

Form No: HCJD/C.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Writ Petition No. 196 of 2016

Maqbool Associates Pvt. Ltd. etc.

Vs.

Federation of Pakistan etc.

Petitioners by: Mr. Arshad Nazir Mirza & Mr. Asim Shafie, Advocates.

Respondents by: Mr. Wasim Sajjad, Mr. Idrees Ashraf, Mr. Rizwan Faiz Muhammad, Mr. Ahmed Atta ur Rehman & Barrister Mumtaz Ali Khan, Advocates.

Date of Hearing: 30.03.2016.

AAMER FAROOQ, J.- Through this consolidated judgement the instant petition as well as Writ Petition No.197/2016 are being decided as common questions of law and facts are involved.

2. The petitioners are aggrieved of rejection of bid and non-awarding of the contract with respect to two projects of respondents No.2 & 3 i.e. N-70 and N-50. In this behalf on 19.12.2014 National Highway Authority i.e. respondent No.2 published an advertisement in the newspapers inviting bids from eligible bidders for two departmental projects in Baluchistan. For the purposes of present controversy two relevant contracts were ICB-N-70 Upgradation, Widening and Improvement of Qila Saifullah to Loralai Waigum Rud section of National Highway N-70. The referred project consisted of two lots i.e. Lot-I Qila Saifullah to Loralai and Lot-II Loralai to Waigum Rud (Subject matter of the instant petition). The other project pertained to ICB N-50

Upgradation, Widening and Improvement of Zhob to Mughalkot section of National Highway N-50. The referred project also consisted of two Lots i.e. Lot-I Zhob to Killi Khudae Nazar and Lot-II Killi Khudae Nazar to Mughalkot (Subject matter of W.P. No.197/2016). According to the advertisement the bidding process was according to International Competitive Bidding and was based on Two Envelope Single Stage. Moreover, a bidder could bid for any one lot or all the lots. On 05.03.2015 the Joint Venture of the petitioners submitted bids to respondent No.2 for Lots-I & II vis-à-vis N-50 as well as Lot-I & II vis-à-vis N-70 projects. On 17.08.2015 the petitioners were informed that they are technically qualified for all lots of the projects. The petitioners were also informed that the opening of the financial bids will take place on 18.08.2015 and in this behalf N-70 Lot-I, Lot-II bids would be opened and likewise N-50 Lot-I and Lot-II bids shall be opened. The referred sequence was changed, however, was corrected on the protest of the petitioners. On 18.08.2015 bids were opened and according to the petitioners they were lowest bidders in all four Lots. In this behalf the petitioners made a bid for N-70 Lot-I to the tune of Rs.235,669,822/- and with respect to Lot-II Rs.310,643,689/-. Similarly, with respect to project N-50 Lot-I bid was Rs.359,653,747/-, however, the petitioners were not lowest bidder for Lot-II of N-50 project. The petitioners were declared successful with respect to N-70 Lot-II and vis-à-vis N-50 Lot-II. In the instant petition as well as W.P. No.197/2016 grievance has been raised for not declaring the petitioners successful in respect to Lot-I of N-70 and Lot-I of N-50.

3. Learned counsel for the petitioners *inter alia* submitted that the bids of the petitioners have been rejected without any reason or justification. In this behalf it was

contended that the petitioners were technically qualified and there does not exist any reason for rejection of their bids on technical grounds. In this behalf it was contended that in the bid with respect to Lot-I of N-70 the contract has not been awarded to the petitioners on the sole basis that they do not have the technical and financial capacity to undertake the same. It was contended that since the petitioners stood technically qualified, therefore, there is no justification for raising this objection; that the petitioners have expertise and technical knowhow to carry out all the four projects. It was also contended that the process of the bidding is tainted with *mala fide*. In this behalf learned counsel pointed out that to technically knockout the petitioners on the ground of insufficient capacity is not tenable; that under the bidding documents where there are multiple contracts the employer i.e. National Highway Authority was to evaluate and compare bids on the basis of contract, or combination of contracts, or as a total of contracts in order to arrive at the least cost combination. Under the referred bidding documents if a bidder submits several successful bids the evaluation shall also include an assessment of the bidder's capacity to meet the aggregate requirements. On the basis of the referred clause learned counsel pointed out that since the petitioners were technically qualified, therefore, they had the expertise to carry out the contracts. Learned counsel next submitted that since the bid of the petitioners is 5.29%, lower than the second lowest bidder, therefore, an additional burden is being cast upon the exchequer by declaring respondent No.4 as a successful bidder.

4. Learned counsel for the petitioners with respect to being unsuccessful vis-à-vis Lot-I of N-50 submitted that the bid of the petitioner was lowest, however, only due to

an error it has been held to be not so. In this behalf it was contended that there was a typographical error by virtue of which the amount was expressed as higher. In this behalf the bid of the petitioners was taken to be Rs.657,268,460,896/- which could not have been the case as the error was typographical and arithmetical in summing up various terms. Learned counsel submitted that in this behalf various letters were written to respondents No.2 and 3 which were not duly replied; that under the bidding documents it is permissible for a bidder to correct any technical error by intimating the same to the employer which was accordingly done but respondents No.2 & 3 did not reply and the bid of the petitioners was taken which was typographically and arithmetically incorrect. Learned counsel further submitted that failure to respond to the letters of the petitioners by respondents No.2 & 3 is based on *mala fide*. Similarly, it was contended that if the correct amount is taken after adding all the items and in words then the petitioners' bid is lowest, therefore, the contract vis-à-vis N-50 Lot-I should have been granted to the petitioners as well. It was also contended that where the contract is awarded in a non-transparent manner at any inflated cost the same can be set aside. The petitioners also, during the course of proceedings, moved applications challenging the award of contract to respondent No.4 in both the petitions (C.M. No.687/2016 & C.M. No.689/2016). In support of his contentions learned counsel placed reliance on the case titled *Raja Mujahid Muzaffar and others v. Federation of Pakistan and others* (2012 SCMR 1651), *Messrs Presson Manufacturing Limited and another v. Secretary, Ministry of Petroleum and Natural Resources and 2 others* (1995 MLD 15), *Messrs Airport Support Services v. The Airport Manager, Quaid e Azam International Airport, Karachi and*

others (1998 SCMR 2268), *Petrosin Gas Pakistan Pvt. Ltd. v. Pakistan State Oil and another* (2010 YLR 2643), *Petrosin Corporation Pvt. Ltd. and 2 others v. Oil and Gas Development Company Ltd. through Managing Director* (2007 CLD 578), *Tariq Aziz ud Din and others; in re (Human rights cases Nos.8340, 9504-G, 13936-G, 13635-P & 14306-G to 143309-G of 2009)* (2010 SCMR 1301) & *Petrosin Products Pvt. Ltd. v. Federation of Pakistan through Secretary Privatization Commission* (2001 CLC 1412).

5. Learned counsel for respondents No.2 & 3 *inter alia* submitted that the instant petition as well as W.P. No.197/2016 is not maintainable inasmuch as the petitioners have an alternate remedy under Public Procurement Regulatory Authority, Rules, 2004 (PPRA) which they also availed, however, now are prolonging the proceedings before the referred alternate forum. It was also contended that the petitioners have approached this Court with unclean hands inasmuch as the contracts/letters of acceptance were awarded to respondent No.4 in both the petitions on 14.01.2016; that the petitioners have no vested right to be awarded the contract. Learned counsel also contended that under the PPRA Rules and Bidding Documents the respondents are not bound to declare successful any bidder which has made the lowest bid, however, the contract is to be awarded to the lowest evaluated bid and since in the instant petition the petitioners do not have the technical knowhow and expertise, therefore, they were not awarded the first Lot of N-70 and with respect to N-50 petitioners have also not come with clean hands as the bid was not the lowest. It was also contended that the petitioners are blowing hot and cold at the same time inasmuch as they are the beneficiaries of the entire

bidding process whereas the process is being referred to as based on *mala fide* and non-transparent. Learned counsel also pointed out that earlier a petition was filed by another bidder in which the petitioners were one of the respondents and in the same the respondents had filed a reply and categorically submitted that the bidding process was fair and transparent (W.P. No.2641/2015). It was also contended that in the referred proceedings the petitioners had taken a categorical stance that the writ petition is not maintainable in light of PPRA Rules which provides for alternate remedy before Grievance Redressal Committee; that the projects in question are being funded by Asian Development Bank; in this behalf the projects pertain to two sections viz N-50 and N-70 and both were divided into two Lots, therefore, the total four Lots/packages were to be awarded; all bidders were free to bid for one or more of the Lots, however, the award of more than one Lot was subject to fulfillment of the criteria provided in section 3 of Evaluation and Qualification Criteria i.e. "National Highway Authority Evaluation of Bids" to arrive at lowest combination and evaluation of the bidders' capacity to meet the aggregated requirements for carrying out works on multiple projects. In this behalf learned counsel contended that the petitioners were qualified for the bid and were the lowest announced bidders, however, evaluation of their bids revealed that they were not the lowest with respect to Lot-I of N-50 as they had made a bid for Rs.443,564,473/- and after qualification of their unit rates it was revealed that they had calculated the price wrongly and the total calculation turnout to be Rs.65,726,846,896/-, therefore, they ceased to be the lowest bidder. It was next contended that the petitioners failed to qualify with respect to aggregate qualification requirements i.e. to carry out all

four projects and in this behalf also did not have the financial capacity/requisite experience in respect thereto. Similarly, it was contended that they did not have the man power and machines to carry out the projects. In support of his contentions learned counsel placed reliance on the case titled *M/s M.K. International Local Agent of M/s Interman Trading FZE v. Sui Southern Gas Company through M.D. and 2 others* (2016 CLC 1), *TECHNO TIME CONSTRUCTION COMPANY through Partner v. PUNJAB HIGHWAY DEPARTMENT through Chief Engineer and 2 others* (2014 MLD 874), *Messrs KHALID AND BROTHER through Proprietor and 5 others v. PUNJAB PROVINCE through Secretary Housing Urban Development and Public Health Engineering Department, Punjab, Lahore and 2 others* (2014 CLD 1410), *PETROSIN CORPORATION LTD. v. OIL AND GAS DEVELOPMENT COMPANY LTD. through Managing Director* (2010 CLD 15), *Ayaz Builders through Partner v. Karachi Water and Sewerage Board through Managing Director and 2 others* (2007 CLC 728).

6. Learned counsel for respondent No.4 (the respondent who was declared successful bidder) contended that tender process has been undertaken in accordance with ADB Guidelines and with concurrence of ADB at every stage. The Bidding Documents were based on the standard bidding material. In this behalf it was pointed out that under clause 36.4 of Instructions to Bidders where bidders quoted separate prices for different contracts the methodology to determine the lowest evaluation price is specified in section 3 of Evaluation and Qualification Criteria. In this behalf it was pointed out that the awarding of multiple contract is dealt in clause 1.2 and the decision of National Highway Authority is based on Multiple Contract Criteria. It was also contended that the petitioners' technical qualifications were conditional as the letter of technical qualification expressly

states that the opening of bids and award of the works is subject to fulfilling multiple contracts requirements. In this behalf though the petitioners were the lowest bidders in both the Lots, however, National Highway Authority followed the multiple contract formula to evaluate whether the petitioners had construction experience, financial resources, equipment and personnel to undertake both the Lots. Learned counsel also contended that the instant petition is not maintainable in light of alternate remedy available to the petitioners which has been duly availed. In this behalf reliance was placed on *Maqbool Associates Pvt. Ltd. v. Paksitan Power Park Management Company and others* (2015 MLD 1790). It was further contended that the controversy involves disputed question of facts which cannot be adjudicated in writ jurisdiction. Learned counsel pointed out that in contractual disputes this Court under Article 199 of the Constitution interferes only if there is *mala fide*, arbitrariness or nepotism floating on the face of record which in the instant case is not there, therefore, no interference can be made in the Constitutional jurisdiction by this Court. Learned counsel also submitted that the question as to whether the petitioners had the technical skill and knowhow, this aspect can only be fairly determined by respondents No.2 & 3 and cannot be adjudicated in a writ jurisdiction. Reliance was placed on the case titled *Messrs Arshad & company v. Capital Development Authority, Islamabad through Chairman* (2000 SCMR 1557), *Al-Abbas Sugar Mills Limited v. Managing Director, Karachi Water and Sewerage Board and 2 others* (2006 CLD 674) and *Messrs Michigan Rubber India Ltd. v. State of Karnataka and others* (2013 SCMR 526). Learned counsel also adopted the arguments raised by the learned counsel for respondents No.2 & 3 that the lowest bid can be

rejected. Reliance was placed on the case titled *Ayaz Builders through Partner v. Karachi Water and Sewerage Board through Managing Director and 2 others* (2007 CLC 728), *Afzal Motors Company Pvt. Ltd. v. Province of Sindh and others* (2009 CLD 798) and *Raunaq International Ltd. v. I.V.R. Construction Ltd. and others* (AIR 1999 Supreme Court 393).

7. Learned counsel for respondent No.4 in W.P. No.197/2016 *inter alia* submitted that the petitioners have alternate remedy and on the basis thereof the instant petition is not maintainable. In this behalf reliance was placed on the case titled *Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others* (2012 SCMR 455), *Muhammad Irshad and another v. Tehsil Municipal Administration through Tehsil Nazim, Lodhran and 3 others* (2006 CLC 1902), *Mehboob Ali Malik v. The Province of West Pakistan and 2. The Lahore Municipal Corporation* (PLD 1963 (W.P.) Lahore 575), *Jamshoro Jaoint Venture Ltd. and others v. Khawaja Muhammad Asif and others* (2014 SCMR 1858). It was also contended that bids were made in March, 2015 whereas the first letter of correction was written somewhere in August, 2015 after about six months and the petitioners all this time did not approach the employer/NHA. It was next contended that the petitioners made a written complaint on 11.01.2016 under Rule 48 of PPRA Rules, 2004 for constitution of Grievance Redressal Committee which was so constituted, however, the petitioners then did not appear before the said Committee and the matter lingered for one reason or the other and instead the petitioners filed the instant petition. Learned counsel also pointed out that there is a discrepancy in the bid made by the petitioners and on that account their bid was liable to be rejected inasmuch as the discrepancy is

not of the type which can be cured/rectified under the Bidding Documents.

8. All the respondents have taken preliminary objection regarding the maintainability of the writ petition in light of alternate remedy available to the petitioners which they did avail. In this behalf under Rule 48 of PPRA Rules, 2004 Procuring Agency has to constitute a Grievance Redressal Committee which shall address the grievance of the bidder within a period of 15 days. A bidder, if is aggrieved of the decision of the Committee, can file an appeal before the Court of competent jurisdiction. In this behalf for the sake of brevity the relevant rule is reproduced below and is as follows:

“48. Redressal of grievances by the procuring agency.-

(1) The procuring agency shall constitute a committee comprising of odd number of persons, with proper powers and authorizations, to address the complaints of bidders that may occur prior to the entry into force of the procurement contract.

(2) Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written complaint concerning his grievances not later than fifteen days after the announcement of the bid evaluation report under rule 35.

(3) The committee shall investigate and decide upon the complaint within fifteen days of the receipt of the complaint.

(4) Mere fact of lodging of a complaint shall not warrant suspension of the procurement process.

(5) Any bidder not satisfied with the decision of the committee of the procuring agency may lodge an appeal in the relevant court of jurisdiction.”

9. In case of *Maqbool Associates Pvt. Ltd. v. Paksitan Power Park Management Company and others* (2015 MLD 1790) this Court while relying upon earlier decision reported as *2011 MLD 1876* held that in the presence of alternate and adequate remedy under Rule 48

of PPRA Rules, 2004 a writ petition should only be entertained as an exception and not a rule.

10. Another primary objection which has been taken in the instant case is that since the bid of the petitioners in the instant writ petition has been dismissed on the ground that they did not have the requisite experience and qualification. The sole judge of the referred issue can be respondents No.2 & 3 and the matter cannot be adjudicated in the writ petition. In this behalf since the petitioners made a bid for all four Lots, therefore, they were evaluated on the basis of Multiple Contracts Criteria as provided in clause 1.2 of section 3 of Evaluation and Qualification Criteria. The relevant criteria is reproduced below and is as follows:

“1.2 Multiple contracts

Works are grouped in multiple contracts and pursuant to ITB 36.4, the Employer will evaluate and compare Bids on the basis of a contract, or a combination of contracts, or as a total of contracts in order to arrive at the least cost combination for the Employer by taking into account discounts offered by Bidders in case of award of multiple contracts.

- i) Lot-I*
- ii) Lot-II*

If a Bidder submits several successful (lowest evaluated substantially responsive) bids, the evaluation will also include an assessment of the Bidder's capacity to meet the following aggregated requirements as presented in the bid:

- Construction Experience (value of similar contracts previously undertaken by the Bidder),*
- Financial Resources Requirements,*
- Equipment to be allocated, and*
- Personnel to be fielded.”*

11. The bare reading of the referred clause shows that in addition to fact that a bidder has made the lowest

bid; the assessment shall also include bidders' capacity to meet the following aggregated requirements in the bid which include; *construction Experience, Financial Resources Requirements, Equipment to be allocated and Personnel to be fielded*. The respondents have rejected the bid of the petitioners on the ground that they do not meet the requisite criteria vis-à-vis construction and financial experience as well as equipment and personnel which fact has been denied by them. Though the petitioners as well as respondents No.2 & 3 have pointed out various documents in support of their stances, however, assertion of lack of experience of respondents No.2 & 3 and its denial by the petitioners leads to disputed question of facts which cannot be adjudicated in Constitutional jurisdiction. Learned counsel for the petitioners has vehemently argued that since the bid of the petitioners was lowest, therefore, the lack of experience could not have formed basis for rejection of the bid or non-awarding of the contract to the petitioners. In this behalf under Rule 38 of PPRA Rules, 2004 it is provided that the bidder with the lowest evaluated bid, if not in conflict with any other law, rules, regulations or policy of the Federal Government, shall be awarded the procurement contract. In this behalf case law relied upon by the learned counsel for respondent No.4 is instructive, inasmuch as the decision whether the bid of the petitioners was lowest evaluated bid in light of multiple contracts criteria mentioned hereinabove is sole prerogative of respondents No.2 & 3 and whether the decision with respect thereto has been taken erroneously cannot be adjudicated in a Constitutional petition as this Court lacks the requisite skill and ability to evaluate the expertise of the petitioners. In this behalf in *Messrs*

Arshad & company v. Capital Development Authority, Islamabad through Chairman (2000 SCMR 1557) it was held as follows:

"Let we mention here at the outset that it would not be possible to decide the factual controversy and disputed facts such as whether the petitioner/firm has got the skill, technical know-how, modern equipments, capability and resource to accomplish the task in question and in our considered opinion CDA is in better position to determine such ticklish and technical questions it is well settled by now that "the superior Courts should not involve themselves into investigation of disputed question of fact which necessitate taking of evidence. This can more appropriately be done in the ordinary civil & procedure for litigation by a suit. The Constitutional jurisdiction is intended primarily for providing an expeditious remedy in a case where the illegality of the impugned action of an executive or other authority can be established without any elaborate inquiry into complicated or disputed fact". (1971 SCMR 110, 1970 SCMR 853, PLD 1964 SC 636, PLD 1983 SC 280, PLD 1983 SC 280).

6. *In such view of the matter we cannot give the petitioner/firm certificate of fitness for pre-qualification as technical and expert opinion C cannot be substituted. We have not been able to agree to persuade ourselves with Ch. Mushtaq Ahmad Khan, Advocate Supreme Court that it is a case of sheer discrimination for the reason that discrimination always involves an element of unfavourable bias which cannot be proved on the basis of bald p assertion but requires solid and concrete evidence which apparently is lacking. The award of contract falls within the discretionary domain of CDA and every exercise of discretion is not an act of discrimination."*

In case titled *Al-Abbas Sugar Mills Limited v. Managing Director, Karachi Water and Sewerage Board and 2 others* (2006 CLD 674) it was held as follows:

"8. We have carefully perused paragraph 6.7(a) of the Guidelines. The word used in the para. is "may" which does not make it obligatory on the part of the respondent No.1 to hold post bid meeting with the contesting parties. The respondent No.1 has rightly relied upon the evaluation report, which deals with all the aspects and opinion of the respondent No.1 after the evaluation report of the Committee by holding post bid meeting was insignificant for want

of technical expertise. The report of the Evaluation Committee runs into 50 to 60 pages and each and every aspect of the bid documents submitted by the parties were examined. Mere non-inviting the petitioners for post bid meeting therefore, would not nullify the recommendations of the Evaluation Committee. Even otherwise, the nature of the terms contained in the bid are procedural/ directory in nature and would in no way be termed as mandatory in nature to nullify the award of contract in favour of the respondent No.3 projects of the nature are dependent on the expertise and the professionalism which can only be examined by the experts. In the present case the NESPAK which has sufficient experience in such projects once recommended award of contract in favour of respondent No.3 this Court in writ of mandamus would not nullify such award of contract for want of compliance of the terms which, ex facie, are procedural in nature and have no substantial bearing on the award of the contract."

In case titled *Messrs Michigan Rubber India Ltd. v. State of Karnataka and others* (2013 SCMR 526) it was held as follows:

"-In the matter of formulating conditions of a tender document and awarding a contract, greater latitude was required to be conceded to the State authorities, and unless the action of tendering authority was found to be malicious and a misuse of its statutory powers, interference by courts was not warranted---Certain preconditions or qualifications for tenders had to be laid down to ensure that the contractor/bidder had the capacity and the resources to successfully execute the work, and if the State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract, then interference by court was very restrictive since no person could claim fundamental right to carry on business with the Government---Before interfering in a tender or contractual matter, in exercise of power of judicial review, the court should pose to itself the questions whether the process adopted or decision made by the authority was mala fide or intended to favour someone; or whether the process adopted or decision made was so arbitrary and irrational that the court could say that the decision was such that no responsible authority acting reasonably and in accordance with relevant law could have reached the same, and whether the public interest was affected---If the answers to the said questions were in negative, then there should be no interference by court in exercise of its powers of judicial review."

In case titled *Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others* (2012 SCMR 455) it was held as follows:

“In Federation of Pakistan v. Saeed Ahmed Khan (PLD 1974 SC 151), this Court was called upon to dilate upon the mala fides as a ground for exercise of power of judicial review of administrative action and the Court observed as follows:--

"Mala fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mala fides. As has been pointed out by this Court in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14), mala fides must be pleaded with particularity, and once one kind of mala fides is alleged, no one should be allowed to adduce proof of any other kind of mala fides nor should any enquiry be launched upon merely on the basis of vague and indefinite allegations, nor should the person alleging mala fides be allowed a roving enquiry into the files of the Government for the purposes of fishing out some kind of a case.

"Mala fides" literally means "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself.

The Courts while dealing with cases relatable to financial management by the government or awarding of contract by it must appreciate that these are either policy issues or commercial transactions requiring knowledge in the specialized fields. The Courts lack the expertise to express any opinion on the soundness or otherwise of such acts/transactions. The question whether a contractual transaction or decision taken in the exercise of executive authority by the Government can be subjected to judicial review has engaged the attention of constitutional courts in several countries and the judicial consensus generally has been that the Courts should ordinarily refrain from interfering in policy making domain of executive authority or in the award of contracts

unless those acts smack of arbitrariness, favoritism and a total disregard of the mandate of law.

In the case of Watan Party supra (Pakistan Steel Mills Case), the well established principles governing the power of judicial review were reiterated by holding that:--

"in exercise of the power of judicial review, the courts normally will not interfere in pure policy matters (unless the policy itself is shown to be against Constitution and the law) nor impose its own opinion in the matter."

The Court quoted with approval the law laid down in Messrs Elahi Cotton Mills Ltd. v. Federation of Pakistan (PLD 1997 SC 582) and BALCO Employees Union (Regd.) v. Union of India (AIR 2002 SC 350). In the latter judgment, the Indian Supreme Court held as follows:--

"Process of disinvestments is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority."

37. *Similarly in Tata Cellular v. Union of India ((1994) 6 Supreme Court Cases 651), the Court laid down that the power of judicial review would be available qua the contractual powers of the government bodies to prevent arbitrariness or favouritism. However, the Government being guardian of finances is expected to protect the financial interest of the State. The Court nevertheless enunciated the principle of judicial restraint by holding that it does not sit as a court of appeal but merely to review the manner in which the decision was taken. This is so because the Court does not have the expertise in the domain of administrative decision making.*

38. *In Sterling Computers Ltd. v. M & N Publications Ltd. ((1993) 1 Supreme Court Cases 445), the Court outlined parameters of judicial review in terms as follows:--*

"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."

39. *In Air India Ltd. v. Cochin International Airport Ltd. ((2000) 2 Supreme Court Cases 617), the Court held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation. Nevertheless it was observed, the State, its corporations, instrumentalities and agencies have the public duty to be fair in their transactions. In the event of some irregularity in the decision making process, it was further observed, the Court must exercise its discretionary powers of judicial review with circumspection and only in furtherance of public interest and not merely making out of a legal point. It should always keep the larger public interest in mind to interfere or not to interfere. Only when the public interest overwhelms any other consideration, the Court should interfere."*

In case titled Institute of Chartered Accountants of Pakistan Karachi and others v. Federation of Pakistan and others (1998 SCMR 2679) it was held as follows:

The learned Judges having found the decision of the Council fixing the number of chances for the students to clear the two examinations of the C.A. intra vires, they should not have travelled in the domain of policy matter of the Council which required consideration of various factual aspects of the case. The learned Judges while examining the above controversy in- exercise of their jurisdiction under Article 199 of the Constitution could not act as a Court of Appeal against the decision of the Council, so as to entitle them to substitute their conclusions for that of the Council.

14. The jurisdiction of the High Court under Article 199 of the Constitution to interfere with the exercise of power by the Council under the Ordinance could only be justified on the ground that the Council in issuing the S.R.O. had acted against the mandate of law (without jurisdiction) or in excess of the mandate of law (in excess of the jurisdiction) or the decision of the Council was arbitrary and devoid of any basis."

Similarly, it is trite law that the lowest tender can be rejected. In this behalf the Hon'ble Division Bench of Sindh High Court in case titled *Ayaz Builders through Partner v. Karachi Water and Sewerage Board through Managing Director and 2 others* (2007 CLC 728) held as follows:

8. It would be seen that per settled law, mere participation in a bidding process does not entitle a bidder to claim the contract in question, although it may be the lowest. However, an unsuccessful bidder can certainly approach this Court where it alleges mala fides and discrimination etc, in the award of the contract to another bidder.

*10.(sic) As to the cases relied upon by Mr. Raja Qureshi regarding enforcement of contractual rights through a writ petition, there is no cavil with the proposition that this cannot be done in situations calling for such enforcement per se. In the present case, however, we are not called upon to do so as what is impugned before us is the lack of transparency in the tender evaluation process. This is in the fitness of things since what the Courts are most familiar with is lack of transparency, clue process of law, discrimination and unfair exercise of executive power. Hence, normally it is in this context that the superior Courts of this country while exercising constitutional jurisdiction have interfered in matters which are otherwise contractual in nature. However, it is again interesting to observe that where it had been established before a constitutional Court that the lower bid suffered from some flaws inasmuch as the bidder lacked the necessary technical expertise etc., which was possessed by the higher bidder, the Governments' decision to award the bid to the latter was upheld. Reference in this regard can be made to the case of *Pacific Multinational (Pvt.) Ltd. v. I.-G. of Police* (supra). Needless to say such are not the facts of the case at hand."*

In case titled *Afzal Motors Company Pvt. Ltd. v. Province of Sindh and others* (2009 CLD 798) it was held as follows:

We also could not find out any document on record which could tend to show that the actions of the respondents were tainted with malice or the process starting from the invitation of tenders till award of contract was either mala fide or non-transparent. Simply to level vague and unsubstantiated allegation of mala fide on the part of the public

functionaries does not advance the case of the petitioners. It is very easy for a litigant to allege mala fide but it is very difficult to prove it. It has now fairly been settled that the allegation of mala fides requires proof of a high order and the burden of proof lies on the person who makes it. Reference can be made to "Federation of Pakistan v. Saeed Ahmed PLD 1974 SC 151, Shabbir Hussain v. Registrar, Lahore High Court PLD 2004 SC 191 and Hazara (Hill Tract) Improvement Trust v. Qaisara Elahi 2005 SCMR 678."

Reliance is also placed on case titled *Raunaq International Ltd. v. I.V.R. Construction Ltd. and others* (AIR 1999 Supreme Court 393). In *Messrs M. K. International, Local Agent of Messrs Interman Trading FZE v. Sui Southern Gas Company through M.D. and 2 others* (2016 CLC 1) the Hon'ble Division Bench of Sindh High Court held that factual controversy could only be determined on the basis of evidence of the parties and High Court while exercising Constitutional jurisdiction could not look and enter into such factual dispute. It was also observed that Public Procurement Rules, 2004 had provided the complete mechanism/remedy to an aggrieved person for redressal of grievance and the remedy provided in law could not be allowed to be abandoned or bypassed on mere whims and desires of an aggrieved party. In *Messrs Khalid and Brother through Proprietor and 5 others v. Punjab Province through Secretary Housing Urban Development and Public Health Engineering Department, Punjab, Lahore and 2 others* (2014 CLD 1410) the Hon'ble Lahore High Court held that the question as to whether a particular contractor was pre-qualified was either a policy issue or commercial transaction requiring specialized fields and Courts lack expertise to express any opinion as to technical expertise or managerial capabilities of the contractor. It was also observed that

the question whether the petitioners were qualified is a factual controversy which could not be resolved by the High Court in its Constitutional jurisdiction. In *Petrosin Engineers and Contractors PTE Ltd. v. Federation of Pakistan and others* (2003 MLD 646), the Hon'ble Division Bench of Sindh High Court held that no legal right would be acquired by a bidder by simply making a lowest bid because other factums like capacity to fulfill other conditions to complete the contracted project would also be kept in view. Similarly, in *Ayaz Builders through Partner v. Karachi Water and Sewerage Board through Managing Director and 2 others* (2007 CLC 728), it was reiterated mere participation in bidding process would not entitle a bidder to claim contract in question although he might be the lowest.

12. In W.P. No.197/2016 bid of the petitioners was basically rejected on the score that there were certain errors in pricing the units. Learned counsel for the petitioners has vehemently argued that it was *bona fide* arithmetical and typographical error and in this behalf the employer, respondents No.2 & 3 could have sought clarification of the bid under clause 27.1 of the same. Similarly, learned counsel pointed out that any arithmetical error could be corrected under clause 33 as contained in section 1 of Instructions to Bidders. In this behalf the referred clause is reproduced below and is as follows:

“33. Correction of Arithmetical Errors

33.1 During the evaluation of Price Bids, the Employer shall correct arithmetical errors on the following basis:

- (a) if there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected, unless in the opinion of the*

Employer there is an obvious misplacement of the decimal point in the unit price, in which case the total price as quoted shall govern and the unit price shall be corrected;

(b) if there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected;

(c) if there is a discrepancy between the bid price in the Summary of Bill of Quantities and the bid amount in item (c) of the Letter of Price Bid, the bid price in the Summary of Bill of Quantities will prevail and the bid amount in item (c) of the Letter of Price Bid will be corrected: and

(d) If there is a discrepancy between words and figures, the amount in words shall prevail, unless the amount expressed in words is related to an arithmetic error, in which case the amount in figures shall prevail subject to (a)(b) and (c) above."

13. Bare reading of the referred clause shows that certain arithmetical errors can be corrected by the bidders in case of discrepancies. In the instant case the petitioners wrote to respondents No.2 & 3 for correction of errors in August 2015, however, they were not responded. It is interesting to observe that with respect to contract of such a magnitude such an error regarding non-pricing of units was made by the petitioners and the same went un-noticed for almost about 6 months. Respondents No.2 & 3 were not bound to allow the rectification and under clause 38 of Instructions to Bidders reserved the right to reject any bid without assigning any reason. The learned counsel for the petitioners vehemently argued that by awarding contract to respondent No.4 the exchequer is being burdened with additional sum. It was also contended that the price by which the entire bid proceeding had been conducted is tainted with *mala fide*. In this behalf reliance has been placed on the case titled *Raja Mujahid Muzaffar and*

others v. Federation of Pakistan and others (2012 SCMR 1651) as well as *Messrs Presson Manufacturing Limited and another v. Secretary, Ministry of Petroleum and Natural Resources and 2 others* (1995 MLD 15) and others. There is no cavil with the principles laid down in the referred cases, relied upon the learned counsel for the petitioners, however, *mala fide*, arbitrariness and procedural impropriety are the basic criteria on the basis of which the Courts under Article 199 of the Constitution interfere even where the contracts have been concluded. In the instant case there is no transgression of power or abuse of the same and/or colourable exercise of the power which calls for interference in writ jurisdiction.

14. In view of foregoing reasons, the instant petition as well as W.P. No.197/2016 are without merit and are accordingly dismissed.

(AAMER FAROOQ)
JUDGE

Announced in open Court on the 12th day of May 2016.

JUDGE

Approved for reporting