

JUDGMENT

Before Athar Minallah, J

HAKAS (PVT.) LTD. through Managing Director---Petitioner

Versus

**PAKISTAN WATER AND POWER DEVELOPMENT AUTHORITY (WAPDA) through
Chairman and 2 others---Respondents**

Writ Petition No.1379 of 2016, heard on 16th November, 2016.

ATHAR MINALLAH, J.---The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, assailing letter dated 07.03.2016 issued by the respondent No.2.

2. The facts, in brief, are that the petitioner is a juridical person, inter alia, engaged in the business of providing construction services. The respondent No.2 maintains, manages and operates the Mangla Dam. The latter vide advertisements published in various newspapers on 13.1.2016, invited bids from civil contractors for WAPDA-MDO Rehabilitation Works Tender i.e. Rehabilitation Works of Mangla Reservoir Rim along Mirpur-Kotlue Road near Khaliqabad and Road payment construction works near Khaliqabad etc. The bidding documents were made available to the bidders. Method of single stage of two-envelope process described under the Public Procurement Regulatory Rules, 2004 (hereinafter referred to as the "Rules of 2004") was prescribed. The bidders were required to submit two sealed envelopes, one containing the technical bid while the other the financial bid. The petitioner submitted its bid. It is the case of the petitioner that the respondent No.2 did not allow it to participate in the process of opening of the financial bids. It is alleged that the petitioner was not informed regarding its disqualification at the stage of accepting or rejecting the technical bids. It is asserted by the petitioner that despite repeated reminders and notices issued to the respondent No.2, none were responded.

3. The learned counsel for the petitioner, inter alia, contends that the respondent No.2 had failed to constitute a Grievance Redressal Committee as required under Rule 48 of the Rules of 2004; the mandatory provisions of the Rules of 2004 have been violated and reference has been made to Rules 4, 33, 35, 38 and 48; right to a reasonable and fair decision in the light of section 24-A of the General Clauses Act, 1897 has also been denied; Freedom of Information Act, 2005 makes it mandatory that the bidders shall have access to public record; the respondent No.2 refused to provide the relevant record; reliance has been placed on "Messrs Fuel Auto supply Company through Managing partners and 6 others v. Federation of Pakistan through Secretary, Ministry of Communications and others", 2005 MLD 1844, "Rohtas Industries Ltd. v. S.D. Agarwal and another etc.", AIR 1969 SC 707, "Crescent Steel and Allied Product Limited v. Sui Northern Gas Co. Ltd.", 2015 CLC 478, "Basit Ali v. Additional Chief Secretary and 6 others" 2005 YLR 1719 and "Kishore Kumar B. Zaveri and another v. Navinchandra H. Somaiya and others", AIR 1998 Calcutta 153; the petitioner's right to be able to participate in the transparent procurement process has been violated; lack of transparency in the procurement process obviously is fatal and, therefore,

the contract awarded to the successful bidders is liable to be cancelled; reliance has been placed on "Muhammad Ayub and brothers through Partner v. Capital Development Authority and 5 others", PLD 2011 Lah. 16, "Al-Abass Sugar Mills Limited v. Managing Director, Karachi Water and Sewerage Board and 2 others" 2006 CLD 674, "Suo Motu case No.5 of 2010", PLD 2010 SC 731; it is the duty of this court to call for and review the record and reliance in this regard has been placed on "Mir Abdul Baqi Baloch v. The Government of Pakistan, etc." PLD 1968 SC 313, "Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri", PLD 1969 SC 14, "Messrs Pacific Multinational Pvt. Ltd. v. Inspector-General of Police, Sindh Police Headquarters and 2 others" PLD 1992 Kar. 283, "Crescent Steel and Allied Product Ltd. v. Sui Southern Gas Co. Limited", 2015 CLC 478, "Messrs Exen Industries v. The Chief Controller of Imports and Exports, New Delhi and others", AIR 1971 SC 1025; the Court is vested with power to strike down procurement process, which as not been carried out in a transparent manner reliance has been placed on "Messrs Pacific Multinational Pvt. Ltd. v. Inspector-General of Police, Sindh Police Headquarter and 2 others", PLD 1992 Karachi 283.

4. The learned counsel appearing on behalf of the respondent has argued that; the petition is not maintainable as the petitioner without availing the remedy provided by the Grievance Redressal Committee has approached this Court; the Grievance Redressal Committee has been constituted; the petitioner before opening of the technical bids had attempted to influence the bidding process; reference has been made in this regard to letter dated 05.03.2016; the petitioner was informed regarding its technical disqualification vide letter dated 02.03.2016; a copy of the said letter was again sent to the petitioner along with the impugned letter dated 07.03.2016; Rule 33 is not relevant in the instant case; the evaluation of technical as well as financial bids was carried out through an independent entity i.e. NESPAK; the petitioner has raised disputed questions of fact and the same cannot be resolved while exercising jurisdiction under Article 199 of the Constitution.

5. The learned counsel have been heard and the record perused with their able assistance.

6. The petitioner had participated in the bidding process in response to bids invited through advertisements published in various newspapers. The technical bid of the petitioner was rejected and, therefore, it was not more entitled to participate in the remaining bidding process. The petitioner claims that it was not informed regarding its disqualification at the stage of evaluating the technical bids nor any reasons were given. The respondent No.2 on the other hand contends that the petitioner was informed regarding the rejection of its technical bid vide letter dated 02.03.2016. Perusal of the impugned letter dated 07.03.2016 shows that a copy of letter dated 02.03.2016 was also attached therewith. Whether or not the letter dated 02.03.2016 was received by the petitioner is a disputed question of fact and the same cannot be resolved while exercising jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

7. It is settled law that disputed questions of fact cannot be determined while exercising jurisdiction under Article 199 of the Constitution. Reliance is placed on the cases of "Dr. M.A. Haseeb Khan v. Sikandar Shaheen and 9 others" (PLD 1980 SC 139), "Ghulam Muhammad and another v. Mst. Noor Bibi and 5 others", (1980 SCMR 933), "Khawaja Muhammad Akhtar v. President, Cantonment Board, Sialkot Cantt. Election Authority (Tribunal) and another (1981 SCMR 291), "Benedict F.D. Souza v. Karachi Building Control Authority and 3 others (1989 SCMR 918), "Federation of Pakistan and 2 others v. Major (Retd.) Muhammad Sabir Khan", (PLD

1991 SC 476), "Muhammad Younis Khan and 12 others v. Government of N.W.F.P. through Secretary, Forest and Agriculture, Peshawar and others" (1993 SCMR 618), "Shah Wali and others v. Ferozuddin and others" (2000 SCMR 718) "Collector of Customs and others v. Messrs Fatima Enterprises Ltd. and others" (2012 SCMR 416) and 'Sher Afgan Khan Niazi v. Ali S. Habib and others' (2011 SCMR 1813).

8. The learned counsel for the petitioner despite his able assistance has not been able to show any violation of the Rules of 2014, which could be treated fatal for the purposes of the validity of the bidding process. The process and evaluation was carried out through an independent entity i.e. NESPAK. The contract has been awarded to the successful bidder and no legal infirmity has been pointed out in order to warrant interference.

9. For what has been stated above, the instant petition is not maintainable and is, therefore, accordingly dismissed.

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