

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3542 of 2019
Creative Electronics (Pvt.) Limited

Versus

Government of Pakistan through Prime Minister and others

Date of Hearing: 15.01.2020, 21.01.2020 and 30.01.2020
Petitioner by: Mr. Tahir Maqsood Butt, Advocate for the petitioner
Respondents by: Mr. Muhammad Asif Khan, Advocate for I.E.S.C.O./respondent No.3
M/s Shehzad Ata Elahi and Shameer Naveed, Advocates for respondent No.5.
Mr. Muhammad Khurshid, Deputy Director, P.P.R.A.
Mr. Noor-ul-Najam representative of P.P.R.A.

MIANGUL HASSAN AURANGZEB, J:- Through the instant petition, the petitioner, Creative Electronics (Pvt.) Ltd., seeks a declaration to the effect that the procurement process initiated by respondent No.3 (Islamabad Electric Supply Company, "I.E.S.C.O.") pursuant to the invitation to bid published on 07.01.2019, is contrary to the provisions of the Public Procurement Rules, 2004 ("the 2004 Rules") made by the Federal Government in exercise of the powers conferred by Section 26 of the Public Procurement Regulatory Authority Ordinance, 2002 ("the 2002 Ordinance"), as well as the Construction and Operation of Engineering Works Bye-laws, 1987 ("P.E.C. Bye-laws") made by the Executive Committee of the Pakistan Engineering Council ("P.E.C.") with the previous sanction of the Federal Government in exercise of the powers conferred by Section 25 of the Pakistan Engineering Council Act, 1975 ("the P.E.C. Act").

2. The facts essential for the disposal of the instant petition are that on 07.01.2019, I.E.S.C.O. published an advertisement inviting bids for the award of the contract for design, supply, installation and commissioning of an Advanced Metering Infrastructure Project in Rawalpindi Circle, Customer Information System and New Billing System ("the Contract"). In the said advertisement, it was explicitly stated that payments under the contract were to be made from a loan from the Asian Development Bank ("A.D.B.") which had been received by the

Government of Pakistan to meet the cost of the Second Power Distribution Enhancement Investment Program. It was also mentioned that the international competitive bidding for the project will be conducted in accordance with A.D.B.'s Single-Stage: Two-Envelope bidding procedure. In order for a bidder to be eligible for participation in the bidding process, it had to have a minimum average annual turnover of US Dollars 80 million calculated as total certified payments received for contracts in progress or completed within the last three years. The bids were required to be submitted on or before 21.02.2019 on which date the technical bids were to be opened. It is an admitted position that the deadline for the submission of the bids and the date for the opening of the technical bids was extended to 07.03.2019. Respondent No.5 (KT-KAIFA Consortium) was one of the bidders who submitted its bid within the said deadline. It is also an admitted position that respondent No.5 was technically qualified.

3. On 23.01.2019, All Pakistan Energy Meter Manufacturers ("A.P.E.M.M.") addressed a letter to I.E.S.C.O., voicing their concerns and reservations regarding the subject tender. In the said letter, it was asserted that foreign bidders should be required to enter into a joint venture agreement with a Pakistani firm and be given 30% of the share in the project as required by Bye-law 7(2) of the P.E.C. Bye-laws prior to its amendment. For the purpose of clarity, the relevant paragraph in the said letter is reproduced herein below:-

"As per previously in-vogue Clause 7(2) of Pakistan Engineering Council (PEC), Engineering Works By-Laws, before initiating any activity, the foreign firms were bound to get license from PEC, but only for specific projects where technology is not available in Pakistan and such foreign firm was bound to enter into a JV agreement with the Pakistani firm in which the share of the Pakistani firm is to be limited to 30%. But unfortunately this clause has been amended. Kindly, ensure the implementation of original Clause that allows minimum local value addition of 30%."

4. The petitioner was one of the signatories to the said letter. On 08.02.2019, I.E.S.C.O. responded to the said letter and informed A.P.E.M.M. that the subject tender had been carried out in accordance with the A.D.B. Procurement Guidelines, and that under clause 1.3.4 of the Evaluation and Qualification Criteria (which was a part of the bidding documents), a margin of preference will be granted to eligible domestically produced products.

5. Some of the signatories to the said letter dated 23.01.2019 (excluding the petitioner), being dissatisfied with I.E.S.C.O.'s response, filed writ petition No.808/2019 before this Court which was dismissed vide order dated 21.05.2019. The petitioners in the said writ petition had also asserted that the foreign bidders should have been required to form a joint venture with local manufacturers for the purpose of participating in the subject tender. In the said order dated 21.05.2019, it was *inter alia* held as follows:-

“...Moreover, the case of the petitioner Companies is based on violation of bye-law 7 of the Construction and Operation of Engineering Works Bye-Laws, 1987. The said bye-law was amended and in this regard notification was published in the official gazette on 29.05.2018. The learned Counsel for the petitioner Companies, despite his able assistance, could not show that the amended bye-law is ultra vires the provisions of the Pakistan Engineering Council Act, 1975. Moreover, the project for which advertisements were published on 07.01.2019 is funded by an international lending institution. The learned Counsel for the petitioner Companies was not able to satisfy this Court regarding maintainability of the instant petition by establishing that the latter could be treated as aggrieved in the context of Article 199 of the Constitution.”

6. It was not until 14.10.2019 that the petitioner filed the instant writ petition. The petitioner's primary stance is that paragraph 4 of the advertisement dated 07.01.2019, which permits a foreign bidder to submit a bid without associating with itself a local manufacturer, is in violation of Bye-law 7(2) of the P.E.C. Bye-laws as well as the standard form of bidding documents for procurement of works issued by the P.E.C (“standard form of bidding documents”), which were applicable to the subject procurement process by virtue of Rule 23(4) of the 2004 Rules read with Regulation 3 of the Public Procurement Regulations, 2008 (“the 2008 Regulations”), which were made by the Public Procurement Regulatory Authority (“P.P.R.A.”) in exercise of the powers conferred by Section 27 of the 2002 Ordinance.

7. Learned counsel for the petitioner submitted that the procurement process undertaken by I.E.S.C.O. was for an award of a contract that entailed the supply of engineering equipment and the carrying out of engineering works; that the procurement process conducted by I.E.S.C.O. was in violation of the requirements of the Bye-law 7(2) of the P.E.C. Bye-laws as well as the standard form of bidding documents, which required a foreign bidder to form a joint venture with a Pakistani firm registered with P.E.C. before participating in the bidding; that the

said standard form of bidding documents explicitly provide that it is mandatory for all engineering organizations and departments at the Federal and Provincial level and district governments to use these documents for procurement of electrical and mechanical works funded locally or through donor agencies; that the standard form of bidding documents were approved by the Executive Committee of the National Economic Council in its meeting held on 12.11.2007, and notified by the Planning Commission (Government of Pakistan) vide notification dated 12.02.2008; that the National Economic Council has constituted under Article 156 of the Constitution to review the overall economic condition of the country and to formulate plans in respect of financial, commercial, social, and economic policies; and that Rule 24 of the Rules of Business, 1973 provides *inter alia* that when a case has been decided by the National Economic Council or its Committee, the Minister-in-Charge shall take prompt action to give effect to the decision.

8. Learned counsel for the petitioner further submitted that the procurement process conducted by I.E.S.C.O. is contrary to the requirements of Bye-law 7(2) of the P.E.C. Bye-laws and the standard form of bidding documents inasmuch as in the bidding documents issued by I.E.S.C.O. did not require foreign bidders to enter into a joint venture with a Pakistani firm prior to submitting a bid; that Bye-law 7(2) and the said standard form of bidding documents applied to the subject tender by virtue of Rule 23(4) of the 2004 Rules read with Regulation 3 of the 2008 Regulations; and that I.E.S.C.O., instead of following the procedure prescribed in the standard form of bidding documents, adopted A.D.B. Procurement Guidelines-2015 ("**A.D.B. Procurement Guidelines**") for the subject tender and violated Rule 23(4) of the 2004 Rules read with Regulation 3 of the 2008 Regulations.

9. Furthermore, it was submitted that although the project for which the procurement process was being carried out by I.E.S.C.O. was funded by the A.D.B., foreign bidders could not be exempted from the requirements of the 2004 Rules without the approval of the Economic Coordination Committee of the Cabinet in terms of Regulation 3 of the Public Procurement Regulations, 2011 ("**the 2011 Regulations**"); that since the procurement process was in violation of Rule 23(4) of the 2004 Rules as well as Bye-law 7(2) of the P.E.C. Bye-laws, it is liable to be

declared as such; and that the instant case was one of misprocurement in terms of Rule 50 of the 2004 Rules which provides that any unauthorized breach of the said Rules shall amount to misprocurement. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

10. On the other hand, learned counsel for respondent No.5 (KT-KAIFA Consortium) submitted that the petitioner had no *locus standi* to file the instant petition since after obtaining the bidding documents on 01.01.2019, it neither participated in the bidding process nor was it qualified/eligible to do so; that since the petitioner has an authorized capital of only Rs.100 million, it was not able to satisfy the eligibility criteria contained in clause 2.3.2 of the bidding documents, which required a bidder to have a minimum average annual turnover of US Dollars 80 million calculated as total certified payments received for contracts in progress or completed within the last three years; that the petitioner had taken contradictory positions by raising objections to the tender documents (including the objection regarding non-fulfillment of the requirements of Bye-law 7(2) of the P.E.C. Bye-laws) vide letter dated 23.01.2019 on the one hand, and on the other giving its consent to be a sub-contractor of other bidders; that the petitioner is estopped from challenging the bidding process after agreeing to being the sub-contractor of some of the bidders; that since the petitioner was interested in the tender, it cannot claim to be acting in the public interest by filing the instant petition; that even though the advertisement inviting bids was published on 07.01.2019, the petitioner waited until 14.10.2019 to file the instant writ petition; that during this period, the bidding process progressed and the technical evaluation of the bidders had been completed; that the instant writ petition is liable to be dismissed due to severe *laches*; and that the instant writ petition has not just been filed belatedly but is also tainted with *malafides*.

11. Learned counsel for respondent No.5 further submitted that the project, which is the subject matter of this litigation, is being funded from a loan provided by A.D.B. to Pakistan; that terms of the loan agreement provide that procurement shall be governed by A.D.B. Procurement Guidelines, which specifically prohibit mandatory joint venture conditions; that I.E.S.C.O. had conducted the tender bidding

process strictly in accordance with the A.D.B. Procurement Guidelines; that there was no provision in the 2004 Rules which made it mandatory for a foreign bidder to submit a bid as a joint venture with a local company; that the P.E.C. Bye-laws cannot be given preference over the 2004 Rules which were made several years after the P.E.C. Bye-laws; that the 2004 Rules apply to all kinds of procurement whereas the P.E.C. Bye-laws apply only to procurement of professional engineering works; that since Rule 51 of the 2004 Rules gives an overriding effect to the said Rules over anything to the contrary contained in any other rules concerning public procurements, Rule 5 of the 2004 Rules shall have an overriding effect on Bye-law 7(2) of the P.E.C. Bye-laws; that by virtue of Rule 5 of the 2004 Rules, the A.D.B. Procurement Guidelines would also have an overriding effect over the P.E.C. Bye-laws; that on 07.02.2019, a *proviso* was added to Regulation 3 of the 2011 Regulations by virtue of which the approval of the E.C.C. to proceed in terms of Rule 5 of the 2004 Rules is not required in case of the commitment of the Federal Government arising out of arrangements with international financial institutions or State(s), where finances are provided by them; that since the project for which the bidding process in question was initiated by I.E.S.C.O. was being funded out of a loan given by the A.D.B. to Pakistan, there was no requirement for the approval of the E.C.C. for invoking Rule 5 of the 2004 Rules; that in essence, the requirement of Bye-law 7(2) of the P.E.C. Bye-laws has been fulfilled since A.D.B. has given 15% domestic preference in the subject tender; that even otherwise the P.E.C. Bye-laws do not apply to the subject tender since the engineering works (i.e. installation and commissioning) of the material supplied by the successful bidder is to be carried out by I.E.S.C.O.; that the position taken by P.E.C., in its written comments, was that by virtue of Rule 5 of the 2004 Rules, the A.D.B. Procurement Guidelines will take precedence over the P.E.C. Bye-laws; and that there was no legal infirmity in the bidding process carried out by I.E.S.C.O. Learned counsel for respondent No.5 prayed for the writ petition to be dismissed.

12. Learned counsel for respondent No. 3 (I.E.S.C.O.) submitted that as far back as 08.02.2019, the petitioner was informed by I.E.S.C.O. that the tender bidding process would be carried out in accordance with the A.D.B. Procurement Guidelines; that the petitioner was also informed

that in order to support domestic industry, 15% domestic preference was to be given in the financial evaluation for the locally manufactured goods and services; that four meter manufacturers (excluding the petitioner) had filed writ petition No.808/2019 before this Court challenging the subject tender on similar grounds as has been taken by the petitioner in the instant petition; that the said writ petition was dismissed vide order dated 21.05.2019; that the petitioner kept quiet until 14.10.2019 when the instant petition was filed purely as an afterthought; that the instant writ petition is liable to be dismissed due to *laches* and its inequitable conduct; that the petitioner has been nominated by respondent No.5 as its sub-contractor; that clauses 7.1 to 7.3 of the Instructions to Bidders provide that any sub-contractor so nominated by a bidder is disqualified from being a bidder itself or a partner in a joint venture; that since the petitioner has been nominated as a sub-contractor by respondent No.5, it is disqualified from participating in the bidding process; and that the petitioner has been well aware of the requirements of the tender bidding documents since January 2019 but waited till the eleventh hour to sabotage the bidding process by filing the instant petition. Learned counsel for respondent No.3 prayed for the writ petition to be dismissed.

13. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 6 above, and need not be recapitulated.

14. The vital question that needs to be answered is whether the bidding process initiated by I.E.S.C.O. is liable to be annulled due to non-adoption of the standard form of bidding documents issued by P.E.C., and the absence of the requirement in the bidding documents for the foreign bidders to bid as joint ventures with local firms registered with P.E.C.

15. Rule 23(4) of the 2004 Rules provides that procuring agencies shall use standard bidding documents as and when notified by Regulations made by P.P.R.A. Regulation 3 of the 2008 Regulations provides that a procuring agency, when engaged in procurement of works, shall use the standard form of bidding documents prescribed by

the P.E.C. The standard form of bidding documents for procurement of works were issued by the P.E.C. on 11.06.2007. The said documents incorporate FIDIC General Conditions of Contract for Electrical and Mechanical Works. The draft “Invitation for Bids”, which is part and parcel of the standard form of bidding documents, provides *inter alia* that a foreign bidder is entitled to bid only in a joint venture with a Pakistani constructor in accordance with the provisions of the P.E.C. Bye-laws. Bye-law 7(2) of the P.E.C. Bye-laws provides *inter alia* that a foreign firm shall not be eligible to participate in bidding individually, and that a foreign firm shall enter into a joint venture with a Pakistani firm registered with P.E.C. in the equivalent/compatible category and submit the same to the employer before participating in the bidding.

16. Rule 5 of the 2004 Rules provides *inter alia* that whenever the 2004 Rules are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State or States or any international financial institution, the provisions of the international treaty or agreement shall prevail to the extent of such conflict. The procedure for invoking the provisions of Rule 5 of the 2004 Rules is provided in Regulation 3 of the 2011 Regulations which provides that whenever a sponsoring Ministry/Division is of the view that prospective procurements are required to be made by invoking Rule 5 of the 2004 Rules, it shall bring a case to the Economic Coordination Committee of the Cabinet (“E.C.C.”) after undertaking due consultations with the stakeholder Ministry/Division/Department etc. as prescribed in the Rules of Business, 1973. Furthermore, the said Regulation provides that the E.C.C. shall consider such cases and decide whether to authorize the sponsoring Ministry/Division to proceed or not to proceed in terms of Rule 5 of the 2004 Rules.

17. Now, on 07.02.2019, a *proviso* was added to Regulation 3 of the 2011 Regulations by virtue of which the approval of the E.C.C. to proceed in terms of Rule 5 of the 2004 Rules is not required in case of the commitment of the Federal Government arising out of arrangements with international financial institutions or State(s), where finances are provided by them. Since the *proviso* to Regulation 3 of the 2011 Regulations was added through an amendment in 2019, it cannot be treated as surplusage or overlooked.

18. The function of a *proviso* is to except something out of the enactment or to qualify something enacted therein which but for the *proviso* would be within the purview of the enactment. The general rule in construing an enactment containing a *proviso* is to construe them together without making either of them redundant or otiose. Even if the enacting part is clear, effort is to be made to give some meaning to the *proviso* and to justify its necessity. A *proviso* has to be strictly construed. Guidelines for the interpretation of a *proviso* to an enactment are given in the following judgments:-

- (i) In the case of Mst. Nawab Bibi Vs. Ch. Allah Ditta (1998 SCMR 2381), it was held as follows:-

“It is settled law that proper function of a proviso is to [except] and deal with a case which would otherwise fall within the general language of the main section, and its effect is confined to the rule or section to which a proviso has been added. The proper way to regard the proviso is as a limitation upon the effect of principal section or rule. A proviso, which is in fact and in substance a proviso, can only operate to deal with a case which, but for it, would have fallen within the ambit of the section to which the proviso is a proviso. To put it in another way the section deals with a particular field while proviso excepts or takes or carries out from the field a particular portion and therefore, it is perfectly true that before a proviso can have any application the section itself must apply.”

- (ii) In the case of Sheikh Abdul Hakeem Vs. Shamsuddin (PLD 2008 Quetta 14), the Hon'ble Balochistan High Court has held as follows:-

“The proper way to regard a proviso is as a limitation upon the effect of the principal enactment, where the section deals with particular field and the proviso excepts or takes out or carries out from the field a particular portion. A proviso is not independent of section, its object is to carve out from the main section a class or category, to which the main section does (sic) apply.”

- (iii) In the case of Lubna Afzal Vs. Union Bank Limited (2003 CLD 868), the Division Bench of the Hon'ble Lahore High Court held as follows:-

“It is settled principle of law that a proviso to a section has an overriding effect and control over the whole section. Meaning thereby the function of a proviso is to exclude and take out certain cases from the rule to which it is a proviso. In other words to that extent the proviso modifies the main provision of the enactment.”

- (iv) In the cases of Abid Hussain Vs. Additional District Judge, Alipur, District Muzaffargarh (2006 SCMR 100), Messrs Hamdard

Dawakhana Vs. Commissioner Income-Tax, Karachi (PLD 1980 SC 84), and Messra Tariq Brothers Vs. Collector of Customs (2005 PTD 186), it was held *inter alia* that a *proviso* is in the nature of an exception to the general rules and ought to be strictly construed.

- (v) In the case of Madras and Southern Mahratta Ry. Co. Ltd. Vs. Bezwada Municipality (AIR 1944 Privy Council 71), Lord Macmillan held *inter alia* that the proper function of a *proviso* is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case.
- (vi) In the case of Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subhash Chandra Yograj Siniha (AIR 1961 S.C. 1596), Hidayatullah, J. held *inter alia* that as a general rule, a *proviso* is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a *proviso* is not interpreted as stating a general rule.
- (vii) In the case of Mullins Vs. Treasurer of Survey (1880) 5 QBD 170, Lush J. held *inter alia* that when one finds a *proviso* to a Section, the natural presumption is that, but for the *proviso*, the enacting part of the Section would have included the subject matter of the *proviso*.
- (viii) In the case of Local Government Board Vs. South Stoneham Union (1909) AC 57 (HL), Lord Macnaghten held that a *proviso* may be a qualification of the preceding enactment which is expressed in terms too general to be quite accurate.

19. It is not disputed that A.D.B. is an international financial institution. In the advertisement dated 07.01.2019, it was clearly mentioned that the Government of Pakistan had received a loan from the A.D.B. towards the cost of the Second Power Distribution Enhancement Investment Programme – Tranch 1, and that a part of this loan will be used for payments under the contract for which the bidding process had been initiated. Clause 2.03(b) of the project agreement dated 19.11.2016 executed between A.D.B. and I.E.S.C.O. provides that I.E.S.C.O. shall procure all items of expenditure to be financed out of the proceeds of the loan given to Pakistan by A.D.B. under the loan agreement dated 19.11.2016. Schedule 4 of the said loan agreement provides that the

procurement shall be governed in accordance with A.D.B. Procurement Guidelines, which specifically prohibit mandatory joint venture conditions. Additionally, clause 2 (section 1) of the Instructions to Bidders provides *inter alia* that the borrower intends to apply a portion of the funds to eligible payments under the contract(s) for which the bidding document had been issued. It was also provided that payments by A.D.B. will be made only at the request of the borrower and upon approval by A.D.B. in accordance with the terms and conditions of the financing agreement between the borrower and A.D.B. These provisions in the said advertisement, agreements and in the Instructions to Bidders etc., leave no room for doubt that the project for which the tender bidding process had been initiated by I.E.S.C.O. was being financed from funds provided by A.D.B. to the Government of Pakistan under the loan agreement dated 19.11.2016.

20. Since Rule 5 of the 2004 Rules gives primacy to an obligation or commitment of the Federal Government arising out of an agreement with an international financial institution over the 2004 Rules, it needs to be determined as to whether there is any conflict between the requirements of the 2004 Rules and the A.D.B. Procurement Guidelines in accordance with which the tender bidding process in question was required to be conducted by the loan agreement. Unlike Bye-law 7(2) of the P.E.C. Bye-laws, there is no requirement in the A.D.B. Procurement Guidelines for a foreign firm to enter into a joint venture with a Pakistani firm registered with P.E.C. in order to be eligible for participating in a tender bidding process. The A.D.B. Procurement Guidelines permit firms to bid as a joint venture with the joint venture partners being jointly and severally liable, but do not make it mandatory for firms to submit a bid as a joint venture. In this regard, paragraph 1.10 of the A.D.B. Procurement Guidelines is reproduced herein below:-

“Any firm may bid independently or in joint venture confirming joint and several liability, either with domestic firms and/or with foreign firms, but ADB does not accept conditions of bidding which require mandatory joint ventures or other forms of mandatory association between firms.”

21. Furthermore, paragraph 1.6 of the A.D.B. Procurement Guidelines provides *inter alia* that to foster competition, A.D.B. permits bidders from all eligible countries to offer goods, works, and services for A.D.B.-financed projects, and that any conditions for participation shall be

limited to those that are essential to ensure the bidder's capability to fulfill the contract in question. Paragraph 1.7 of the said guidelines provides that in connection with any contract to be financed in whole or in part by A.D.B., A.D.B. does not permit a borrower to deny participation of a bidder for reasons unrelated to its capacity and resources to successfully perform the contract nor does it permit a borrower to disqualify any bidder for such reasons.

22. Since the procurement which is the subject matter of the instant petition is in fulfillment of an obligation or commitment of the Federal Government arising out of the loan agreement executed between A.D.B. (which is an international financial institution) and the Government of Pakistan, the provisions of the A.D.B. Procurement Guidelines will have primacy over Rule 23(4) of the 2004 Rules and the provisions of the standard form of bidding documents for procurement of works issued by the P.E.C. on 11.06.2007 as well as Bye-law 7(2) of the P.E.C. Bye-laws. Due to the *proviso* to Regulation 3 of the 2011 Regulations added on 07.02.2019, the procurement process which is the subject matter of the instant petition cannot be annulled for want of E.C.C.'s approval for proceeding in terms of Rule 5 of the 2004 Rules.

23. It ought to be mentioned that the Pakistan Engineering Council (respondent No.2), in its written comments, has disagreed with the petitioner's assertion that a foreign bidder could not participate in the bidding process individually without entering into a joint venture with a Pakistani constructor/operator. The position taken by respondent No.2, in its written comments, is that since the procurement process (which was the subject matter of the instant petition) was being funded by A.D.B., the provisions of the loan agreement would take precedent over the requirements of the standard form of bidding documents issued by respondent No.2 on 11.06.2007.

24. Although the said *proviso* was added after the publication of the advertisement dated 07.01.2019, but since it was added prior to the last date stipulated for the submission of the bids, i.e. 07.03.2019, it would be applicable to the tender bidding process in question. Even otherwise, if the contention of the learned counsel for the petitioner that since the said amendment was made after the publication of the advertisement dated 07.01.2019, the entire bidding process should be brought to a

naught is to be accepted, its effect would be for the rebidding process to be carried out in the very same manner as it has already been carried out, i.e. in accordance with the A.D.B. Procurement Guidelines. In other words, if the tender bidding process challenged in the instant petition is annulled and an order is made for a fresh bidding process, such a process would also be in accordance with the A.D.B. Procurement Guidelines, and by virtue of the *proviso* to Regulation 3 of the 2011 Regulations whereby no approval of the E.C.C. would be required for the process to be carried out by invoking Rule 5 of the 2004 Rules. Such an exercise would be futile and wasteful. In the case of Debendra Bandhu Lahiri Vs. The State of West Bengal (AIR 1952 Calcutta 808), it has been held *inter alia* that a writ of *certiorari* and *mandamus* should not be issued when they would be useless.

25. Even otherwise, the P.E.C. Bye-laws would be applicable to a bidding process for the award of contracts involving professional engineering works. Section 2(xxv) of the P.E.C. Act defines “*professional engineering work*” to mean *inter alia* construction, inspection and supervision of engineering work. I would tend to agree with the learned counsel for respondent No.5 that the scope of the project for which the procurement process in question had been initiated did not require the party to whom the contract is awarded to carry out engineering work. Clause 7.1 of the Schedule of Requirements, which is part of the tender bidding documents, provides that I.E.S.C.O. shall provide the resources for the installation of the field equipment. Furthermore, clause 7.2.2 provides that it shall be I.E.S.C.O.’s responsibility to receive the equipment and install it on the field based on the instructions received from the contractor. The said clause also provides that the contractor is to provide the goods and implement the hardware and software for all systems, and provide necessary training to I.E.S.C.O. for the installation and operation of the systems. The tender bidding documents also permit I.E.S.C.O. to hire a third party for the installation of the meters.

26. Learned counsel for the petitioner could not point out any provision of the tender bidding documents under which the successful bidder to whom the contract was to be awarded had to carry out any construction activity. On the contrary, the bidding documents made it clear that I.E.S.C.O.’s responsibility shall be to receive the equipment

and install it in the field based on the instructions received from the successful bidder. The successful bidder is required to provide the goods and also to provide necessary training to I.E.S.C.O. for the installation and operation of the system. In particular, clause 7.1 of the Schedule of the Requirement provides that I.E.S.C.O. shall provide the resources for the installation of the field equipment. Therefore, I am of the view that the P.E.C. Bye-laws did not apply to the subject tender.

27. No explanation was put forth by the learned counsel for the petitioner for the petitioner's silence between 08.02.2019 (when I.E.S.C.O. responded to the letter dated 23.01.2019 from A.P.E.M.M.) and 14.10.2019 (when the instant writ petition was filed). During this period, the bids submitted by four bidders were technically evaluated; on 28.05.2019, the technical evaluation report was submitted to A.D.B.; the bidders were asked to provide clarifications; on 02.08.2019, I.E.S.C.O. requested the bidders to submit affiliate company guarantees; respondent No.5 was informed that it had been technically qualified; the non-responsive bidders were asked by I.E.S.C.O. to collect their sealed financial bids; on 13.09.2019, A.D.B. provided its N.O.C. for the opening of the financial bids; and the financial bid of respondent No.5 was opened on 23.09.2019.

28. Respondent No.5's financial bid had been opened prior to the filing of the instant petition. After the filing of the instant petition, the only decision that remained to be taken by I.E.S.C.O. was whether or not to award the contract to respondent No.5. As can be gathered from the developments in the bidding process that had taken place between 08.02.2019 and 14.10.2019, the petitioner waited till the eleventh hour before filing the instant writ petition praying for the entire process to be scrapped. The petitioner's conduct in the case at hand was far from satisfactory; rather it was highly objectionable and needs to be deprecated. Such inequitable conduct, in my view, disentitles the petitioner to seek the issuance of a writ from a Court exercising discretionary jurisdiction.

29. A Court exercising equitable jurisdiction cannot overlook the conduct of a party. A petitioner's conduct can be taken into consideration in allowing or disallowing equitable relief in Constitutional jurisdiction. It has consistently been held that the jurisdiction of the

Court to issue a writ of mandamus is equitable and therefore the Court, on being approached will, apart from other considerations, also look to the conduct of the party invoking its jurisdiction, and may refuse to grant relief unless the petitioner's conduct is free from blame. A party invoking the jurisdiction of this Court under Article 199 of the Constitution has to show that it was not unfair or inequitable in its dealings with the party against whom it was seeking relief. Its conduct should be fair and honest. Reference in this regard may be made to the following case law:-

- (i) In the case of National Accountability Bureau Vs. Messrs Hudaibya Paper Mills Limited (PLD 2018 SC 296), it was held that a Court in the exercise of its Constitutional jurisdiction or when it is considering the grant of discretionary relief may decline to extend time if it is inequitable to do so.
- (ii) In the case of Ghansham Das Vs. Federation of Pakistan (2017 PLC (C.S.) 191), this Court held as follows:-

"It is settled law that he who seeks equity must do equity. This court's jurisdiction under Article 199 of the Constitution is equitable in nature. No relief in such jurisdiction can be extended to the appellant whose conduct is inequitable."

- (iii) In the case of Javed Ali Vs. Mst. Shabiran (2010 MLD 943), it was held by the Hon'ble High Court of Sindh that awarding of discretionary relief under the Constitution mainly depends upon the conduct of the parties.
- (iv) In the case of Nadir Ali Vs. Secretary, Regional Transport Authority, Faisalabad (PLD 2006 Lahore 298), it was held by the Hon'ble Lahore High Court that a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 falls within the realm of equitable and discretionary jurisdiction wherein the conduct of the petitioner assumes significant importance.
- (v) In the case of Haji Arbab Ali Vs. Deputy Director, SASO (1996 CLC 245), the Hon'ble Mr. Justice Wajihuddin Ahmed (as he then was) had the occasion to hold as follows:-

"There is little doubt that Constitutional relief under Article 199 of the Constitution of Pakistan is relief of an equitable nature, discretion always lying with the High Court to deny or accord it, depending always on a judicious exercise of discretion, calculated to secure advancement of justice but never to perpetuate injustice. Where an equitable remedy is sought and

the concerned person comes to Court with unclean hands, having been himself guilty of an inequitable conduct, relief as a rule is to be denied, irrespective of merits of the controversy.”

Law to the said effect has also been laid down in the cases of Manzoor Hussain Vs. Zulfiqar Ali (1983 SCMR 137), Nadeem Akhtar Khan Niazi Vs. Zila Council, Khanewal (1999 YLR 685), Pakistan Herald Publications (Private) Ltd. Vs. Federation of Pakistan (1998 CLC 65), Muhammad Yaqoob Vs. Muslim Commercial Bank (2002 PLC 158), Shah Rehman Vs. The State (2003 MLD 714), and Shams Din Vs. Additional Settlement Commissioner, Lahore (1985 MLD 1266).

30. Clause 7.3 of the Instructions to Bidders provides *inter alia* that if a bidder intends to sub-contract major items of products and/or services, it shall include in the bid details of the name and nationality of the proposed sub-contractor, including vendors for each of those items. The petitioner gave its consent to be nominated as a sub-contractor by respondent No.5. The learned counsel for the petitioner did not dispute this fact. The petitioner addressed letter dated 16.02.2019 to I.E.S.C.O. authorizing respondent No.5 to submit a bid and to negotiate a contract with I.E.S.C.O. for the resale of energy meters and meter boxes. The petitioner did not just authorize respondent No.5 but also gave similar authorizations to other bidders including Landis+Gyr and Norinco International - iESLab - YTL - Sunrise Joint Venture. The petitioner concealed from this Court the letters dated 16.02.2019, 20.02.2019 and 21.02.2019 addressed to I.E.S.C.O. whereby authorizations were given to foreign bidders to sell the petitioner's products if awarded the contract. The petitioner has annexed more than five hundred pages of documents along with its petition, but has for obvious reasons chosen not to file the said letters, which were brought on record by I.E.S.C.O. along with its written comments. This is yet another unconscionable and inequitable conduct on the petitioner's part. It is obligatory on a Court exercising equitable jurisdiction to impose costs on a litigant for such unprincipled conduct.

31. After giving the said authorization to respondent No.5, the petitioner is estopped from questioning the entire bidding process or to assert that respondent No.5 was not eligible to participate in the bidding process. A plea taken by a party, which is contradictory to its stand

taken earlier, cannot be allowed to be agitated before a Court. This is an added reason why the instant petition ought to be dismissed.

32. As mentioned above, the petitioner's assertion was that a foreign bidder should have been required to form a joint venture with a local meter manufacturer, and thereafter to submit a bid as a joint venture. Clause 7.1 of the Instructions to Bidders explicitly provides that any sub-contractor nominated by any bidder is automatically disqualified from being a bidder itself or a partner in a joint venture. Furthermore, the said clause provides that non-compliance with this requirement may result in the rejection of all bids in which the affected firm participates as a bidder or as a partner in a joint venture. The petitioner was aware or ought to have been aware of the said clause in the Instructions to Bidders before it gave its authorization to respondent No.5 to be nominated as its sub-contractor. The petitioner's nomination as respondent No.5's sub-contractor *ipso facto* disqualified it from being a bidder or a joint venture partner of a bidder in the said bidding process.

33. Learned counsel for the petitioner emphasized that the Constitutional jurisdiction of this Court had been invoked by the petitioner as a public interest litigant, and that it was espousing a public cause by challenging the bidding process being undertaken by I.E.S.C.O. After letting respondent No.5 nominate the petitioner as its sub-contractor, and informing I.E.S.C.O. that respondent No.5 had been authorized to sell its items/products, the petitioner could not assert that it had no stake in the bidding process. In the case of Echo West International (Pvt.) Ltd. Vs. Government of Punjab (2009 CLD 937), the petitioner, after realizing that it was unlikely to succeed in view of its participation in the bidding process to obtain relief for itself regarding the project subjected to tender, asserted that the matter should be examined as one of public importance. The Hon'ble Supreme Court spurned the said argument in the following terms:-

"15. Realizing that the appellant was unlikely to succeed in view of his participation in the bidding process to obtain relief for itself regarding the said two projects, the learned counsel for the appellant insisted that the matter be examined as one of public importance to undo the result of failure of public functionaries to perform their duties properly. It was thus, urged that the entire process be repeated and transparency ensured. The learned counsel, therefore, attempted to make it a case of public interest litigation. The litigation of such nature do not fall specifically under any provision of Article 199 of the Constitution.

However, this concept has received judicial recognition enabling the Courts to enlarge the scope of the meaning of 'aggrieved person' under Article 199 of the Constitution to include a public spirited person who brings to the notice of the Court a matter of public importance. The appellant has a personal interest in the present litigation as he is motivated purely by his own economic interests and wants the entire bidding process reversed so that he can avail another opportunity of bidding for the project. The present litigation is, therefore, not public interest but rather personal interest litigation. We will thus not examine the case from that stand point. We have already held that the appellant has locus stands, having personal interest in the litigation but at the same time have found that he has no cause for complaint. Furthermore, since we are not considering the present case as one of public interest litigation and having held that the appellant was not treated unfairly or discriminately, we need not comment upon the arguments advanced by both sides, on the application or otherwise, of the provisions of the Public Procurement Regulatory Authority Ordinance No.XXII of 2002, to the present case."

34. Although in the instant case, the petitioner was not a bidder but was indeed a meter manufacturer who wanted I.E.S.C.O. to require foreign bidders to submit their bids as joint ventures with local manufacturers as their joint venture partners. This is the position taken by the petitioner as one of the signatories to the letter dated 23.01.2019 addressed by the A.P.E.M.M. to I.E.S.C.O. Having taken this position, the petitioner cannot be permitted to masquerade as a public interest litigant and seek to obtain relief from this Court which it was unable to achieve from I.E.S.C.O. when it objected to the tender bidding process in the said letter dated 23.01.2019. R & M Trust Vs. Koramangala Resi. Vigilance (AIR 2005 SC 894) it was held as follows:-

"Public Interest Litigation is no doubt a very useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons and it has brought very bad name. Courts should be very slow in entertaining petitions involving public interest in very rare cases where public at large stand to suffer. This jurisdiction is meant for the purpose of coming to the rescue of the down trodden and not for the purpose of serving private ends. It has now become common for unscrupulous people to serve their private ends and jeopardize the rights of innocent people so as to wreak vengeance for their personal ends. This has become very handy to the developers and in matters of public contracts. In order to serve their professional rivalry they utilize the service of the innocent people or organization in filing public interest litigation. The Courts are sometimes persuaded to issue certain directions without understanding implication and giving a handle in the hands of the authorities to misuse it. Therefore, the courts should not exercise this jurisdiction lightly but should exercise in a very rare and few cases involving public interest of large number of people who cannot afford litigation and are made to suffer at the hands of the authorities."

35. Additionally, in the case of Dattaraj Nathuji Thaware Vs. State of Maharashtra (2005) 1 SCC 590, it was held as follows:-

“Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta.”

36. It is understandable for a procuring agency to err of the side of caution by not proceeding with the bidding process or not awarding the contract when litigation challenging the bidding process is pending before a Court. Learned counsel for I.E.S.C.O. had confirmed that after this petition had been filed, I.E.S.C.O. had not proceeded further in the bidding process and was not going to award the contract until this petition was decided. In this day and age of rapid inflation, delay in the award of a contract due to pendency of litigation can become the cause for the award of a contract at the rates quoted by the successful bidder in its financial bid to become unviable. In a procurement process for the award of public contracts, such delay can cause loss to the public exchequer. Petitioners with a personal or financial interest in a procurement process, but claiming to be public interest litigants, cannot be permitted to challenge with impunity the bidding process initiated by procuring agencies. Additionally, delay in approaching the Court to initiate public interest litigation has been held to be a valid defence on which such litigation may be defeated.

37. In view of the above, I do not find any merit in this petition, which is accordingly dismissed with costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)