

## JUDGMENT SHEET

### ISLAMABAD HIGH COURT, ISLAMABAD, JUDICIAL DEPARTMENT

W.P. No.2992/2019

Nescamp Services Company

*versus*

Federation of Pakistan & another.

Petitioner by: C. M. Rehman & Ch. Abdul Razzaq, Advocates.

Respondent No.2: Sardar Haseeb Iftikhar Ahmad & Mr. Umair  
Majeed Malik, Advocates.

Date of Decision: 04.11.2019.

**MOHSIN AKHTAR KAYANI, J:** Through the instant writ petition, the petitioner has called in question letter dated 13.06.2019, whereby petitioner's bid submitted against Tender No.PROC/LF/PT/PE&FD/NOF-17601/19 - Porta Cabins has been rejected by OGDCL i.e. respondent No.2.

2. Brief facts referred in the instant writ petition are that Oil & Gas Development Company Limited (OGDCL)/Respondent No.2 invited sealed bids vide its Tender Enquiry No.PROC/LF/PT/PE&FD-17575/19 for supply of 27 porta cabins from manufacturers/distributors having relevant experience in supplying of porta cabins and the petitioner being aspirant applied for the said tender and provided bid security in form of Pay Order while complying with Clause 1.16 of the Master Set of Tender Documents - Local. However, Respondent No.2 without mentioning any reason renounced the said tender and published its new advertisement inviting bids vide Tender Enquiry No.PROC/LF/PT/PE&FD-17601/19 for supply of 99 porta cabins with new terms and conditions, while the petitioner being an eligible manufacturer submitted its bid together with Pay Order to the tune of Rs.7.0 Million, but Respondent No.2 in terms of Clauses 1.17 and 3.1 rejected the bid of petitioner. Hence, the instant writ petition.

3. Learned counsel for petitioner contended that the act of Respondent No.2 rejecting the bid of petitioner is corresponding to breach of fundamental rights, law and PPRA Rules; that Rule 25 of the PPRA Rules states that the procuring agency may require the bidder to furnish a bid security not exceeding 5% of the bid price, whereas Respondent No.2 imposed conditions difficult to meet with as provided in Rule 22 of the PPRA, and eventually rejected the bid submitted by the petitioner vide impugned letter dated 13.06.2019, which is liable to be set-aside with direction to Respondent No.2 to issue new tender invitation on merits in accordance with law.

4. Conversely, learned counsel for respondent No.2 contended that no discrimination has been meted out to the petitioner during procurement process that forms the subject matter of the instant writ petition; that the petitioner has failed to comply with the terms and conditions of the bid, especially Clauses No.1.17 and 3.1, therefore, he is not an aggrieved person in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and petitioner is estopped by its conduct to assail the terms and conditions of the biddings; that it is trite law that Courts refrain to interfere in matters of policy unless such policy suffers from illegality, irrationality or procedural impropriety, which is not the case in the instant writ petition, therefore, the same may be dismissed.

5. Arguments heard, record perused.

6. Perusal of record reveals that OGDCL/Respondent No.2 has floated tender/invitation to bid on 23.02.19 published in Daily Dawn for supply for 27 Porta Cabins (*first tender*) and advised all the prospective bidders to view and download Master Set of Tender Documents from the website of OGDCL. During the said process, the Supply Chain Management Department of OGDCL had also initiated similar procurement project for additional 72 Porta Cabins in different fields, which constrained the OGDCL to merge both the procurement processes

in a single procurement process for avoidance of audit objection of initiating piecemeal procurement processes for the same item and price discrepancies, therefore, the OGDCL pursuant to all legal formalities annulled the first tender in accordance with Clause 1.9 of the Instructions to Bidders contained in first Master Set of Tender Document.

7. After annulment of the first tender, respondent No.1 on 29.03.2019 returned the sealed and unopened financial bids of four bidders, including the one submitted by the petitioner. Consequently, on 18.04.2019, OGDCL floated a new tender/invitation to bid, through an advertisement published in Daily Dawn for procurement of 99 Porta Cabins (*second tender*), whereby all the prospective bidders were again advised to view Master Set of Tender Document from the website of OGDCL coupled with additional conditions of submitting bid bond to the tune of Rs.7.0 Million by 06.05.2019.

8. Clauses 1.13 and 1.14 of the Instructions to Bidders of the second Master Set of Tender Document clearly provided that all prospective bidders to examine all the instructions and carefully read all the terms and conditions mentioned therein prior to submission of quotation and as such, any bid not substantially responsive to the bidding document shall be rejected in terms of Clause 1.13.

9. The main dispute amongst the parties in this writ petition is the application of Clause 1.17 of the instructions to Bidders of the Master Set of Tender Document. For ready reference, the said clause is reproduced as under:

*"Bid Bond/Bid Security/Earnest Money/Performance Bond/Advance Payment Bank Guarantee will not be acceptable with the banks whose market price as per share is quoted below the par value at Stock Exchange. Cross Cheque/Insurance Guarantee and Swift Message will also not be accepted."*

10. On the other hand, the petitioner in response to second tender has submitted Pay Order of Rs.7.0 Million as security vide Pay Order of Silk Bank bearing No.02263441, dated 03.05.2019, attached with the technical bid and at the

time of evaluation of the bidding document, it was observed by the OGDCL that on 07.05.2019, the market price per share of the Silk Bank was below the par value at Stock Exchange due to which the bid submitted by the petitioner was rejected by the OGDCL vide letter dated 08.05.2019. The glimpse of the said letter is reproduced as under:

Subject:- **REJECTION OF BID AND RETURN OF BID BOND SUBMITTED AGAINST TENDER NO.PROC/LF/PT/PE&FD/NOF-17601/19 - PORTA CABINS.**

Dear Sirs,

*This is with reference to your Technical Bid No.Nil dated 03.05.2019 submitted against the above captioned subject tender. Please be informed that your bid has been rejected as per Tender Document Clause No.1.17 and 3.1 due to the reason that the Pay Order of Silk Bank bearing No.02263441 dated 03.05.2019 amounting Rs.7 Million attached with your Technical Bid has market price of Rs.0.90/per share as on 07.05.2019 at the Stock Exchange which is below the par value.*

2. *The Pay Order is being returned herewith signed and stamped which may be treated as cancelled/released as OGDCL has no claim whatsoever against the same. Your sealed/unopened financial bid will be returned at later stage.*

3. *The receipt of the same may please be acknowledged.*

*Yours faithfully,  
for Oil and Gas Development Co. Ltd.*

11. In response to the aforesaid letter, the petitioner company submitted a reply vide letter dated 14.05.2019, addressed to General Manager, Supply Chain Management, OGDCL and acknowledged that:

*"The narration in both tenders is exactly the same except Sec 1.17 in new tender documents, we would like to bring into your kind notice that Sec 1.17 should have been clearly highlighted/clearly mentioned so that the bid bond should be made accordingly.*

*We shall highly appreciate if you kindly allow us to resubmit another bid bond of bank whose Market share is above par value as per OGDCL requirement. Our sealed Financial Bid is still with OGDCL.*

12. The above said letter was replied by the OGDCL vide impugned letter dated 13.06.2019 with reference to Clause 1.14, which states that all prospective

bidders are advised to read carefully all the terms and conditions mentioned in the Tender Document prior to filing/submission of the quotation. The OGDCL has also highlighted Clause 1.13 of the Tender Document, which states that bidders are expected to examine all instructions, forms, terms and specifications in the Bidding Documents and failure to furnish all information required by the Bidding Documents or submission of a bid not substantially responsive to Bidding Documents in all respects will result in the rejection of the bid(s).

13. Keeping in view the correspondence between the parties together with the facts noted by this Court, the core question left with this Court is to decide at the first instance as to whether in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the conditions of Tender Document could be judicially reviewed or the actions taken by the OGDCL while rejecting the petitioner's bid could be considered under judicial scrutiny or otherwise?

14. While considering the above propositions, this Court is bound by the principles and scope of judicial review of administrative decisions and exercise of contractual powers by Government bodies, wherein the principles are highlighted in the celebrated judgment reported as AIR 1996 SC 11 (Tata Cellular vs. Union of India), wherein it has been held as under:

*"Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.*

(Paras 86,89,90)

*The duty of the court is to confine itself to the question of legality. Its concern should be:*

1. *Whether a decision-making authority exceeded its powers?*
2. *committed an error of law,*

3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) *Illegality*: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (ii) *Irrationality*, namely, *Wednesday unreasonableness*.
- (iii) *Procedural impropriety*.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.

(Paras 93,94,95)

The principles deducible relating to scope of judicial review of administrative decisions and exercise of contractual powers by Government bodies are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

15. Besides the above referred guiding principles, I have also gone through another judgment reported as (1993) 1 SC Cases 445 (Sterling Computers Limited vs. M&N Publications Ltd.), wherein it was held that:

*"While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making*

*process'.....By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Court have inherent limitations on the scope of any such enquiry. But at the same time the Courts can certainly examine whether "decision making process" was reasonable rational, not arbitrary and violative of Article 14 of the Constitution."*

16. Similarly, it is also a settled principle that once competent authority in Government has taken decision backed by law, it would not be in consonance with the well established norms of the judicial review to interfere policy making domain of the executive authority. It is also not meant for the Court to enter into arena where question arises whether a particular policy of particular decision taken in the fulfillment of that policy is fair and it is only concerned with the manner in which those decisions have been taken. The Court must exercise this discretionary power of judicial review with circumspection and in furtherance of public interest and not merely for making of a legal point and it should always keep the larger public interest in mind to decide whether to interfere or not. Reliance is placed upon 2012 SCMR 455 (Dr. Akhtar Hassan Khan, etc. vs. Federation of Pakistan, etc.). Similarly, the Islamabad High Court in case titled M/s SIS Corporation (Pvt.) Ltd. vs. Federation of Pakistan [W.P. No.4650/2016] (citation awaited), has held as under:

71. *A position well settled by a catena of judicial pronouncement is that this Court, while exercising, its powers of judicial review of administrative action, does not sit as a Court of appeal but only reviews the manner in which the decision in question is arrived at. Judicial review is concerned with reviewing not the merits of the decision which is challenged in a writ petition, but the decision making process. In Chief Constable of the North Wales Police v. Evans, (1982) 3 All.ER 141, Lord Brightman said:-*

*"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial Review is concerned, not with the decision, but with the decision making process. Unless that restriction the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."*

17. At last, this Court has also considered the view of the Peshawar High Court, Peshawar in case reported as 2015 CLC 1585 (Sinotec Co. Ltd. vs. Province of KPK), wherein it has been held as under:

*“13. The duty of the Court is to confine itself to the question of legality. Its concern should be:---*

- (1) Whether a decision-making authority exceeded its powers?*
- (2) committed an error of law,*
- (3) committed a breach of the rules of natural justice,*
- (4) Reached a decision which no reasonable Tribunal would have reached or,*
- (5) Abused its powers.*

*Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:---*

- (i) Illegality.--- This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*
- (ii) Irrationality; and*
- (iii) Procedural impropriety.”*

18. In view of above, this Court comes to an irresistible conclusion that the petitioner has failed to comply with the terms of Master Set of Tender Documents mentioned in Clause 1.17, which provides a specific direction to submit a security bond from the bank whose market price as per share is not below the par value at Stock Exchange, but the petitioner by neglecting the said condition submitted pay order of the Silk Bank, whose market price per share was below the par value at Stock Exchange, due to which the bid submitted by the petitioner was rejected. Consequently, the petitioner by filing an application requested the respondent authority for resubmission of another bid bond of the bank whose market share is above par value as per OGDCL requirement, but at that time it was too late and as such, the OGDCL authorities in rejecting the bid submitted by the petitioner have not committed any illegality or made a mistake, rather it is negligence on the part of petitioner, who at this stage cannot claim any violation of his right when he himself is the negligent party and overlooked the



requirements of Clause 1.17 of the Master Set of Tender Document, therefore, no illegality has been observed in the bidding process, which is fair and transparent, hence the instant writ petition is misconceived and the same is hereby **DISMISSED**.

**(MOHSIN AKHTAR KAYANI)**  
**JUDGE**

Khalid Z.