

**IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN
CPLA NO. 35/2009**

Before: Mr. Justice Muhammad Nawaz Abbasi, Chief Judge.
Mr. Justice Syed Jaffar Shah, Judge.
Mr. Justice Muhammad Yaqoob. Judge.

M/S Fahim Haider

Petitioner.

Versus

Government of Pakistan through Secretary KA&GB Affairs and 09 others.

Respondents.

Mr. Muhammad Ibrahim Satti Sr. Advocate Supreme Court of Pakistan assisted by Mr. Javaid Iqbal for Petitioner
Advocate General for Respondent No. 2 to 7
Mr. Naeem Bukhari Advocate Supreme Court of Pakistan for respondent No. 8.

Date of hearing: 11-06-2010

JUDGMENT

Muhammad Nawaz Abbasi, CJ: This petition by leave of court has been directed against the judgment dated 04/11/2009 passed by a Division Bench of the Chief Court whereby the two connected writ petitions bearing No. 54/2009 filed by the Gilgit-Baltistan Contractors Association and writ petition No. 73/2009 filed by the present petitioner M/s Faheem Haider Pvt Ltd, have been dismissed.

2. The petitioners in the above petition have sought declaration to the effect that the order dated 09-09-2009 passed by the Secretary, Ministry of KA&NA (KA&GB), Government of Pakistan by virtue of which he set aside the order dated 05.08.2009 passed by the Chief Engineer Water and Power Department, Government of Gilgit-Baltistan in his capacity as Chairman, Departmental Procurement Committee for recall of the tenders for fresh bid in respect of the contract of supply of Hydro Power Turbines was without lawful authority and of no legal effect.

3. M/S Fahim Haider petitioner herein on dismissal of his Writ Petition has preferred this petition before this court in which after preliminary hearing, the notice was issued to the respondents vide order dated 27-04-2009 for consideration of the question relating to the jurisdiction of Minister for KA&NA/Chairman Northern Areas (now Gilgit-Baltistan) for taking cognizance in the matter and the authority of Secretary KA&NA Division to pass the order under challenge by reversing the order of Chairman Departmental Bidding Committee. The order is read as under: -

"The subject matter of this petition is contract for supply of hydro power turbines to be awarded by Water and Power department Gilgit-Baltistan. The tenders were accordingly invited and the petitioner and respondents No. 8 to 10 participated in the bid. The Chief Engineer having found none of the bids responsive, rejected all the bids vide Order dated 05-08-2009 with recall of the tenders. The Secretary, Ministry of KA&GB Division Islamabad on representation of respondent No. 8 against rejection of his bid vide order dated 09-09-2009 declared him successful bidder.

The learned counsel for the petitioner with reference to Rule 48 of Public Procurement Regulatory Authority Rules 2004 framed under Public Procurement Regularity Authority Ordinance 2002 contents that any person aggrieved of rejection or acceptance of a bid can avail the remedy of complaint before the procurement committee or invoke the jurisdiction of competent court and neither the representation before Secretary KA&NA Division Islamabad was maintainable nor the Secretary was competent to interfere in the matter.

Precisely the contention of the learned counsel is that the remedy against the rejection of bid was either complaint before the Procurement Committee or to invoke the jurisdiction of the competent court but the Chief Court without attending the real question involved in the matter has dismissed the Writ petition in a perfunctory manner on technical ground.

The learned counsel added that the order passed by the Secretary KA&GB Division being without lawful authority may seriously reflect upon the fair award of contract of an important public project and dismissal of writ petition on the ground that it was not maintainable was not proper and legal.

The contentions raised being not without force require consideration, therefore notice is issued to the respondents.

Learned Advocate General on court call has appeared and he has been directed to file concise statement on behalf of the officials respondents (respondents No. 2 to 7). The Learned counsel for petitioner states that respondents No. 09 and 10 are proforma and respondent No. 8 is the real contestant. In addition

to the ordinary mode of service respondent No 8 shall also be served through the Deputy Commissioner Islamabad as special measure.

The case will be relisted on 17-05-2010 and meanwhile the order passed by the Secretary KA&GB Division whereby respondent No. 8 has been declared successful bidder will remain suspended”.

4. It is considered appropriate to recapitulate the factual position in the background with reference to the documents relied upon by the parties for better appreciation of the question of law and facts raised by their learned counsel in the present petition for determination of this court.

5. The Board of officers of the department of water and power, Government of Gilgit Baltistan invited application for prequalification of contractors for participation in the bid for grant of the contract of 46 turbo Generating sets for 27 hydro power projects and in response 13 application were received out of which 5 were shortlisted as qualified for participation in the bid in which the petitioner and respondents No. 8 to 10 were included who having participated in the auction offered their bids. The bidding Committee on opening the bids, except the bid offered by M/S Al-Fajr International (respondent No. 8), having found no other bid responsive, observed that single responsive bid was not competitive and recommended for rejection of all bids. Consequently the Chief Engineer in his capacity as Chairman of the committee assuming the power of competent authority vide order dated 05.08.2009, rejected all bids with direction for recall of tender. The bid of Al-Fajr International (respondent No. 8) was excluded from consideration for the reason that it was a single responsive bid and not only was noncompetitive but was also not lowest to the nonresponsive bids offered by other bidders in the auction. Al-Fajr International (Respondent No. 8) being aggrieved of

rejection of his bid filed a representation before the Minister for Kashmir Affairs and Northern Areas (KA&GB) who was also exercising the power of Chairman Northern Areas under Northern Areas Governance Order 1994 for interference in the matter. The Chairman Northern Areas taking cognizance of the matter directed Secretary KA&NA Division of Federal Government of Pakistan for obtaining opinion of Public Procurement Regulatory Authority (PPRA) in the matter and PPRA on a reference of Secretary KA&NA Division expressed opinion as under: -

**“GOVERNMENT OF PAKISTAN
PUBLIC PROCUREMENT REGULATORY AUTHORITY
(CABINET DIVISION)**

Subject: **Clarification on acceptance of Single Tender.**

Reference Kashmir Affairs & Northern Areas Division's D.O. letter No. PC-1/1/2005, dated 2nd September, 2009 on the above subject.

2. There is no restriction under Public Procurement Rules, 2004 on acceptance of a single bid received in response to a tender notice if the same fulfils requirements of the procuring agency translated through qualification as well as evaluation criteria. Public Procurement Rules, 2004 restrict the procuring agencies to accept lowest evaluated bid which has been defined under rule 2(h) of the Public Procurement Rules, 2004 as:

- i) a bid most closely conforming to evaluation criteria and other conditions specified in the bidding document, and
- ii) having lowest evaluated cost,

3. Any bidder which has been declared as technically non-responsive should not be considered for competition even if his financial offer is comparatively lower.

Sd/-
Muhammad Saleemullah
Director-1”

6. The Secretary KA&NA Division, Government of Pakistan in pursuance of the opinion of PPRA examined the matter in detail and vide order dated 09.09.2009 held the respondent No. 8 as successful bidder with direction to the Chief Secretary, Government of Gilgit-Baltistan for further necessary action. The Chief Secretary instructed the Bidding Committee for negotiation with respondent No. 8 for reduction of bid money and bidding Committee having negotiated the matter with the respondent made him agree to reduce the bid money to

a reasonable extend which is almost equal to the bid money of lowest bid and implemented the order of Secretary KA&NA for award of contract to Al-Fajr International (Respondent No. 8). The Petitioner also in the meanwhile filed a representation before the Minister for KA&NA/Chairman Northern Areas in which a report was called from the Chief Secretary, Gilgit-Baltistan and since no separate order was passed in the representation of petitioner therefore the same would deemed to have been disposed of by the order dated 09.09.2009 passed by the Secretary KA&NA Division in the representation filed by Al-Fajr Pvt. Ltd.

7. The petitioner being aggrieved of the Order of Secretary KA&NA Division Challenged the same before the Chief Court Gilgit-Baltistan in a writ petition which was dismissed vide impugned judgment, whereupon he preferred the present petition before this court supported by the documents referred hereunder: -

Representation of Al-Fajr Pvt limited before the minister for KA&NA,
Government of Pakistan: -

“Subject: **NA WATER & POWER DEPARTMENT'S TENDER FOR SUPPLY, INSTALLATION COMMISSIONING AND TEST RUNNING OF TURBO GENERATING SETS FOR GILGIT REGION (LOT-A) 13 SETS AND BALISTAN REGION (LOT-B) 07 SITES OPENED ON 3RD AUGUST, 2009 A;;EAL AGAINST DEPARTMENT'S DECISION DATED 5TH AUGUST, 2009**

Honourable Sir,

We take the opportunity to inform you that our company, AL-FAJR International, Islamabad is engaged in the field of Hydropower since last 28 years. We supplied and installed all together 60 Hydro Machines of different capacities. In the recent past, we successfully completed 10 power projects of the NA PWD and two Hydro Projects of SHYDO in Chitral.

Our company, after going through the entire open competitive Bidding Process, submitted its bid to the Department on due date i.e. 3rd August, 2009.

In addition to our company, the following companies also competed and submitted their bids:

1. M/s. Heavy Mechanical Complex, Texila
2. M/s. Hydropower Equipments & Engineers Research Institute TRIED, China JV with Wazir Imtiaz, Hassanabad, Skardu.

3. M/s. Fahim Haider & Co. Lahore.

The above three companies were declared nonresponsive by the Departmental Procurement Committee on one reason or the other while our bid was declared most responsive.

But now we have been informed by the Department vide their letter dated 5th August 2009 that our bid, (the only responsive bid) has been rejected by the Competent Authority due to nonresponsive bids submitted by the tree firms and the tender will be recalled.

In this connection we would like to invite your kind attention to the fact that the Public Procurement Rules 2004 do not put any limit or number of tenders/bids received in response to tender notices. The rules lay down that the single bid may be considered if it meets the evaluation criteria laid down in the tender document.

Very recently we met with the same situation in WAPDA's tender for 22 MW JABBAN HPP. WAPDA received only one bid after going through the open competitive bidding process. The bid was meeting the evaluation criteria laid down in the tender documents. WAPDA considered that bid in the light of Public Procurement Rules 2004 and the contract was awarded after negotiations.

As we are confident that our bid meets the evaluation criteria laid down in the tender document and is not in conflict with any rules, regulations or policy of the Government, we request your honour to kindly intervene in the matter and direct the Northern Areas Water & Power Department to make a prudent decision by inviting us for negotiation in order to avoid repetition of the some time consuming bidding process because the Department has already used Open Competitive Bidding Process as the Principle Method of Procurement as laid down in the Public Procurement Rules 2004.

It is pertinent to add here that by submission of the Appeal we are not asking for any undue favour but justice only.

Assuring you of our highest regards and best attention at all times.

Tanking you,

Yours Sincerely,
for Al-Fajr International,
-sd-
MD"

Letter dated 2nd September 2009 of Government of Pakistan, KA&NA Division by virtue of which Secretary KA&NA Division sought opinion of PPRA Islamabad:-

"Subject:- CLARIFICATION ON ACCEPTANCE OF SINGLE TENDER

Water and Power Department Northern Areas invited applications from the contractors for pre-qualification for the work "Supply, Installation, Commissioning and Test Running of Turbo Generator Sets for hydropower project in Northern Areas Lot'A' & Lot 'B' through print media for wide publicity and same was also displayed on the public procurement Regulatory Authority's (PPRA) website. Thirteen firms applied for pre-qualification short listing and the process was carried out though a Committee of professionals.

2. The pre-qualification process was found transparent and neither any firm having very low category of Pakistan Engineering Council was short listed nor any firm considered without assignment of any reason therefore, no irregularity in the short listing process was observed. Those firms which could not fulfill the criteria and not short listed were informed indicating reasons of disqualification.

3. PEC bidding documents were used for calling of tenders on single stage-two envelop system of PPRA, wherein all the short listed firms/contracdtors were supposed to submit technical and financial bids separately. Bids were opened on 03-08-2009 b y a tender opening and evaluation Committee at Gilgit. According to the process, on first

day all the bids were scrutinized to ascertain responsiveness for further evaluation of bids. Only four firms participated in the bidding.

4. Bid submitted by three of the firm were found nonresponsive because of the following reasons:

- i) They had changed the manufacturer and their profile and experience have also not been furnished.
- ii) Neither Bid security was furnished nor letter of exemption of Ministry regarding public manufacturer of the goods being supplied as required under article 6(3) of SRO 627(1)/2001 dated 3rd December, 2001.
- iii) Nonresponsive as Bid Security in shape of CDR of Bank Guarantee was not furnished.
- iv) Nonresponsive due to defective pricing. Prices for each site were not quoted separately and lump sum prices without giving details were quoted, which could not be evaluated. The quoted rates were also doubtful due to excessive cutting & there were arithmetical mistakes in addition of the rates. The amount of bid security was also less than 2% of the quoted amount of some bidders.

5. In view of the above, only one bid was found fully responsive. The issue for which your advice is required is “whether the procuring authority will be in line with the rules if this single bid is accepted”. It may be mentioned that the bidding process was transparent and competitive and the laid down procedure were fully followed. This Ministry went through the Public Procurement Rules 2004 and found that there is no limitation on the number of tenders/ bids received a single bid may be considered if it meets the evaluation criteria expressed in tender notice and is not in conflict with any other rules, regulations or policy of the Federal Government.

6. However, it is also laid down that in case of a single bidder a decision to accept the bid must be made keeping in view comparison of price of similar goods procured during the same year, and market price. In this case no procurements of this type were made in the current financial year and since the bids were competitive a mark survey was not resorted to. It may be mentioned that one of the rejected bid (because it was non-responsive) had quoted a lower price than the responsive bidder.

7. It is requested that an early advice may be given in view of the fact that the work season in the Northern Areas is limited.”

Letter of PPRA in the Cabinet Division, Government of Pakistan containing the opinion of PPRA: -

“GOVERNMENT OF PAKISTAN
PUBLIC PROCUREMENT REGULATORY AUTHORITY
(CABINET DIVISION)

Subject: **Clarification on acceptance of Single Tender.**

Reference Kashmir Affairs & Northern Areas Division's D.O. letter No. PC-1/1/2005, dated 2nd September, 2009 on the above subject.

2. There is no restriction under Public Procurement Rules, 2004 on acceptance of a single bid received in response to a tender notice if the same fulfills requirements of the procuring agency translated through qualification as well as evaluation criteria. Public Procurement Rules, 2004 restrict the procuring agencies to accept lowest evaluated bid which has been defined under rule 2(h) of the Public Procurement Rules, 2004 as:

- a. a bid most closely conforming to evaluation criteria and other conditions specified in the bidding document, and
 - b. having lowest evaluated cost,
- 3.** Any bidder which has been declared as technically non-responsive should not be considered for competition even if his financial offer is comparatively lower.

Sd/-
Muhammad Saleemullah
Director-1”

The letter dated 09-09-09 of KA&NA Division containing the order of Secretary KA&NA Division addressed to chief Secretary Gilgit-Baltistan declaring Al-Fajr International (Respondent No. 08) successful bidder was as under: -

“Subject: SHORT LISTING OF FIRMS FOR SUPPLY OF GENERATORS.

Reference your u.o. N.o SWP-1/2009 dated 06-08-2009 on the subject. The whole case was examined in this Ministry and put-up to the Minister KA&NA/Chairman Northern Areas. The Minister has desired to refer the case to PPRA for a regulatory advice. The PPRA vide their letter No. F.6(16)/DD-1/PPRA/KA&NA/2009 dated 3rd September, 2009 informed that:

- i) Under the Public Procurement Rules 2004, 2004 there is no restriction of acceptance of a single bid subject to the condition that it is done according to the laid down evaluation criteria and condition specified in the bidding documents.
- ii) The bid has the lowest evaluated cost.
- iii) A technically non-responsive firm is not considered for competition even if his financial offer is comparatively low.

2. In light of the above advice of PPRA it is evident that while the prequalification and evaluation process of the bid documents were in line with the PPRA requirements and transparent in nature. The criteria/bidding documents of Pakistan Engineering Council were used on the basis of which the bids of M/s Heavy Mechanical Complex, Taxila, M/s TRIED China and M/s Muhammad Fahim Haider Lahor were found non responsive.

3. The bid of M/s Al-Fajr International (the second lowest Bidder) was also found responsive and rejected because, the bid of M/s TRIED China was lowest than him and was considered as the reasonable price. The PPRA has ruled that a technically nonresponsive firm is not considered for competition even if his financial offer is comparatively low. In light of this advice it seems that the rejection of bid of M/s Al-Fajr International was not in line with the laid down regulation. The Minister KA&NA/Chairman NAs has opined that the action so taken will result in delay of the execution of the works and create unnecessary controversy and may also result in cost over runs.

4. In view of the above decision of PPRA the decision of the evaluation has been over rules. The firm M/s Al-Fajr International may therefore, be considered as the successful bidder and the case be further processed on an immediate basis under the intimation to this Ministry.

-sd-
(Muhammad Ihtisham Khan)
Secretary”

Intimation letter dated 2nd November 2009, Office of Chief Engineer NA Water and Power Department Gilgit to Al-Fajr International, for grant of contract: -

“No. HW NAHEW/2009-10/611
Government of Pakistan
Office of the Executive Engineer
NAHEW Division W&P Department
Gilgit.

Dated: 2nd November, 2009

To

M/S Al-Fajr International
No.9 Street 29, F-71
Islamabad Pakistan

Subject: **SUPPLY, INSTALLATION COMMISSIONING AND TEST RUNNING
OF TURBO GENERATOR FOR HYDRO POWER PROJECTS IN
GILGIT-BALTISTAN**
(Lot-a & lot-B) (letter of acceptance)

1. It is to inform you that your rebated financial bid for Lot-A & Lot-B for Rs.1486124000/- (Rupees one billion forty eight crore, sixty lac and twenty four thousand only) has been approved by the competent authority on 31-09-2009.
2. You are requested to furnish the following immediately and attend the office of Chief Engineer Water and Power Department Gilgit-Baltistan for signing of contract on 07th November, 2009. The contract of Gilgit Region will be signed by the Chief Engineer Gilgit and contract of Baltistan Region will be signed by Chief Engineer Baltistan Region: -
 - i. Item wise rebated price of T/G Set for each site as per detail given in the bid document, keeping the total amount within the rebated price quoted by you.
 - ii. Copy of agreement drawn between your principal and manufacturers for supply of Turbo-Generators and auxiliaries as per scope of bid for Lot-A & Lot-B.
 - iii. Performance security equal to 10% of the approved bid price or Lot-A & Lot-B separately, in the name of Chief Engineer for Gilgit Region and in the name of Chief Engineer Baltistan Region, on the prescribed form of performance security given in the documents.
3. The contract period will be 2 years with effect from the date of issue of this acceptance letter. It will be appreciated if the completion time is reduced during the signing of contracts without any cost effect, if you want to complete the procurement earlier.
4. You are therefore, requested to attend the office of Chief Engineer Water and Power Department Gilgit for signing of contract on 7th November, 2009 after fulfillment of pre requisites mentioned in para 2 & 3 above.

-sd-
(Engr. Naz Akbar Shah)
Executive Engineer
NAHEW/H-Nagar Division W&P Department
Gilgit"

Application of the petitioner Faheem Haider Pvt. Limited to the Ministry of KA&NA wherein he lodged complaint of misappropriation of funds against the Works Department, Government of Gilgit-Baltistan and for award of Contract: -

"Ref: MFH/A&B/KA&NA/09-1
Dated: 29th December 2009

The Hon'ble Minister,
Kashmir Affairs and Northern Areas
Pak Secretariat, R Block,
Islamabad.

Ref: This office letter to Hon'ble Minister No. MFH/A&B/KA&NA/09 dated 28th August 2009.
This office letter to Prime Minister of Pakistan dated 27th September 2009
This office letter to Hon'ble Minister for KA&NA dated 20th October 2009

Subject: **MIS APPROPRIATION OF FUNDS IN ALLOTMENT OF PROJECT
(SUPPLY INSTALLATION, COMMISSIONING AND TEST
RUNNING OF TURBO GENERATING SETS FOR HYDRO POWER
IN NORTHERN AREAS (TENDER)**

Respected Sir,

We would like to draw your kind attention on the subject work and the letter written to difference forums at times, but no action has been taken so far. We got to know that the negotiations are in process with a company which quoted higher rates than us at the time of opening of bids.

Negotiation with single company which is not lowest is unlawful.

We approach your honour with the request to kindly intervene in the matter and prevail upon the project authorities to handle this matter on just and equitable grounds, stop the procedure which is under way by the department and the tender for the contract may please be awarded to us as we are the lowest amongst all the bidders and our Financial/Technical proposal is responsive and complete in all respect.

Thanking you
Very truly yours
For M. Fahim Haider (Pvt) Ltd.

-sd-
Azeem Haider
Director”

Letter dated 5th January 2010 of the Ministry of KA&NA Division whereby report was called from the Chief Secretary Gilgit, on the complaint of petitioner: -

“No. PC 1.1.2005
Government of Pakistan
Ministry of Kashmir Affairs and Gilgit-Baltistan
Planning and Monitoring Cell

Islamabad 5th January, 2010

Subject: **MIS APPROPRIATION OF FUNDS IN ALLOTMENT OF PROJECT (SUPPLY INSTALLATION, COMMISSIONING AND TEST RUNNING OF TURBO GENERATING SETS FOR HYDRO POWER IN NORTHERN AREAS (TENDER)**

A self explanatory letter No. MFH/A&B/KA&NA/09-1 dated 29th December, 2009 addressed to Minister for Kashmir Affairs and Gilgit-Baltistan with copies inter alia to Secretary Ministry of Kashmir Affairs and Gilgit-Baltistan by M. Fahim Haider (Pvt) Ltd on the the above subject is enclosed.

2. Secretary, Ministry of Kashmir Affairs and Gilgit-Baltistan has desired that a report in the matter may be sent to this Ministry IMMEDIATELY.

-sd-
Muhammad Ashraf Cheema
Chief (P&M)”

Report submitted by the Chief Secretary in reply to the letter dated 5th January 2010 of the Ministry of KA&NA Division: -

“Subject: **MIS-APPROPRIATING OF FUNDS IN ALLOTMENT OF PROJECT (SUPPLY INSTALLATION, COMMISSIONING AND TEST RUNNING OF TURBO GENERATING SETS FOR HYDRO POWER UNITS IN GILGIT-BALTISTAN (TENDER).**

Please refer to the Ministry of KA & GB letter No. PC-1-1-2005 dated 5th Jan, 2010.

Before giving the detailed report of the case it would be better to briefly mention some facts which will amply clarify the position of the bid offered by M.Fahim Haider (Pvt) Ltd, Lahore.

The compliant made by M. Fahim Haider is absolutely false and based on lies as when he failed to get the bid he went to the court of law where his petition was dismissed. M. Fahim Haider has now come with the flimsy pretext that “negotiation with single company which is not lowest is unlawful”.

The fact is that the highest bidder was HMC Textile followed by M. Fahim Haider Lahore while M/S. Al-Fajr International Islamabad was at number (3) three and TRID China was the lowest thus M/S. Al-Fajr International was the second lowest.

The financial proposal of M. Fahim Haider was not according to the conditions and criteria clearly mentioned in the print media and also

displayed on the PPRA,s website. Following defects/flaws were also observed by the Board of Officers.

- i. Amount of bid security/earnest money for lot "A" was less than 2% the required amount.
- ii. Site-Wise pricing was not given as required by the tem and conditions of the tender.
- iii. Quoted rates/amount was also doubtful due to excessive cuttings, over writings and arithmetical mistakes.

It will not be out of place to mention here that soon after opening of all the bids M.Fahim Haider submitted a written request vide his No. MFH-RG-1-09 dated 5th August, 2009 (copy attached) for release of his earnest money. As he knew that his offer was neither the lowest nor as per criteria/conditions already published in newspapers and displayed on PPRA,s website. In short his offer was clearly non responsive and therefore he requested for release of 2% earnest money which was released on 06-08-2009. Detailed report is as under:-

1. Water and Power Department Gilgit-Baltistan initially planed to procure 44 Nos Turbo generators for 27 Nos hydro power projects across Gilgit-Baltistan in two Lots, Lot- "A" for Gilgit region and Lot-"B" for Baltistan region.

The department invited applications for pre-qualifications from reputed firms/contractors/joint ventures vide letter No. E6-9(8)/pre/2008/1776 dated 16th December, 2008 through print media for wide publicity and same was also displayed on PPRA website as per rules and regulations of PPRA. In the advertisement, scope of work, mandatory conditions for short listing & criteria for short listing was also clearly mentioned. In response 13 firms applied for pre-qualifications.

2. The pre-qualification process was carried out through a Board of Officers, constituted by the Secretary Power GB (the then NA) vide letter No. E6-4(182)/2007/285 dated 28th March, 2009, comprising of 6 members from the power department headed by Chief Engineer and 01 member from Planning and Development Department and 01 member from Finance Department Gilgit-Baltistan. The Board of Officers evaluated the documents submitted by the firms as per criteria already given in the advertisement mentioned in Para '1' above and finally short listed the following five firms.

1. Heavy Mechanical Complex Taxila.
2. M/S. Al-Fajr International Islamabad.
3. TRIED (Tianjun Design & Research) in joint venture with Imtiaz Haider Skardu.
4. Muhammad Fahim Haider.
5. Design Engineers Lahore.

3. Pakistan Engineering Council bidding documents were used for calling of tenders on single stage one envelop system of PPRA rule 36(a) wherein all short listed firm/contractors were supposed to submit technical and financial bids separately. The bid was opened on 3rd August, 2009 by a Board of Officers constituted by the competent authority. Out of five short listed firms four (4) firms submitted their technical and financial proposals. The evaluation committee opened the bids on 3rd August, 2009 in presence of members of committee and representatives of the firms. The technical and financial proposals were examined to ascertain their responsiveness. Out of four (4) firms only one firm M/S. Al-Fajr International Islamabad found responsive and the other 3 firms HMC Textile, TRIED China and Muhammad Fahim Haider Lahore became non responsive. The committee recommended to recall the tenders, as the rates of M/S. Al-Fajr International Islamabad were on higher side. The recommendations of the committee were approved by the competent authority which was also endorsed by the Secretary Power.

4. The firm M/S. Al-Fajr International Islamabad has submitted appeal to the Federal Minister for Kashmir Affairs & Gilgit-Baltistan (the then NA), Chairman Gilgit-Baltistan against the decision of the department. The

Minister KA&GB has opined that the action so taken will result in delay of the execution of the works, and create un-necessary controversy, may result in cost over run and moreover the PPRA had clearly mentioned that if bidding procedure were as per PPRA rules then single id can also be considered, therefore has asked to reconsider the case.

The Kashmir Affairs & Gilgit-Baltistan (the then NA) Division referred the case to Public Procurement Regulatory Authority (PPRA) vide DO letter No. PC 1/2005 dated 2nd September, 2009.

Public Procurement Regulator Authority gave a clarification on acceptance of single tender vide their letter No. F. 6(16)/DD-I/PPRA/KA&NA/2009 dated 3rd September, 2009.

In light of the advice of PPRA, KA&GB Division Islamabad took the decision that, the rejection of M/S. Al-Fajr International Islamabad was not in line, with the laid down regulation and over ruled the decision of the department and further directed to process the case considering M/S. Al-Fajr International Islamabad as the successful bidder and conveyed vide KA&GB letter No. PC-I/1/2005 dated 9th September, 2009.

5. Mean time Contractor Association of Gilgit-Baltistan and Muhammad Fahim Haider Lahore filed a writ petition in the Chief Court Gilgit-Baltistan praying that all the bids may be rejected and recall the tenders. On 4th November, 2009 the panel of Chief Court rejected both the appeals on merit.

6. In light of letter of KA&GB and verdict of Chief Court the case was processed. M/S. Al-Fajr International Islamabad has given a considerable rebate and reduced his proce from Rs. 1596123883/- to Rs.1486124000/. The rebated prices has been approved by the principal accounting officer (Chief Secretary Gilgit-Baltistan) and the work awarded to the firm duly completing all the documents including "integrity pact".

Muhammad Fahim Haider Lahore has submitted an appeal in Supreme Appellate Court Gilgit-Baltistan for leave to appeal against the judgment & decree orders and the case is subjudice.

It will not be out of place to mention here that some contractors had tried to get the contract through unfair means but when failed have tried to pressurize and blackmail the department by submitting appeals here and there.

In light of the above mentioned facts, it is clear that the complaint has been based on wrong information and concocted stories it is therefore, requested that such complaints may not be entertained to avoid wastage of time.

(BABAR YAQOOB FATEH MUHAMMAD)
CHIEF SECRETARY GILGIT-BALTISTAN.

MR. MUHAMMAD ASHRAF CHEEMA,
CHIEF PLANNING & MONITORING CELL,
MINISTRY OF KASHMIR AFFAIRS & GILGIT-BALTISTAN,
ISLAMABAD.

U. O. No. So (S)-1-1(10)2008/84 Dated 14-01-2010."

Application of Faheem Haider Pvt. Limited for release of his security furnished in the form of insurance guarantee whereupon the order of release of Bid Security was passed:-

"M. FAHIM HAIDER (PVT) LTD.

Architects, Designers, Engineers and Contractors

Karahci Office:

1-4 Noor Estate Building
Shahrah-e-Faisal
Tel: (042) 4321610

Lahore Office:

2nd Floor, 187 'Y' Block
Commercial Area. D.H.A.
Tel: (042) 5743890-91
Fax: (042) 5743892
E-mail: fahimhaider 48@yahoo.co.pk
5th August, 2009
MEH-RG-1-09.

Executive Engineer
NAHEW Division
Gilgit.

Subject: - **SUPPLY INSTALLATION, COMMISSIONING AND TEST
RUNNING OF TURBO GENERATING SETS FOR HYDRO POWER
IN NORTHERN AREAS (LOT-A & LOT-B)**

Dear Sir

Reference your letter No. EE/HW/2009/486 dated 5th August 2009. It is requested to please release the Bid Security submitted with the tender.

Thanking you

Very truly yours

For M. Fahim Haider

-sd-

Finance Director "

8. The official and private respondents have filed separate concise statements to this petition which are reproduced hereunder: -

"Statement of facts necessitated by incorrect statements and fabricated documents annexed with CPLA No. 35/2009

1. The Water & Power Department invited application from reputed firms/ contractors in 2008, through the print media, displaying the same on the website in Pakistan of Procurement Regulatory Authority (PPRA) as per rules and regulations of PPRA.
In response 13 firms applied for pre-qualification.
2. The pre-qualification process was carried out by Board of Officers and five applicants were pre-qualified namely:-
 1. M/S. Heavy Mechanical Complex Taxila.
 2. M/S. Al-Fajr International Islamabad.
 3. M/S. TRIED China.
 4. M/S. Fahim Haider Lahore.
 5. M/S. Design Engineer Lahore.
3. Each pre-qualified firm/ joint venture was invited to participate in the bidding subject to specified mandatory conditions.
4. The most important requirement of any bid was that the bid should be accompanied by "**2% of quoted amount in the shape of Deposit At Call or Bank Guarantee**" from a scheduled Bank of Pakistan, without which the bid was to be summarily rejected.
5. In the tender Documents 2(a) and (b) Schedule of Prices and Schedule of Prices-Equipment, Erection, Testing and commissioning, it was necessary to fill these forms site/ stations wise.
6. Out of the 5 pre-qualified firms only four submitted Tender Documents:-
 - (a) HMC Taxila quoted the highest price but without a Bid Bond and was rejected, for failure to comply with this mandatory requirement.
 - (b) TRIED of China with a local partner, quoted the lowest price but also without a bid bond and was summarily rejected.
 - (c) The petitioner submitted the second highest bid after HMC. However, the petitioner neither provided a Deposit at Call nor a Bank guarantee but Insurance Bonds and that too of less than the required value. The Bid was therefore to be summarily rejected.
 - (d) The petitioner did not attach the documents annexed with the petition at page 37 to 64 with his bid. **These are fabricated to present them in court. The original bid document submitted by the petitioner in the department can be produced if required.** Forms 2 (a) and 2(b) of the tender documents did not specify the site/station wise price and were thus contrary to the requirement of the Tender Document.
 - (e) The petitioners bid was rejected for the following reasons:-
 - (i) Nonresponsive due to defectives pricing.
 - (ii) Prices of each site were not quoted separately and lump sum prices without giving details were quoted, which can not be evaluated. The quoted rates are also doubtful due to excessive cuttings and there are arithmetical mistakes

in calculation of the rates. The amount of bid security is also less than 2% of the quoted amount which is violative of statutory provision as contained in PEC and Public Procurement Rules 2004 both. The inadequate bid security Bonds, so submitted by the petitioner were withdrawn vide application dated 05-08-2009, which signifies the facts that the petitioner had no objection on the process of bidding ranging from evaluation to rejection.

- (f) Al-Fajr International's bid was the third highest or second lowest. It was responsive in every aspect and fully complied with all the bid requirement. The bid as submitted, was lower than the petitioner's bid by Rs. 3 crores. Although Al-Fajr International's bid could have been accepted on 03-08-2009 and contract awarded to Al-Fajr, however, out of abundant caution, the committee recommended calling for fresh tenders, which recommendation was accepted by the Chief Secretary, Gilgit-Baltistan.
- 7. Al-Fajr International's Islamabad filed a Representation to the Federal Minister for Northern Areas, who under the Self Governance Order 1994 was the Chairman, with powers and functions defined in the parent act as well as the Rules of Business.
- 8. The Chairman NA being of the view that this was important for the Federal Government, called for a detailed examination of the case by the Federal Secretary for Northern Areas.
- 9. **The Primary and only issue was whether a Single Tender could be accepted?**
- 10. Expert opinion and advice was sought from PPRA who vide their opinion dated 03-09-2009 advised as under:-

**"GOVERNMENT OF PAKISTAN
PUBLIC PROCUREMENT REGULATORY AUTHORITY
(CABINET DIVISION)**

Subject: **Clarification on acceptance of Single Tender.**

Reference Kashmir Affairs & Northern Areas Division's D.O. letter No. PC-1/1/2005, dated 2nd September, 2009 on the above subject.

4. There is no restriction under Public Procurement Rules, 2004 on acceptance of a single bid received in response to a tender notice if the same fulfills requirements of the procuring agency translated through qualification as well as evaluation criteria. Public Procurement Rules, 2004 restrict the procuring agencies to accept lowest evaluated bid which as been defined under rule 2(h) of the Public Procurement Rules, 2004 as:

- a. a bid most closely conforming to evaluation criteria and other conditions specified in the bidding document, and
 - b. having lowest evaluated cost,
5. Any bidder which has been declared as technically non-responsive should not be considered for competition even if his financial offer is comparatively lower.

Sd/-
Muhammad Saleemullah
Director-1
Ph: 9203542"

- 11. On receipt of this advice, the chairman Northern Areas taking into account the inevitable delay in supply of electricity, the inevitable rise in costs, the right of Al-Fajr International, who have a vast experience in the Gilgit-Baltistan, directed to finalize the matter with Al-Fajr International Islamabad.
- 12. The bid price was further reduced by Al-Fajr International giving a rebate of Rs. 110.000 million and contract executed on 07-11-2009.

13. The Department and Gilgit-Baltistan Administration had previously responded in detail to PPRA through its parent Ministry vide their letter No. SO (S)-1-1(10) 2008/84 dated 14-01-2010.
14. The entire process was transparent and decision taken on merits. Mobilization Advance, Guarantee have been received and Mobilization advance released in part. The petitioner is trying to unravel an ongoing contract reached after great delay, whose completion in time is vital for the people of the area.
15. The petitioner has previously been unsuccessful in 2005 for a similar project, which was also won by Al-Fajr. The petitioner even then, as now raised hue and cry.
16. That the writ petition has rightly been dismissed as the same was not maintainable for availability of alternate remedy.
17. That the petitioner has concealed material facts from the court, hence the writ was not maintainable.
18. That after withdrawal of bid security on his own application, the petitioner has lost locus standi.

Dated 14th May 2010

-sd-
 Chief Engineer
 Water & Power Department
 Gilgit-Baltistan

-sd-
 Secretary
 Water & Power Department
 Gilgit-Baltistan

-sd-
 Advocate General
 Gilgit-Baltistan”

9. The concise statement of respondent No. 8 is as under: -

“CONCISE STATEMENT ON BEHALF OF RESPONDENT NO.8, AL FAJR INTERNATIONAL

The Respondent most respectfully submits in reply to the main petition.

Preliminary Objections: THAT

1. The petitioner M/s. M. Fahim Haider (Pvt) Limited is not an aggrieved person in the matter for the reason that the bid submitted by the petitioner was totally and absolutely unresponsive, as the petitioner though pre-qualified, had miserably failed to comply with the mandatory requirements/ conditions for participating in the bidding for the supply, installation, commissioning and test and running of turbo Generators Sets for Hydro Power Projects in NA and his bid had to be summarily rejected.
2. The documents at pages 37 to 64 were not submitted along with the bid and have been fabricated later.
3. This honourable Court has been pleased to issue notice no the incorrect assertion by the petitioner that “the Chief Engineer having found none of bids responsive”.

Thirteen firms applied for pre-qualification, out of which five (5) were pre-qualified and four (4) of them submitted bids.

Three (3) including the petitioner's bid, out of the four (4) bids, were found to be un-responsive. Respondent No. 8's bid was the only bid, which was found to be technically and financially fully responsive. It had to be accepted on 3.2.2009, but was erroneously ignored.

4. The petitioner has falsely asserted that the petitioner had quoted the lowest rates and respondent No.8's had “quoted the highest rates”. Respondent No.8 was lower than the unresponsive bid of the petitioner by Rs.30 million.
5. The petitioner has deliberately / willfully concealed and withheld material documents from this honourable court.

6. The petitioner having failed in the participatory process of bidding, is trying to sabotage a public project, that would provide electricity to the people of Gilgit / Basltistan, a process that commenced in 2008, culminating in award of the contract to Respondent No.8 on 2.11.2009.
7. The Gilgit/ Baltistan Contractors Association (Regd,) having filed WP No.54/2009 on 29.9.2009, the petitioner filed in the High Court by the petitioner on 4.11.2009 was also hit by laches, in the circumstances.
8. The public interest project of providing electricity in the shortest possible time will be severely jeopardized by any further delay and will most certainly lead to huge cost increase, in view of the falling value of the Rupee and the rising value of the Chinese Yuan.
9. The parties and in particular, Respondent No.8 have taken irreversible steps in the matter by:
 - (a) Arranging for and submitting Performance Guarantee for Rs. Hundred and fifty Million.
 - (b) Advance Payment Guarantee for Rupees four Hundred and fifty Million.
 - (c) Firm contracts executed with equipment suppliers from China, creating corresponding rights and heavy liabilities.
 - (d) Receipt of Post mobilization Advance in part.
10. The petitioner has been granted the complete relief at the ad-interim stage through order dated 27.4.2010.
11. The petitioner has not challenged the award of contract which wasexecuted by the Respondent No.8 after the price was further lowered by 11 crores Rupees in negotiations carried out by the Chief Secretary, gilgit-Baltistan and Secretary Water & Power, GB and has limited himself to an earlier situation, rendering his petition incompetent.
12. The petitioner having taken back even the inadequate and non-compliant insurance bond on 5.8.2009, had / has thereafter, no locus standi in the matter.
13. Under the Northern Areas Governance Order, the Federal Minister for Kashmir affairs and Northern Areas was the Chairman of Northern Areas and the head of the Government. Appeal by Respondent No.8 was therefore properly filed to the Chairman, northern Areas and the Head of the Government and the one to whom the Representation could be addressed. The petitioner had also addressed an appeal / representation to the Chairman NA, being the only competent authority, as being the government, having the power to call for any case and give orders through the Secretary. This position emanates from Northern Areas Rules of Business and Northern Areas Self Governance Order 1994.
14. The Petitioner has attempted to give an impression that the Chairman, Northern Area immediately accepted the representation of Respondent No.8 which is far from the truth.
 - (i) On the Representation of Respondent No. 8 dated 7.8.2009, Chairman Northern Areas, taking notice of the continuous delay and costs rise, sought further details from Secretary KA and NA.
 - (ii) The Secretary KA & NA sought report and opinion on the Acceptance of Single Tender which qualified in all respects vide his memo dated 2.9.2009, which was responded to. The Public Procurement Regulatory Authority is the only body with the expertise to advise on the matter.
 - (iii) In the light of the response, the Chairman NA made the decision communicated on 9.9.2009, which was strictly on merit and in the larger public interest.
 - (iv) Detailed negotiations were thereafter held on the price with Chief Secretary, GB and Secretary Water & Power, GB and the price was reduced by Rs. 110 million by Respondent No.8.
 - (v) The contract was awarded to Respondent No.8 on 2.11.2009.
15. An entirely new case is sought to be set up before the Supreme Appellate Court.
16. The petitioner has not challenged the order of acceptance of the Respondent's bid or the award of contract, either before the Chief Court of before this honourable Appellate Court.
17. Respondent No.8 has a vast experience of working in the Northern areas since 1984, while the petitioner has none.

Nearly 60% of the Power Projects installed in the Northern Areas, have been done directly or indirectly be Respondent No.8 These projects number more than 33 and machinery / equipment / turbo generators installed number more than 59.

In contrast, the petitioner has zero experience in the area and also lost a major contract in NA to Respondent No. 8 in the year 2005.

The petitioner's sole effort is to stall the execution of a project, for which his bid was summarily and correctly rejected.

On Merits:

- Para 1. The overall superintendence and control over projects and public works remained with the Chairman, Northern Areas.
- Para 2. The participation in the bidding by any pre-qualified party, was subject to compliance with the mandatory conditions duly communicated, which were violated by the petitioner.
- Para 3. The bids submitted by the petitioner did not comply with the mandatory requirements and constituted a non-responsive bid, meriting summary rejection. The petitioner attempted to correct the bids after the bids were opened (not before) and accepted that they were not in conformity and took back the insurance bonds in 5.8.2009.
- Para 4. M/s TRIED gave the lowest bid but without a Bid Bond. The fourth bid of Respondent No. 8 was not accepted because the rates were high. Hut under the erroneous assumption that a Single Tender could not be accepted.
- Para 5. Respondent No. made the Representation to the Federal Minister for Kashmir Affairs and Gilgit-Baltistan in his capacity as Chairman NA in terms of the Northern Areas Governance Order 1994, under which the Chairman NA was head of the Government.
- Para 6&7 The Public Procurement and Regulatory Authority (PPRA) is the only statutory authority capable and competent to advise on the matter. The relevant documents though available have been withheld.
- Para 8. The letter dated 9.9.2009 issued by the Federal Secretary was preceded by advice, opinion and detailed discussions, including with the Chief Secretary, NA Gilgit.
- Para 9. The petitioner's bid was palpably unresponsive, while the non-award of the contract to Respondent no.8 on 3.8.2009 was under an erroneous assumption.

The petitioner has failed to challenge the execution of contract with and by Respondent No.8

GROUND:

1. The Chairman NA was the Head of the Government to whom a representation was also addressed by the petitioner on 23.10.2009, The non—award to Respondent No.8 was in fact a non-compliance with the Public Procurement Principles and Rules.
2. The petitioner had no locus standi after his bid was found to be non-responsive. This was established in his presence on 3.8.2009.
3. The decision to re-advertise was wrong and against the public interest. It would have led to great delay in providing electricity and huge costs overrun. This wrong was corrected after due deliberation by the head of the government.
4. The bid the petitioner was non-compliant and non-responsive, which was admitted publicly by him on 3.8.2009.
5. There was no ambiguity in concluding that the petitioner's bid was non-compliant and non-responsive.
6. This non-compliance and non-responsiveness of the bid was floating on the surface and required no detailed analysis. Even the non-responsive bid was higher by Rs.30 million as compared to the bid of Respondent No.8.
7. The petitioner seeks a fishing / roving enquiry about facts already established.
8. The miscalculation argument is an after thought. There was no motive to favour anybody. In fact the Evaluation Committee proceeded on an incorrect assumption, by not awarding the contract to Respondent No.8 on 3.8.2009.
9. The petitioner neither submitted Deposit a Call nor a Bank Guarantee. Insurance bonds were rightly rejected as the petitioner took them back on 5.8.2009.
10. The petitioner's documents attached with the petition are different from the ones attached with bid.

It therefore prayed that the petition be dismissed with the costs.”

10. The Writ Petition was dismissed by the Chief Court on short ground that writ petitioner without availing the remedy of complaint before the Procuring Agency in terms of Rule 48 of Public Procurement Rules 2004 could not invoke the writ jurisdiction of Chief Court in the

matter and that an unsuccessful bidder would have no cause of action to challenge the order of Secretary and also had no locus standi to file the Writ Petition.

11. Mr. Muhammad Ibrahim Satti Sr. Advocate, Supreme Court of Pakistan learned counsel for the petitioner in support of this petition has raised the following contentions in his address before the court.

- a. The petitioner and respondent No. 8 both indirectly availed the remedy of complaint before Procuring Agency against the rejection of their bid, under Rule 48 of Public Procurement Rules 2004 by filing representations before the Chairman Northern Areas, but the Secretary KA&NA without notice to the petitioner passed an expte order in the representation of respondent adverse to the interest of petitioner, therefore, the dismissal of writ petition by the Chief Court on the ground that the remedy of complaint was not availed was improper exercise of writ Jurisdiction.
- b. The order of the Secretary KA&NA Division by virtue of which the Order of Bidding Committee of the Department, for recall of tender was set aside, was mala fide and having been passed for extraneous consideration in utter disregard to the principle of natural justice was without lawful authority. The element of direct or indirect undue favour or personal interest is considered extraneous consideration which would make the order mala fide.
- c. The Secretary KA&NA Division passed the order on 09.09.2009 and on the same date Gilgit-Baltistan

(Empowerment and Self Governance) Order 2009 was enforced by virtue of which Prime Minister of Pakistan was substituted as Chairman Northern Areas and Minister for KA&NA ceased to be the chairman Northern Areas, therefore, without the approval of Prime Minister of Pakistan, the order of Secretary KA&NA Division on the representation of respondent No. 8 would be without lawful authority and of no legal effect.

- d. The representation filed by the petitioner before the Minister/Chairman Northern Areas was not attended with the representation of respondent No. 8 rather it was rejected without providing an opportunity of hearing to the petitioner and he was condemned unheard in utter disregard to the principle of natural justice, consequently, the order passed by the Secretary KA&NA Division behind the back of petitioner was not sustainable in law.
- e. The Chief Court while dismissing the writ petition on technical grounds has not exercised the jurisdiction in proper manner and order of the Chief Court being suffering from jurisdictional error would be deemed to have been passed without lawful authority.
- f. The cognizance of the matter taken by the Chairman Northern Areas and Secretary KA&NA Division was mala fide with extraneous consideration and Order of Secretary KA&NA Division was not in public interest rather it was motivated to extend undue favour to respondent No. 8 at the

instance of Minister for KA&NA which was unfair and unjust in Law.

- g. The discretion exercised by the Secretary KA&NA Division being contrary to the spirit of law would seriously reflect upon his bona fide whereas, Chief Court dismissed the Writ Petition in undue haste on technical grounds without considering the case on merits which was also not proper exercise of discretionary jurisdiction.
- h. That the manner in which the order was passed would evidently suggest that the matter was not dealt with fairly and in transparent manner, therefore, even if the order passed by the Secretary was not suffering from any jurisdictional defect, the same being not transparent would be deemed to have been tainted with mala fide and void in law.
- i. The decision of a public authority in administrative discretion involving rights of individuals has the character of quasi judicial decision and if such a decision is made in departure to the normal judicial procedure, it would not be considered a legal decision.

12. The learned Counsel in support of his arguments has placed reliance on Messrs Ramna Pipe and General Mills (Pvt.) Limited Versus Messrs Sui Northern Gas Pipe Lines (Pvt.) and others (2004 SCMR 1274), Airport Support Services v. Airport Manager (1998 SCMR 2268), Ibrahim Shamsi v. Bashir Ahmed (2005 SCMR 1450), Federation of Pakistan v. Saeed Ahmed Khan (PLD 1974 SC 151),

Yousaf Ali v. Muhammad Aslam Zia (PLD 1958 SC 104) and Nawabzada Muhammad Mir Khan v. The Controller of Estate Duty (PLD 1961 SC 119).

13. Mr. Naeem Bukhari Senior Advocate Supreme Court of Pakistan and learned counsel for the respondent No. 8 at the first instance raising objection to the maintainability of Writ Petition before the Chief Court has contended that the writ petition was filed subsequent to the award of contract to respondent No. 8 and petitioner suppressing the material fact regarding the award of contract has mislead the court to believe that the order passed by the Secretary KA&NA Division has not yet taken effect and having not come to the court with clean hands would not be entitled to any discretionary relief either in the writ petition or in the present petition.

14. The next objection of learned counsel is that as per direction contained in letter dated 24-06-2009 the qualified bidders were required to furnish Bank guarantee or deposit call slip for participation in the bid, whereas, the petitioner instead of furnishing Bank guarantee or deposit slip, which was a mandatory condition for participation in the bid provided insurance guarantee and having not fulfilled the essential pre-requisite for participation in bid would have no right to claim evaluation of his bid for the purpose of competition. The bid of petitioner was rejected as non-responsive for more than one reasons and immediately on rejection of bid, he got released the insurance Guarantee and waived the right of further contest, therefore he would have no legal claim for adjudication before any departmental or judicial forum and consequently, no exception would be taken to the order of

Secretary KA&NA Division and the order of dismissal of Writ Petition by the Chief Court.

The contention of the learned counsel on merits of the case are as under: -

a. The financially and technically responsive bid of respondent was rejected for the consideration firstly, that bid was non competitive and secondly it was not lowest, whereas both these reasons have no substance. The law would not permit rejection of single responsive bid for mere reason that it was noncompetitive or that it was not lowest in comparison to non responsive bids. The administrative decision of Chairman Departmental Bidding Committee being wrong and arbitrary was questioned by the respondent by way of filing a representation before the Chairman Northern Areas for interference in the matter in exercise of the power conferred on him under Article 3 of Northern Areas Governance Order 1994 read with Rule 5 of the Rules of Business of Provincial Government of Gilgit-Baltistan 2007 and the same was ultimately disposed of as a complaint under Rule 48 of Public Procurement Rules, 2004.

b. That no illegality was committed by the Chairman Northern Areas and Secretary KA&NA in taking cognizance of the matter or any procedural or substantial error of law in the subsequent proceeding to suggest any element of malice or bad faith. The perusal of the representation of the petitioner before the Chairman Northern Areas would show

that he having acknowledged the fairness and integrity of the Minister for KA&NA/Chairman Northern Areas sought his interference in the matter and neither in the Writ Petition nor in the present petition pleaded malice or any personal interest of Chairman Northern Areas instead the learned counsel for the petitioner during the course of argument before this court attributing unfounded allegation of undue favour and personal interest has made an attempt to create an impression of mala fide with the assertion that order was motivated for extraneous consideration.

c. That mala fide is a question of fact which is required to be specifically proved through the evidence and cannot be presumed merely on the basis of general allegation in absence of any evidence direct or circumstantial, therefore, mere oral assertion of malice in law or fact or personal interest would not make the order of a public authority mala fide.

d. The presumption of regularity is attached with the official acts and business and unless this initial presumption is rebutted through the reliable evidence, the law would not permit for raising of a contrary presumption of unfairness, unjust and mala fide on the basis of general allegation.

15. In reply to the question relating to the violation of principle of natural justice and audi alterum patrem, learned counsel argued that right of hearing is not recognized without any legal right and an unsuccessful bidder would have no legal right to claim right of hearing

before a quasi judicial or judicial forum and resist the claim of successful bidder. He added that since order passed by the Secretary was not prejudicial to the interest of petitioner in respect of any of his legal right, therefore he was not an aggrieved person either in the proceedings before the Secretary KA&NA or in the Writ Petition rather he being a stranger in the proceedings before the Secretary KA&NA could not claim right of hearing in the representation of Respondent No. 8 and having not been able to offer a responsive bid would have no legitimate right to raise any objection to the acceptance of responsive bid of respondent for grant of contract. In support of the above contentions learned counsel has placed reliance on Arsalla Khan v. Bashir Ahmed (PLD 1976 SC 586), Ramna Pipe and General Mills v. Sui Northern Gas Pipe Lines (2004 SCMR 1274), Pakistan State Oil Company v. Muhammad Naqi (2001 SCMR 1150), Ittehad Cargo Service v. Syed Tasneem Hussain Naqvi (PLD 2001 SC 116), Petrosin Corporation v. Oil and Gas Development Company (2010 SCMR 306), Kay Bee International Pvt. Ltd. Islamabad through Managing Director v. Secretary to the Government of Punjab, Industries and Mineral Development Department (PLD 2005 SC 1074), Petrosin Corporation Pvt. Ltd. and Others v. MOL Pakistan Oil and Gas Co. and others (PLD 2008 SC 472) and Afzal Motors Company Pvt. Ltd v. Province of Sindh and others (2009 CLD 798).

16. While dealing with the question of legal rights of the petitioner in the matter in hand learned counsel contented that in an public auction an unsuccessful bidder would have no right to question the acceptance of bid of successful bidder in equitable jurisdiction before the administrative authorities or the Courts of law and mere reason that

recommendation of bidding committee in respect of recall of tenders was not contrary to the law would not create a legal right to claim re-auction for the benefit of an unsuccessful bidder to be enforced at law by way of a remedy of Writ Petition in equitable jurisdiction. The contention of the learned Counsel that in the present case there is no direct or circumstantial evidence to raise a presumption of mala fide and mere fact that the cognizance of the matter was taken by the Secretary on the instruction of Minister would not make the order of the Secretary unfair, unjust and unreasonable in law.

17. The learned Advocate General Gilgit-Baltistan with reference to the comments filed on behalf of respondent No. 2 to 7 has contended that the Chairman Northern Areas being controlling authority of Northern Areas under Northern Areas Governance Order, 1994 was competent to entertain the representation of respondent No. 8 and examine the matter to ascertain the legality or otherwise of the order of Chairman Bidding Committee of department in the public interest and that Secretary KA&NA Division being head of administrative Division/Procuring Agency of the Federal Government was competent to deal with the matter under Public Procurement Rules, 2004 and pass appropriate order in public interest.

18. The learned Advocate General argued that writ jurisdiction of Chief Court cannot be ordinarily invoked in the matters of public auctions or contracts, unless it is shown on record that the required standard of transparency was lacking in the transaction whereas in the present case no element of mala fide, undue influence or unfairness has been brought on record to plead that order passed by the Secretary KA&NA Division was not transparent.

19. The contract was awarded to respondent No. 8 on the basis of Order of Secretary KA&NA Division before filing of the Writ Petition and on his furnishing security with performance guarantee work order has also been issued to him with mobilization advance and since the order of Secretary KA&NA Division has already been implemented and given effect, which has created valuable rights in favour of respondent No. 8 therefore reversal of the said order at this stage would result in cancellation of contract with the consequence of heavy financial loss and damage to the Government.

20. That in pursuance of the order of Secretary KA&NA Division the bidding committee of department having negotiated with the respondent No. 8 for reduction of bid money got the same reduced almost equal to the lowest bid which was much below to the bid of petitioner, as a result of which the difference of responsive bid of respondent and nonresponsive bids if any stood removed, therefore, the contention that in consequence to the grant of contract to respondent No. 8, financial loss would be caused to the exchequer was baseless. Learned Advocate General urged that recall of tender in the given facts would not only cause delay in the project but also would amount to protect the interest of petitioner at the cost of extra burden on the exchequer on account of increase in the prices and cost of project which is not in the public interest.

21. The Chief Engineer Water and Power Department, Government of Gilgit-Baltistan present in Court has stated that the transaction was quite fair and transparent and since the bid of M/s Al-Fajr International (respondent No. 8) was rejected for irrelevant consideration in law, the Secretary KA&NA Division was fully justified

to accept his representation and further recall of the bid tender would not only increase the cost of project but would also cause delay in the project which was not in public interest.

22. We having heard the learned counsel for the parties, have considered their respective contention in the light of the facts of the case and law on the subject. The Writ Petition was dismissed by the Chief Court for the reasons firstly, that petitioner having not been able to fulfill prerequisite of providing bank guarantee or deposit slip which was an essential condition for participation in the bid would have no right to contest the matter before the Secretary or locus standi to challenge the order of Secretary before the Chief Court and secondly, the petitioner having withdrawn the insurance guarantee provided by him as substitute of bank guarantee immediately on rejection of his bid by the bidding committee would have no right to raise any claim in the matter either before Procuring Agency or before the courts of law.

23. This may not be incorrect to say in the normal cases that after withdrawal of the earnest money or bid security a participant of the auction may have no locus standi to claim any right in public auction and also may not be able to challenge the auction in the extra ordinary writ jurisdiction but notwithstanding the general rule and technical objection the court may entertain a petition in public interest and we without taking any exception to the well settled principle of law and the observation made by the Supreme Court of Pakistan in Kay Bee International (Pvt) Ltd, Islamabad v. Secretary to the Government of Punjab, Industries and Mineral Development Department, Lahore (PLD 2002 SC 1074) that ordinarily writ jurisdiction is not invokeable in the

cases of public auctions and contracts involving contractual obligation and an unsuccessful bidder may have no legitimate right to call interference of court in discretionary jurisdiction hold that the principle of locus standi is not strictly applicable in the cases of public importance and even a stranger can invoke the jurisdiction of court in such cases. Learned counsel for the parties have also conceded that in a case of public importance, the court may ignore the technical objections and interfere in a matter in which decision was made adverse to the public interest or in an unfair, unreasonable or unjust manner.

24. There is no cavil to the proposition that the question of locus standi is a material question for determining the right of a person to challenge the order in a writ petition but this is a settled proposition that in case of an adverse order even a person who is not party in the proceedings can invoke jurisdiction of the court and this court in exercise of extraordinary power of judicial review under Article 61 of Gilgit-Baltistan (Empowerment and Self Governance) Order 2009 may not give any importance to the question of locus standi in such cases of public importance. The Supreme Court of Pakistan in a number of cases observed that in a case of public and national importance or in a case involving the question relating to the enforcement of Fundamental rights of the people, the objection of locus standi is of no significance and we hold accordingly.

25. The objection relating to the maintainability of the writ petition in the present case is also not well founded in the light of the settled law that in the cases of public importance the jurisdiction of the court can be invoked by any person in public interest. The Supreme Court of

Pakistan in Benazir Bhutto's Case (PLD 1988 SC 416) held that in a matter of public importance relating to the enforcement of fundamental right, the technical objection regarding maintainability of a constitution petition before the Court is not entertainable. Therefore, the dismissal of writ petition by the Chief Court on technical ground was not proper as the matter involving important questions of law would require decision on merits in the interest of substantial justice.

26. After hearing the learned counsel for the parties and examined the documents placed on record with their assistance, we in view of the importance of questions of law and facts involved in this matter, without going into the technicalities of law would like to examine the legality of the order of Secretary KA&NA in the light of settled principle of law that a decision taken or order passed by the public functionaries if lacked procedural or substantive transparency or is found tainted with the element of mala fide, unfair, unjust or is based on unreasonable consideration or is the result of improper exercise of discretion vested in a public authority or is found adverse to the public interest is not immune from the judicial scrutiny of the Courts.

27. Before proceeding further, we would like to discuss the question relating the right of hearing before the executive authorities in such matters in the light of principle of natural justice.

28. This is settled law that if an order adverse to the right of a person is passed by an authority, behind his back and without notice, the order being violative of principle of natural justice, would not be sustainable in law. The principle of natural justice and rule of audi alteram patrem is universal principle of law which must be followed by all judicial, quasi judicial and by administrative authorities in the

matters which involves rights of others but the principle of natural justice may not be invariably applicable in all matters before the administrative authorities and public functionaries without infringement of a legal right of a person.

29. The principle of natural justice is that if an order adverse to the right of a person is passed in his absence, the same would be considered to have been passed in violation of principle of natural justice, but if a decision is made without any adverse interest or causing prejudice to any legal or substantive right of any person he may have no right of hearing in the light of principle of natural justice. In the present case, the petitioner claimed right of hearing without any substantive right rather he being interested in fresh bid in terms of order of bidding committee contested the legitimate claim of respondent for grant of contract. The petitioner having offered a nonresponsive bid would have no right of contract and also would not be considered an aggrieved person but he having the interest to participate in the re-auction, may have right to defend the order of recall of bid tender. Therefore, the proposition for consideration would be whether the petitioner has any substantial right arising out of the order of Bidding Committee enforceable at law which has been infringed by Order of Secretary KA&NA under challenge.

30. The bid is an invitation to offer and unless it is finally accepted or rejected by the competent authority no right enforceable at law is created in favour of any bidder and an unsuccessful bidder may have no right to claim re-auction unless the order of acceptance of a bid in the public auction passed by an executive or administrative authority is declared illegal. The law is that if an order of acceptance of bid in public

contract is blended with mala fide, unfair, unjust, arbitrary exercise of power or lack of transparency in the transaction may not create any legal right in favour of a successful bidder. The public procurement contracts of Federal Government of Pakistan are governed by PPRA law and Gilgit-Baltistanis is under administrative control of Federal government, therefore, no exception can be taken to this special law for procurement contracts of Government of Gilgit-Baltistan. This being so, the legality of the order of Bidding Committee and the Order of Secretary KA&NA Division would require examination in the light of the provision of the PPRA Ordinance and the Rules framed thereunder.

31. The administrative law is part of constitutional law which relates to the administration of the affairs of state and subject to the control of judicial authorities of abuse or access of exercise of discretion in the matter involving public right the administrative authorities are independent in their functions within the scope of their power and jurisdiction under the law. The administrative authorities cannot act in departure to the policy of law and also have no absolute prerogative to act and exercise administrative power in violation of the civil rights of the people rather these authorities are required to exercise the power in strict observance of law to accomplish their duty. The administrative power and quasi judicial power with the public authorities is differentiated on the basis of the nature of power conferred on a person and frame work of law under which such power is conferred as well as the manner of exercise of power and the consequential order passed in a matter. In the civilized societies all organs of the state are supposed to be regulated and controlled by rule of law and concept of rule of law may loose its vitality if the state functionaries are not charged with the

duty of discharging their functions in a fair and just manner showing that administrative actions were taken justly and fairly which were not arbitrary and capricious. The dividing line of administrative and quasi judicial power is that in quasi judicial decisions the procedural formalities of law are considered inherent for exercise of power and these formalities are almost merely facilities of law which may have no substantive effect on the ultimate decision but violation of these procedural formalities may create doubt in respect of the transparency of the decision and consequently we conclude that an executive authority while exercising administrative powers under statutory law or exercising the quasi judicial power is required to pass an order in respect of the rights of a person in judicious manner so that not only the rule of propriety but also the principle of natural justice is not in any manner offended. Notwithstanding the fact that petitioner had no vested right to resist the claim of respondent, he would be entitled to the right of hearing in the application filed by him in the matter to satisfy the requirement of natural justice which is read as part of every statute and grant of such right to the petitioner would have no other effect except that in case of rejection of representation of respondent No. 8 he would have a right to participate in re-auction subject to the fulfillment of mandatory conditions. In strict sense the respondent had an ascertainable claim with an enforceable right under the administrative law, whereas the claim of petitioner in respect of his non responsive bid or participation in re-auction on rejection of representation of respondent No. 8 was not a remedial right or a superior right in law to be enforced in preference to the right of respondent, still the principle of natural justice would demand that the

petitioner who was also in competition for grant of contract, should have been provided fair chance of hearing in support of his claim.

32. This is right of a person subject to the fulfillment of required qualification to participate in the public auction and in case of illegal or arbitrary rejection of his bid, he may avail the legal remedy for redressal of his grievance in accordance with law. The petitioner and respondent No. 8 to 10 participating in the public auction for the contract of "Supply of Turbines for Hydro Power Project in Gilgit-Baltistan" offered bids and Bidding Committee of the Water and Power Department, Government of Gilgit-Baltistan on opening of the bids having found the bid offered by Al-Fajr International responsive and all other bids including the bid of petitioner nonresponsive recommended for rejection of all bids with observation that no doubt the bid of respondent No. 8 was responsive but it was not only noncompetitive but was also not lowest, therefore bid tender may be recalled. The respondent No. 8 being aggrieved of the order of rejection of his bid instead of filing a complaints under Rule 48 of the Public Procurement Rules, 2004 before the Procuring Agency or directly approaching the court filed a representations before the Minister for KA&NA/Chairman Northern Areas for interference whereas petitioner also filed a similar representation and both these representations would demand to have been disposed of by virtue of the order dated 09.09.2009 passed by Secretary KA&NA Division, Government of Pakistan.

33. The contention of the learned counsel for the petitioner that the Secretary KA&NA Division without attending the representation filed by the petitioner to the Chairman Northern Areas or giving any notice in the said representation passed a unilateral order in favour of

respondent No. 8 behind his back in colorful exercise of the power without considering the most fair and reasonable recommendation of departmental committee for recall of tenders which was, if not passed by the competent authority or with the approval of Procuring Agency still it would not be liable to be interfered by the Secretary in his discretion has no substance. This is to be seen that the Secretary exercising the power of competent authority of Procuring Agency while proceeding under Public Procurement Rules, 2004 taking care of proportionality in exercise of discretion for rejecting or accepting the bid of respondent No. 8 was conscious of the importance of the matter and consequently while exercising discretionary jurisdiction passed the order on the basis of opinion of PPRA strictly in accordance with law. The detail scrutiny of facts and circumstances of the case in the light of law on the subject, would not show any substantive right of the petitioner which has been adversely effected by reason of passing the order under challenge behind his back. This is noticeable that respondent No. 8 was also not provided personal hearing and his representation was decided in his absence. Be that as it may the grievance of the petitioner has been redressed in the subsequent proceedings before the Chief Court and this court in this petition in which he has been heard at length on all issues. It appears from the order of the Secretary that no notice of hearing was given to any party and order was passed as his administrative function on the basis of the opinion of PPRA which has the exclusive jurisdiction to deal with such cases and the opinion of PPRA having binding force for the Procuring Agencies would have been given preference over the views of Bidding Committee, therefore, the order of Secretary would not be suffering

from any legal defect calling for interference of the courts and mere fact that notice was not given to the petitioner in the matter would not be a sufficient reason or substantial defect to declare the order invalid.

34. In the light of the facts in the background, the essential question requiring determination in the present petition would be whether Chairman Northern Areas and Secretary KA&NA Division were legally competent to exercise the administrative power and decide the matter and whether the order was not passed in good faith and public interest.

35. The main emphasize of learned counsel for petitioner was that notwithstanding the presumption of regularity and correctness attracted with official record and the proceedings, the manner in which the representation was entertained by the Chairman Northern Areas and was dealt with by the Secretary KA&NA Division, the element of unfairness, malice and impairment of public interest would not be excluded, therefore, no legal cover can be given to the order of Secretary. There can be no exception to the settled principle of law that in the cases of public interest if an element of partiality or undue favour or a slight substantial irregularity is found on record which may create doubt in the mind of a common man regarding the transparency of the transaction, the Court may not hesitate to interfere in the matter. Learned counsel however conceded that mala fide is a question of fact or mixed question of law and fact which must be specifically proved and without any evidence in support thereof no presumption of mala fide of fact can be raised, but at the same time asserted that presumption of mala fide as a mix question of law and fact can be raised on the basis of the attending circumstance and in the present case even if the bidding committee of department of Provincial Government was not competent

to accept or reject the bid, the recommendation for the recall of the tenders being quite fair and in accordance with the law were not ignorable, therefore the interference of the Secretary KA&NA Division in the matter at the instance of Minister for KA&NA would evidently suggest the element of personal interest and undue favour and notwithstanding the fact that order of Secretary was not suffering from any procedural error or substantial defect, the same being not a fair order would have no legal value and this court in exercise of the power of judicial review may declare the order as illegal.

36. The question of law and mixed question of law and facts raised in this petition since require examination in the light of provisions of PPRA Ordinance 2002 and Rules framed thereunder, therefore we consider it proper to reproduce the relevant provisions of the Ordinance and the Rules for better appreciation of the propositions raised in the present petition. The PPRA Ordinance 2002 was promulgated for procurement of goods and services in the public sector and under Section 2 (e) of the Ordinance goods have been defined as under: -

“(e) “goods” means articles and objects of every kind and description including raw materials, products, equipment, machinery, spares and commodities in any form and includes services incidental to installation, transport, maintenance and similar obligations related to the supply of goods if the value of these services does not exceed the value of such goods;”

Misprocurement is defined in clause (h) of Section 2 as under:-

“(h) “misprocurement” means public procurement in contravention of any provision of this Ordinance, any rules, regulations, orders or instructions made there under or any other law in respect of, or relating to, public procurement;”

The Procuring Agency has been defined under clause (j) in the following manner:-

“(j) “procuring agency” means-

- i. any Ministry, Division, Department or any Office of the Federal Government;

- ii. ii. any authority, corporation, body or organization established by or under a Federal law or which is owned or controlled by the Federal Government;”

Section 4 of the Ordinance empowers the Federal Government to issue directions as under: -

“4. Power of the Federal Government to issue directives

The Federal Government may, as and when it considers necessary, issue directives to the Authority on matters of policy, and such directives shall be binding on the Authority”.

The function to be performed by Public Procurement Regularity Authority and authority to be exercised by the board constituted thereunder is provided as under: -

“5. Functions and powers of the Authority.-

- (1) Subject to other provisions of this Ordinance, the authority may take such measures and exercise such powers as may be necessary for improving governance, management, transparency, accountability and quality of public procurement of goods, services and works in the public sector.
- (2) Without prejudice to the generality of the powers conferred by sub-section (1), the Authority may
 - (a) monitor application of the laws, rules, regulations, policies and procedures in respect of, or relating to, procurement;
 - (b) monitor the implementation of and evaluate laws, rules, regulations, policies and procedures in respect of, or relating to, inspection or quality of goods, services and
 - (c) recommend to the Federal Government revisions in or formulation of new laws, rules and policies in respect of or related to public procurement;
 - (d) make regulations and lay down codes of ethics and procedures for public procurement, inspection or quality of goods, services and works;
 - (e) monitor public procurement practices and make recommendations to improve governance, transparency, accountability and quality of public procurement;
 - (f) monitor overall performance of procuring agencies and make recommendations for improvements in their institutional set up;
 - (g) provide and coordinate assistance to procuring agencies for developing and improving their institutional framework and public procurement activities;
 - (h) submit reports to the Government in respect of public procurement activities of procuring agencies;
 - (i) call any functionary of procuring agencies to provide assistance in its functions and call for any information from such agencies in pursuance of its objectives and functions;
 - (j) perform any other function assigned to it by the Federal Government or that is incidental or consequential to any of the aforesaid functions.

The Authority under Section 20 may delegate its powers and function to the Managing Director or one or more Members or its officers as under: -

“20. Delegation

The Authority may, by such conditions and limitations as it may deem fit to impose, delegate any of its functions or powers to the Managing Director, or one or more members or any of its officers except the power to-

- (a) approve audited accounts;
- (b) recommend exemption under section 21; and
- (c) make or repeal regulation made under this Ordinance.”

Section 26 of the Ordinance empowers the Federal Government to make rules: -

“26. Power of the Federal Government to make rules

The Federal Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Ordinance.”

37. The Federal Government in exercise of the power conferred under Section 26 of PPRA Ordinance 2002 has framed Public Procurement Rules 2004 wherein certain terms have been defined as under: -

- “(a) “bid” means a tender, or an offer, in response to an invitation, by a person, consultant, firm, company or an organization expressing his or its willingness to undertake a specified task at a price;
- (e) “contract” means an agreement enforceable by law;
- (h) “lowest evaluated bid” means,-
 - (i) a bid most closely conforming to evaluation criteria and other conditions specified in the bidding document; and
 - (ii) having lowest evaluated cost;”

The principle of Procurement has been laid down in rule 4 of the above rules as under: -

“4. Principles of procurements.- Procuring agencies, while engaging in procurements, shall ensure that the procurements are conducted in a fair and transparent manner, the object of procurement brings value for money to the agency and the procurement process is efficient and economical.”

Rule 8 and 9 of the Rules relate to the Planning and limitation on splitting or regrouping of proposed procurement as under: -

“8. Procurement planning.-

Within one year of commencement of these rules, all procuring agencies shall devise a mechanism, for planning in detail for all proposed procurements with the object of realistically determining the requirements of the procuring agency, within its available resources, delivery time or completion date and benefits that are likely to accrue to the procuring agency in future.

9. Limitation on splitting or regrouping of proposed procurement.-

Save as otherwise provided and subject to the regulation made by the Authority, with the prior approval of the Federal Government, a procuring agency shall announce in an appropriate manner all proposed procurements for each financial year and shall proceed accordingly without any splitting or regrouping of the procurements so planned. The annual requirements thus determined would be advertised in advance on the Authority's website as well as on the website of the procuring agency in case the procuring agency has its own website."

The procedure of prequalification process is given under rule 20 of the Rules is as under: -

"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 and works."

The bid will be called by the Procuring Agency in accordance with the procedure provided in the rules and Security for bid is furnished under Rule 25 in the following manner: -

"25. Bid security

The procuring agency may require the bidders to furnish a bid security not exceeding five per cent of the bid price."

Rule 28 to 35 of the Rules contain the procedure for opening, evaluation and rejection of the bids as under: -

"28. Opening of bids.-

(1) The date for opening of bids and the last date for the submission of bids shall be the same. Bids shall be opened at the time specified in the bidding documents. The bids shall be opened at least thirty minutes after the deadline for submission of bids.

(2) All bids shall be opened publicly in the presence of the bidders or their representatives who may choose to be present, at the time and place announced prior to the bidding. The procuring agency shall read aloud the unit price as well as the bid amount and shall record the minutes of the bid opening. All bidders in attendance shall sign an attendance sheet. All bids submitted after the time prescribed shall be rejected and returned without being opened.

29. Evaluation criteria.-

Procuring agencies shall formulate an appropriate evaluation criterion listing all the relevant information against which a bid is to be evaluated. Such evaluation criteria shall form an integral part of the bidding documents. Failure to provide for an unambiguous evaluation criteria in the bidding documents shall amount to mis-procurement.

30. Evaluation of bids.-

(1) All bids shall be evaluated in accordance with the evaluation criteria and other terms and conditions set forth in the prescribed bidding documents. Save as provided for in sub-clause (iv) of clause (c) of rule 36 no evaluation criteria shall be used for evaluation of bids that had not been specified in the bidding documents.

(2) For the purposes of comparison of bids quoted in different currencies, the price shall be converted into a single currency specified in the bidding documents. The rate of exchange shall be the selling rate, prevailing on the date of opening of bids specified in the bidding documents, as notified by the State Bank of Pakistan on that day.

(3) A bid once opened in accordance with the prescribed procedure shall be subject to only those rules, regulations and policies that are in force at the time of issue of notice for invitation of bids.

31. Clarification of bids.-

(1) No bidder shall be allowed to alter or modify his bid after the bids have been opened. However the procuring agency may seek and accept clarifications to the bid that do not change the substance of the bid.

(2) Any request for clarification in the bid, made by the procuring agency shall invariably be in writing. The response to such request shall also be in writing.

32. Discriminatory and difficult conditions.-

Save as otherwise provided, no procuring agency shall introduce any condition, which discriminates between bidders or that is considered to be met with difficulty. In ascertaining the discriminatory or difficult nature of any condition reference shall be made to the ordinary practices of that trade, manufacturing, construction business or service to which that particular procurement is related.

33. Rejection of bids.-

(1) The procuring agency may reject all bids or proposals at any time prior to the acceptance of a bid or proposal. The procuring agency shall upon request communicate to any supplier or contractor who submitted a bid or proposal, the grounds for its rejection of all bids or proposals, but is not required to justify those grounds.

(2) The procuring agency shall incur no liability, solely by virtue of its invoking sub-rule (1) towards suppliers or contractors who have submitted bids or proposals.

(3) Notice of the rejection of all bids or proposals shall be given promptly to all suppliers or contractors that submitted bids or proposals.

34. Re-bidding.-

(1) If the procuring agency has rejected all bids under rule 33 it may call for a re-bidding.

(2) The procuring agency before invitation for re-bidding shall assess the reasons for rejection and may revise specifications, evaluation criteria or any other condition for bidders as it may deem necessary.

35. Announcement of evaluation reports.-

Procuring agencies shall announce the results of bid evaluation in the form of a report giving justification for acceptance or rejection of bids at least ten days prior to the award of procurement contract."

The procedure for acceptance of bid and award of procurement contract is provided in Rule 38 to 41 as under: -

"38. Acceptance of bids.-

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, within the original or extended period of bid validity.

39. Performance guarantee.-

Where needed and clearly expressed in the bidding documents, the procuring agency shall require the successful bidder to furnish a performance guarantee which shall not exceed ten per cent of the contract amount.

40. Limitation on negotiations.-

Save as otherwise provided there shall be no negotiations with the bidder having submitted the lowest evaluated bid or with any other bidder:

Provided that the extent of negotiation permissible shall be subject to the regulations issued by the Authority.

41. Confidentiality.-

The procuring agency shall keep all information regarding the bid evaluation confidential until the time of the announcement of the evaluation report in accordance with the requirements of rule 35."

The forum for redressal of grievances and settlement of disputes is provided in Rule 48 to 49 as under: -

"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.

49. Arbitration.-

(1) After coming into force of the procurement contracts, disputes between the parties to the contract shall be settled by arbitration.

(2) The procuring agencies shall provide for a method of arbitration in the procurement contract, not inconsistent with the laws of Pakistan”.

38. Under Section 2 (j) supra only “any Ministry, Department or division or any office of the Federal government or any authority, corporation or organization established by or under a Federal Law or which is owned or controlled by the Federal Government” is included in the definition of Procuring Agency. The Water and Power Department of Government of Gilgit-Baltistan or the Bidding Committee of Department is not covered by the definition of “Procuring Agency” as it is not a Ministry, Division, Department or an office of Federal government and also do not fall in the definition of an authority, corporation, body or organization established under any Federal Law or owned or controlled by the Federal Government.

39. In public procurement matter, the procuring agency has the pivotal role and in the light of definition of the procuring agency under PPRA Ordinance 2002 in the present case, KA&NA Division, Government of Pakistan would be the procuring agency and Chairman Northern Areas under Northern Areas Governance Order 1994 being controlling authority of Northern Areas would exercise the power in the affairs of Northern Areas under Northern Areas Governance Order, 1994 and Secretary KA&NA Division having administrative control of Procuring Agency under PPRA Ordinance would exercise the power accordingly and Water and Power Department of Government of Gilgit-Baltistan would function under the control of KA&NA Division of Government of Pakistan for the purpose of PPRA Ordinance 2002. The real question for consideration would be whether Secretary KA&NA

Division was competent to deal with the matter and if so the order passed by him was a fair and transparent Order or it was a mala fide Order which would be treated to have been passed without lawful authority.

40. The Provincial Government of Northern Areas established under Northern Areas Governance Order 1994 would be discharging its functions under the administrative control of Ministry of Kashmir Affairs and Northern Areas and Minister for KA&NA under the Governance Order 1994 was the Chairman and controlling authority of Northern Areas and KA&NA Division by virtue of Section 2(j) of PPRA Ordinance supra being an administrative division of Federal Government would be the Procuring Agency for the purpose of procurement of public contracts in Gilgit-Baltistan whereas the Water and Power Department of provincial government of Gilgit-Baltistan would be performing the duty of an agent of KA&NA Division. In view of the legal position, the function of bidding committee of provincial government would be confined to the extent of inviting the tenders for prequalification, call of bids and after evaluation of bids to submit its recommendation to the Procuring Agency (KA&NA Division) in terms of Rule 34 of Public Procurement Rules, 2004 referred above for rejection or acceptance of bid. Subject to PPRA Ordinance and Rules framed thereunder a Procuring Agency of Federal Government may delegate its power wholly or partially to its subordinate office or department and KA&NA Division being Procuring Agency in all procurements matters may expressly or impliedly authorize any department of Government of Gilgit-Baltistan to perform certain functions of Procuring Agency under Public Procurement Rules, 2004, but the department may not be

independently treated Procuring Agency under Section 2 (j) of the PPRA Ordinance 2002.

41. Gilgit-Baltistan is under the administrative control of Federal Government of Pakistan by virtue of Northern Areas Governance Order 1994 since repealed by Gilgit-Baltistan (Empowerment and Self Governance) Order 2009. The Northern Areas Governance Order 1994 and Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 have the status of sub constitutional document which are deemed to have been issued by the Federal Government of Pakistan for governance of this area in terms of Article 258 of the Constitution of Pakistan which provides as under: -

“258. Government of territories outside Provinces.

Subject to the Constitution, until [Majlis-e-Shoora (Parliament)] by law otherwise provides, the President may, by Order, make provisions for peace and good government of any part of Pakistan not forming part of a Province.”

42. Gilgit-Baltistan is not a province of Pakistan or part of Capital Territory of Pakistan rather by virtue of Article 1(2)(d) of the Constitution being considered an area included in Pakistan, is under the administrative control of Government of Pakistan and subject to the laws of Pakistan would be governed by Northern Areas Governance Order 1994 substituted by Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, therefore, PPRA Ordinance 2002 and Public Procurement Rules 2004 having overriding effect on the departmental instruction or the rules of business of Government of Gilgit-Baltistan, would govern all Procurement contracts in Gilgit-Baltistan by KA&NA Division as Procuring Agency by virtue of Section 2(j) ibid read with Public Procurement Authority Rules 2004, whereas the Bidding Committee of Water and Power Department of Government of Gilgit-

Baltistan would have implied authority of performing the ministerial functions on behalf of the Procuring Agency.

43. The Minister for KA&NA by virtue of Article 2 (c) of Northern Areas Governance Order 1994 was holding the office of Chairman Northern Areas and was authorized to exercise the power under Article 3 of the Governance Order 1994 as under: -

- “3. **CHAIRMAN.**- (1) There shall be a Chairman of the Northern Areas who shall be the Federal Minister for Kashmir Affairs and Northern Areas.
- (2) The Chairman shall exercise powers specified in sub-rule (1) of rule 5 of the Rules of Business.
- (3) The Chairman shall address the opening and closing sessions of the Northern Areas Legislative Assembly (NALA) in every financial year wherein he shall detail his policy for the Northern Areas and review the working of Northern Areas Government in that year respectively. He may also address the Assembly at his discretion and for that purpose may require the attendance of the members.
- (4) The Chairman shall work towards continued empowerment of the elected representatives and the people of Northern Areas.”

44. The Rules of Business of provincial Government of Northern Areas 2004 in respect of discharge of function by the Chairman provides as under: -

- “Rule 5. Functions of the Chairman. - (1) The Chairman shall: -
- (a) be the head of Government.
- (b) be responsible for co-ordination and implementation of all policy matters;
- (c) exercise powers of the Federal Ministry of Finance in relation to the approved budget for Northern Areas as specified in Schedule-III;
- (d) exercise administrative powers of the Establishment Division in relation to employees of Northern Areas as specified in Schedule-IV;
- (e) perform other function assigned under these rules; and
- (f) have the powers to call for any case or information from any office or Corporation.

45. It is clear from plain reading of the above provision of governance order read with the definition of Procuring Agency under Section 2 (j) of PPRA Ordinance 2002 and Rule 48 of the Rules framed thereunder the Chairman Northern Areas and Secretary KA&NA Division would have exclusive jurisdiction to deal with the matter and no other departmental authority in the provincial or federal government was competent to interfere in the matter.

46. In the light of above discussion we hold that Chairman Northern Areas being controlling authority would be competent to interfere in the affairs of Government of Gilgit-Baltistan and the representation of the respondent in the form of a complaint under Rule 48 ibid before the Procuring Agency was rightly entertained by him in exercise of power under Article 3 of Northern Areas Governance Order 1994 and Secretary KA&NA Division being incharge of administrative Division could competently deal with the complaint under Rule 48 of PPRA Rules 2004.

47. The procedure and power of rejection or acceptance of bid or rebidding is provided under rule 33 to 35 of the ibid Rules and careful examination of these rules would bring us to the conclusion that the departmental committee of Water and Power Department, Government of Gilgit-Baltistan on completion of the process of prequalification of contractors would call the bid tenders and after evaluation of bids would submit evaluation report to the procuring agency for final decision of rejection or acceptance of a bid. The Procuring Agency has exclusive jurisdiction to entertain complaint in respect of any matter before the award of contract under Rule 48 of the Public Procurement Rules 2004 and Bidding Committee of Water and Power Department of Government of Gilgit-Baltistan, after making recommendation on evaluation of bids would become factious offico to recall or rescind the recommendation or to deal with the complaint or perform any other function on behalf of Procuring Agency. The decision of acceptance or rejection of a bid or recall of the tender for fresh bid would not be the function of Bidding Committee of department of Water and Power, Government of Gilgit-Baltistan, therefore the Minister for KA&NA as

Chairman Northern Areas in exercise of the power under Northern Areas Governance Order 1994, read with Rules of Business of Government of Northern Areas 2007 being authorized to call for the record of any case pertaining to Northern Areas to ascertain the legality of an action may interfere in the matter and the objection to the entertainment of representation of respondent No. 8 by the Chairman or its disposal by the Secretary KA&NA Division as a complaint under Rule 48 supra is without any substance. The Secretary KA&NA Division exercising power of head of Procuring Agency, on the instruction of Chairman referred the matter to PPRA for opinion and while acting as one Member Committee in the light of opinion of PPRA decided the matter. Therefore, the contention that the complaint under Rule 48 of the Public Procurement Rules 2004 was required to be filed before the Departmental Bidding Committee or Water and Power Department of Provincial Government of Gilgit-Baltistan has no legal force. The Chairman Northern Areas by virtue of Article 3 of the Northern Areas Governance Order 1994 even without a formal application could call the record of any case and pass an appropriate order in the public interest, whereas, in the present case the Chairman instead of passing any order on the representation of the respondent No. 8 instructed Secretary KA&NA to refer the matter to PPRA for opinion and in the light thereof Secretary KA&NA Division passed the order under challenge as competent authority of Procuring Agency under Public Procurement Rules, 2004.

48. Public Procurement Regularity Authority established under PPRA Ordinance 2002 has exclusive authority to deal with the procurement matters and opinion of this Regularity Authority (PPRA) has binding

force, therefore the Secretary KA&NA Division in his capacity as administrative head of Procuring Agency on the basis of opinion of PPRA passed the order and mere fact that cognizance of the matter was taken by him on the instruction of Chairman Northern Areas and the order was also passed with his approval would not give rise to the presumption of personal interest of Chairman or Secretary in the matter.

49. The detail examination of law on the subject and record of Works Department of Government of Gilgit-Baltistan and the documents referred above would show that after completion of process of prequalification by the Board, the function of the departmental bidding committee was confined to the extend of calling of bids for award of contract, opening of technical and financial bids for the purpose of evaluation and in the light of bidding document after evaluation had to submit its recommendation to the Procuring Agency for acceptance or rejection of bids. The Bidding Committee of Water and Power Department of Government of Northern Areas was constituted by the Chief Engineer under the order of Secretary of department and order of Chief Engineer would show that after evaluation of the bids, the committee was required to forward the matter with its recommendation to the competent authority for decision of acceptance or rejection of any bid or recall of the tenders. The expression competent authority under the PPRA Ordinance 2002 read with Public Procurement Rules, 2004 is Procuring Agency and in the present case Procuring Agency was KA&NA Division, Government of Pakistan.

50. In consequence to the recommendation of Board of officers and the proceeding for prequalification of the contractors for participation in

bids. The Secretary Water and Power Northern Areas Government of Gilgit-Baltistan vide letter dated 23-06-2009 directed as under: -

“No. E4-4(182/2008/689
Government of Pakistan
Office of Secretary Water & Power
Northern Areas

To

Chief Engineer
Water & Power Department
Gilgit.

Subject: -

**SUPPLY INSTALLATION, COMMISSIONING AND TEST RUNNING
OF TURBO GENERATING SETS FOR HYDRO POWER IN
NORTHERN AREAS (LOT-A & LOT-B)**

Reference your letter No. board of Officer/TG sets/2009/23 dated 1st June 2009 on the subject noted above.

Board proceedings of board has been approved by the competent authority. The following firms have been pre-qualified to take part in the bidding for Lot A and B.

- i. M/S Al Fajr International Islamabad.
- ii. HMC Taxila.
- iii. Design & Engineers Pvt. Ltd.
- iv. M/S Fahim Haider Lahore.
- v. Hydro Power Engineer and research institute TRIED China.

XEN NAHEW is directed to issue invitation letter and BOQs to the respective firms to submit their technical and financial proposals within notified time.

Those firms not pre qualified to be informed with reasons.

Bids will be opened and evaluated by a Committee to be notified by the Chief Engineer Reps of Secretary P&D. Secretary Finance and Secretary Water and Power be also included in the Committee.

SE (Works)
For Secretary Water & Power”

51. There is no indication in the letter of Secretary Works or in the proceeding of auction that departmental Committee or the Chief Engineer as the case may be, would be authorized to finally accept or reject the bid on behalf of procuring agency, rather it is clear from the record that bidding Committee with its recommendation and all bidding documents was required to place the matter before the Procuring Agency (KA&NA Division) for decision regarding acceptance or rejection of bids. The Board of officers constituted for the purpose of prequalification of contractors to participate in the bid for the auction of contract of supply and installation of Turbo Generator Sets for ongoing 16 Hydro Projects in Gilgit region and 11 Projects in Skardu Region invited application and on completion of the process or prequalification

under the Order of Secretary, a the Bidding Committee was constituted to be head by the Chief Engineer. The bidding Committee submitted its report to the Chief Engineer for further action and Chief Engineer without having any authority or approval of Procuring Agency assuming the role of competent authority by rejecting all bids vide order dated 03-08-2009, directed for recall of the bid tenders.

52. In consequence to the above discussion we hold that the Bidding Committee or Chief Engineer Water and Power Department of Government of Gilgit-Baltistan as the case may be, was not competent to finally reject or accept any bid rather it was the authority of Procuring Agency to reject or accept a bid in the light of the recommendation of the Bidding Committee and Secretary KA&NA Division exercising the power of Procuring Agency on the instruction of Chairman Northern Areas rightly referred the matter to PPRA for opinion and on the basis of opinion of PPRA gave his verdict vide order dated 09.09.2009.

53. The perusal of the proceedings of bidding Committee and the Procurement Agency and also the order of Secretary would not show any procedural irregularity or substantial illegality in the matter or any other legal defect in the order of Secretary which may render the order illegal. The mere technicalities or minor procedural irregularities may not directly or indirectly effect the validity of the order calling for interference of this court.

54. The Minister for KA&NA Government of Pakistan exercising the power of Chairman Northern Areas by virtue of Article 3 ibid was empowered to deal with the affairs of Northern Areas as controlling authority under Northern Areas Governance Order 1994 and being

executive head would discharge his functions under the Rules of Business of provincial Government of Northern Areas referred above through the Chief Secretary of the Provincial Government of Northern Areas and the Secretary KA&NA Division who having administrative control of the provincial government of Northern Areas would directly involve in the affairs of Government of Gilgit-Baltistan and bidding committee headed by the Chief Engineer of Water and Power Department of Government of Gilgit-Baltistan under the Rules of Business of Provincial Government 2007 read with Rules of Business of Government of Pakistan 1973 would be performing function subject to the control of KA&NA Division.

55. This may be seen that in the present case the Bidding Committee in the light of evaluation criteria and the bidding documents recommended rejection of all bids including the bid of Al-Fajr International on the ground that single responsive bid which was also not lowest was not competitive and Chief Engineer assuming the power of competent authority of Procuring Agency directed for recall of the tenders without considering the criteria in terms of Public Procurement Rules, 2004 for acceptance of a bid as under: -

“A bid should fulfill evaluation criteria and other conditions specified in the bidding documents and also should have lowest evaluated cost but technically non responsive bid even if lowest is not considered for competition”.

56. In the light of above criteria a nonresponsive bid would not be put in competition with responsive bid for any purpose including cost and a single responsive bid also could not be rejected for mere reason that it was not lowest in cost to that of the nonresponsive bids. The principle of fair, open and transparent method of procurement in the public

contract being well founded in law is applicable to all public projects to ensure that public authority has acted in quite fair and transparent manner strictly in accordance with law. The rule of law and principle of fair treatment is that responsive and nonresponsive bids are not placed together in competition for the purpose of cost evaluation rather the cost competition would be determined inter se responsive bids and bid lowest in cost would be accepted. The procuring agency reserves the power of rejection of any bid but the rejection or acceptance of a bid for a reason beyond the scope of law may negate the purpose of law and thus exclusion of a responsive bid from consideration for mere reason that in comparison to nonresponsive bids it was not lowest, was not proper and would amount an infringement of a legitimate right of contract and denial of a legal right arbitrarily.

57. The learned counsel for the petitioner without pointing out any material on the record showing any personal interest or mala fide of any public authority in the Federal Government asserted that filing of a representation by Respondent No. 8 directly before the Chairman in departure to the normal procedure and subsequent proceedings in the matter in the KA&NA Division on the instruction of Minister would make the order of Secretary doubtful and would be sufficient to infer the personal interest and mala fide reflecting upon the transparency of the transaction. The assertion that in cases of doubtful character if court taking judicial notice of the conduct of departmental authorities may raise a presumption of mala fide or lack of bona fide in the transaction reflecting upon improper exercise of jurisdiction is without any foundation.

58. The question of mala fide is a matter of evidence and mala fide in fact is a state of mind of ill-will hatred or hostility of one person towards another person to do a wrongful act without a legal excuse or justification. Malice is a positive desire and intention of a person which induces him to injure and defame or cause damage to another person. The malice in law is intentional performance of an act with just and lawful excuse or willful violation of law or right or privilege of others with the intention to do a wrong or cause injury to another person or to get undue benefit disregard to the right of others. The presumption of malice in fact or law cannot be raised by mere fact that an action of an official authority was not in consonance with spirit of law.

59. This is settled principle that mala fide, unfairness, unjust, unreasonableness or bias and favouritism or improper exercise of the discretion in the public auctions and contracts by the public authorities or such other matters of public importance are valid and legal reasons for interference of courts but if no such reason is found in a transaction, the same would be deemed to have been conducted in quite transparent manner and no presumption to the contrary would be raised on the basis of mere assertion. This Court in exercise of power of judicial review is not supposed to import new facts or to allow to plead new facts which are not part of record to raise the presumption of mala fide.

60. The law laid down by the Supreme Court of Pakistan in PLD 1992 SC 2266, Messrs Ramna Pipe and General Mills (Pvt.) Limited Versus Messrs Sui Northern Gas Pipe Lines (Pvt.) and others (2004 SCMR 1274) is subject to the proof of the element of mala fide, unjust, unfairness or personal interest in the transaction or that for

any other reason the transaction was not transparent. Therefore the courts are not supposed to frequently interfere in the administrative decisions unless there is a valid reason to show improper or illegal exercise of jurisdiction by an administrative authority.

61. The mala fide in fact means a malicious act done or an action taken in bad faith or with the motive of benefit as against to the public interest and mere a wrong action taken by a public authority or an action taken without lawful authority is not considered a mala fide action unless the element of malice or the ulterior motive for taking a wrong action is proved. The presumption of unfairness and mala fide as contended by the learned counsel for the petitioner cannot be raised merely on the basis of an allegation that action was wrong in law is not sufficient to hold the case mala fide. The Supreme Court of Pakistan in Federation of Pakistan v. Saeed Ahmed Khan (PLD 1974 SC 151) has held as under: -

“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 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. 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 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.”

62. The careful examination of the documents placed on record and the factual position in the background would not suggest any unfairness in use of power or any procedural or substantial error or defect in the proceedings either before the Chairman Northern Areas or the Secretary KA&NA Division which may creat any doubt regarding departure of high order of transparency required in such cases of public interest. The mere fact that representation filed by respondent No. 8 in the matter was entertained by the Chairman without observing the

formalities of official business and Secretary KA&NA on his instruction taking cognizance passed the order against the interest of petitioner is not by itself a ground to hold that order was mala fide or was illegal. The technically and financially responsive bid of respondent No 8 was excluded from consideration by the bidding committee for the reason that it being single responsive bid was not competitive and as compared to nonresponsive bids was also not lowest. The above reason having no legal sanction for rejection of a bid would amount to take away the legitimate right of successful bidder in an arbitrary manner as the rule of acceptance of comparatively lowest bid is applicable intense responsive bids and not on the basis of lowest evaluation cost of nonresponsive bid. In case of single responsive bid which is noncompetitive the reasonability of the cost value of bid is the rule for its acceptance or rejection and the reasonableness of the cost will be judged in context to the reserved price. Thus the principle is that if a noncompetitive bid is found unreasonable vis a vis the reserved price, the same may not be accepted. The improper rejection of a bid without any just and valid reason and rebidding at the cost of public time and money with risk of increase of cost of project due to increase of prices is not in the public interest rather this exercise may put the exchequer under extra burden and courts in such cases of public projects are always reluctant to interfere.

63. The doctrine of reasonableness is an elastic term which is of uncertain of value in definition and which depends upon variety of consideration and circumstances. The expression 'Reasonable in law' mean capable of reasoning i.e. a reasonable base and for exercise of judicial discretion to review an administrative action and application of

law in just, and reasonable manner is to judge the legality of an act done by a public authority. The reasonableness of an action is the degree of care taken in dealing with a matter involving rights of others which are taken by a person of ordinary prudence in the use of his property. The rule with regard to exercise of power of judicial review in respect of administrative decision and action is that court should not substitute its judgment and decision for the order and action of a public authority rather the function of the court is to determine the reasonableness of the order by considering the facts and circumstances and the evidence in the manner in which a reasonable man would determine reasonableness in such matter.

64. The question for consideration is whether a reasonable doubt arise to suggest that an administrative order passed by an authority is polluted with any reason which appears to be violative of the rule of fairness or offends the principle of reasonableness in law. The doubt must be actual and substantial arising from the fact as distinguished from a vague apprehension and also must be fair in the common sense and the state of mind which after fair comprehension and consideration of the evidence and also the facts and circumstances of the case creates an impression of doubt on the mind of a person of ordinary prudence. In net shall the rule of reasonableness required to be applied in dealing with the matters of public importance is that no element of unfairness, mala fide or personal interest making the order unjust and unreasonable should appear in the mind of a reasonable person.

65. The true test of reasonableness of an order or an action of a public authority is that in the ordinary circumstances it is not beyond the expectation or judgment of common man and also is not considered

arbitrary, capricious and confiscatory in the estimation of a common person. The court while judging the reasonableness of an order on the above test if comes to the conclusion that the order lacks necessary diligence and care required to be taken in the matter of public importance may raise presumption of unreasonableness of an order but no such presumption can be raised merely on the basis of hearsay reasons which do not satisfy the mind of a reasonable person.

66. The learned counsel for the Respondent No. 8 in the light of law laid down by the Supreme Court of Pakistan in Ms Ittihad Cargo Service v. Syed Tehseen (PLD 2001 SC 116), Pakistan State Oil Company v. Muhammad Naqi (2001 SCMR 1150), Petrosin Corporation v. Oil and Gas Development Company (2010 SCMR 306) conceding the proposition that the court in its discretionary jurisdiction can interfere in a matter of public importance and may declare an order of a public authority illegal on the ground of mala fide, arbitrary exercise of discretion, lack of transparency and undue favour or influence, submitted that applying the above test to the order under challenge in the present petition a person of ordinary prudence would not find any element of unfairness, mala fide, personal interest which may effect the transparency of the order or transaction.

67. The criteria to judge the legality of an order of an executive or judicial authority is judged in each case on the basis of facts and circumstances of the case and not on the basis of a general rule not otherwise attracting in the facts of a particular case.

68. The administrative authorities while dealing with the matters involving rights of a person must exercise power with extra care and

administer the law in respect of such rights in judicious manner but the strict observance of judicial procedure of courts being not requirement of administrative law, an executive or administrative authority before making decision need not to hold an inquiry or conduct an investigation into the matter as in the cases of judicial decisions unless an inquiry or investigation is considered an obligatory determinative factor for the decision under the statute. The public authorities are not required to necessarily act judicially in a matter under consideration before them unless the law in express or implied terms requires to follow the judicial procedure for an administrative decision.

69. There are different rights which are enforceable through the process of law as superior or inferior legal rights and courts of law are required to determine these rights accordingly. The right may be defined in law as under : -

“The just and valid claim in any property or thing or privilege or in any other matter which involves a right recognized by law and since there are qualified and unqualified rights therefore correct definition of right is deceptive”.

70. This is an absolute right of a person to use his property subject to law in the manner he likes but he has no right to use his property for any immoral or illegal purpose. The civil rights are distinguished from elemental ideas of absolute rights and thus only the rights given and protected by law are enforceable at law and similarly a substantial right which is recognized as enforceable at law is distinguishable from a technical right in same manner as a real and actual claim is distinguishable from a colourable claim.

71. The claim to a thing is a right of an individual in primitive sense which has the protection of law and a legal action can be taken on its infringement. The mere permission to do a thing in law is not a legal right to be enforced at law rather the liberty of doing or possessing something consistently is a right in law. In net shell the right is an interest which is recognized and protected by law and possessor of such right can enforce it by an appropriate action in accordance with law. There are primary or substantive rights which are rights in rem and right in personam and infringement of these rights is challengeable by availing the remedies provided under the law. The participation in a public auction subject to fulfilling requisite qualification is a legal right of a person and a wrong action in respect of such right in breach of the law is actionable at law. Therefore a successful bidder in an public auction may on wrongful rejection of his bid by availing the legal remedy take action for enforcement of his right but an unsuccessful bidder cannot defeat the legitimate right of contract of successful bidder on the basis of claim of re-auction for technical reasons.

72. In the light of the concept of rights we find that the petitioner has no independent statutory right to assert his claim rather he is resisting the legitimate right of respondent No. 8, a successful bidder with the interest of participation in re-auction. The right of a person to participate in public auction subject to law is a legal right which may arise if auction is held but the right of successful bidder in an auction for grant of contract is a substantive right which is enforceable at law and is considered a superior right to that of a right which depends on happening of an event. In the light thereof the petitioner on the basis of expectation of participation in re-auction cannot defeat the

legitimate and substantive right of contract of respondent No. 8 a successful bidder in the auction.

73. There is no cavil to the proposition that the orders passed by the public authorities involving public interest or right of an individual are not immune from judicial scrutiny but the scope of interference of the courts in such matters being very limited, the courts are not supposed to raise a presumption of mala fide or unfairness or that a public auction or contract was not transparent merely on the basis of unfounded allegation and defeat the legitimate right of a person. However, the court during the course of judicial scrutiny of a public auction or contract in a case if comes to the conclusion that transaction was for an extraneous consideration or was mala fide or undue favour has been extend to any person may without looking for any other evidence declare the auction or the contract as the case may be, illegal but in the present case, no element of mala fide, unfairness or favouritism reflecting upon the transparency in the order of Secretary is traceable on record, calling for interference of court. This is not denied that petitioner without fulfilling the requirement of furnishing the bank guarantee or deposit slip for participation in the bid, offered the bid which was rejected being not responsive and consequently, for the purpose of determining the fair test of bid, the technically and financially responsive bid would not be placed with the responsive bid for determination of cost. The law would not approve the view of the Bidding Committee that a single responsive bid which was also not lowest to the nonresponsive bids was non competitive to reject the responsive bid.

74. The law on the subject (PPRA Ordinance and Rules) is self-explanatory and self-executory the Procuring Agencies being bound by this law must not pass orders against the spirit of PPRA law. Therefore, notwithstanding the limited scope of judicial scrutiny of the administrative decision, the court may not hesitate to interfere in judicial discretion in a matter of improper exercise of Jurisdiction subject to the limitation that court may not frequently interfere in administrative decision unless the element of unfairness, unjust unreasonable, lack of transparency, bias, favoritism or mala fide is found apparent on record or arbitrary exercise of discretionary power by a public authority in a matter. Net result of above discussion is that courts following the policy and principle of judicial restrained may not frequently interfere in an order passed by a public authority, unless it is found suffering from the defect of improper exercise of jurisdiction, or is mala fide or unfair and unreasonableness in the eye of law. The court may also in its discretion take judicial notice of an order passed in a matter of public importance adverse to the public interest.

75. The discretion in plain words is that in the facts of a particular case what decision is to be taken in the guidance of law and decision to the expectation of a person may not be absolutely right rather the determinative factor is that the same is within the scope of law and is in the interest of justice. The administrative authorities and public functionaries do not have uncontrolled discretionary jurisdiction to decide a matter absolutely in their choice rather this power demands equitable decision which is just and proper under the circumstances of the case. The discretion is power of performing in ones own judgment without control of others and thus this power confers a right upon the

official authorities for doing an act under the certain circumstances according to the dictate of their own judgment and conscious uncontrolled by the judgment and conscious of others.

76. There is no concept of unfettered discretion in law rather all administrative and judicial authorities have to exercise the discretionary jurisdiction in a reasonable, rational and proportionate manner. The unreasonable exercise of discretion may give rise to the presumption that the order was motivated for some extraneous consideration and was not dealt with fairly and in a case of exercise of discretionary power by a public authority in an unreasonable manner the superior courts may in exercise of power of judicial discretion interfere and pass an appropriate order to advance the cause of justice and rule of law.

77. The exercise of discretionary power beyond the limits and comprehension of a person of ordinary intelligence is unreasonable, irrational and improper and an order passed in improper exercise of jurisdiction is treated without lawful authority. The principle is that exercise of discretion by the public authorities in the matter involving public interest in an improper manner is considered a substantial error in exercise of the jurisdiction which is deemed to have not been exercised in good faith or public interest. This is settled law that if an official transaction of Public importance involves an element of a reasonable doubt or personal interest, undue favour, unfairness or for a consideration other than the public interest, the presumption that order was not bona fide can be raised but no such presumption can be raised merely on the basis of general allegation without the support of substantial material. The doubtful character of the transaction must be

proved to have been polluted with bad faith or consideration not within the compass of good faith which may give rise to the presumption that transaction was not transparent but in absence of any evidence direct or circumstantial the raising of such presumption is illegal exercise of jurisdiction.

78. The Supreme Court of Pakistan in 1997 SCMR 641 held as under:-

“The doctrine of proportionality stems from irrationality and perversity in the exercise of administrative discretion. “Disproportionality and unreasonableness are synonymous, and the jurisprudential basis is that the power, and the court proceeds on the presumption that the legislature does not authorize unreasonableness acts. While conferring discretion on an authority the statute does not intend to arm such authority with unfettered discretion which may be beyond the limits of reason, and comprehension of a man of ordinary intelligence. It is to be read in such statute that the authority while exercising its discretion shall act reasonably.”

79. The writ jurisdiction of the Courts is equitable and discretionary jurisdiction which is different from the ordinary jurisdiction and judicial discretion in the exercise of judicial power in accordance with spirit of law must be based upon the facts and circumstances of the case brought before the court in which the court may draw a conclusion deserved by law. The discretion conferred by law upon the court in judicial matter is a legal discretion to be exercised in conformity with the spirit of law and in a manner to subserve and not defeat the ends of justice and similarly the exercise of discretion by the public functionaries while dealing with the matter involving rights of others should be in the spirit of law to advance the cause of justice in the manner that their order may be construed to mean fair, just and proper and may not be interfereable in judicial discretion. The principle is that court in discretionary jurisdiction will not substitute their opinion and judgment with the opinion and the judgment given by the executive authorities or public functionaries in their discretion unless the

discretion exercised by such authorities is arbitrary, capricious and unreasonable in law and facts of the case.

80. The Superior Courts in Gilgit-Baltistan in exercise of power of Judicial Review under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 may issue direction/orders and writs to an authority or government discharging executive functions under any statute but the encroachment upon decision of an executive authority in departure to the principle of the distribution of powers between the legislative, executive and the judiciary would amount judicial invasion and would be contrary to the spirit of law. This is settled principle that in exercise of Writ jurisdiction the court cannot substitute itself for an executive authority or assume the jurisdiction in a manner which may suggest that court has taken upon itself the responsibility of the executive authority or exercise judicial authority in the form of executive order rather the function of the Court is only to issue directions to the administrative or executive authorities in a matter which falls within the ambit of judicial review of the courts. The improper or illegal exercise of jurisdiction by an executive authority or exercise of jurisdiction not vested under law in departure to the law with overriding effect injurious to a justiciable right of a person is undoubtedly subject to the Judicial scrutiny of the Court but an Order of an executive authority may not call for interference merely for the reason that the court is competent to exercise jurisdiction. The reliance may be placed on Tariq Transport Company, Lahore v. Sargodha-Bhera Bus Service, Sargodha and others. (PLD 1958 SC 437)

81. The superior courts following the principle of judicial restraint if in a case of public importance form an opinion that public interest has

been impaired or has not been properly safeguarded may in exercise of the power of judicial review interfere in the matter and we, without taking any exception to the proposition of law that an order passed by a public functionary or a departmental authority if is found tainted with an element of mala fide, personal interest or adverse to the public interest would be deemed to have been passed without lawful authority, hold that the above rule is subject to the exception that the courts in their extra ordinary jurisdiction may not frequently interfere in the public auctions and contracts and disturb the functioning of public authorities in discretionary jurisdiction unless reasonable grounds to believe are shown that transaction did not fulfill the required standard of transparency or an order was adverse to the public interest.

82. The court may not hesitate to interfere in a matter in which an executive authority or a public functionary passed an order for a consideration other than public interest or for the reason behind the scope of law and if in a matter of public importance, the element of mala fide, unreasonable, unjust and unfairness is traceable on record or it is found that discretion has been improperly exercised for some personal interest or benefit or for a consideration other than the public interest, the court may in writ jurisdiction declare a public auction or contract without lawful authority.

83. In the light of the above test of transparency we have not been able to find out any element of personal interest or malice or unfairness or unreasonableness or undue favour in the order passed by the Secretary KA&NA Division and also have not found any substance in the contention of learned counsel for petitioner that in normal circumstances the order of recall of tender passed by departmental

committee would not be interfered by the Secretary therefore, perception would be that because of the personal interest of the Chairman, he has taken pain to pass an order favourable to respondent No. 8 which would create an impression of unfairness and undue influence. This may not be fair to raise a presumption of undue favour or undue influence and unfairness or extraneous consideration for exercise of discretion merely for the reason that an authority which has passed an order was also empowered to pass a contrary order in his discretion in same set of circumstances. The plea of personal interest, extraneous consideration, undue favour or influence or mala fide without support of any substantial evidence may have no basis and law would not permit for drawing a presumption or an inference merely on the basis of suspicion or self created doubt of unfairness of an order or transaction. The law is that initial presumption of correctness attaches with the official acts, transaction and business and also in favour of bona fide of an order, therefore, unless this presumption is rebutted through evidence direct or circumstantial, the legality of a public transaction or an order of a public authority cannot be interfered merely on the basis of unfounded and general allegation of mala fide, unfairness or unreasonableness.

84. The careful examination of the record in the light of law on the subject would show that no element of mala fide or direct or indirect interest of any public authority including the Secretary KA&NA Division and Chairman Northern Areas is traceable in the transaction and also no procedural or substantial error or jurisdictional defect is found to have been committed in passing the order to make it unlawful and further we have not found the order adverse to the public interest. The

petitioner in his application moved to the Chairman NAs and also in the Writ Petition filed by him before the Chief Court as well as in the present petition before this court has not alleged mala fide of Chairman or Secretary or that order was passed for some extraneous consideration or personal interest or that undue favour was extended to respondent No. 8 rather he depositing full confidence in the independence of Chairman in the application sought his interference in the matter. This assertion of mala fide and personal interest was taken for the first time by learned counsel for the petitioner during the course of arguments with emphasize that this court by raising presumption of mala fide and extraneous consideration on the strength of law laid down by the superior courts of Pakistan for exercise of power of Judicial Review in public contracts and auctions may declare the order of Secretary illegal. This court exercising ordinary or extraordinary jurisdiction under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 without any positive proof or plausible reason appealable to mind is not supposed to raise the presumption of mala fide and doubt the fairness of an order passed by a public authority. The Court also may not take judicial notice of a matter or consideration which is not within the compass of the facts of a case and draw an inference of bad faith. This is not legal to draw an adverse inference against an order of public authority in ordinary circumstances without any proof of malice or personal interest of such authority. The allegation of mala fide or unjust and unfairness or reasonableness of an order must be proved on record to establish that order was not transparent or the same was not in public interest.

85. The Supreme Court of Pakistan in Messrs Ramna Pipe and General Mills (Pvt.) Limited Versus Messrs Sui Northern Gas Pipe Lines (Pvt.) and others (2004 SCMR 1274) held as under: -

“A contract carrying element of the public interest is open for judicial review. A contract carrying elements of public interest, concluded by functionaries of the State has to be just, fair, transparent, reasonable and free of any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premises 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 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”.

86. From the scrutiny of the record with the assistance of learned counsel for the parties in the light of test of transparency laid down in such matters, we have not been able to find out any apparent element of personal interest or mala fide, unfairness or unreasonableness to hold that the order of the Secretary was not in the public interest.

87. The learned counsel for the parties and also learned Advocate General assisted by the Chief Engineer and other officials of Works Department Government of Gilgit-Baltistan informed the court that before filing the writ petition by the petitioner in the Chief Court, contract was awarded to respondent No. 8 in implementation of the order passed by the Secretary KA&NA Division and notwithstanding the result of this petition certain obligation and liabilities of parties have been created under the contract therefore the reversal of the order of Secretary at this stage on a technical ground may create complication and cause heavy loss to the government. They asserted that the bids for grant of contract were offered on the basis of prevailing prices and in case of rebidding the cost of contract would be double of the present cost due to the increase in prices, which would not be in public interest. The Chief Engineer who was Chairman of the bidding

Committee of the department has frankly conceded that the opinion of bidding committee of department being not in consonance to the spirit of PPRA Ordinance and Rules framed thereunder was overruled by the Secretary KA&NA Division on the basis of opinion of PPRA and rightly declared Al-Fajr International as successful bidder therefore, the order was not suffering from any legal or factual infirmity or defect and was also not against the public interest calling for interference of this court. The learned Advocate General at this stage pointed out that proper safeguard has been provided in PPRA Ordinance and Rules for the protection of public interest in public procurement contracts whereunder in case of any breach of contract including the concealment of any material fact in the process of prequalification or at a subsequent stage before the grant of contract or any other omission committed by the contractor falling within the purview of Rule 17, 18 and 19 of the Public Procurement Rules 2004 or under any other provision of PPRA Ordinance 2002, the Procuring Agency is authorized to proceed against the contractor and take appropriate action including cancellation of contract in accordance with law.

88. There is general complaint in Gilgit-Baltistan that contractors usually do not complete the public projects within the stipulated period provided in the contract rather in connivance with the concerned department intentionally cause delay in the execution of work with the purpose to raise the cost of project on the ground of acceleration of prices for undue financial gain against the public interest. The delay in public projects for an unforeseen reason or an act of god or an act of government is explainable but the delay in the contract in normal circumstances is not excusable and failure of the contractor to fulfill his

contractual obligation within time may constitute willful breach of contract and held him liable to pay damages to the government. The rule of per force majeure is to meet the extra ordinary situation and may not be applicable in ordinary circumstances, therefore, in case of willful breach of contractor in a Public Procurement Contract, contractor must face the consequence of penalty provided in the contract and under the law.

89. In consequence to the above discussion we hold that the public procurement contracts are governed by PPRA Ordinance and Rules framed thereunder which is special law on the subject, therefore, the failure of contractor to supply the goods at agreed price according to the schedule of supply may be a breach of contract which may cause delay in the main project, therefore the Procuring Agency is obliged under the law to proceed against the contractor for appropriate action including cancellation of contract at his cost and risk in accordance with law.

90. The contractors are not entitled to any claim beyond the scope of contract and law unless it is provided in the contract for payment of extra cost on the basis of acceleration of price if project is not completed within contract period and no such claim is entertainable without determination of cause of delay or the reason of non completion of project within time. The extra payment on the basis of acceleration of prices in the normal circumstances is undue favour to the contractors, which amounts misappropriation of government funds on the part of concerned officials, therefore the officials involved in such matters must face the consequence of criminal charge and also departmental action for misconduct. The Chief Secretary, Government of Gilgit-Baltistan in cases of extra payment at the cost of burden on the exchequer may

holding inquiry into the cause of delay or justification of extra payment to a contractor set the law at motion for action in accordance with law. The above are the detail reason for short order rendered on 14-06-2010 which is treated part of this judgment as under: -

"This petition for leave to appeal under Article 60 of Gilgit-Baltistan (Empowerment and Self Governance) Order 2009 has been directed against the Judgment dated 29-03-2009 passed by the Chief Court Gilgit-Baltistan in a Writ Petition filed against the Order dated 09-09-2009 passed by Secretary KA&NA (KA&GB) Division by virtue of which Respondent No. 8 Al-Fajr International was declared successful bidder for grant of contract for "Supply, Installation, Commissioning and test running of Turbo Generator sets for Hydro Power Projects in Northern Areas".

"After preliminary hearing notice was issued to the respondents vide order dated 27-04-2010 to consider the validity of the order of the Secretary KA&NA Division and the judgment of the Chief Court under challenge before us in the petition for leave to appeal which is reproduced as under: -

"The subject matter of this petition is contract for supply of hydro power turbines to be awarded by Water and Power department Gilgit-Baltistan. The tenders were accordingly invited and the petitioner and respondents No. 8 to 10 participated in the bid. The Chief Engineer having found none of the bids responsive, rejected all the bids vide Order dated 05-08-2009 with recall of the tenders. The Secretary, Ministry of KA&GB Division Islamabad on representation of respondent No. 8 against rejection of his bid vide order dated 09-09-2009 declared him successful bidder.

The learned counsel for the petitioner with reference to Rule 48 of Public Procurement Regulatory Authority Rules 2004 framed under Public Procurement Regularity Authority Ordinance 2002 contents that any person aggrieved of rejection or acceptance of a bid can avail the remedy of complaint before the procurement committee or invoke the jurisdiction of competent court and neither the representation before Secretary KA&NA Division Islamabad was maintainable nor the Secretary was competent to interfere in the matter.

Precisely the contention of the learned counsel is that the remedy against the rejection of bid was either complaint before the Procurement Committee or to invoke the jurisdiction of the competent court but the Chief Court without attending the real question involved in the matter has dismissed the Writ petition in a perfunctory manner on technical ground.

The learned counsel added that the order passed by the Secretary KA&GB Division being without lawful authority may seriously reflect upon the fair award of contract of an important public project and dismissal of writ petition on the ground that it was not maintainable was not proper and legal.

The contentions raised being not without force require consideration, therefore notice is issued to the respondents.

Learned Advocate General on court call has appeared and he has been directed to file concise statement on behalf of the officials respondents (respondents No. 2 to 7). The Learned counsel for petitioner states that respondents No. 09 and 10 are proforma and respondent No. 8 is the real contestant. In addition to the ordinary mode of service respondent No 8 shall also be served through the Deputy Commissioner Islamabad as special measure."

Mr. Muhammad Ibrahim Satti Sr. Advocate Supreme Court of Pakistan appeared on behalf of the petitioner and Mr. Naeem Bukhari Sr. Advocate Supreme Court of Pakistan represented respondent No. 8 whereas the official respondents (No. 2 to 7) have been represented by the Advocate General Gilgit-Baltistan and Profoma respondents Nos. 9 & 10 are unrepresented.

Having heard the learned counsel for the parties at length and examined the record with their help and also giving due consideration to the matter in the light of provisions of Public Procurement Ordinance 2002 read with the rules framed thereunder and the judgments of Supreme Court of Pakistan cited by the learned counsel for the parties we propose to dispose of this petition as regular appeal through this short Order with the result as under:-

“The Order dated 09-09-2009 passed by the Secretary KA&NA, Division Government of Pakistan whereby M/S Al-Fajr International has been declared successful bidder on the basis of opinion of Public Procurement Regulatory Authority (PPRA), impugned in the writ petition before the Chief Court and before this court in this appeal has not been found suffering from any legal defect for our interference and consequently for the detail reasons to be recorded later we dismiss this appeal with no orders as to the costs.”

We with full appreciation acknowledge the valuable assistance rendered by the learned counsel for the parties and pain taken by them in conclusion of their arguments in the matter.”

91. In the light of the foregoing discussion this appeal is dismissed with no orders as to costs.

Chief Judge

Judge

Judge