract more competition. NSPC had followed the PPRA Rules 2004 in true spirit and the procurement process is in line with PPRA Rules 2004.”*

92. Rule 48(3) of the 2004 Rules provides that the G.R.C. shall investigate and decide upon the complaint within fifteen days of the receipt of the complaint. It goes without saying that the decision of the G.R.C. is required to be an informed and a reasoned decision as required by Section 24A of the General Clauses Act, 1897. The G.R.C.'s decision dated 03.08.2018 does not address a number of complaints raised by the petitioner in its letters dated 21.05.2018, 29.06.2018 and 19.07.2018. For instance, no reference is made to any “exceptional circumstance” justifying N.S.P.C.L to ask the bidders for an extension in the validity of their bids. The G.R.C.'s decision, being bereft of reasons, is not sustainable.

93. It is an admitted position that at no material stage in the proceedings before the G.R.C. was the petitioner afforded an opportunity of hearing. This is despite the fact that the petitioner, through its letter dated 17.07.2018 to N.S.P.C.L., had pointed out that the G.R.C. had not conducted any hearing pursuant to the petitioner's complaints. P.P.R.A., in its written comments, has

taken the position that although Rule 48 of the 2004 Rules does not expressly provide for any opportunity of a personal hearing but under the principle of natural justice the aggrieved party may be provided such an opportunity. In all proceedings by whomsoever held, whether judicial or administrative, the principle of natural justice has to be observed if the proceedings resulted in consequences affecting the person or property or other rights of the parties concerned. Without participation of a party affected by an order or a decision amounts to an action without lawful authority. The requirement of *audi alteram partem* is not confined to proceedings before Courts but extends to all proceedings by whomsoever held which may affect a person or property or other rights of the parties concerned in the dispute. The principles of natural justice must be read into each and every statute unless and until it is prohibited by the statute itself. In the case of Commissioner of Income Tax East Pakistan Vs. Fazal ur Rehman (PLD 1964 S.C. 410), it has been held *inter alia* that even if there is no provision as to notice in a statute, it cannot override the principle of natural justice and an opportunity of a hearing has to be given. Law to the said effect has also been laid down in the cases of University of Dacca and another Vs. Zain Ahmed (PLD 1965 S.C. 90), Abdul Wadood Khan Vs. Chief Land Commissioner (PLD 1983 S.C. 183), Pakistan Chrom Mines Limited Vs. War Risk Insurance (1983 SCMR 1208), Pakistan Vs. Public at Large (PLD 1987 S.C. 304), Abdul Majeed Zafar Vs. Governor of Punjab (2007 SCMR 330) and Ali Muhammad Vs. The State (PLD 2010 S.C. 623).

94. If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice. A decision taken in violation of the principles of natural justice must be declared to be no decision as held in the case of Medical Education Registration of U.K. Vs. Spackman [1943] 2 All ER 337. It is well settled that an order passed in violation of the principles of natural justice is void. Reference in this regard may be made to the law laid down in the case of Muhammad Swaleh and another Vs. United Grain and



Fodder Agencies (PLD 1964 S.C. 97). Therefore, the decision of the G.R.C. taken in violation of the principles of natural justice was void. The fact that the G.R.C.'s decision was not challenged by the petitioner would not obviate the fact that it was void. The outcome of the proceedings of the G.R.C. (whose members were subordinates of the officials of N.S.P.C.L. who decided to award the contract to M/s Mühlbauer) would have been different, had any heed been paid to the following observations of this Court in the case of S.I.S. Corporation (Pvt.) Ltd. Vs. Federation of Pakistan (supra):-

*“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 subordinates.”*

95. As mentioned above, on the petitioner's application for interim injunction, praying for restraining N.S.P.C.L. from awarding the contract, this Court, vide order dated 09.08.2018, issued notice to the respondents and let the procurement process continue but made the result of the same subject to the final

outcome of this petition. N.S.P.C.L. issued the purchase order dated 28.09.2018 during the pendency of the instant petition. In the said purchase order, it is clearly noted that if the decision of this Court in the instant petition comes against N.S.P.C.L., the purchase order would be treated as canceled.

96. In view of the above, the instant petition is allowed; it is declared that M/s Mühlbauer's prequalification was in violation of clause 11 of the terms and conditions of the prequalification documents, and consequently the purchase order dated 28.09.2018 awarded to M/s Mühlbauer is declared to be unlawful and of no legal consequence. D.G.I.&P. is directed to forthwith return the 100,000 ID-3 cards to the petitioner. N.S.P.C.L. is at liberty to initiate the reprocurement process for ID-3 cards strictly in accordance with the 2004 Rules. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)  
JUDGE

ANNOUNCED IN AN OPEN COURT ON \_\_\_\_/2019

(JUDGE)

*Qamar Khan\**

**APPROVED FOR REPORTING**