

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

W.P. No.2671 of 2016
M/s MIA Corporation (Pvt.) Limited
Versus.
Pakistan PWD and others

Date of Hearing:	31.08.2016
Petitioner by:	M/s Bilal Akbar Tarar, and Shahid Naseer, Advocates.
Respondents by:	Mr. Arshad Khan Jadoon, learned Deputy Attorney-General with Mr. Muhammad Mushtaq, Chief Engineer Pak P.W.D. Ch. Nadeem Ahmad Bhutta, learned Advocate for respondent No.2, Sardar Masroof Abid, Hasnain Muzaffar and Shakir Javaid, learned Advocates for respondent No.3.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, M/s Mia Corporation (Pvt.) Limited, has voiced its grievance against the decision of respondent No.1 (Pakistan Public Works Department) to award the contract for the procurement and installation of Heating, Ventilation and Air-Conditioning (“HVAC”) equipment to respondent No.3, (M/s Wuler Engineers & Contractors) without an advertisement or going through a competitive tender bidding process as required by the Public Procurement Regulatory Authority Rules, 2004 (“PPRA Rules”).

2. The record shows that respondent No.1, in the year 2015, had invited bids for the award of a contract for the procurement and installation of HVAC equipment for the headquarters of the National Accountability Bureau, Sector G-5/1, Islamabad. The petitioner participated in this bidding process, and was prequalified along with five other bidders. The petitioner turned out to be the lowest and most responsive bidder. It’s bid of Rs.235,709,544/- was accepted by respondent No.1. Consequently, respondent No.1 issued Letter of Award dated 09.02.2016 to the petitioner. On 21.03.2016, respondent No.2 (M/s Hassan Associates (Pvt.) Limited), who had been appointed as the consultant for the project

by respondent No.1, issued a Letter of Commencement to the petitioner. Subsequently, a number of disputes and differences in connection with and arising out of the contract developed between the petitioner and respondent No.1, culminated in the issuance of a termination letter dated 10.06.2016 by respondent No.1 to the petitioner. In the said termination letter, it was alleged that the petitioner had failed to open a Letter of Credit for the procurement of the required equipment even though 122 days out of a total contract period of 180 days had lapsed. The termination of the contract caused the petitioner to file an application under Section 20 of the Arbitration Act, 1940 ("the 1940 Act") before the court of learned Civil Judge, Islamabad, on 18.06.2016. Along with the said application, the petitioner also filed an application for interim relief praying for *inter-alia*, restraining the respondents from performing any further works regarding the procurement and installation of the HVAC equipment. Vide ad-interim order dated 18.06.2016, the respondents before learned civil court were restrained from encashing the mobilization advance guarantee and performance bonds furnished by the petitioner in pursuance of the contract. The said injunction was issued on the condition that the guaranteed amount was deposited in the court.

3. It appears that after terminating the contract, respondent No.1 took steps to award the contract for the procurement and installation of HVAC equipment by inviting quotations from only the five bidders/parties (excluding the petitioner) which had been prequalified at the stage prior to the award of the contract by respondent No.1 to the petitioner. In other words, after terminating the contract, respondent No.1 decided not to issue a fresh tender advertisement for inviting bids for the procurement and installation of the HVAC equipment, but resorted to a selective bidding amongst the five bidders/parties. This process culminated in the award of the re-procurement contract to respondent No.3. On 29.06.2016, the petitioner filed the instant writ petition, praying for the following relief:-

"In the light of the foregoing facts, submissions and circumstances, as well as the applicable legal provision, it is most respectfully prayed, that, this Honourable Court may be pleased to

allow this instant Writ Petition and set aside the Impugned Re-Tendering Process, whereby Project Works were awarded to the Respondent No.3;

It is further prayed that the Impugned Termination notice may be set aside:

In alternate, it is prayed that the Petitioner may allowed to participate in fresh re-tendering process, to be initiated after due compliance with the applicable regulatory mechanism, including the PPRA Rules;

Any other relief not specifically prayed for, which this Honorable Court deems fit and appropriate on facts of instant case as well as in interest of justice, equity and fair play, may also be granted to the Petitioner.”

4. Learned counsel for the petitioner after narrating the events that led to the issuance of the termination letter dated 10.06.2016, and the filing of the application under Section 20 of the 1940 Act, submitted that respondent No.1 had initiated the process for the re-procurement of the HVAC equipment without issuing an advertisement inviting parties to participate in the bidding process; that by doing so respondent No.1 had violated the norms of a transparent tender bidding process; that the lowest and most competitive price for the procurement of the HVAC equipment could have been obtained only if respondent No.1 had issued an advertisement inviting bids from all interested parties; that since respondents No.1 and 2, in the re-procurement process, had changed the Bill of Quantities (“BOQs”), this was an added reason why the said respondent should have issued a fresh tender advertisement; that as a consequence of the unlawful selective tender bidding process, respondent No.1 had awarded the contract to respondent No.3; that respondents No.1&2 had violated rules 3, 4, 14 and 20 of the PPRA Rules as well as the law laid down in the cases of M/s Malik Mushtaq Goods Transport Co. Vs. Federation of Pakistan (PLJ 2011 Lahore 227) and Habibullah Energy Limited Vs. WAPDA through Chairman (PLD 2014 SC 47), by not issuing a fresh advertisement inviting bids in the re-procurement process for the HVAC equipment. Learned counsel for the petitioner prayed for the contract awarded to respondent No.3 as a result of the unlawful selective bidding to be scrapped, so that re-bidding could take place strictly in accordance with the PPRA Rules.

5. On the other hand Mr. Muhammad Mushtaq, Chief Engineer, Pakistan Public Works Department, appeared and submitted that

the termination of the contract between the petitioner and respondent No.1 was lawful inasmuch as the petitioner had miserably failed in timely discharging its obligations under the said contract; that since the contract between the petitioner and respondent No.1 had been terminated, the petitioner had no right to question the decision taken by respondent No.1 or its consultant with respect to the re-procurement process; that respondent No.1 had committed no violation of law by resorting to a selective tender bidding process by inviting quotations for the supply and installation of the HVAC equipment only from those parties which had been prequalified in the earlier round of bidding; that the PPRA Rules do not expressly prohibit the invitation of quotations from the parties which had been prequalified prior to the termination of the contract; that respondent No.1 had resorted to such a selective tender bidding process, because the initiation of a bidding process by issuing a fresh public advertisement would have taken a very long time; that in the re-procurement process, the BOQs were changed because of an increase in the air conditioning area.

6. Ch. Nadeem Ahmed Bhutta, Advocate for respondent No.2 objected to the maintainability of this petition by submitting that after the termination of the contract, the petitioner had no right to challenge the decision taken by respondents No.1&2 regarding the re-procurement process. He further submitted that as the petitioner had already filed an application under Section 20 of the 1940 Act, before the learned civil court, it could not agitate the same grievances before this Court in its constitutional jurisdiction; that there was an arbitration clause in the contract between the petitioner and respondent No.1, therefore, the petitioner had an alternative remedy for the redressal of its grievances; that the petitioner could not agitate his contractual rights before this Court in a petition under Article 199 of the Constitution; that this case involved several disputed questions of fact which could not be resolved without recording evidence; that the petitioner had not come to this Court with clean hands, because on account of breach of contract committed by the petitioner, respondent No.1 had terminated the contract. In making his submission, the learned

counsel for respondent No.2, placed reliance on the law laid down in the cases of Pakcom Limited Vs Federation of Pakistan (PLD 2011 SC 44), Indus Trading and Contracting Company Vs. Collector of Customs (2016 SCMR 842), Quality Weaving Mills Limited Vs. Government of Punjab (2005 CLC 964), GETZ Pharma (Pvt.) Limited Vs. Federation of Pakistan (PLD 2016 Sindh 420), Syed Bhais (Pvt.) Limited Vs. Government of Punjab (PLD 2012 Lahore 52) and Muhammad Maqsood Sabir Ansari Vs. District Returning Officer (PLD 2009 SC 28).

7. This Court, on 18.08.2016, heard the arguments of the petitioner and respondents No.1&2 at considerable length. Mr. Muhammad Mushtaq, Chief Engineer, Pak PWD, after making his submissions pointed out that respondent No.3, who had been awarded the re-procurement contract was un-represented, and deserved to be heard. Therefore, notices were directed to be re-issued to respondent No.3 through courier as well as registered A.D, and the matter was adjourned to 25.08.2016, whereon the representative of respondent No.3 sought time to engage the services of a counsel. On 30.08.2016 and 31.08.2016, the learned counsel for respondent No.3, addressed his arguments.

8. Learned counsel for respondent No.3 submitted that the re-procurement contract awarded by respondent No.1 to respondent No.3 is required to be completed on 20.12.2016; that 85% of the project has been completed; that the Letter of Credit had been opened and a substantial amount had already been invested; that respondent No.3 was not a party to the application under Section 20 of the 1940 Act filed by the petitioner; that the said application was filed after the contract was awarded to respondent No.3; that the petitioner could not file a writ petition in the presence of an alternative remedy of arbitration in terms of Rule 49 of PPRA Rules; that even though the contract between the petitioner and respondent No.1 had been terminated, respondent No.1 had committed no illegality by requiring the prequalified parties in the earlier round to submit their quotations for the procurement and installation of the HVAC equipment under the changed BOQs; that none of the other prequalified parties had objected to the award of

the re-procurement contract to respondent No.3; that there was healthy competition between five parties that had been prequalified in the earlier round. Learned counsel for respondent No.3 prayed for the writ petition to be dismissed with costs. In making his submissions, learned counsel for respondent No.3 placed reliance on the law laid down in the cases of Jan Muhammad Mughal Vs. Tariq Saleem Dogar (2011 MLD 769), Noman Razzaq Vs. Faryad Hussain Chaudhry (PLD 2015 SC AJK 7), and Haider Khan Vs. Additional Chief Secretary, FATA (2012 MLD 1830).

9. I have heard the arguments of the learned counsel for the contesting parties, as well as the Chief Engineer, Pak PWD, and have perused the record with their able assistance. The facts leading to the filing of the writ petition are set out in sufficient detail in paragraphs 1 to 3 above, and need not be recapitulated.

10. I propose, at first, to deal with the preliminary objection raised by the learned counsel for respondent No.2 that the petition is liable to be dismissed, because it raises several disputed questions of fact, which could not be resolved in the constitutional jurisdiction of this Court. As mentioned above, this Court, in these proceedings, is only to determine whether it was lawful for respondent No.1 to invite quotations for the re-procurement contract from five bidders which had been pre-qualified in the bidding process prior to the award of the contract for the supply and installation of HVAC equipment by respondent No.1 to the petitioner, and its subsequent termination by respondent No.1. The respondents have not denied that such a selective bidding process for the re-procurement contract was adopted and that no advertisement for inviting bids for the re-procurement contract was published. Respondent No.1, in its written comments, has pleaded as follows:-

“As already explained that in the presence of already pre-qualified firms, there was no need to re-advertise for retendering. There is no restriction from PPRA in this regard.”

11. In the case at hand, the learned counsel for the respondents have not identified any fact asserted by the petitioner which has been disputed by the respondent, and cannot be resolved without recording evidence. A respondent in a writ petition cannot expect to have the petition dismissed by making a vague and general

assertion to the effect that the petition involves disputed questions of fact. For a respondent to succeed on this score, he must identify the disputed questions which cannot be resolved without the recording of evidence. Reference in this regard may be made to the following case-law:-

- (i) In the case of Saad Muhammad Shaheen Ali-Soofi Vs. Principal & Chairman Academic Council, Sind Med. College (1982 CLC 805), it has been held at page 815 of the report as follows:-

“The learned counsel for the respondent No. 1 lastly contended that as disputed questions of facts are involved in the petition it should be dismissed. ... There is no cavil to the proposition that the disputed questions of fact- cannot be gone into by the High Court in exercise of the Constitutional jurisdiction under Article 199 of the Constitution. However, each case has to be considered on its merits and before this principle is applied it has to be considered whether disputed questions of facts are involved in it. Merely because a certain assertion has been made and denied by the other party does not ipso facto make it a disputed fact. In order to establish that a fact is a disputed question of fact; the party making such allegation has to make out a prima facie case or place on record certain material from which it may be possible for the Court to determine that the dispute involves controversial question of fact or that the controversy will require evidence and investigation.”

- (ii) In the case of Shamim Khan Vs. Pakistan Defence Officers Housing Authority (1999 YLR 410), a judgment authored by the great jurist Sabihuddin Ahmad J., it has been held at page 413 of the report as follows:-

“... in our humble opinion, the mere existence of a factual controversy will not bar the maintainability of this petition. However, if it can be shown that there is a substantial and not merely illusory factual dispute, the relief claimed can only be granted upon resolution of such dispute and such resolution cannot be effected on the basis of affidavits and material on record, but requires an elaborate inquiry into facts, the Court would be persuaded to take the view that the alternative remedy by way of a civil suit is adequate and more efficacious and, therefore, a petition would not lie.”

12. In this case there is no question of investigating a complicated or a disputed question of fact. Hence, the respondents' *objection/contention that the petition should be dismissed on account of disputed questions of fact* fails and is accordingly rejected.

13. As regards the respondents' assertion that contractual disputes could not be resolved in writ jurisdiction, suffice it to say that in the present case the petitioner is not seeking the enforcement of contractual obligations or to resolve contractual disputes, but is only seeking to strike down the decision of respondent No.1 to resort to selective bidding between the parties who were pre-qualified prior to the termination of the contract between the petitioner and respondent No.1.

14. The disputes and differences in connection with and arising from the contract between the petitioner and respondent No.1 are presently the subject matter of the application under Section 20 of the 1940 Act, which is pending adjudication before the learned civil court. This Court has no intention of going into or determining those contractual disputes. The sole question for determination before this Court is whether respondent No.1, after terminating the contract with the petitioner, was under an obligation to start a tender bidding process *de novo* for the procurement and installation of HVAC equipment, by issuing an advertisement for the invitation of bids OR whether it could resort to selective bidding by inviting quotations from the parties that had been prequalified in the earlier round of bidding. Therefore, the objection/assertion of the respondents that the petition should be dismissed because the same involves contractual disputes, is also spurned.

15. The learned counsel for the respondents also contended that as the contract between the petitioner and respondent No.1 had been terminated on account of the petitioner's breach of contract, the petitioner had not approached this Court with clean hands. Whether or not the petitioner had committed breach of contract is yet to be determined in accordance with the dispute resolution mechanism enshrined in the contract executed between the petitioner and respondent No.1. As the petitioner's application under Section 20 of the 1940 Act was still pending adjudication, it was premature for the respondents to assert that the petitioner had approached with soiled hands.

16. Coming to the merits of the case, the learned counsel for the respondents and the Chief Engineer, Pak PWD, could not identify

any provision in the tender documents which enabled respondent No.1 to call for quotations from the bidders who had been pre-qualified in the tender bidding process prior to the award and subsequent termination of the contract between the petitioner and respondent No.1. The respondents' defence was that the PPRA Rules do not explicitly prohibit seeking quotations from parties that were pre-qualified at an earlier stage i.e. prior to the award of the contract to a successful bidder, and its subsequent termination. Respondents' position is that since the pre-qualification process had been carried out at an earlier stage, there was no need for a *de novo* initiation of a tender bidding process by issuing an advertisement and inviting bids for the re-procurement contract from the open market.

17. PPRA Rules are not exhaustive and do not cater for each and every eventuality that can be thought of in the realm of tender-bidding. The PPRA Rules are codified norms and requirements of a fair, open, competitive and transparent tender bidding required to be conducted by the Government or Public Sector Organizations. The mere fact that a certain process adopted for bidding by a procuring agency is not expressly prohibited by the PPRA Rules will not pose as an obstacle before this Court to examine the process on the touchstone of fairness, reasonableness and transparency. These requirements are also stipulated in Rule 4 of the PPRA Rules, which provides that procuring agencies, while engaging in procurements, shall ensure that the procurements are conducted in a fair and transparent manner, the object of the procurement brings value for money to the agency and the procurement process is efficient and economical. Additionally, Rule 20 of the PPRA Rules reads as follows:-

“20. Principal method of procurement. –Save as otherwise provided hereinafter, the procuring agencies shall use open competitive bidding as the principal method of procurement for the procurement of goods, services or works.”

18. In Suo Moto Case No.5 of 2010 (Action regarding huge loss to public exchequer by ignoring lowest bid of Fauji Foundation and Multinational Energy from Vitol by awarding LNG Contract) (PLD 2010 SC 731), the Hon'ble Supreme Court has held that it is the duty

of the Court to ensure that Public Procurement Regulatory Authority Ordinance, 2002 read with the PPRA Rules are adhered to strictly to ensure transparency. Further, in the case of Tipu Salman Makhdoom Vs. Federation of Pakistan (PLD 2014 Lahore 468), it has been held that the Government could not bypass the procurement process as provided under the PPRA Rules. In the case of Muhammad Atif Hanif Vs. Government of Punjab (2013 CLC 1612), the Hon'ble Lahore High Court, after referring to the provisions of the Public Procurement Regulatory Authority Ordinance, 2002 and the PPRA Rules, held as follows:-

“21. As will be evident respondent No.1 is a Procuring Agency within the meaning of section 2(1) of the Act, ibid. The provisions of the Act and the Rules, ibid, are mandatory in nature for all Procuring Agencies. Respondent No.2 is, therefore, bound to follow the procedure as laid down in the Act and the Rules, ibid, in matters of Public procurement. The method of procurement has been spelled out in great detail in the Rules, ibid, which inter alia provide for public advertisement and envisage a process of open bidding. There is no provision for negotiation or award of contract by way of private negotiations. Reliance in this regard is placed on a judgment of the Hon'ble Supreme Court reported as "Mujahid Muzaffar and others vs. Federation of Pakistan and others" (2012 SCMR 1651).” (Emphasis added).

19. As mentioned above, the respondents, in their written comments, have admitted that no advertisement inviting bids from the general public for the re-procurement contract were published. This is in stark violation of Rule 12 of PPRA Rules, which *inter alia* provides that all procurement opportunities over a certain financial limit should be advertised on Public Procurement Regulator Authority's website as well as in other print media or newspapers having wide circulation. Furthermore, Rule 14 of the PPRA Rules 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.”*

20. It is not the respondents' case that the re-procurement contract for the supply and installation of HVAC equipment at the National Accountability Bureau's Headquarters at Islamabad, *"related to national security and its publication could jeopardize national security objectives"* or that advertisement would relate to disclosure of information which was proprietary in nature or fell within the definition of intellectual property available from a single source. The respondents' defence was that the PPRA Rules do not expressly prohibit the invitation of quotations from the parties which had been pre-qualified prior to the award of the contract by respondent No.1 to the petitioner.

21. 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 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)

22. Now, vide letter dated 10.06.2016, respondent No.1 invited (1) M/s Ch. Mubarik Ali Contractors, (2) Joint Ventures M/s Primer Engineering Methods & Riaz & Sons, (3) M/s Wular Engineers, (4) M/s Shahid Builders (Pvt) Limited and, (5) M/s DWP Technologies (Pvt) Limited for rebidding for the procurement and installation of HVAC equipment. The text of this letter is reproduced herein below:-

“INVITATION OF RE-BIDDING FORM PRE-QUALIFIED CONTRACTORS/FIRMS FOR HVAC WORK OF THE PROJECT “CONSTRUCTION OF NAB HEADQUARTER BUILDING IN SECTOR G-5/1 AT ISLAMABAD.

After rejection of the tender of M/s MIA Corporation (Pvt) Limited by the competent authority, sealed bids are hereby invited for the work “Construction of NAB Headquarter Building in Sector G-5/1, Islamabad” (HVAC Work), from already pre-qualified firms.

A complete set of bidding documents may be purchased from the office of the consultant M/s Hassan Associates, Intl (Pvt) Ltd. 2nd Floor, Taj Arcade, 73 Jail Road, Lahore on submission of a written application upon payment of a non-refundable fee of Rs.5,000/-.

Bidder may obtain further information from the office of the undersigned i.e. Executive Engineer Store & Workshop Division Pak, PWD, Islamabad, 3U Plaza, upper Utility Store, G-7 Markaz, Sitara Market, Islamabad.

Yours faithfully,

*-Sd-
(FAIZ AHMAD FAIZ)
Executive Engineer
Store & Workshop Division
Pak. PWD. Islamabad.”*

23. This letter starts with a misstatement. It starts with the words *“after rejection of the tender of M/s Mia Corporation (Pvt) Limited by the competent authority.”* The impression projected is that the petitioner’s bid had been rejected by the competent authority i.e. respondent No.1. In fact the petitioner’s bid had been accepted by respondent No.1 and a Letter of Award had been issued on 09.02.2016. Instructions/notice to commence work had been issued to the petitioner, and mobilization advance had also been paid to it. Thereafter, on 10.06.2016 the contract was terminated by respondent No.1. 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.

24. A procuring agency can request for quotations from bidders but only where the prerequisites set out in Rule 42(b) of the PPRA Rules are satisfied. Rule 42 (b) is reproduced herein below:-

“PPRA Rule 42(b) request for quotations:- A procuring agency shall engage in this method of procurement only if the following conditions exist, namely:-

i. the cost of object of procurement is below the prescribed limit of one hundred thousand rupees:

Provided that the respective Boards of Autonomous bodies are authorized to fix an appropriate limit for request for quotations method of procurement subject to a maximum of rupees five hundred thousand which will become financial limit under this sub-rule;

ii. the object of the procurement has standard specifications;

iii. minimum of three quotations have been obtained; and

iv. the object of the procurement is purchased from the supplier offering the lowest price:

Provided that procuring agencies convinced of the inadequacy of the financial limit prescribed for request for quotations in undertaking their respective operations may approach the Federal Government for enhancement of the same with full and proper justifications;”

(Emphasis added)

25. As the contract price for the procurement and installation of HVAC equipment is far in excess of the financial limit fixed under Rule 42 (b) (i) of the PPRA Rules, respondent No.1 could not resort to inviting quotations from only five parties, and

avoid to requirement of issuing a public advertisement for the invitation of bids for the re-procurement contract.

26. Now, it is my view that the method of selective bidding adopted by respondent No.1 for the award of re-procurement contract, does not satisfy the requirements of Rules 4 and 20 of the PPRA Rules. In the case of Petrosin Products (Pvt.) Ltd. Vs. Federation of Pakistan (2001 CLC 1412), the Division Bench of the Hon'ble Lahore High Court has held that the *“rationale behind bidding is to earn maximum possible price for a property through open competition in the market”*. 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 issued 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.

27. In matters of judicial review, the basic test is to see whether there is any infirmity in the decision making process and not in the decision itself. The decision maker must understand correctly the law that regulates his decision making power and he must give effect to it otherwise it may result in illegality. A basic and obvious test to apply in such cases is to see whether the impugned action satisfies the test of reasonableness. Thus, the question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case.

28. Respondent No.1 had no justifiable grounds to presume that if a fresh advertisement for the re-procurement contract was issued, no one other than the five parties who were invited vide letter dated 10.06.2016 to submit their quotations, would have participated in the re-bidding process. In the case of Captain-PQ Chemical Industries (Pvt.) Ltd. Vs. A. W. Brothers (2004 SCMR 1956), it has been held that auction proceedings

should be transparent and every possible effort should be made to fetch maximum price close to market value. Furthermore, it was held that the prime object of inviting tenders was to provide an equal opportunity to all the prospective bidders.

29. Considering the facts and circumstances of the case, it is my view that respondent No.1's decision not to issue an advertisement inviting bids for the re-procurement contract (after the termination of the contract between the petitioner and respondent No.1), not just violates Rules 4, 12, 14 and 20 of the PPRA Rules, but also the law laid down by the superior courts in the case of Habibullah Energy Limited Vs. WAPDA through Chairman (Supra), and the cases mentioned herein below. The re-procurement contract executed between respondent No.1 and respondent No.3 as a consequence of the said aberration from the recognized norms of a tender bidding process renders the said contract illegal and, therefore, liable to be set aside. The Superior Courts have time and again enunciated that violations of law in a tender bidding process renders the resultant contract liable to be set aside in the constitutional jurisdiction of this Court. Reference in this regard may be made to the following judicial precedents:-

- (i) In the case of Pacific Multinational (Pvt.) Ltd. V. Inspector-General of Police, Sindh Police Headquarters and 2 others (PLD 1992 Karachi 283), and it was observed:-

“There could be no cavil with the proposition that enforcement of a purely contractual obligation could not properly form the subject matter of proceedings under Article 199 of the Constitution. However, it could not be ignored that the State had a Constitutional obligation to act fairly even when performing an administrative function. Therefore, when a party complained before the Court that the State while awarding a contract to a party had acted in an unfair or arbitrary manner or had discriminated against one of the parties who contested for the award of the contract, such grievance could be looked into by superior Court in exercise of its powers of judicial review under Article 199 of the Constitution and if the Court was satisfied that the Government while entering into a contract had acted arbitrarily or in an unfair manner or had discriminated between the parties before it in matter of awarding the contract, it could interfere and strike down such action.”

- (ii) In the case of Huffaz Seamless Pipe Industries Ltd. Vs. Sui Northern Gas Pipelines Ltd. (1998 CLC 1890), the Division Bench of the Hon'ble Lahore High Court has held as follows:-

“10. As regard to second question, we feel it necessary to reiterate a well known rule that the enforcement of [contractual] obligation is not permissible in writ jurisdiction of this Court. It is also equally well-settled that functionaries of Government/State Instrumentalities/Local Authorities are bound to follow the rules of fairness and neutrality while awarding contracts to citizens; that if such Authorities act arbitrarily, unfairly and discriminately, this Court had the power to strike down such orders/administrative actions and contracts. See Pacific Multi-national v. I.G. PLD 1992 Kar. 283, Abdullah & Co. v. Province of Sindh 1992 MLD 293, Jones v. Swansea (1989) 3 All ER 162, Blackpool Flyde Aero Club Ltd. v. Black Pool Borough Council (1990) 25 All ER, Guruswamy v. State of Mysore AIR 1954 SC 592, Ras Bibari v. State of Orissa AIR 1969 SC 1081, D.F.O. South Kheri v. Ram Shone AIR 1973 SC 205, Remana v. I.A. Authority AIR 1979 SC 1628 and Port Services (Pvt.) Ltd. v. Pakistan PLD 195 Kar. 374.”

The Hon'ble Supreme Court of Pakistan dismissed the appeal against the above-mentioned judgment. See Ramna Pipe and General Mills (Pvt.) Ltd. Vs. Sui Northern Gas Pipelines (2004 SCMR 1274).

- (iii) In the case of Airport Support Services Vs. The Airport Manager, Quaid-i-Azam International Airport, Karachi (1998 SCMR 2268), it has been held as follows:-

“Further a contract, carrying elements of public interest, concluded by functionaries of the State, has to be just, proper, transparent, reasonable and free of any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premise that public functionaries, deriving authority from or under law, are obligated to act justly, fairly equitably, reasonably, without any element of discrimination and squarely within the parameters of law, as applicable in a given situation. Deviation, if of substance, can be corrected through appropriate orders under Article 199 of the Constitution. In such behalf even where a contract, pure and simple, is involved, provided always that public element presents itself and the dispute does not entail evidentiary facts of a disputed nature, redress may be provided.”

- (iv) In the case of Ittehad Cargo Service Vs. Syed Tasneem Hussain Naqvi (PLD 2001 SC 116), it has been held as follows:-

“8. The first contention urged in support of the petitions was that the High Court had no jurisdiction to entertain the respondent's writ petition as the contracts challenged therein were concluded contracts. We are afraid the contention cannot prevail as it tends to curtail the scope of judicial review by placing an uncanny fetter on the Constitutional jurisdiction of the High Court to test the validity of grant of a concluded contract on the touchstone of well-settled and well-known grounds of challenge. No doubt a concluded contract commands respect and its sanctity is to be preserved as a matter of public interest/public policy but this does not mean that the order in respect of its grant is sacrosanct and unassailable. The High Court in exercise of its Constitutional jurisdiction is possessed of power to examine the validity of the order in regard to grant of a concluded contract and strike it down on the grounds of mala fide, arbitrary exercise of discretionary power, lack of transparency, discrimination and unfairness etc. provided the challenge is made promptly and contentious questions of fact are not involved.”

- (v) In the case of Kay Bee International (Pvt.) Ltd. Vs. Secretary to the Government of Punjab (PLD 2002 SC 1074), it was held that the approach of the Government in awarding contracts and licences shall be rational, reasonable and transparent and it should not be based upon arbitrariness and discrimination. In this case the Hon'ble Supreme Court cancelled the award of contract on account of aberrations in the bidding process.
- (vi) In the case of Iqtedar Ali Khan Vs. Department of Mines and Minerals (PLD 2004 SC 773), the Hon'ble Supreme Court upheld the cancellation of the lease because the manner in which the lease was given to lacked transparency and fairness.

30. As regards the contention of the learned counsel for respondent No.3 that the writ petition should be dismissed because the re-procurement contract awarded by respondent No.1 to respondent No.3 had been partly performed, I am of the view that if the Court finds the process by which such a contract is awarded to be illegal, it cannot turn into a legality simply by

virtue of the fact that it has been performed or partly performed. There are several instances where the Superior Courts have, on accounts of violations of law in a bidding process, struck down concluded contracts regardless of whether they were performed or partly-performed. For instance, in the case of Habibullah Energy Limited Vs. WAPDA through Chairman (supra), a process adopted for the award of contract/lease in 2006 was declared illegal in 2013. Furthermore, in the case of Khawaja Muhammad Asif Vs. Federation of Pakistan (PLD 2014 SC 206), an agreement executed in 2003 was set aside in 2013 on account of aberrations in the bidding process.

31. I am not inclined to grant the petitioner's prayer that the termination notice be set aside or to pre-empt respondent No.1 by directing them to permit the petitioner to participate in the re-bidding process. However, it may be noted that respondent No.1 invited quotations for the re-procurement contract from five parties on the same very day on which the termination letter was issued to the petitioner. By not inviting the petitioner to submit its quotation for the re-procurement contract, respondent No.1 has, in effect, prevented the petitioner from participation in the process. However, no decision of respondent No.1 to such an effect has been brought on record. If respondent No.1 is adamant about preventing the petitioner from participation in the re-bidding process, a reasoned decision in accordance with the law and the requirement of natural justice needs to be taken in that regard. Absent such a decision, the petitioner cannot be prevented from participation in the re-bidding process merely because the petitioner and the respondents are adversaries in litigation pending before the learned Civil Court.

32. Another aspect of this case is that respondents have not denied that the BOQs in the re-procurement contract were different from the ones in the original contract between the petitioner and respondent No.1. Respondent No.2, in their written comments, justify this change in the BOQs by pleading that:-

"Denied being incorrect, as explained in para 5, The change of BOQs is caused due to increase of air-conditioning area and

respondent 01 and 02 are fully competent to take any appropriate decision in interest of the works, however the petitioner has no concern regarding any change agreement drawn after his termination of contract.”

33. Furthermore, respondent No.1's written comments on the issue of the change in BOQs are as follows:-

“The Consultant M/s Hassan Associates increased the quantity of units due to increase in area of air conditioning of building as per requirement of the client. There is no change in design and PPRA allowed under clause 34(2).”

34. Now, Rule 33 of the PPRA Rules *inter alia* permits the procuring agency to reject all bids at any time prior to the acceptance of a bid. Rule 34 (1) provides that if the procuring agency has rejected all bids under Rule 33, it may call for re-bidding. Rule 34 (2) permits the procuring agency to revise specifications, evaluation criteria or any other condition for bidders, before the invitation for re-bidding. The term “rebidding” envisaged in Rule 34 is a *de novo* initiation of a bidding process by issuing an advertisement inviting bids from the general public for the award of the contract. The procuring agency cannot retrace its steps to a certain stage of the earlier bidding process, like for instance in this case to a stage when six bidders were pre-qualified and restart the process from that stage. Since the contract between the petitioner and respondent No.1 had been terminated, there was nothing preventing respondent No.1/procuring agency from changing the BOQs or specifications for the re-procurement contract so long as the re-bidding process was started afresh by issuing a public advertisement.

35. In view of the above, it is declared that procedure adopted by respondent No.1 for the award of the re-procurement contract for the supply and installation of the HVAC equipment, without issuing an advertisement inviting bids from the public, is declared unlawful. The mere fact that an advertisement was published at a stage when bids were initially invited prior to the award of the contract by respondent No.1 to the petitioner, did not absolve respondent No.1 from initiating a bidding process *de novo* by issuing a fresh advertisement for the re-procurement

contract. The selective bidding process for the award of the re-procurement contract adopted by respondent No.1 by inviting quotations from five parties which had been pre-qualified in the earlier round of bidding is also declared unlawful being in violations of Rules 4, 12, 14 and 20 of the PPRA Rules. The re-procurement contract between respondent No.1 and respondent No.3 is set aside and respondent No.1 is directed to initiate a bidding process in a transparent manner by issuing an advertisement inviting bids from the general public. This petition is allowed in the above terms with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

Uploaded By: Zulqarnain Shah