

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.858 of 2021
Reliance IT Solutions (Private) Limited
Versus
Federation of Pakistan and others

Date of Hearing:	14.01.2022.
Petitioners by:	M/s Salman Akram Raja, Asad Ladha and Malik Ghulam Sabir, Advocates for the petitioner in W.P. No.858/2021. M/s Imtiaz Rashid Siddiqui, Raza Imtiaz Siddiqui and Syed Hasnain Ibrahim Kazmi, Advocates for the petitioner in W.P. No.1003/2021.
Respondents by:	Mr. Qasim Wadood, learned Additional Attorney General. Rana Imran Farooq, learned Assistant Attorney General. Syed Ishfaq Hussain Naqvi, Advocate for F.B.R. assisted by M/s Urooj Zeb Abbasi and Sajjad Ahmed Mughal, Advocates. Mr. Tariq Hussain Sheikh, Project Director, T&T System. Mr. Khalid Ahmed Khan, Second Secretary Projects, F.B.R. Mr. Shazib Masood and Raja Abdul Qadeer Janjua, Advocates for AJCL. Mr. Saad M. Hashmi, Advocate for SICPA. Barrister Ahsan Jamal Pirzada, for Steuermarken Solution. Mr. Muhammad Khurshid, Deputy Director (Legal), P.P.R.A.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, I propose to decide writ petitions No.858/2021 and 1003/2021 since they entail certain features which are common.

2. Through writ petition No.858/2021, the petitioner Reliance IT Solutions (Private) Limited (“**Reliance**”), impugns the order dated 26.02.2021 passed by the Grievance Redressal Committee (“**G.R.C.**”) constituted by the Federal Board of Revenue (“**F.B.R.**”) rejecting the petitioner’s grievance regarding the tender bidding process for the grant of a licence for the development, maintenance and operation of a track and trace system (“**T&T System**”) for tobacco products, cement, sugar and fertilizer (“**the**

Goods”). Furthermore, the petitioner seeks a declaration to the effect that the entire procurement process conducted by the F.B.R. was vitiated by irregularities and illegalities.

3. Through writ petition No.1003/2021, the petitioner National Institutional Facilitation Technologies (Pvt.) Ltd. (“N.I.F.T”), impugns the order dated 03.03.2021 passed by the G.R.C. whereby the grievances of the said petitioner with respect to the said tender bidding process were rejected. Furthermore, the said petitioner seeks a declaration to the effect that the award of the contract to AJCL (Pvt.) Ltd. (“AJCL”) by the F.B.R. to be without lawful authority and of no legal effect. It is also prayed that the F.B.R. be directed to declare the said petitioner as duly qualified in the tender bidding process and entitled to the award of the contract.

4. With the avowed object of acquiring and implementing information technology-based tools and solutions to ensure fair and just federal tax revenue collection, improved monitoring of federal tax collection and reliable federal tax revenue forecasting, the Government of Pakistan mandated the F.B.R. to licence the development, implementation, operation, and maintenance of the T&T System. This system was intended to prevent leakage of federal tax revenue and under-reporting of production and sales of tobacco, cement, sugar, and fertilizer products. The licence period was to be for five years with a possible extension for an additional period of three years.

5. On 20.11.2020, the F.B.R. published an advertisement inviting applications for the grant of a five-year licence of the T&T System for the electronic monitoring of the Goods manufactured in or imported into Pakistan. The licensee was to be responsible for the end-to-end installation and operation of the T&T System connecting manufacturing sites and import stations to the F.B.R.’s central control room. The T&T System was to include the provision of tax stamps and integrated codes to enable real-time electronic monitoring of the Goods throughout Pakistan.

6. The F.B.R. had prepared and issued Instructions for Licencing (“I.F.L.”) which set out the mechanism and procedure

for the bidding process. All applicants were required to submit their technical and financial bids in separate sealed envelopes which were to be evaluated in accordance with the evaluation criteria given in the I.F.L. The sealed bids were required to be submitted by the extended deadline of 31.12.2020.

7. The criteria for the evaluation of the technical and financial bids was provided in Annex No.5 to the I.F.L., according to which the technical proposal carried 160 marks whereas the financial proposal carried 40 marks. Out of the 160 marks for the technical proposal, 30 marks were allocated for the quality of security features of each type of the proposed Unique Identification Markings (“U.I.M.s”). Clause 3.9 of the evaluation criteria of the technical bids required real specimens of the stamps to be presented with detailed and full description of security features.

8. In order to avoid conflict of interest between the licensee and industry sectors of the Goods, clause 4.7 of the I.F.L. required the bidders to provide a declaration and full disclosure demonstrating that the applicant has no material conflict of interest with the respective four industry sectors of the Goods. Clause 4.8 entitled the F.B.R. to require the bidders to provide information regarding holding structure and ownership, affiliations, finances, key personnel, and activities to ensure that no conflict of interest or links with the industry of the Goods exists. Furthermore, Annex No.2 to the I.F.L. sets out the bidders’ mandatory eligibility requirements. Clauses 1.8 and 3(h) of the said Annex read thus:-

“1.8 The Applicant shall have no material conflict of interest with the industry of the Goods such as, but not limited to, direct or indirect involvement in the manufacturing, import, export, distribution, wholesale and retail of the Goods.”

“3(h) For requirement as per subpoint 1.8: Self-declaration duly executed by authorized signatories of the Applicant confirming that the Applicant has no material conflict of interest with the industry of the Goods such as, but not limited to, direct or indirect involvement in the manufacturing, import, export, distribution, wholesale and retail of the Goods.”

9. Eleven bidders, including Reliance and N.I.F.T., submitted their bids by 31.12.2020. The technical bids were opened on the same day on which they were submitted in the presence of the

bidders' authorized representatives. The technical evaluation of the bids was conducted by the Licencing Committee of the F.B.R. between 04.01.2021 and 28.01.2021. The said Committee found seven out of the eleven bidders to be ineligible and consequently, vide letters dated 11.01.2021 and 12.01.2021, the Chairman of the said Committee informed the seven bidders as to the reasons for their disqualification. Six out of these seven bidders assailed their ouster from the bidding process before the G.R.C., which had been constituted by the F.B.R., vide letter dated 31.12.2020. The G.R.C., vide orders dated 21.01.2021 and 27.01.2021, allowed four out of the six applicants to participate in the bidding process. Consequently, eight out of the eleven bidders participated in the bidding process.

10. Vide letters dated 29.01.2021, the Licencing Committee informed the technically qualified bidders that their financial bids would be opened on 01.02.2021. The Licencing Committee declared AJCL as the *"most advantageous"* bidder, having secured 182.93 out of 200 marks. AJCL had been awarded 156.60 marks for its technical bid, and 26.33 marks for its financial bid. On 01.02.2021, the Licencing Committee issued the bid evaluation report. For the purposes of comparison and clarity, the marks obtained by the eight bidders are as follows:-

Sr. No.	Name of Bidder	Marks		
		Technical (out of 160)	Financial (out of 40)	Total (out of 200)
1.	AJCL	156.60	26.33	182.93
2.	NIFT	134.99	28.97	163.96
3.	SICPA	134.02	28.56	162.58
4.	Reliance	123.85	37.73	161.58
5.	NRTC	129.21	25.99	155.20
6.	ASY	110.51	35.71	146.22
7.	LMKR	109.74	29.32	139.06
8.	Steuermarken	94.60	40.00	134.60

11. Four of the unsuccessful bidders, including Reliance and N.I.F.T., filed complaints under Rule 48(2) of the Public Procurement Rules, 2004 ("P.P.R.") before the G.R.C. N.I.F.T.'s primary grievance was that AJCL should not have been qualified to participate in the bidding process since it had a conflict of interest due to its longstanding business relationship with the producers of cement, sugar and fertilizer.

12. Reliance had sent a notice to the G.R.C. on 03.02.2021 and supplemental notices on 06.02.2021 and 08.02.2021. Its primary concerns were regarding the alleged refusal by the Licencing Committee to accept samples of its tax stamps, and the breakdown of the technical marks obtained by each bidder having not been made public when the bid evaluation report was issued. In its supplemental notice dated 06.02.2021, Reliance asserted that the F.B.R. had engaged the services of the consultant, IDECO Biometrics Security Solutions (Pty.) Ltd. (“IDECO”), through a non-transparent and flawed process, and that AJCL should have been disqualified due to its conflict of interest on account of its involvement in indenting, import and export of commodities such as cement, sugar, fertilizer, etc.

13. Vide order dated 26.02.2021, the G.R.C. turned down Reliance’s complaint. N.I.F.T.’s complaint was also turned down by the G.R.C. vide order dated 03.03.2021. The said orders have been assailed by the petitioners before this Court.

CONFLICT OF INTEREST:-

14. Learned counsel for Reliance and N.I.F.T. were in unison on their submission that since AJCL was indirectly dealing with the Goods, which were to be monitored through the T&T System, it ought to have been disqualified for having a conflict of interest with the four industry sectors of the Goods. They submitted that AJCL had concealed the fact that it owned the entire shareholding in AJCL Global Holdings Limited (registered in the United Kingdom) which in turn owned 75% shares in Claiser Trading Limited (registered in the United Kingdom on 30.07.2018). Claiser Trading Limited is said to have established an office in Sharjah, United Arab Emirates (“U.A.E.”) and trading under the name of Claiser Trading FZE. The petitioners also asserted that AJCL, AJCL Global Holdings Limited and Claiser Trading Limited have common sponsors and directors. Attention of the Court was drawn to bills of lading dated 20.01.2019 and 21.02.2019 for consignments of ethanol showing Claiser Trading Limited as the consignee and Shakar Ganj Limited, a sugar mill in Pakistan, as

the shipper. These transactions, according to the petitioners, showed a trading relationship between AJCL and sugar mills in Pakistan which disqualified it from participation in the bidding process due to conflict of interest.

15. Furthermore, it was submitted that ethanol is produced by sugar mills; that the basic raw material for the manufacture of ethanol comes from sugar mills; that AJCL had given a list of its clients which included sugar mills; that the bulk of ethanol procured by AJCL is from sugar mills; that eighteen members of Pakistan Ethanol Manufacturers Association (“P.E.M.A.”) are sugar mills; that the Licencing Committee did not properly examine the question of a conflict of interest; and that the order of the G.R.C. on the allegation of conflict of interest made by the petitioners against AJCL has no substance. Reference was also made to AJCL’s website which showed a few sugar mills as its clients.

16. Learned counsel for AJCL did not deny the fact that AJCL owns 100% shareholding in AJCL Global Holdings Limited which in turn owns 75% shares in Claiser Trading Limited. He admitted that AJCL’s indirect subsidiary is based in the U.A.E. and imports ethanol from several countries, including Brazil, Thailand and Pakistan. It was submitted that AJCL is not engaged in the business of importing or exporting sugar; that molasses is a by-product of the sugar industry and is used in distilleries to make ethanol; that not every sugar mill has put up a distillery; that there are about 80 sugar mills in Pakistan out of which some have ethanol distilleries; that ethanol is not one of the goods for which the T&T System is to be established; and that there is in fact a conflict of interest between N.I.F.T. (which is a consortium of six banks some of which own cement plants) and the industry sector of cement. Learned counsel for AJCL submitted that since there was no legal infirmity in the process culminating in the grant of the licence to AJCL, the petitions ought to be dismissed with costs.

17. N.I.F.T.’s challenge to the grant of the licence to AJCL was solely on the ground that the latter had a conflict of interest with the four industry sectors of the Goods. In addition to the ground of

conflict of interest, Reliance had taken other grounds in support of its demand for the annulment of the procurement process. The other grounds shall be discussed at a later stage in this Judgment.

18. AJCL's website shows that it has longstanding relationships with some of the leading producers of rice, sugar, wheat, etc., in Pakistan. AJCL admits that it is actively involved in the indenting, import and export of several commodities. The list of its clients includes a few sugar mills in Pakistan.

19. The vital question that needs to be answered is whether the import of ethanol to U.A.E. from Pakistan by one of AJCL's subsidiaries would amount to a conflict of interest between AJCL and the industry sector of sugar so as to disqualify it from participation in the bidding process.

20. Ethanol is produced by the fermentation of plant sugar. It can be produced from a variety of feed stocks such as sugarcane, bagasse, sugar beet, molasses, etc. In Pakistan, there are more than 22 distilleries operating which use molasses for ethanol production. As per the documents brought on record by AJCL, 12 members of the P.E.M.A. are sugar mills that have their own ethanol distilleries.

21. Ethanol is admittedly not one of the Goods for which the T&T System is being established. Clause 1.2 of the I.F.L. makes it clear that the purpose of the licence for the development, implementation, operation, and maintenance of the T&T System is to prevent leakage of federal tax revenue and under-reporting of production and sales of tobacco, cement, sugar, and fertilizer products. The I.F.L. classifies these four products as the "*goods*." Ethanol is not one of the Goods.

22. The data brought on record by N.I.F.T. shows that Claiser Trading FZE had entered into contracts with sugar mills in Pakistan and stand-alone distilleries for the import of "*ethanol alcohol*" to other countries including Thailand, Saudi Arabia, Tanzania, Cameron, Singapore, etc. in the period between 2018 and 2020. The execution of such contracts by Claiser Trading FZE for trade in ethanol would not, in my view, disqualify AJCL from

participation in the bidding process. Nothing was brought on record by the petitioners to demonstrate that AJCL or any of its subsidiaries had been engaged in the business of exporting or importing sugar or any of the other “Goods” from or to Pakistan. The nexus between trade in ethanol or any of the by-products of the Goods and the installation and operation of the T&T System with respect to the Goods is too remote for disqualifying a bidder indulging in such trade on the basis of a conflict of interest.

THE SELECTION OF IDECO AS A CONSULTANT:-

23. Reliance, in its supplemental notice dated 06.02.2021 to the G.R.C., asserted that the F.B.R., after cancelling the competitive process (initiated through advertisement dated 26.07.2020) for engaging consultancy services of a firm for the preparation of the I.F.L., hand-picked IDECO for the said purpose. It was also asserted that a proper procurement process in accordance with the P.P.R. had not been carried out by the F.B.R. for engaging the services of a consultant, and that the consultant selected by the F.B.R. had no prior experience of drafting complicated I.F.L.s. Furthermore, it was asserted that IDECO was appointed as a consultant to prepare an I.F.L. that was tailor-made for AJCL, and that the illegality in the process for the selection of the consultant cast a severe doubt on the sanctity and independence of the I.F.L.

24. The F.B.R. has brought on record documents which explain the process that was adopted by the F.B.R. in selecting the consultant, IDECO. These documents show that the World Bank had given a loan to the Government of Pakistan for a project called “Pakistan Raises Revenue” (“the PRR Project”). The objective of the PRR Project was to contribute to sustainable increase in domestic revenue by broadening the tax base and by combating tax evasion. This objective was sought to be enforced through a T&T System aimed at enforcing proper payment of taxes and duties in the tobacco, cement, fertilizer, and sugar sectors. The F.B.R. intended to apply a part of the loan towards acquiring consultancy services to support it in preparing and

executing the process for the award of a licence to implement and operate the T&T System.

25. On 26.07.2020, the F.B.R. published an advertisement inviting firms to indicate their interest in providing consultancy services for the preparation of bidding documents / I.F.L. for the track and trace solution for the Goods manufactured, imported and sold in Pakistan, and to support the F.B.R. during the bidding process. The expressions of interest were required to be submitted by 20.08.2020. In response to the said advertisement, nine firms submitted their expressions of interest.

26. Since the F.B.R. intended to pay the consultant from the proceeds of the loan advanced by the World Bank to the Government of Pakistan for the PRR Project, the F.B.R. had adopted the *“Qualified Based Selection”* method under the World Bank Procurement Regulations, 2016. The documents brought on the record by the F.B.R. show that the World Bank’s representative in Pakistan, vide email dated 27.07.2020, had voiced his concerns through the Director of the PRR Project that the procurement of the consultant’s services had not been processed through the World Bank’s online portal, i.e., Systematic Tracking of Exchanges in Procurement (**“STEP”**). The F.B.R. was cautioned not to proceed with the procurement until the matter was discussed with the World Bank and a way forward was agreed upon. This caused the F.B.R. to decide that the consultant would be paid from the F.B.R.’s own funds and not from the loan advanced by the World Bank. Vide letter dated 28.08.2020, a request for the provision of funds for the said purpose was also made to the Member (Administration), F.B.R.

27. The F.B.R. had also, vide letter dated 07.09.2020, requested the Director of the PRR Project to assist the F.B.R. in procuring the services of a consultant. The Contract Management Specialist of the PRR Project, vide letter dated 11.09.2020, pointed out to the F.B.R. that in the advertisement published by the F.B.R. on 26.07.2020, it was mentioned that the procurement method to be adopted was the Qualification-Based Selection (**“QBS”**) set out in the Procurement Regulations of the World Bank, whereas no such

method was envisaged by P.P.R. It was also pointed out that the F.B.R. had not obtained a “No Objection Letter” from the World Bank before publishing the advertisement. The Contract Management Specialist advised the F.B.R. to initiate a fresh procurement process for engaging the services of a consultant in accordance with the *“guidelines of the respective Authority / Agencies with the approval of the Competent Authority.”* For the present purposes, it is not necessary to go into the reasons why the Qualification-Based Selection method is not compatible with the P.P.R.

28. Vide office order dated 03.09.2020 issued by the F.B.R., a three-member committee (**“the Selection Committee”**) had been constituted for engaging the services of a consultancy firm. The Selection Committee shortlisted eight firms, whose representatives were called for an interview on 10.09.2020. The representatives of six firms appeared for the interview. The said Committee, in its report dated 01.10.2020 submitted to the Chairman, F.B.R., recommended that IDECO be engaged for the provision of consultancy services.

29. On 12.10.2020, the Chairman, F.B.R. made the following observations:-

“Hiring of the Design consulting firm for developing of Standard Bidding Documents and supervision of the procurement life cycle for selection of Track & Trace Solution Providers for Cigarettes, Cement, Sugar and fertilizer sectors, has been carried out by the Committee through “Consultants Qualified Based Selection (CQS) Method” under The World Bank Procurement Regulations, 2016 (Revised August, 2018). However, during the same, the selection process was switched to be carried out under GoP Procurement Regime which does not contain the stated CQS method and thus brings legal infirmity to the said selection process. The Committee may review the selection process and resubmit the case.”

30. The Selection Committee, in its meeting dated 20.10.2020, unanimously decided that the procurement process under the Qualification-Based Selection method of the World Bank be scrapped and the advertisement dated 26.07.2020 be cancelled. It was also decided to initiate a fresh process for the procurement of consultancy services in accordance with the P.P.R.

31. Instead of initiating a fresh tender bidding process by inviting bids or expressions of interest through an advertisement, the Selection Committee decided to adopt Single-Source Selection Method under Regulation 3(D)(i)(d) of the Procurement of Consultancy Services Regulations, 2010 for selecting a consultant. As a justification for adopting this method, it was recorded as follows:-

“104. The Committee understands that Track and Trace system is very crucial as it is one of the major requirements of IMF and also included in the component-II of World Bank to issue license of Track and Trace System as mentioned in World Bank documents at DLI-4. Initially, the timelines set for issuance of license and implementation of the system was 30th June, 2020 but owing to COVID-19 pandemic, the IMF has relaxed this deadline and extended the compliance date by another one year i.e. upto June, 2021. Keeping in view the aggressive timelines set by IMF/WB and committed by Government of Pakistan, it is imperative to start the process of Licensing immediately with the help of an expert consultancy firm.

105. In view of the foregoing, the Committee has been given a task to start the process of hiring the services of consultancy firm. The Committee convened a meeting on 20-10-2020 to discuss various options available for procurement of consultancy firm under GoP Procurement Rules. Consequent to thorough discussion and in depth study of procurement rules, it has been unanimously agreed by the committee members that the fresh procurement process should be finalized in minimum possible time in order to avoid further delay in compliance of international commitments with IMF/World Bank regarding the implementation and operationalization of Track and Trace system for specified sectors by June, 2021.

106. The committee understands the urgency of hiring process because any delay in the selection process of hiring consultancy firm will eventually delay the subsequent process of bidding/ tender for issuance of license to IT solution provider, who will be responsible to install equipments on factory premises for implementation and operationalization of Trace and Trace System. The committee recommends to adopt a time saving strategy / method under the GoP Procurement Rules in order to fulfill international commitments by adopting the Single Source selection method as given at Sub-rule D(i)(d) of Rule 3 of Procurement of Consultancy Services Regulations Rules, 2010 (Flag A). The Committee agrees that it is most suitable and preferred method which is very effective, economical and efficient in current scenario.

107. Another justification for choosing single stage method process is its advantage over other selection methods, because in previous selection process, it has been observed that only one i.e. M/s IDECO Biometrics Security Solutions (PTY) Ltd out of 9 applicants possesses the required experience and capability for the current assignment. It is expected that same applicants/ consultancy firms will take part in the new procurement process

and their technical evaluation will yield the same results as observed in earlier process held under CQS method.....”

32. The documents on record show that eight firms had submitted their bids in response to the advertisement dated 26.07.2020. These firms were (i) ID Consult International of Germany, (ii) Sovereign Border Solutions of South Africa, (iii) ST Security of the United Kingdom, (iv) SGS of Switzerland, (v) Shantalla Inc. of Canada, (vi) Vandagraf International of the United Kingdom, (vii) KW Group of Malaysia and (viii) IDECO Biometrics Security Solutions (Pty) Ltd. of South Africa.

33. After all the bidders other than IDECO had been considered as “not suitable” for the award of the contract for consultancy services by the Selection Committee, the said committee formed the view that there was a “*strong likelihood*” that IDECO will again be qualified in a competitive bidding process. It also formed the view that F.B.R. could not afford to spend another two to three months on a procurement process “*which may result in the selection of the same firm.*” The said view of the Selection Committee was duly recorded in paragraph 108 of the note file (brought on record by the F.B.R.) and formed the basis of its proposal to engage the services of IDECO “*directly under single source selection method.*”

34. In giving the said proposal, the members of the Selection Committee who are no more than ordinary mortals ascribed to themselves the role of fortune-tellers and predicted the future by assuming that in the event a fresh competitive tender bidding process for engaging the services of a consultant is initiated, it would result in IDECO being declared as the most responsive bidder. This prediction of the future by members of the Selection Committee proceeded on the assumption that no other party other than those who had submitted their bids in response to the advertisement dated 26.07.2020 would submit bids if a fresh advertisement in accordance with Rule 12 of the P.P.R. was issued. This became the ground for not issuing an advertisement to invite interested parties to submit bids or expressions of interest for the award of the consultancy contract. In effect, the

proposal of the Selection Committee was to award the contract for the consultancy services to IDECO on the basis of its evaluation of the bids that had been submitted pursuant to a process (initiated through advertisement dated 26.07.2020) which had already been scrapped.

35. Since the said process had been scrapped, a bid evaluation report in accordance with the requirements of Rule 34 of P.P.R. had not been issued at any material stage. The said Rule provides that procuring agencies shall announce the result of bid evaluation in the form of a report giving justification for acceptance or rejection of bid at least ten days prior to the award of the procurement contract. Observations of the Selection Committee in a note file are not a lawful substitute of the obligation to issue a bid evaluation report. The non-issuance of the evaluation report precluded the other bidders (who had been found to be “unsuitable” by the Selection Committee) from knowing the reasons for their ouster from the bidding process or from taking issue with such ouster.

36. It is an admitted position that a fresh advertisement inviting bids had not been published by the F.B.R. after it was decided to scrap the bidding process initiated through advertisement dated 26.07.2020. This omission is in stark violation of Rule 12 of P.P.R., which *inter alia* provides that all procurement opportunities over a certain financial limit should be advertised on the Public Procurement Regulatory Authority’s website as well as in other print media or newspapers having wide circulation. Furthermore, Rule 14 of the P.P.R. makes it mandatory for all procuring agencies to advertise all procurement requirements exceeding a certain financial limit. Under the said Rule, deviation from the requirement to advertise procurement opportunities or requirements is permissible, with the prior approval of the Public Procurement Authority, in the following circumstances only:-

- “(a) *the proposed procurement is related to national security and its publication could jeopardize national security objectives; and*
- (b) *the proposed procurement advertisement or notice or publication of it, in any manner, relates to disclosure of information, which is proprietary in nature or falls within the*

definition of intellectual property which is available from a single source.”

37. It is not the F.B.R.’s case that the procurement process for the award of a consultancy contract for the T&T System “*related to national security and its publication could jeopardize national security objectives*” or that a fresh advertisement would result in the disclosure of information which was proprietary in nature or fell within the definition of intellectual property available from a single source. Therefore, it is held that conditions prescribed in Rule 14 of the P.P.R. for bypassing the mandatory requirement of issuing an advertisement for inviting bids, after the scrapping of the earlier process, had not been fulfilled in the instant case.

38. The Selection Committee justified the adoption of the single source selection method by observing that it was permissible under sub-Rule D(i)(d) of Regulation 3 of the Procurement of Consultancy Service Regulations, 2010. The said sub-rule is reproduced herein below:-

“D. (i) *Single source or direct selection.- This method will be used only in exceptional cases, where it provides clear advantage over competition in following cases (only), namely:-*

(a)

(b)

(c)

(d) *where only one consultant is qualified or has experience of exceptional worth with reference to clause (c) (d) of rule 42 of the Public Procurement Rules, 2004.*”

39. The expression “*where only one consultant is qualified*” in Regulation 3(D)(i)(d) is obviously not referable to a case where a single consultant is found to be qualified during a qualification process in a competitive tender bidding exercise conducted in accordance with the requirements of P.P.R. It is not uncommon for only one bidder to be found technically qualified from amongst several competing bidders for an award of a contract. In such an eventuality, the procuring agency can proceed to award the contract to such a sole technically qualified bidder if its financial bid is acceptable or to initiate a fresh tender bidding process so that the competitive arena could be enlarged. A contract entered into by a procuring agency with such a sole technically qualified

bidder would not be through a process of a “*single source selection*” but through a competitive process under the competitive mode envisaged by the provisions of P.P.R. The technical qualification of a single bidder from among several other bidders would not rule out the existence of other parties, which did not participate in the bidding process, which could be technically qualified if they participated in a fresh tender bidding process.

40. In the case of MIA Corporation (Pvt.) Limited Vs. Pakistan PWD (PLD 2017 Islamabad 29), the respondent had terminated the contract for the procurement and installation of Heating, Ventilation and Air-Conditioning equipment awarded to the petitioner which had emerged as a successful bidder in a competitive tender process. Thereafter, the respondent did not invite fresh bids for the award of the re-procurement contract but asked only those bidders who had been prequalified in the earlier tender process which had culminated in the award of the contract to the petitioner to submit their quotations. The process adopted by the respondent for the award of the re-procurement contract to a party who had submitted the best quotation was declared unlawful by this Court. In the said report, it was held as follows:-

“To invite quotations from only five bidders who had been pre-qualified by respondent No.1 in the bidding process prior to the award of the contract to the petitioner, and not to issue an advertisement inviting bids for the re-procurement contract, hits at the root of the very purpose and rationale of tender bidding. The purpose of a tender bidding process is to allow “widest possible competition”. This purpose stands defeated when only a select group of bidders are invited by a procuring agency to submit bids/quotations.”

41. Furthermore, in paragraph 23 of the said report, it was held as follows:-

“This was not a case where there had been a rejection of the petitioner’s bid because it had resiled therefrom or its bid was not found to be in conformity with the requirements of the tender. Once a contract is awarded, the tender bidding process comes to an end. If such a contract is subsequently terminated, transparency and fair play demands that a fresh tender bidding process be initiated for re-procurement purposes by issuing a fresh public notice/advertisement in accordance with the PPRA Rules. A procurement agency cannot skip an advertisement by resorting to a selective bidding process by inviting quotations from the bidders who had been pre-qualified prior to the award of

the contract to the successful/most responsive bidder. This is more so when the BOQs and specifications in the re-procurement process are different from the ones in the original tender.”

42. By analogy, in the case at hand, when the F.B.R. decided to cancel the advertisement dated 26.07.2020 and scrapped the bidding process initiated through the said advertisement, it was obligatory for the F.B.R. to have initiated a fresh bidding process by issuing an advertisement inviting bids or expressions of interest from the public for the award of the consultancy contract. It could not have selected one of the bidders which had been found as the only suitable bidder in a process that had been scrapped. The requirement of a fresh advertisement inviting bids has been emphasized by the Hon'ble Supreme Court in the case of Habibullah Energy Limited Vs. WAPDA through Chairman (PLD 2014 SC 47). Paragraph 29 of the said report reads as follows:-

“29. Examining the transaction, the subject matter of the instant case in the light of the principles of Judicial Review enumerated hereinabove, it appears that the original process initiated through the advertisement dated 26-7-2003 was for the appointment of a ROMM Operator and was commenced through the Government of Sindh in consultation with WAPDA. The said process was formally terminated on 17-3-2004. The disputed contract of lease was a result of independent process undertaken by WAPDA unrelated to the procedure initiated pursuant to the advertisement dated 26-7-2003. No fresh public advertisement was issued. Such an advertisement is universally accepted as a condition precedent for ensuring a free, fair, open, competitive and transparent process for transfer of public assets or rights therein. In fact no compelling reasons have been pleaded at the bar by WAPDA for not issuing such an advertisement. The absence of such an advertisement, alone in fact and under the circumstances of the case, is fatal to the transaction in question.

33. The decision in principle to award the contract to Messrs AG was taken on 22-3-2006 at the highest level by the President of Pakistan, Prime Minister of Pakistan and the Chairman, WAPDA. Thereafter, without issuing any advertisement for the information of the public at large, some of such firms, which had originally shown their Expression of Interest for being appointment as a ROMM Operator, pursuant to the advertisement dated 26-7-2003 were contacted. Such procedure was not only illegal but in fact a farcical and mala fide attempt to cloth the transaction with some semblance of legality. The said process and the subsequent approval by the Board of WAPDA to Messrs AG appears to be an infertile attempt to paper over the illegalities.”

(Emphasis added)

43. As mentioned above, the Selection Committee had found the other bidders competing with IDECO to be “not suitable” not

because they did not have the qualifications or requisite experience but due to conflict of interest. For instance, ID Consult International was disqualified on account of a conflict of interest due to having been engaged in joint venture projects with the National Database and Registration Authority (“N.A.D.R.A.”) in Kenya. This Court asked the learned counsel for the F.B.R. as to why ID Consult International had suffered disqualification on the ground of its nexus with N.A.D.R.A. He submitted that ID Consult International and N.A.D.R.A. were members of the same consortium which had submitted its bid in the earlier round of the tender bidding process for the T&T System which was annulled by this Court vide judgment reported as National Institutional Facilitation Technologies (Pvt.) Limited Vs. The Federal Board of Revenue (PLD 2020 Islamabad 378), and that it was likely for them to be joint venture parties for the award of the licence for the T&T System. The Selection Committee had also disqualified Sovereign Border Solutions on the ground that its Managing Director was a former employee of SICPA, which had participated in the earlier tender bidding process for the T&T System. Conflict of interest was put forth as a ground for disqualifying Sovereign Border Solutions.

44. The expression *“with reference to clause (c) or clause (d) of rule 42 of the Public Procurement Rules, 2004”* after the expression *“where only one consultant is qualified or has experience of exceptional worth”* in Regulation 3(D)(i)(d) of the Procurement of Consultancy Services Regulations, 2010 (**“the 2010 Regulations”**) clearly implies that the single source selection method for an award of a public contract by a procuring agency is permissible only if the requirements of Rule 42(c) and (d) of the P.P.R. are fulfilled. The expressions used in Regulation 3(D)(i)(d) of the 2010 Regulations are to be strictly construed since resort to *“single source or direct selection”* method for the award of public contracts is required to be made *“only in exceptional cases.”* Before a single consultant is selected through a single source method, the procuring agency is to undertake an exercise to determine that there would be no other consultant who would be

qualified or would have experience of exceptional worth as required by the procuring agency. Such an exercise has clearly not been taken by the F.B.R. before awarding the contract for consultancy services to IDECO. Had a fresh competitive tender bidding process been undertaken by the F.B.R., it could not be said with certainty that no other bidder other than the ones who had submitted their bids in response to the advertisement dated 26.07.2020 would have participated in such a process.

45. The documents brought on record by the F.B.R. do not refer to any of the conditions in Rule 42(c) and (d) of the P.P.R. having been fulfilled when a decision was taken by the F.B.R. not to initiate a fresh tender bidding process in accordance with the requirements of P.P.R. after scrapping the process initiated through the advertisement dated 26.07.2020. This omission on the part of the F.B.R. causes me to hold that the essential prerequisite for deciding to adopt the single source selection method for the award of a consultancy contract to IDECO had not been fulfilled.

46. Learned counsel for the F.B.R. as well as the learned Additional Attorney-General submitted that Rule 42(d)(iii) permitted the F.B.R. to adopt negotiated tendering with one party without prior publication of a procurement notification *“for reasons of extreme urgency brought about by events unforeseeable by the procuring agency, the time limits laid down for open and limited bidding methods cannot be met.”* The said Rule also provides that the circumstances invoked to justify extreme urgency must not be attributable to the procuring agency.

47. Earlier, the F.B.R. had initiated a competitive tender bidding process through an advertisement dated 06.08.2019. This process had culminated in the award of the contract to M/s National Radio & Telecommunication Corporation. The process adopted by the F.B.R. for the award of the said contract was subjected to a challenge before this Court by another competing bidder in writ petition No.3995/2019. The said writ petition was allowed vide judgment reported as National Institutional Facilitation Technologies (Pvt.) Limited Vs. F.B.R. and others

(supra). The said judgment was upheld by the Division Bench of this Court vide judgment dated 19.01.2021 passed in intra Court appeal No.170/2020 and connected appeals. Perusal of the said judgment shows that the tender bidding process had been annulled on account of procedural irregularities and illegalities committed *inter alia* by officials in the F.B.R. Therefore, I am of the view that the delay in initiating the process for the award of the licence for the T&T System, of which the contract for the procurement of consultancy services was an essential component, was for reasons attributable to the F.B.R. This being so, even if it is assumed for the sake of argument that there were circumstances of extreme emergency, such circumstances had been brought about by the F.B.R. and therefore, resort to negotiated tendering under Rule 42(d)(iii) of the P.P.R. could not have been made by the F.B.R.

48. Another reason which caused the delay in the process for engaging the services of a consultant was the objection raised by the representative of the World Bank that the procurement process for selecting a consultant had not been initiated through STEP. It is this objection which caused the F.B.R. to decide to pay for the consultancy services from the Government of Pakistan funds and not through the proceeds of the loan advanced by the World Bank. The F.B.R. has also brought on record email dated 09.07.2020 from Ms. Clelia Rontoyanni of the World Bank to the Director, PRR which contains explicit advice that *“an appropriate procurement approach which needs to be entered in STEP prior to the initiation of the procurement process.”* It appears that the F.B.R. went ahead and initiated the procurement process by issuing the advertisement dated 26.07.2020 without the same having been initiated through STEP. This lapse on the part of the F.B.R. caused the World Bank to express reservations with respect to the said advertisement. The letter dated 28.08.2020 from the F.B.R. shows that the F.B.R. did not want to revise the advertisement but decided instead to utilize Government of Pakistan funds for engaging the services of a consultant.

49. Now, the said advertisement was in accordance with the QBS method of the World Bank whereas the F.B.R. had decided that funds for the consultancy services were to be provided by the Government of Pakistan. This inconsistency caused the Chairman, F.B.R. to express his reservation that since the QBS method is not envisaged by the *“GoP procurement regime,”* i.e., P.P.R., the process adopted by the F.B.R. *“brings legal infirmity in the said selection process.”* All this shows that had the F.B.R. given due consideration to the email dated 09.07.2020 sent by the representative of the World Bank and initiated the procurement process for engaging the services of a consultant through STEP, the delay in the process would not have occurred. Therefore, the F.B.R. could not resort to the single source selection method for engaging the services of a consultant since the circumstances of urgency, if any, were the creation of none other than the F.B.R. It ought to be borne in mind that Rule 42(d)(iii) of the P.P.R. does not permit negotiated tendering where the circumstances of urgency are attributable to the procuring agency.

50. The 2010 Regulations have been made in exercise of the powers conferred by Section 27 of the Public Procurement Regulatory Authority Ordinance, 2002, which provides that the Authority may make Regulations not inconsistent with the provisions of the Ordinance and the Rules made thereunder for carrying out the purposes of the Ordinance. Regulation 12 of the 2010 Regulations provides that the P.P.R. and the said Regulations are to be taken as mutually explanatory of one another but in case of inconsistency, the P.P.R. shall take precedence over the Regulations. Hence, in case of inconsistency between the P.P.R. and the 2010 Regulations, the former are to prevail. Where the conditions provided for resorting to negotiated tendering in Rule 42(d)(iii) are not fulfilled, the single source selection provided in Regulation 3(D)(i)(d) of the 2010 Regulations cannot be invoked by a procuring agency.

51. Under the proviso to Rule 42(d)(iii) of the P.P.R., a procuring agency desirous of using negotiated tendering as a method of procurement shall record reasons and justifications in writing for

resorting to negotiated tendering and shall place the same on record. As per the learned counsel for the F.B.R., the reasons for adopting the single source selection method were recorded by the Selection Committee in the note file. Perusal of paragraph 105 of the note file shows that there were some *“international commitments with IMF / World Bank regarding the implementation and operationalization of Track and Trace system for specified sectors by June, 2021.”* These so-called reasons were recorded on 20.10.2020, *i.e.*, eight months prior to the date when the T&T System was supposed to have been implemented and made operational. Other than the note file, no other document was placed on the record by the F.B.R. to show that such a deadline had been fixed by the IMF or the World Bank. Be that as it may, deadlines imposed by donor agencies on the F.B.R. or by the F.B.R. onto itself cannot be a plausible justification to bypass a competitive tender bidding process which is a requirement of not just the P.P.R. but also the Constitution. If this Court were to endorse the F.B.R.’s decision not to adopt a competitive bidding process for the award of the consultancy contract for reasons which could not be supported either by Regulation 3(D)(i)(d) of the 2010 Regulations or Rule 42(c) and (d) of the P.P.R., it would be setting a terrible precedent. Consequently, I am of the view that the decision taken by the F.B.R. to avoid its Constitutional and legal obligation of awarding a public contract (*i.e.* the contract for engaging the services of a consultant) through a competitive tender bidding process in accordance with the procedure prescribed in the P.P.R. and instead adopting a single source selection method or negotiated tendering, is unlawful. In holding so, I derive guidance from the law laid down in the following cases:-

- (i) In the case of Sachidanand Panday Vs. State of West Bengal (AIR 1987 SC 1109), O. Chinnappa Reddy, J. summarized the legal propositions in the following terms:-

“On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established: State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and

principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest when it is considered necessary to dispose of a property is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.”

(ii) The Indian Supreme Court in the case of Nagar Nigam Vs. Faheem Meat Exports (P) Ltd. (2006 (13) SCC 382), held as follows:-

“The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money Deposit, etc. The award of Government contracts through public-auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed from and such contracts may be awarded through 'private negotiations'.”

(iii) The Delhi High Court in the case of Global Rescue Foundation Vs. Union of India¹, after making reference to a catena of case law including the judgment of the Indian Supreme Court in the case of Nagar Nigam Vs. Faheem Meat Exports (P) Ltd. (2006 (13) SCC 382), held as follows:-

“24. The Supreme Court, in the case of Nagar Nigam (supra), cautioned that in rare and exceptional cases when the Court feels there are justifiable reasons, a contract may have to be granted by private negotiations. This practice has been discouraged as it would shake public confidence. Contracts made by the State, its Corporations, instrumentalities and agencies must ordinarily be

¹ <https://indiankanoon.org/doc/145563603/>

granted through public auction/public tender and by inviting tenders from eligible persons after advertising the same in well-known dailies having wide circulation with relevant details including the subject matter of auction, technical specifications, estimated cost etc. in order to avoid public confidence being shaken and to promote healthy competition and to ensure transparency. The objective is to promote healthy competition amongst tenderers to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices. No doubt, in rare cases, the exception to the rule is applied when there is some natural calamity or emergency declared by the Government or where the procurement is possible from a single source only."

52. Whenever public procurement is made without calling for tenders and instead on nomination basis, it excludes large number of persons who could have participated and got orders. Public procurement by nomination is exclusionary in nature and kills competition in the market, often leading to higher expenditure for the public procurer. Regardless of the urgency in the matter created by the FBR, it was obliged to float a global tender for the appointment of a consultant after the earlier advertisement was cancelled and the bidding process scrapped. Thus, there were no justifiable reasons to invoke Regulation 3(D)(i)(d) of the 2010 Regulations in a hurry.

53. I am cognizant of the fact that none of the bidders which competed with IDECO in the competitive process for the award of the contract for consultancy services, have challenged the award of the contract by the F.B.R. to IDECO. I have delved into and examined the process adopted by the F.B.R. for the award of the consultancy contract to IDECO to determine whether the G.R.C. was correct in turning down the objection taken by Reliance to the process adopted by the F.B.R. for the award of the said contract.

54. The G.R.C.'s order dated 26.02.2021 shows that the G.R.C. decided not to examine the process adopted by the F.B.R. for the award of the consultancy contract on the ground that Reliance should have raised this objection prior to the opening of the bids. True, Reliance did not raise this objection prior to the opening of the bids but it was also not privy to the decision-making process adopted by the F.B.R. for the award of the contract for consultancy services to IDECO on a single source basis. Since

Reliance, in its supplemental grievance notice, had explicitly asserted that a proper procurement process in accordance with the P.P.R. had not been carried out by the F.B.R. for engaging the services of a consultant, the G.R.C. could not have refused to exercise its jurisdiction by not examining the legality of the process for the award of the contract to IDECO on a single source basis. Aberrations and procedural improprieties in the award of public contracts can be examined by a G.R.C. constituted by a procuring agency or by a Court through a process of judicial review even after the award of the contract.

55. Having said that, the vital question that now needs to be determined is whether the competitive tender bidding process for the award of the contract for the T&T system can be set at naught on the sole ground that the process for the award of the contract to the consultant has been found to be unlawful. In the case at hand, all the competing bidders knew that the I.F.L. had been prepared by IDECO. Reliance's assertion is that this I.F.L. was tailor-made so as to facilitate the award of the contract for the T&T system to AJCL. This was a bald sweeping assertion bereft of any particularity. Learned counsel for Reliance did not refer to any provision of the I.F.L. which operated to the benefit of AJCL and a corresponding detriment to Reliance or any of the other bidders. Reliance accepted the terms of the I.F.L. as they were and participated in the bidding process without any demur or reservation. I am, therefore, of the view that the process for the award of the contract for the T&T system cannot be annulled for the reason that the I.F.L. had been prepared by a consultant whose selection through a single source method had been found to be unlawful.

WHETHER F.B.R. WAS LAIBLE TO RETURN THE COPIES OF THE UNOPENED FINANCIAL BIDS:-

56. Reliance, in its first grievance notice dated 03.02.2021, had expressed its concern that after the original financial proposal of the qualified bidders was opened, the Licencing Committee refused to return the unopened copies of the financial proposals to the bidders. This refusal caused Reliance to suspect that the

copies of the financial proposals had been opened at the stage of the technical evaluation of the bids and prior to the date and time scheduled for the opening of the original financial bids. Learned counsel for Reliance did not point to any requirement of the I.F.L. or even in the law which obligated the F.B.R. to return copies of the financial bids. Therefore, the suspicion harbored by Reliance is unfounded. Nevertheless, the G.R.C. had examined the unopened copy of the financial bid submitted by Reliance and found that it had not been ripped open. I would tend to agree with the G.R.C. that Reliance's suspicions and apprehensions are based on conjectures.

WHETHER THE F.B.R. WAS BOUND TO SEEK CLARIFICATIONS FROM RELIANCE WITH RESPECT TO ITS BID:-

57. In its first grievance notice dated 03.02.2021, Reliance also complained that the Licencing Committee had refused to seek clarifications from the bidders with respect to their bid. Reliance asserted that during the live demonstration made by its representatives before the Licencing Committee on 14.01.2021, the members of the said Committee had stated that they will seek clarifications from Reliance with respect to certain queries that they may have. At no material stage did the Licencing Committee feel the need of seeking any clarification from Reliance with respect to its bid. Rule 31 of the P.P.R. *inter alia* provides that a procuring agency may seek clarifications to a bid that does not change the substance of the bid. Learned counsel for Reliance did not explain as to which aspect of its bid the Licencing Committee should have sought clarifications. As long as the Licencing Committee did not feel the need to seek clarifications from Reliance with respect to its bid, neither could the G.R.C. nor can this Court issue a direction in an absolute void for clarifications to be sought by the Licencing Committee from Reliance.

WHETHER THE F.B.R. / G.R.C. WAS UNDER AN OBLIGATION TO PROVIDE RELIANCE WITH THE DETAILED BREAKDOWN OF THE MARKS AWARDED TO EACH BIDDER:-

58. The petitioner's primary grievance voiced in its first grievance notice dated 03.02.2021 was that the Licencing Committee had failed to disclose detailed breakdown of the technical marks awarded to each bidder.

59. The financial bids were opened on 01.02.2021 in the presence of the bidders' representatives. Reliance admits the fact that on the said date the Licencing Committee *"put the total technical scores awarded to each bidder on a projector screen."*

The technical marks awarded to each bidder were as follows:-

S.#	Name of Bidder	Marks obtained in Technical Evaluation (out of Total 80)
1	Athentix Inc. Jaffer Brothers Consortium (JBL) / AJCL	72
2.	NIFT Consortium	73
3.	De La Ru & NTL	72
4.	Itechnology	73
5.	Reliance IT solutions Pvt Ltd.	76
6.	Sicpa SA/Arwentec	72
7.	Steuermaaken Solution (Pvt.) Ltd.	73
8.	NRTC	72

60. The bid evaluation report was issued on 01.02.2021, and its copy was sent to Reliance vide email dated 02.02.2021, and also uploaded on websites of the F.B.R. and P.P.R.A. on the same day. This report does not give a detailed breakdown of the technical marks awarded to each bidder for each component of the evaluation criteria in the I.F.L.

61. Reliance was disappointed with its technical score since in the previous round of bidding (which was only for the operation of the T&T System for tobacco) it had been awarded the highest technical score. Vide letters dated 01.02.2021 and 02.02.2021, Reliance requested the F.B.R. to provide the detailed breakdown of the technical marks awarded to each bidder for each category of the evaluation criteria contained in the I.F.L. The F.B.R. did not provide the detailed breakdown of the marks to Reliance or any other bidder.

62. Reliance also requested the G.R.C., vide letters dated 09.02.2021 and 15.02.2021, for the provision of the detailed breakdown of the marks. The G.R.C. did not issue any directions

for the detailed breakdown of the marks to be made available to Reliance. The detailed breakdown of the marks was provided to Reliance *albeit* as an annex to the G.R.C.'s order dated 26.02.2021, *i.e.*, on conclusion of the proceedings before the G.R.C. The G.R.C., in its order dated 26.02.2021, has taken the position that Rule 35 of the P.P.R. does not obligate the procuring agency to give a detailed break-up of the technical marks awarded to each bidder in the evaluation report.

63. Now, as per the evaluation criteria (Annex No.5 to the I.F.L.), a maximum of 160 marks could be awarded for a bidder's technical proposal. The said criteria has 17 components with different marks for each component, all totaling 160. These components and the maximum marks that they carried are set out in "Schedule-A" hereto.

64. Where an I.F.L. or tender documents stipulate a technical bid evaluation criteria under which marks are awarded to bidders for different components, like in the case at hand, it is my view that the bid evaluation report must contain the detailed breakdown of the marks awarded to each bidder for each component of the evaluation criteria. These are the demands of propriety, fairness and transparency. There is nothing in the P.P.R. which prevents a procuring agency from making such information available in the bid evaluation report.

65. Rule 35 of the P.P.R. obligates the procuring agency to *inter alia* "announce the results of bid evaluation in the form of a report" but it does not set a maximum or minimum threshold of the information to be provided in the bid evaluation report. The said Rule, in no manner, prevents a procuring agency from providing a detailed breakdown of the marks provided to each bidder in the technical process. A bid evaluation report ought to contain information sufficient to convey to an unsuccessful bidder the causes for its failure. If a bidder's technical bid is to be judged by a procuring agency on the marks obtained for different components in the evaluation criteria then "*the results of bid evaluation*" must *a fortiori* include the marks gained by bidders for each component of the bid evaluation criteria.

66. Because the evaluation report issued by the F.B.R. did not contain the detailed breakdown of the marks, Reliance was well within its rights to require the F.B.R. vide its letters dated 01.02.2021 and 02.02.2021, and the G.R.C. vide letters dated 09.02.2021 and 15.02.2021, to provide the detailed breakdown of the technical marks awarded to each bidder for each category of the evaluation criteria contained in the I.F.L. After the bid evaluation report had been issued by the F.B.R. on 01.02.2021, there was no lawful excuse for not providing the detailed breakdown of the marks in the face of numerous requests made by Reliance. The suspicion as to the transparency and the fairness of the evaluation process harbored by Reliance was understandable given the fact that not just the F.B.R. but also the G.R.C., during the pendency of the proceedings pursuant to Reliance's grievance notice, did not provide the detailed breakdown of the marks to Reliance. In the case of BNP (Pvt.) Ltd. Vs. Capital Development Authority (PLD 2017 Islamabad 81), this Court has held that transparency is mandatory at every stage i.e., planning disposal, inviting interested parties, bidding process, evaluation of bids, declaring a successful bidder, and the execution of the lease or contract pursuant thereto.

67. Given the 80% weightage of the technical marks in the evaluation criteria contained in the I.F.L., it is my view that it was obligatory on the F.B.R. to have provided a detailed breakdown of the technical marks awarded to each of the bidders (for each category of the evaluation criteria contained in the I.F.L.) to the bidders making a request for its provision. Furthermore, in a project of as important in magnitude as that of the T&T System it was reasonable for the bidder to expect the F.B.R. to have provided the detailed breakdown of the marks in the bid evaluation report. The omission on the part of the F.B.R. to provide such a breakdown amounts to withholding crucial information which the participating bidders had every right to be provided. This is moreso when a bidder only had 15 days from the date of issuance of the bid evaluation report to challenge the same before the G.R.C.

68. Had the G.R.C. directed the F.B.R. to provide the detailed breakdown of the marks to Reliance in response to its letters dated 09.02.2021 and 15.02.2021, Reliance could have challenged the correctness of the marks awarded to a bidder for each category of the evaluation criteria in the I.F.L. under Rule 48(2) of the P.P.R. which reads thus:-

“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.”

69. The award of marks for each component in the evaluation criteria contained in the I.F.L. is indeed an “*act of the procuring agency*” against which a complaint can be filed under Rule 48(2) of P.P.R. before the G.R.C. It is an admitted position that the detailed breakdown of the marks awarded to each bidder had not been provided by the F.B.R. or the G.R.C. within a period of fifteen days after 01.02.2021 when the bid evaluation report was issued. The fifteen-day time limit (from the date of the announcement of the bid evaluation report) within which a complaint can be filed before the G.R.C. can certainly not be made applicable where information which is crucial to the bidding or evaluation process is withheld from a bidder by the procuring agency, like in the case at hand. When the foundational information for a challenge before the G.R.C. is not provided by the procuring agency to a bidder, how could it be expected to file a purposeful complaint before the G.R.C.? The omission on the F.B.R.’s part to provide the breakdown of the marks indeed made it impossible for the unsuccessful bidders to understand the reasons for which they had been given lesser marks than AJCL and to challenge the same before the G.R.C. An aggrieved bidder cannot be expected to submit a meaningful grievance petition without knowing the breakdown of the marks awarded to it and the other bidders for each category of the evaluation criteria contained in the I.F.L. In the absence of the detailed breakdown, it would be impossible for a bidder to know the grounds on which to challenge the evaluation report before the G.R.C., and the withholding of such information

would therefore prejudice a bidder's rights in the proceedings before the G.R.C.

70. A bid evaluation report, like the one in the case at hand, which merely sets out the total marks obtained by each bidder without the detailed breakdown of the marks awarded to each bidder for each component of the evaluation criteria would not be in accord with the requirements of fairness and transparency. Such a translucent report would amount to denial to an aggrieved bidder with the provision of a foundation on which the process adopted for the award of marks to each bidder could be challenged. Since it is my view that the detailed breakdown of the marks awarded to each bidder would constitute an essential component of the bid evaluation report, the time within which an aggrieved bidder is to file a complaint before the G.R.C. must perforce commence from the date when the detailed breakdown of the marks is provided to the bidder. Where, however, a complaint before the G.R.C. is not entertained on the ground that it had been filed beyond the fifteen-day time limit from the date of issuance of the bid evaluation report in a case where information crucial to the bidding or evaluation process is provided beyond the said limit, a Court of plenary jurisdiction or a Court of Constitutional causes would have the jurisdiction to entertain a bidder's complaint in the form of a suit or a petition.

71. As mentioned above, Reliance had requested the G.R.C. for the provision of the detailed breakdown of the marks awarded to each bidder. The G.R.C. did provide Reliance with the detailed breakdown, but only as an annex to its order dated 26.02.2021. This was more than fifteen days after the issuance of the bid evaluation report. The mere fact that the detailed breakdown of the marks was provided by the G.R.C. along with its report goes to show that the G.R.C. acknowledged and understood its obligation to provide such a breakdown to an aggrieved bidder. The provision of the detailed breakdown at a stage when the G.R.C. was rendered *functus officio* was most unjust.

72. The G.R.C.'s order shows that the G.R.C. had "*looked into the detailed marking pattern*" by the Licencing Committee in order

to see whether each and every category was marked. The G.R.C. may well have examined the detailed markings but it did not disclose the same to Reliance so as to give it an opportunity to see whether the marking by the Licencing Committee had been carried out in a lawful manner or in accordance with the provisions of the I.F.L., read with the subsequently issued detailed Evaluation Framework (which shall be discussed later in this judgment).

73. Although the F.B.R. and the G.R.C. can be said to have committed an irregularity or acted unjustly by not providing the detailed breakdown of the marks to Reliance prior to or during the hearing before the G.R.C., it needs to be determined whether such an omission on the part of the F.B.R. and the G.R.C. would render the entire bidding process liable to annulment. Now, it is an admitted position that the detailed breakdown of the marks awarded by the Licencing Committee to each bidder was provided to Reliance as an annex to the G.R.C.'s order dated 26.02.2021. After this, Reliance could have filed yet another grievance petition before the G.R.C. disputing the correctness of the marks awarded to itself or the other bidders, if it felt that the marks were erroneously awarded. Since Reliance did not have knowledge of the detailed breakdown of the marks when it issued grievance notices dated 03.02.2021, 06.02.2021 and 08.02.2021, it was not estopped from issuing another grievance notice disputing or questioning the marks awarded for each category of the evaluation criteria contained in the I.F.L. This, Reliance did not do.

74. When Reliance filed the instant writ petition, it was in full knowledge of the detailed breakdown of the marks awarded to each bidder for every category in the I.F.L. There is no pleading in the writ petition challenging the detailed breakdown of the marks or the correctness of the marks awarded to each bidder. In paragraph F of writ petition No.858/2021, the ground taken by the petitioner is that it had vast experience and expertise and that the Licencing Committee could not have deducted marks from the petitioner's technical proposal for no apparent reason or justification. This vague and generalized pleading was not

explicated or particularized during the arguments of the learned counsel for the petitioner. Given these circumstances, I am not inclined to annul the bidding process on the ground that the detailed breakdown of the marks were not provided to Reliance until the issuance of the G.R.C.'s order.

WHETHER MARKS COULD HAVE BEEN AWARDED BY THE LICENCING COMMITTEE TO BIDDERS FOR THE STAMPS / UNIQUE IDENTIFICATION MARKINGS ONLY ON PHYSICAL EXAMINATION OF THE SAMPLES SUBMITTED BY THE BIDDERS ALONG WITH THEIR TECHNICAL BIDS:-

75. Clause 1.4 of the I.F.L. provides that the licensee shall implement and operate the T&T System, including the secure paper-based, serialized, non-removable (tamper evident) Unique Identification Markings of the Goods ("UIMs"), designed specifically for the T&T System, and combined with state-of-the-art electronic monitoring and tracking systems of the Goods.

76. Clause 3.5 of the I.F.L. provides that the U.I.M.s shall utilize core material which must be made of an anti-tampering substrate so that any attempt to tamper with or to remove a U.I.M. will crumble a portion of the U.I.M., which will be clearly and immediately recognized. Clause 3.7 of the I.F.L. listed the minimum security features that the U.I.M.s were required to contain. These security features included one overt material security feature visible by the naked eye and one semi-overt material security feature visible through a simple and very low-cost device. Clause 3.9 of the I.F.L. requires a bidder to provide specimens of U.I.M.s with details including full description of the security features. As per paragraph 3.9 of the evaluation criteria set out in the I.F.L., a maximum of 30 marks could be awarded for quality of security features for each type of proposed U.I.M. The said paragraph also requires real-time specimens to be presented with details and full description of the security features.

77. During the course of the arguments, learned counsel for Reliance submitted that Reliance's technical bid also included a box containing the samples / specimens of the tax stamps / U.I.M.s but on the day when the bidders were required to submit their sealed bids, the officials of the F.B.R. did not take the box and

returned it to Reliance's representatives. He further submitted that even though the samples had not been taken from Reliance, it was awarded 29.49 marks for the security features in the U.I.M.s; that the grant of marks without physical examination of the stamps / U.I.M.s, vitiated the process for the award of marks; and that the F.B.R. has taken a facetious position by asserting that no examination of the samples was carried out but nonetheless marks were awarded for the quality of the security features of the U.I.M.s to the bidders.

78. The learned Additional Attorney-General submitted that the submission of the samples of the U.I.M.s was not a paramount consideration in the bidding process. He submitted that marks had not been given on the basis of the examination of the samples of the U.I.M.s submitted by bidders but were instead given on the basis of the first, second and third level security features for visual authentication without instruments provided by bidders along with their bids. He submitted that these marks were awarded in accordance with the detailed Evaluation Framework issued on 08.12.2020. He drew the attention of the Court to the details of the first, second and third level security features of the U.I.M.s and the potential designs of the U.I.M.s for each of the Goods provided by Reliance, along with its bids. For these security features, Reliance was awarded 29.49 marks out of 30 marks, whereas AJCL was awarded 29.89 marks.

79. Reliance, in its first and second grievance notices dated 03.02.2021 and 06.02.2021, did not raise any complaint regarding refusal by the Licencing Committee to accept the U.I.M.s from it. It is only in the third notice dated 08.02.2021 that it complained that the Licencing Committee had refused to accept samples from Reliance or other bidders. In Reliance's writ petition, there is no pleading to the effect that on the day when bids were to be submitted (i.e., 31.12.2020), the officials of the F.B.R. refused to accept the samples / specimens of the tax stamps / U.I.M.s from Reliance. Reliance, however, did plead that during the live demonstration to the Licencing Committee on 14.01.2021, it

“attempted to hand-over to the Licencing Committee, the samples / specimens of the tax stamps it was proposing to provide.”

80. Apparently, Reliance had imported the samples / specimens of the tax stamp but the consignment was not being released by the customs authorities at Lahore for want of an N.O.C. from the F.B.R. Reliance had sought the F.B.R.’s assistance for the release of the consignment. Vide letter dated 24.12.2020, the F.B.R. requested the Deputy Collector of Customs at the Lahore Airport to release Reliance’s consignment so that they are submitted along with Reliance’s bid by 31.12.2020. Whether Reliance was able to have the consignment released in time so that samples / specimens of the tax stamps / U.I.M.s were submitted along with its technical bid on 31.12.2020; and whether the officials of the F.B.R. refused to accept the samples / specimens of the tax stamps / U.I.M.s from Reliance on 31.12.2020 are disputed and controversial questions of fact that cannot be resolved in the Constitutional jurisdiction of this Court. No plausible explanation was offered on behalf of Reliance for not having raised this issue in its first and second grievance notices but only as an afterthought in the third notice. As regards Reliance’s contention that the Licencing Committee refused to accept the samples / specimens of the tax stamps / U.I.M.s during the live demonstration on 14.01.2021, it is my view that as the said demonstration was on a date subsequent to the deadline for the submission of the bids, the Licencing Committee was well within its rights to have refused to accept them.

81. The F.B.R.’s stance is that three bidders, including Reliance, did not give samples of the U.I.M.s along with their bids. The F.B.R. did not disqualify these bidders for not providing the samples of the U.I.M.s and permitted them to participate further in the bidding process. This caused me to ask the learned counsel for the F.B.R. as to why Reliance’s bid was not rejected as non-compliant with the requirement in Clause 3.9 of the I.F.L. and paragraph 3.9 of the evaluation criteria. In response thereto, it was submitted that bid documents from Reliance were accepted as the F.B.R. did not want to narrow the competitive arena.

82. Be that as it may, for the quality of the security features of the U.I.M.s, Reliance had been awarded 29.49 out of 30 marks whereas the successful bidder, AJCL, had been awarded 29.89 marks. Had Reliance been awarded full marks, i.e., 30 marks for the quality of security features, it would still not have been the most responsive bidder. However, the question that crops up in the mind is how could any marks be given to Reliance for the quality of security features of U.I.M.s when Reliance had not provided the F.B.R. with samples of the U.I.M.s?

83. The bid evaluation criteria in the I.F.L. was structured such that there were 17 different components for which different marks could be awarded to the bidders. The said criteria, however, did not provide the basis on which high or low marks were to be awarded for each component. This deficiency in the evaluation criteria was pointed out by the bidders prior to the submission of their bids. In the pre-bid meeting dated 04.12.2020, the questions asked by the bidders included the following:-

*“What is the basis of allocation of the intermediary marks between 1 and maximum?
What factors will be taken into account to decide what mark a particular solution receives?
What will determine the quality of the solution?”*

84. The F.B.R.’s answers to the said questions were as follows:-

“The scoring of the factors underlying the Technical Evaluation is based on using the full scale to obtain maximum distance between highest and lowest scores and to use interpolation to position intermediate scores.

The factors to be used in determining the quality and scoring of the technical solution are provided in a separate document entitled: Evaluation Framework, which will be provided in a separate communication.”

(Emphasis added)

85. Had the bidders not raised questions about how marks were to be awarded by the Licencing Committee for each component of the evaluation criteria, the F.B.R. would perhaps not even thought of coming up with another document titled *“Evaluation Framework.”* The I.F.L. issued in November 2020 does not make any reference to an Evaluation Framework to be issued at a later stage.

86. The F.B.R., in its concise statement submitted before this Court, has pleaded that it had provided clarifications to the queries raised by the bidders and had provided the detailed Evaluation Framework on 22.12.2020. This detailed Evaluation Framework provides the breakdown of the marks for each component of the evaluation criteria. For instance, the evaluation criteria issued along with the I.F.L. provided that *“quality of security features of each type of proposed UIM (real specimens to be presented with detail and full description of security features) would carry up to 30 marks.”* Since the bidders were at a loss as to how the 30 marks were to be apportioned, they raised the query referred to above. The detailed Evaluation Framework issued subsequently provided the following breakdown as to how 30 marks for the said component (i.e. security feature of the U.I.M.s) were to be apportioned:-

**“8. Evaluation of Criterium 3.9
30 points
a. Security feature of UIM: 20 points**

Type of feature	Proof of quality	Effectiveness and efficiency in usage
Visible overt	2	2
Semi-overt device readable	2	2
Covert device readable	2	2
Covert laboratory required	2	2
Digital smart phone	2	2
Total	10	10

b. Operational features of UIM: 10 points

Operational factor	Feature	Score
Adhesiveness (Ability to stick to different surfaces)	Paper	2
	Polymers	2
Management of the serial code	Uniqueness, re-use, black-listing and end-of-life decommissioning/de-activation of the UIMs	2
	Format & symbology of barcode	2
	Human readable & manual submission	2
	Total	10

87. Similarly for the other components of the evaluation criteria, the detailed Evaluation Framework was issued.

88. Learned counsel for Reliance could not dispute the fact that Reliance’s bid documents contained details of the first, second

and third level security features of the U.I.M.s and the potential designs of the U.I.M.s for each of the Goods. It was on the basis of these security features of the U.I.M.s that 29.49 out of 30 marks were awarded to Reliance and not on the physical examination of any specimens (which had not accompanied Reliance's technical proposal).

89. Reliance's pleading in its writ petition, that during the live demonstration to the Licencing Committee on 14.01.2021 it attempted to hand-over the samples / specimens of the tax stamps it was proposing to provide, is a clear admission of the fact that on 31.12.2020, when Reliance submitted its technical bid, it was not accompanied by the samples / specimens of the tax stamps / U.I.M.s. Mr. Tariq Hussain Sheikh, Project Director, T&T System confirmed that Reliance and other two bidders who had also not submitted samples / specimens of the tax stamps / U.I.M.s had been extended favour by not rejecting their bids for non-compliance with clause 3.9 of the I.F.L. and paragraph 3.9 of the evaluation criteria. Reliance cannot expect this Court to annul the entire procurement process for being allowed to participate further in the process despite having submitted a non-compliant bid. As mentioned above, had Reliance been awarded the full marks for the security and operational features of U.I.M.s, it would still not have emerged as the most responsive bidder and therefore could not have been awarded the contract.

90. For the reasons set out above, both the writ petitions ought to be dismissed by this Court and I do so accordingly. No costs.

91. Before parting I may add that the learned counsel for the petitioners and the counsel assisting them presented their case with much dexterity, precision and deftness. Even while putting my appreciation for their endeavor on record, I am not in a position to give them any relief. I also acknowledge with a deep sense of gratitude the assistance I had in generous profusion from the learned counsel for the F.B.R. and AJCL as well as the learned Additional Attorney-General who made an earnest effort successfully opposing the writ petitions.

92. I must clarify that I have not scrutinized the legality of the entire tender bidding process adopted by the F.B.R., since this was not the purpose of these proceedings. What I have decided are petitions seeking the issuance of a writ of *certiorari* with respect to the G.R.C.'s decisions rejecting the petitioners' grievance petitions. Therefore, this judgment shall not insulate the process for the award of the licence for the T&T System from scrutiny by the competent forum.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 17.01.2022.

(JUDGE)

Ahtesham

APPROVED FOR REPORTING

"SCHEDULE-A"

1. Evaluation of Technical Proposals

The scoring of presented and complaint technical proposals shall be executed by FBR through the review, the quantitative and qualitative evaluation of technical proposals in accordance with criteria presented in point 3 of the Instructions – “Key Technical Requirements for the System”, specifically the parameters defined in sub-points 3.2 – 3.16 inclusive:-

Sub-point	Sub-point requirement	Maximum number of points to be allocated
3.2	The System MIS comprises of the main MIS and the back-up MIS physically located in two different premises, to enable continuation of the System operation in case the main MIS is down.	5
3.3	Quality and security of architecture, functionalities, deliverables, and other relevant information MIS is to execute within the System.	5
3.4	Ordering and management of production process of UIM is enabled by MIS via the following MIS functionalities:- <ul style="list-style-type: none"> a) Registration of local manufacturers and importers of the Goods. b) On-line and secure placing of orders for UM by these manufacturers and importers. c) On-line and secure review and approval of or rejection of such orders by FBR. d) Monitoring of execution of approved orders. e) Delivery of executed orders to relevant local manufacturers and importers of the Goods or to other parties which would be duly designated in the orders and such orders approved by FBR. f) On-line and secure access of the manufacturers and importers of the Goods to information on the status of their respective UIM orders as per above points c), d) and e). 	12
3.5	UIM utilize core material which is made of an anti-tampering substrate so that any attempt to tamper with, remove UIM or crumble a portion of UIM is clearly and immediately recognized.	5
3.6	UIM are resistant to environmental factors such as temperature, humidity, and sunlight.	5
3.7	UIM contain, as the minimum, the following security features: <ul style="list-style-type: none"> a) One overt material security feature visible by naked eye. b) One semi-overt material security feature visible through a simple and low-cost 	5

	<p>device.</p> <p>c) One covert material security feature, verifiable by smart phone application, which will be utilized by the FBR inspectors and representatives of other duly authorized Pakistan Government agencies.</p> <p>d) One forensic security feature to unequivocally assist laboratorial analysis and legal procedures.</p> <p>e) One digital/IT security feature readable by the System dedicated smart phone application.</p>	
3.8	<p>Presented UIM are:</p> <p>a) Of required size.</p> <p>b) Compatible with the standard high-speed automated label application equipment used for the Goods.</p>	4
3.9	Quality of security features of each type of proposed UIM (real specimens have to be presented with detail and full description of the security features).	30
3.10	Capacity of the System to undertake for the secure delivery of UIM to the concerned manufacturers and importers of the Goods within the territory of Pakistan.	50
3.11	Capacity of the System to execute/support activation of UIM immediately prior or during the affixation of UIM onto the Goods.	5
3.12	Ability of the System to ensure activation of UIM on the Goods and/or to support concerned manufacturers and importers of the Goods in UIM application of the Goods.	5
3.13	<p>Capacity of the System to utilize UIM for:</p> <p>a) The Goods unique serialization.</p> <p>b) Monitoring of the volume of the production or importation of the Goods.</p> <p>c) Execution of the field audit of UIM and the Goods UIM will be affixed at any level of the national distribution chain by FBR or other duly authorized Pakistan Government agencies.</p> <p>d) Verification of the Goods by national distribution chain stakeholders and final customers/general public.</p> <p>e) Compilation of other information, statistics and reports to enable FBR to identity any anomalies and abnormalities related to the importation or manufacturing or national distribution of the Goods and to adopt respective corrective actions for preventing such events and for protecting relevant tax revenues.</p>	15
3.14	Capacity of the System to digitally transfer to, and record in MIS, the unique serialization	4

	<p>component of UIM and pair it with, as the minimum, the following specific information about the Goods:</p> <p>a) Factory premise, production line and date of manufacturing.</p> <p>b) Stock Keeping Unit / Production Item level information such as the manufacturer, brand, packaging type and packaging size / volume.</p> <p>c) Tax class</p> <p>d) For tobacco products only: information as specified in Article 8 of the Protocol.</p>	
3.15	<p>Capacity of the System to uniquely serialize packs of the tobacco products manufactured in Pakistan for export or for sale under duty free customs regime, and utilize such serialization for:</p> <p>a) Volume verification of production of these tobacco products</p> <p>b) Collection of other information on these tobacco products as required by the Protocol.</p>	5
3.16	<p>Capacity of the System to address and undertake for serialization of tobacco products packaging aggregation and distribution chain tracking as required by the Protocol.</p>	5
	Total possible number of points	160
