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

W.P No.4860/2018.

Open Testing Service (Pvt.) Ltd.

Vs.

Federation of Pakistan through Secretary,

Aviation Division etc.

Petitioner by:

Ms. Sarah Karim, Advocate.

Respondents No.1 to 4 by:

Barrister Muhammad Mumtaz Ali, AAG &

Saeed Akhtar Khan, S.O, Aviation

Division.

Respondent No.5 by:

Mr. Shahid Bashir, Advocate.

W.P No.1564/2019.

Open Testing Service (Pvt.) Ltd.

Vs.

Federation of Pakistan

through Secretary, Aviation Division etc.

Petitioner by:

Ms. Sarah Karim, Advocate.

Respondents No.1 to 4 by:

Barrister Muhammad Mumtaz Ali, AAG &

Saeed Akhtar Khan, S.O, Aviation

Division.

Respondent No.5 by:

Mr. Shahid Bashir, Advocate.

Date of Decision:

19.02.2020.

MOHSIN AKHTAR KAYANI, J:- Through this single judgment, I intend to decide the abovementioned two writ petitions as common questions of law and facts are involved.

2. Brief facts referred in writ petition No.4860/18 are that respondents No. 1 to 3/Aviation Division published a tender notice on the website of respondent No.4/Public Procurement Regulatory Authority on 11.09.2018 inviting the bids from the testing agencies for the purpose of screening tests including written, shorthand and typing tests regarding the recruitment of various post from BPS-05 to BPS-15; that the petitioner (O.T.S) was established in the year 2011, which deals in similar business and the petitioner applied for the said tender through its proposal/profile on 04.10.2018 but the said tender was turned down by respondents No.1 to 3 without any reason; that respondents No.1 to 3 again published tender notice on website of respondent No.4 on 23.10.2018 for inviting bids for similar

purpose and the bid submitted by the petitioner alongwith its profile was placed before respondents No.1 to 3 on 09.11.2018, however, after the evaluation of the bids, respondent No.5 was declared qualified and as such competent authority did not observe the rules and finally the petitioner filed complaint before the grievance committee of respondents No.1 to 3 on 13.10.2018, however, request of the petitioner was turned down.

- 3. In writ petition No.1564/2019, the petitioner has assailed publication of advertisement dated 14.04.2019 on website of respondent No.4/PPRA, whereby applications were invited for the vacancies of BPS-06 to BPS-15 in respondent No.6/Airport Security Forces (ASF) during the pendency of writ petition No.4860/2018 as such the entire selection process is illegal.
- 4. Learned counsel for the petitioner contends that the tender awarded to respondent No.5 is without scrutinizing documents of the petitioner's company, even the evaluation report prepared by respondents No.1 to 3 is against the prescribed rules and regulations; that the petitioner has vast experience in testing service and process and as such they have provided their services to Supreme Court, Peshawar High Court, District Courts, Islamabad, FIA, ZTBL, PIMS and other organization, whereas respondent No.5 is newly established testing service and unable to conduct recruitment process; that respondents 1 to 3/Aviation Division has not considered relevant requirements under the law and selected respondent No.5 in violation of PPRA rules; that despite complaint before redressal committee, core question of eligibility of respondent No.5 has not been decided.
- 5. Conversely, learned AAG in attendance contends that both the writ petitions are not competent as the same have been filed by unauthorized person, who has not referred his authority nor able to demonstrate the same; that eight different testing agencies submitted their bids and the bid evaluation committee opened the bids on 12.11.2018 in presence of the representatives of the companies and only three companies i.e. OTS/petitioner, NTS and ITS/respondent No.5 qualified in bidding process; that result reveals that respondent No.5 is the lowest in bid, therefore, the

tender was awarded to respondent No.5 and the petitioner's request was turned down as such no illegality has been committed in the process of hiring services of respondent No.5.

- 6. I have heard the arguments and gone through the record.
- 7. Perusal of the record reveals that petitioner/Open Testing Service (Pvt.) Ltd. is aggrieved with the tender process of hiring another testing agency Interior Testing Service (ITS)/respondent No.5 by Aviation Division/respondents No.1 to 3 for the purpose of recruitment process of various posts from BPS-06 to BPS-15, whereas the petitioner company was rejected being second lowest bidder in evaluation report and respondent No.5/ITS is first lowest bidder in evaluation report. The petitioner also approached grievance committee of Aviation Division/respondents No.1 to 3 under Rule 48 of PPRA Rules, 2004 against the award of contract to respondent No.5, whereby grievance committee was constituted vide memorandum dated 15.01.2019 comprising of three members, which thoroughly examined the entire case and rejected allegations of the petitioner's company.
- 8. As per record seven testing agencies participated in the bidding process for hiring services of testing agency regarding the recruitment in Aviation Division on the basis of advertisement published in National Dailies on 18.09.2018. The bids were opened on 05.10.2018, however, when the technical evaluation was conducted none of the agency provided the bank statement for the last 12 months as required under PPRA Rules, 2004, resultantly all the bids were rejected under Rule 33 of PPRA Rules, 2004 without final bid on 12.10.2018. The tender was re-advertised in the newspapers on 25.10.2018, resultantly eight testing agencies submitted their technical as well as financial bids, bids evaluation committee opened the bids on 12.11.2018 in presence of their representatives, whereby NTS, OTS and ITS were recommended and recommendations of the committee were approved by the Secretary, Aviation on 29.11.2018, where-after financial bids of three qualified

testing agencies were opened by the committee in presence of their representatives on 03.12.2018. The results are as under:-

S.No.	Name of Testing Agency	Rate (Rs.)	
		MCQs Test	MCQs+Skill Test
1.	National Testing Service	Rs.450/-	Rs.550/-
2.	Interior Testing Service	Rs.97/-	Rs.177/-
3.	Open Testing Service	210/-	Rs.210/-

- 9. On the basis of above mentioned result, the committee recommended respondent No.5/Interior Testing Service (ITS) being lowest bidder and the result was uploaded on the website under Rule 35 of PPRA Rules, 2004 on 04.12.2018. The Aviation Division issued letter to that effect to respondent No.5.
- 10. I have also gone through the selection criteria, which is reproduced as under:-
 - "a. The Testing agency should be registered with SECP.
 - b. The Testing agency/Firm must have relevant past experience to conduct such test for Public Sector Organizations/Departments at a large scale in major cities of Pakistan.
 - c. It should not have been blacklisted by any Government office/organization.
 - d. The Testing agency will provide detail of testing facilities alongwith fee per candidate.
 - e. Quoted rates should be inclusive of all taxes and admissible under rules."
- 11. I have gone through the requirements with the able assistance of learned counsel for the parties and as such no illegality has been observed in the bid evaluation process.
- 12. Besides the above referred position, learned counsel for the petitioner has highlighted her grievance against the criteria fixed by respondents No.1 to 3 for selection of testing agency. It is trite law that any evaluation or criteria fixed for any tender is entirely within the purview of the executive and Courts hardly had any role to play in this process except for striking down such action of the executive as

was proved to be arbitrary or unreasonable. In the matter of formulating conditions of tender document and warding contract, greater latitude was required to be conceded to the state authorities and unless the action of tender authority was found to be malicious and a misuse of its statutory powers, interference by Court was not warranted. Reliance is placed upon 2012 SCMR 526 (Michigan Rubber vs. State of **Karnataka**). Even otherwise, the allegations referred by the petitioner fall within purview of factual controversy and disputed fact such as whether respondent No.5 has got the skill, technical know-how, modern equipments, capability and resources to accomplish the task is subject of the executive and superior courts should not involve themselves into investigation of disputed questions of facts. Reliance is placed upon 2000 SCMR 1557 (M/s Arshad & Co vs. CDA). The report of evaluation committee reveals each and every aspect of the bidding document as well as the evaluation credentials of the parties to participate in the bidding, they have been marked on each of their category and as such the committee has recommended respondent No.5 for awarding of contract and such process cannot be nullified in writ of mandamus. Reliance is placed upon 2006 CLD 674 [Karachi] (Al-Abbas Sugar Mills Limited vs. Managing Director, Karachi Water and Sewerage Board and 2 others). It is settled law that Courts usually do not interfere in tender proceedings if the procedure has properly been followed and there is no malafide on part of government agency.

13. Besides the above referred position on record, learned AAG has raised objection qua the legal authorization for filing of the writ petitions, whereas writ petition No.4860/2018 is silent qua any power of attorney, resolution, articles of association through which it can be assumed that writ petition has been instituted after fulfillment of necessary legal requirements under the law as such writ petition No.4860/2018 has incompetently been filed, which defect is not curable. Reliance is placed upon PLD 2012 Lahore 52 (Messrs Syed Bhais (Pvt.) Ltd. through Director vs. Government of Punjab through Secretary Local Government and 3 others), 2005 CLD 1208 [Karachi] (Messrs Razo (Pvt.) Limited vs. Director,

Karachi City Region Employees Old Age Benefit Institution and others) & 1993

CLC 66 [Azad Jammu and Kashmir] (Walton Tobacco Company (Pvt.) Ltd. and others vs. Azad Government of the State of Jammu & Kashmir and others). It has been observed that Rule 48 of PPRA Rules, 2004 provides alternate remedy to an aggrieve person and as such the writ petitions are not competent. Reliance is placed upon 2011 MLD 1876 [Karachi] (Messrs KSB Pumps Company Ltd. vs. Government of Sindh and others).

- 14. In view of above discussion, the captioned writ petitions are hereby dismissed.
- Besides the above referred legal and factual aspects, the question which 15. requires due consideration is that as to whether the Federal Government or its attached departments can hire services of any testing agency for recruitment of civil servants under civil servant laws and such sovereign function of state can be entrusted to private companies through bidding process. In my humble view all such practices are illegal on part of the Federal Government, who are not allowed to circumvent the process of recruitment by involving private companies in the recruitment/services hiring process as it will create certain conflict of interest as well as it amounts to violation of responsibility and trust extended to the Federation of Pakistan by the Constitution. Even otherwise, Federal Public Service Commission Ordinance, 1977 is law on the subject and rules there under, which have different connotation and all such practices for hiring private testing companies by state departments whether authorized by cabinet division, establishment division or any other division of government of Pakistan is contrary to law and amounts to violation of state responsibilities. Moreover, hiring of private companies for the purpose of recruitment by Federal Government Departments is contrary to the Constitutional mandate provided in Part-12, Chapter 1 Services as referred in Articles 240, 241, 242 of the Constitution of Islamic Republic of Pakistan, 1973 whereby all the appointments in service of Pakistan/Federation in connection with affairs of Federation are subject to the Constitution, which shall be made under appropriate

legislation i.e law, rules and orders and any process designed in violation of the Constitutional mandate, even if agreed by the Federal Cabinet, the same would be against the doctrine of pith and substance and shall be considered against the prescribed Constitutional doctrine, which cannot be allowed to perpetuate as it will create frustration and restlessness among the citizens of Pakistan, who have been guaranteed with equal protection of law and rights governed under Article 18 of the Constitution.

16. Moreover, in my humble view, if the process of recruitment is entrusted to private testing agencies, then how the concept of merit and transparency in the recruitment process would be meted out and whether such testing agencies are otherwise devised to curb evil of unfair practices in the recruitment process in government departments, the answer would certainly be in negative. It is also pertinent to mention here that hiring private testing companies by state departments also reflects poor performance by state/government departments, which are unable to even meet with the recruitment process and have left the recruitment process at the mercy of private testing agencies, which is against the spirit of law and Constitution. Therefore, Federal Government shall take up appropriate measures to eliminate such kind of practice in future and in case services of private testing company are hired for recruitment process of civil servants, the entire process would be illegal. If competent authorities sitting in the helm of affairs in the ministries are unable to recruit their staff by way of their own criteria and requirements, it clearly spells out the lack of confidence, mismanagement and inefficiency on part of the government officials in the concerned ministries.

> (MOHSIN AKHTAR KAYANI) JUDGE

R.Anjam