JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3995 of 2019
National Institutional Facilitation Technologies (Pvt.) Limited
Versus
Federal Board of Revenue and others

Dates of Hearing:	06.02.2020, 13.02.2020, 14.02.2020, 18.02.2020, 19.02.2020, 20.02.2020, 24.02.2020 and 06.03.2020.
Petitioners by:	M/s Imtiaz Rashid Siddiqui, Syed Husnain Ibrahim Kazmi, Shehryar Kasuri and Raza Imtiaz Siddiqui, Advocates Khawaja Muhammad Farooq and Ms. Moona Hussain, Advocates in W.P.No.4395/2019
Respondents by:	Mr. Arshid Mehmood Kiani, learned Deputy Attorney-General. Mr. Muhammad Nadeem Khan Khakwani, learned Assistant Attorney-General. Syed Ali Zafar, Jehanzeb Sukhera Advocate for the F.B.R. M/s Salman Akram Raja, Asad Ladha and Malik Ghulam Sabir Advocates for the applicant in C.M.No.5478/2019 Mr. Khaliq Ishaq, Law Officer, NADRA. Mr. Noor ul Najam, Departmental Representative, P.P.R.A. M/s Salman Aslam Butt and Anique Salman Malik, Advocates for respondent No.8/N.R.T.C.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, I propose to decide writ petitions No.3995/2019 and 4395/2019 since they entail certain common features.

2 Through writ petition No.3995/2019, the petitioner, M/s National Institutional Facilitation Technologies (Pvt.) Ltd. (**"N.I.F.T."**), assails the letter dated 29.10.2019 whereby the Federal Board of Revenue (**"F.B.R."**) granted a licence to M/s National Radio & Telecommunication Corporation (**"N.R.T.C."**) at a price of Rs.731/- per 1,000 stamps for a period of five years to establish, maintain, and operate the whole process of the track and trace system for tobacco products in Pakistan subject to terms and conditions as stipulated in the Licencing Rules, 2019, Invitation for Licencing (**"I.F.L."**) and other relevant laws.

3. Through writ petition No.4395/2019, the petitioner, M/s Authentix Inc., also assails the decision taken by the F.B.R. to grant the said

licence to N.R.T.C. The petitioner also seeks a direction to the F.B.R. to initiate a fresh bidding process for the award of the said licence.

FACTUAL BACKGROUND:-

4. The facts essential for the disposal of the instant petitions are that on 03.11.2004, Pakistan ratified the Framework Convention on Tobacco Control ("F.C.T.C.") and on 29.06.2018 acceded to the F.C.T.C. Protocol to Eliminate Illicit Trade in Tobacco Products. Article 8.2 of the F.C.T.C. Protocol requires Pakistan to establish a tracking and tracing system to be controlled by Pakistan for all tobacco products that are manufactured in, imported into, or transiting through its territory. Pakistan had to embark on a project to implement a track and trace system for tobacco products to meet its national need to monitor and protect its revenues and address the high level of illicit trade within its borders, and to meet its international obligations under the F.C.T.C. The track and trace system was to form part of a regional and global international track and trace regime for tobacco products. In order to prevent the leakage of revenue, under-reporting of production and sale of tobacco products and to ensure proper payment of federal excise duty and sales tax on the manufacture and sale of tobacco products, the F.B.R. was mandated to licence the implementation of the track and trace system, which was required to be developed, operated and maintained by the licencee for tobacco products manufactured in and imported into Pakistan.

5. On 06.08.2019, the F.B.R. published an advertisement inviting applications for the grant of a five-year licence to be issued under the Sales Tax Rules, 2006 for the development, maintenance and operation of a track and trace system in accordance with the provisions of the said Rules and the I.F.L. issued by the F.B.R. The procedure for the bidding was provided in the I.F.L. and the Chapter XIV-B Sales Tax Rules, 2006, inserted through notification (SRO 250(I)/2019) dated 26.02.2019 ("the Licencing Rules, 2019"). The I.F.L. had been placed on the website of the Public Procurement Regulatory Authority ("P.P.R.A."). The bidding was to be through a single-stage: two-envelope procedure. Sealed applications were required to be delivered within thirty days of the publication of the said advertisement. It is an admitted position that the deadline for the submission of the bids was extended to 27.09.2019.

6. The licencee was to be responsible for the end-to-end installation and operation of a track and trace system connecting cigarette manufacturing sites and import stations to the F.B.R. and the law enforcement officials. The track and trace system was to include the provision of tax stamps and integrated codes to enable real time electronic monitoring of the cigarette supply chain throughout Pakistan.

7. Initially, the bid evaluation criteria in the I.F.L. provided *inter alia* that the applications for the grant of the licence found to provide the high combined score of the technical and financial requirements were to be recommended by the F.B.R. for the issuance of the licence. The licencee which submitted the economically most advantageous offer, taking into account the relative weightage of the following selection criteria, was to be selected:-

	Assessment criteria	Marks
a	Applicant's experience & capability	35
b	Features of the track & trace system	45
c	Cost (applicant's total price)	20
	Total	**100**

8. Subsequently, on 17.09.2019. an amendment in the evaluation criteria was also published by the F.B.R. in the newspapers through a 'public notice'. Under the amended evaluation criteria, a maximum of 80 marks could be given for: (i) the applicant's experience and capability (35 marks), and (ii) features of the track and trace system (45 marks). The amended I.F.L. also provided that the applicant scoring 70 or more marks out of total 80 marks for technical and experience shall be considered as technically accepted applications. Under the amended evaluation criteria, the licence was to be granted to the technically qualified bidder whose financial bid was the lowest. The deadline for the submission of the bids was extended from 05.09.2019 to 27.09.2019.

9. It is pertinent to bear in mind that annex-6 to the I.F.L. required the bidders to quote the price for 1,000 tax stamps with unique identification markings.

10. On 27.09.2019, thirteen bidders submitted their bids for the award of the licence, five of whom were declared as *"not responsive."* Vide office order dated 09.10.2019, the F.B.R. constituted a three-member Dispute Resolution/Grievance Redressal Committee ("G.R.C.")

which was empowered to address complaints of the bidders pertaining to the licencing issued under the Licencing Rules, 2019 and the Public Procurement Rules, 2004 ("P.P.R.").

11. The financial bids of the technically qualified bidders were opened on 14.10.2019. As mentioned above, annex-6 of the I.F.L. required the bidders to quote a price for 1,000 stamps with unique identification marks. N.I.F.T. (the petitioner in writ petition No.3995/2019) had quoted Rs.868.36/- per 1,000 stamps; M/s Authentix (the petitioner in writ petition No.4395/2019) had quoted Rs.1,250/- per 1,000 stamps; and N.R.T.C. had quoted Rs.0.731 per 1,000 stamps.

12. As per the bid evaluation report dated 14.10.2019, N.R.T.C's bid of Rs.0.731 per 1,000 stamps was the lowest. Consequently, N.R.T.C. was declared as the lowest evaluated bidder. In the said bid evaluation report, the following observation was made regarding N.R.T.C's bid:-

> ***"The bidder has offered price of Rs.0.731 with the unit of 1000 stamps. However, the bidder claimed that this price quoted is per one stamp and not per quoted 1000 stamps. As per Annex-6 of the IFL, the bidder was required to offer rate per 1000 stamps and not per stamp. Therefore, the rate quoted in the bid is to be taken such i.e. 0.731 per 1000 stamps. However, if contention of the bidder is accepted, the cost comes to Rs.731 per 1000 stamps. Apparently the bidder has violated Annex-6 of the IFL and if the bidder does not agree to Rs.0.731 per 1000 stamps, the next lowest responsive bidder (i.e. NIFT) may be offered the license."***

13. On 15.10.2019, the bid evaluation report was posted on P.P.R.A's website. Vide letter dated 17.10.2019, N.R.T.C. informed the F.B.R. that on 14.10.2019, it had clarified that as a result of an oversight, it had quoted Rs.0.731, and that the said unit price when multiplied by 1,000 it comes to Rs.731 per 1,000 stamps. Furthermore, N.R.T.C. requested the F.B.R. to amend the bid evaluation report so that its quoted price is stated to be Rs.731 per 1,000 stamps or Rs.0.731 per stamp.

14. On 18.10.2019, the F.B.R. forwarded N.R.T.C.'s said letter dated 17.10.2019 to P.P.R.A. and asked for its comments. Vide letter dated 21.10.2019, P.P.R.A. advised the F.B.R. to treat N.R.T.C.'s complaint in accordance with Rule 31 of the Public Procurement Rules, 2004 ("P.P.R."), which authorizes the procuring agency to seek and accept clarifications to the bid in writing. Furthermore, the F.B.R. was informed that it was the responsibility of the procuring agency and the bidder to clarify the mistake in writing *"before issuance of the evaluation report."*

15. N.R.T.C., vide letter dated 22.10.2019 (stamped by the F.B.R. as having been received on 23.10.2019), informed the G.R.C. constituted by the F.B.R. that it had *"mistakenly written"* Rs.0.731 per 1,000 stamps, and that it had already clarified that its bid was actually Rs.0.731 per one stamp, which made its bid Rs.731 per 1,000 stamps. N.R.T.C. requested the G.R.C. to accept the said clarification and declare its status as the lowest bidder in accordance with Rule 31 of the P.P.R.

16. N.R.T.C. had, vide another letter dated 22.10.2019, requested the G.R.C. for a meeting at the earliest. On 22.10.2019, the F.B.R. forwarded P.P.R.A.'s said letter dated 21.10.2019 to N.R.T.C. and informed the latter that the dispute resolution/G.R.C. had fixed a hearing in the case on 23.10.2019. N.R.T.C. presented its case to the G.R.C. on 23.10.2019. N.R.T.C.'s case in essence was that it had *"mistakenly written the unit price of Rs.0.731 per 1,000 stamps."* N.R.T.C. wanted its bid to be considered as Rs.731/- per 1,000 stamps. Vide letter dated 25.10.2019, the G.R.C. sought a clarification from the Law and Justice Division ("the Law Division") on the following questions:-

> ***"i. By accepting the explanation of the bidder will it tantamount to alter or modify the bid as mentioned in the Sub-Rule I of Rule 31 of PPRA Rules, 2004?***
> ***ii. By accepting the explanation of the bidder whether it will change the substance of the bid or not?***
> ***iii. Whether the procuring agency (FBR) should accept the clarification of the bidder after opening of the bid?"***

17. On 28.10.2019, the Secretary, Law Division gave the clarification on the questions posed by the G.R.C. with the caveat that the issue was relatable to the interpretation of the P.P.R. for which P.P.R.A.'s comments shall be sought. The clarification given by the Law Division was as follows:-

> ***"i. written or verbal explanation cannot be taken as part of the bid, therefore, the bid shall be examined as it is submitted;***
> ***ii. the explanation given tantamount to changing the bid price from 0.731 per 1000 to 731 per 1000 which is a clear cut change; and***
> ***iii. F.B.R. should decide this issue in line with applicable PPRA rules as this is not a legal question."***

18. After receipt of the said clarification, the F.B.R., on the very same day (i.e. 28.10.2019), requested the Law Division *"to cite the case law*

and judgments to substantiate" **the said opinion. Paragraph 2 of the said letter is reproduced herein below:-**

> ***"2. In case, the binding case law from the superior court is supportive of your aforesaid legal opinion, please endorse the same; however, if the case law is at variance, we would request you to recall the legal opinion and tender an advice in consonance with the case law."***

19. The said letter dated 28.10.2019 was signed by the Chairman of the G.R.C. The Law Division, after re-examining the matter, issued a second opinion. The Note File on which the second opinion is recorded by the Senior Consultant (Contract) shows that N.R.T.C.'s stance before the G.R.C. was that the price quoted in its bid should be corrected so as to read Rs.731 per 1,000 stamps instead of Rs.0.731 per 1,000 stamps since it was a *bona fide* mistake and *"nothing but an accidental or typographical slip."* The Senior Consultant (Contract)'s view was that the record confirmed N.R.T.C.'s stance which clearly fell within the ambit of Rule 31 of the P.P.R. His view was that *"even if there are any obvious mistakes which are clerical or arithmetical in nature occasioned on account of accidental steps or omissions which crop up in any judgment, order or a decree can be corrected in terms of Section 152 of the Code of Civil Procedure, 1908."* Furthermore, he was of the view that the equitable principles in Section 152 C.P.C. are applicable across the board. In taking this view, he placed reliance on the judgments in the cases of Ghulam Nabi Vs. Sardar Nazir Ahmed (1985 SCMR 824), Muhammad Anwar Vs. Muhammad Ashraf (PLD 2001 SC 209), and Atiq-ur-Rehman Vs. Muhammad Amin (PLD 2006 SC 309). After making reference to the said judgments, the Senior Consultant (Contract) took the view that the Law Division may recall its first opinion dated 28.10.2019, and N.R.T.C. may be permitted to submit a clarification in terms of Rule 31 of the P.P.R. so as to rectify an obvious arithmetical and accidental typographical slip. He further took the view that N.R.T.C.'s quoted price may be read as Rs.731 per 1,000 stamps instead of Rs.0.731 per 1,000 stamps. The Note File also shows that the Secretary, Law Division endorsed the view taken by the Senior Consultant (Contract) on the basis of the dicta laid down by the Hon'ble Supreme Court in the case reported as *PLD 2006 S.C. 309*. It may be mentioned that other than the relevant portion of the Note File, there is no letter on the record from the Law Division to the G.R.C. and/or the

F.B.R. recalling its first opinion dated 28.10.2019. For the purposes of clarity, the Law Division's second opinion dated 28.10.2019 is reproduced in "Schedule-A" hereto.

20. Only on the basis of the second opinion dated 28.10.2019 from the Law Division, the G.R.C., on 28.10.2019, accepted N.R.T.C.'s representation for the correction of its quoted price from Rs.0.731 per 1,000 stamps to Rs.731 per 1,000 stamps. The Law Division's second opinion was reproduced in its entirety by the G.R.C. in its decision dated 28.10.2019. Paragraph 7 of the G.R.C.'s letter dated 28.10.2019 shows that it had relied solely on the Law Division's second opinion in making its decision. All of this culminated in the issuance of the F.B.R.'s letter dated 29.10.2019, whereby N.R.T.C. was informed that the Board was pleased to grant a licence to it at a price of Rs.731 per 1,000 stamps for a period of five years to establish, maintain, and operate the whole process of the track and trace system for tobacco products in Pakistan subject to the terms and conditions as stipulated in the Licencing Rules, 2019, the I.F.L. and other relevant laws.

21. On 13.11.2019, the G.R.C. turned down N.I.F.T.'s grievance petition against the grant of the licence to N.R.T.C. solely on the basis of the second opinion dated 28.10.2019 of the Law Division.

CONTENTIONS OF THE LEARNED COUNSEL FOR N.I.F.T.:-

22. Learned counsel for N.I.F.T/petitioner in writ petition No.3995/2019 drew the attention of the Court to the bid evaluation report dated 14.10.2019 and submitted that N.I.F.T. was one of the bidders who had been technically qualified; that N.I.F.T's financial bid was Rs.868.36 per 1,000 stamps; that since N.R.T.C.'s financial bid was Rs.0.731 per 1,000 stamps, the bid evaluation committee was correct in observing that N.R.T.C. had violated annex-6 of the I.F.L., and that if N.R.T.C. did not stand by its said bid (i.e. Rs.0.731 per 1,000 stamps), the offer for the grant of the licence was to be made to the next lowest responsive bidder; that N.I.F.T. was the next lowest responsive bidder and ought to have been granted the licence after N.R.T.C. took the position that it had quoted Rs.0.731 per 1,000 stamps as a result of an oversight or mistake; that the G.R.C. could not have treated N.R.T.C.'s bid to be Rs.731 per 1,000 stamps under the pretext of 'clarification' under Rule 31 of the P.P.R.; that the G.R.C. did not have the jurisdiction to permit a bidder to change its financial bid; that the G.R.C. had

transgressed N.I.F.T.'s rights by not affording it an opportunity of hearing while deciding N.R.T.C.'s complaints dated 17.10.2019 and 22.10.2019; that N.I.F.T would not have questioned the G.R.C.'s decision dated 28.10.2019 if N.R.T.C. had quoted Rs.0.731 for one stamp; that if N.R.T.C.'s bid was not in conformity with the requirements of annex-6 of the I.F.L., the bid should have been rejected; that prior to the issuance of the bid evaluation report, N.R.T.C. had not applied in writing for its bid to be treated as Rs.731 per 1,000 stamps; that at no material stage, prior to the issuance of the bid evaluation report, had the F.B.R. and/or the licencing committee requested N.R.T.C. in writing to provide a clarification with respect to the quantum of its bid; and that P.P.R.A., in its letter dated 21.10.2019, had stated that it was the responsibility of the procuring agency and the bidder to *"clarify the mistake in writing before issuance of the evaluation report."*

23. Apart from advancing the aforesaid contentions, learned counsel for N.I.F.T. submitted that there was no plausible explanation for the Law Division to have issued two contradictory opinions in one day; that the Law Division's second opinion dated 28.10.2019 is flawed and based on irrelevant case law; that the undue haste with which the matter shuttled between the F.B.R. and the Law Division on 28.10.2019 shows that some sort of ground was being created to award the licence to N.R.T.C.; that the process adopted by the G.R.C. for deciding N.R.T.C.'s complaints was irrational, unlawful, and procedurally irregular; that on 29.10.2019, N.I.F.T. had filed a grievance petition before the G.R.C. wherein the position taken was that if the F.B.R. decides to grant the licence to N.R.T.C., it would not be in conformity with the letter and spirit of the I.F.L. and the F.C.T.C. Convention and Protocols; and that on 13.11.2019, the said grievance petition was rejected by the G.R.C., and N.I.F.T. was informed that relying on the clarification given by the Law Division, the representation filed by N.R.T.C. regarding the correction of its quoted price from 0.731 per 1,000 stamps to Rs.731 per 1,000 stamps was accepted by the G.R.C. Learned counsel for N.I.F.T/petitioner prayed for the writ petition to be allowed and for a direction to be issued to the licencing committee to proceed in accordance with the bid evaluation report dated 14.10.2019.

<u>CONTENTIONS OF THE LEARNED COUNSEL FOR AUTHENTIX</u>:-

24. Learned counsel for Authentix/petitioner in writ petition No.4395/2019 adopted the arguments advanced by the learned counsel for N.I.F.T. Furthermore, it was submitted that the quotation of Rs.0.731 per 1,000 stamps in N.R.T.C.'s financial bid was not the result of a typographical mistake since N.R.T.C. had inserted the said figure by hand; and that the said figure had been inserted by N.R.T.C. in collusion with the F.B.R.'s staff. Learned counsel for Authentix/petitioner brought on record N.R.T.C.'s financial bid showing that the price of Rs.0.731 had been written by hand. Learned counsel for Authentix/petitioner prayed for the said writ petition to be allowed.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE F.B.R.:-

25. On the other hand, learned counsel for the F.B.R. submitted that the International Monetary Fund had required the Government of Pakistan/F.B.R. to introduce a track and trace system for tobacco products at the earliest; that under the said system, each cigarette packet will have a bar code from which it would be determined whether or not sales tax on the product has been paid; that a licence was to be awarded to a bidder which could provide the cheapest system; that the payment for the licence had to be recovered from the tobacco manufacturers; and that the Sales Tax Rules, 2006 were amended vide notification (SRO.250(I)/2019) dated 26.02.2019 by virtue of which Chapter XIV-B in the said Rules was substituted altogether.

26. Learned counsel further submitted that there was a huge difference between the financial bid submitted by N.R.T.C. (i.e. Rs.0.731 per 1,000 stamps) and the one submitted by the next lowest bidder, N.I.F.T (i.e. Rs.868.36 per 1,000 stamps); that N.R.T.C. had informed the F.B.R. that there was a mistake in its bid and that its bid was actually Rs.731 per 1,000 stamps; that N.R.T.C. had asserted that the said mistake was a typographical error which could be clarified/rectified; that Rule 31 of the P.P.R. allows the procuring agency to seek clarifications from bidders after the bids have been opened; that under Rule 31 of the P.P.R., it was the F.B.R.'s obligation to seek a clarification from the N.R.T.C. regarding the latter's financial bid; that by not seeking a clarification, the F.B.R. failed to exercise the jurisdiction vested in it by law; that if this Court came to the conclusion that the F.B.R. could not have sought such a clarification, then the decision of the G.R.C. would become irrelevant and it would be a case

of re-bidding, but certainly not for the award of the licence to N.I.F.T.; that vide office order dated 09.10.2019, a three-member G.R.C. was constituted by the F.B.R. in accordance with the Licencing Rules, 2019 and the P.P.R.; that on 28.10.2019, the G.R.C. decided to accept N.R.T.C.'s clarification that its financial bid was actually Rs.731 per 1,000 stamps; that on 29.10.2019, the licence was awarded to N.R.T.C.; that Reliance and N.I.F.T. had also filed grievance petitions before the G.R.C., which rejected the said petitions after hearing the said parties; that the G.R.C., as a mark of prudence, was cautious by seeking an opinion from the Law Division before deciding N.R.T.C.'s grievance petition; that Rule 14(1)(a) of the Rules of Business, 1973 provides that the Law Division shall be consulted on any legal question arising out of any case; that the case law on the basis of which the Law Division changed its opinion was irrelevant; that the law is clear that a bid cannot be altered, but where there are arithmetical errors in the bid, clarifications could be sought since the ultimate aim is to award the contract at the best price; that the requirement to quote a price for 1,000 stamps is in annex-6 to the I.F.L.; that nowhere else in the I.F.L. is there a requirement for the price to be quoted for 1,000 stamps; and that the G.R.C. did not commit any illegality by treating N.R.T.C.'s financial bid to be Rs.731 per 1,000 stamps. Learned counsel for the F.B.R. prayed for the writ petitions to be dismissed.

CONTENTIONS OF THE LEARNED COUNSEL FOR N.R.T.C.:-

27. Learned counsel for N.R.T.C. raised an objection to the maintainability of writ petition No.3995/2019 on the ground that since N.I.F.T. is one of the four members of the consortium, and since the other members of the consortium are not parties to the said petition, the same is liable to be dismissed. In making his submission, learned counsel for N.R.T.C. placed reliance on the case of SIS Corporation (Pvt.) Ltd. Vs. Federation of Pakistan (PLD 2018 Islamabad 150). Furthermore, it was submitted that since the licence had already been granted to N.R.T.C. on 29.10.2019, this Court, in exercise of its jurisdiction under Article 199 of the Constitution, cannot interfere in concluded contracts.

28. Learned counsel for N.R.T.C. further submitted that the financial bids of all the petitioners were higher than that of N.R.T.C.; that on the very day on which the financial bids were opened, N.R.T.C. had verbally

clarified that its financial bid was Rs.731 per 1,000 stamps; that the said clarification should have been accepted by the F.B.R./licencing committee on 14.10.2019; that it was unfair for the licencing committee to have declared that N.R.T.C.'s bid was Rs.0.731 per 1,000 stamps; that a bid of Rs.0.731 per 1,000 stamps was so ridiculously low that N.R.T.C. could not have been expected to make such a bid; that the price of Rs.0.731 per 1,000 stamps was quoted by N.R.T.C. as a result of a *bonafide* oversight and mistake; that the G.R.C. did not commit any illegality by accepting N.R.T.C.'s representation to treat its financial bid as Rs.731 per 1,000 stamps; that since Rs.731 per 1,000 stamps was the lowest offer, and since the F.B.R. had to make an effort to obtain the best price for the provision of the track and trace system, the G.R.C.'s decision dated 28.10.2019 did not suffer from any legal or jurisdictional infirmity; and that since no funds were to be paid or received by or from the national exchequer, the provisions of the P.P.R. did not apply to the procurement process conducted by the F.B.R. Learned counsel for N.R.T.C. prayed for the writ petitions to be dismissed. In making the above submissions, the learned counsel for N.R.T.C. placed reliance on the judgments in the cases of Dr. Qamar Mahmood Vs. Rukhsana Kausar (2012 CLD 981), unreported judgment dated 09.01.2009 passed by the High Court of Punjab and Haryana in CWP No.970/2008 titled SAB Industries Limited Vs. State of Haryana, Spina Aphalt Paving Vs. Fairview (304 N.J.Super 425), and Munir Ahmed Vs. Rawalpindi Medical College and Allied Hospital (2010 SCMR 2446).

29. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the writ petitions have been set out in sufficient detail in paragraphs 4 to 21 above and need not be recapitulated.

WHETHER A WRIT PETITION FILED BY ONE OF THE MEMBERS OF A CONSORTIUM IS MAINTAINABLE:-

30. I first propose to deal with the objection taken by the learned counsel for N.R.T.C. to the maintainability of writ petition No.3995/2019 on the ground that the bid was submitted by a consortium of which N.I.F.T. was one of the four members, whereas the said petition was filed by N.I.F.T and not the other three members of the consortium.

31. Parties often create a consortium in order to submit a joint bid for a public contract. There are a number of reasons why parties might decide to create a consortium in order to submit a joint bid for a public contract. Some of the reasons why consortiums are formed for this purpose are that firms individually do not have sufficient turnover to meet the minimum turnover requirements or do not meet all of the necessary experience or technical capacity requirements set by the procuring agency in the tender bidding process. The essence of joint bidding for a public contract by members of a consortium is said to be a combination of their experience, knowledge, technical, personnel, business, and financial potential while members of the consortium, acting independently, are unable to meet the requirements given by the procuring agency in the invitation to bid for a public contract.

32. Rule 150ZL of the Licencing Rules, 2019 lists the qualifications which a bidder was required to possess for the issuance of the licence. One of these requirements is that the bidder shall be in a financial position to undertake the project and have a minimum annual turnover of US Dollars 50 million in any of the last three years or financial worth of US Dollars 25 million. It is an admitted position that there is no Pakistani entity providing I.T. solutions with the annual turnover and financial work required by the said Rule. There is no provision in the Licencing Rules, 2019 enabling the formation of a consortium for participation in the bidding process. However, clause 5.1 of the I.F.L. provides that an applicant may submit an application either as a single entity or as a partner in a consortium. Furthermore, it is provided that a consortium may have two or more partners, but an entity which is a part of a consortium is not permitted to be a part of more than one consortium and such entity cannot apply as a single applicant. Clause 5.2 of the I.F.L. requires a joint venture or a consortium interested in participating in the bidding process to provide *inter alia* documentation that precisely outlines the responsibility of each member of the joint venture or a consortium, if not covered under the joint venture/consortium agreement.

33. It is an admitted position that N.I.F.T. did not participate in the bidding process individually but as one of the members of a four-member consortium. The other three members of the consortium were (i) OPSEC Security Limited, (ii) Security Papers Limited, and (iii)

Imprensa Nacional-Casa da Moeda, S.A. The four members of the consortium shall be referred to as the "N.I.F.T. Consortium". The four members of the N.I.F.T. Consortium entered into a consortium agreement on 23.09.2019 for the purpose of jointly submitting a bid for the grant of the licence for the implementation of the IT based solution for the electronic monitoring and track and trace system for tobacco products. Under the terms of the said agreement, N.I.F.T. was appointed as the lead member with the authority to appear before the F.B.R. on behalf of the members of the N.I.F.T. Consortium. N.I.F.T. was independently nominated and appointed by the other three members of the N.I.F.T. Consortium to be their attorney and to act on their behalf and sign any agreement with the F.B.R.

34. Coming back to the question at hand whether a writ petition filed by one member of the N.I.F.T. Consortium was maintainable, the members of the said consortium had not formed a single company for the purpose of participating in the bidding. Each of the components members of the N.I.F.T. Consortium was a separate legal entity. N.I.F.T. is a company incorporated under the provisions of the erstwhile Companies Ordinance, 1984 and pursuant to resolution dated 16.03.2016 passed by its directors, a general power of attorney was executed on 21.03.2016 by N.I.F.T., authorizing Mr. Haider Wahab, the Chief Executive Officer of N.I.F.T. to *inter alia* institute legal proceedings before any Court or a Tribunal on behalf of N.I.F.T.

35. It is my view that the mere fact that N.I.F.T. did not associate all the other members of the N.I.F.T. Consortium as co-petitioners would not render the instant petition incompetent. In the instant petition, the petitioner has assailed the legality and propriety of the tender bidding process adopted by the F.B.R. for the grant of the licence to N.R.T.C. For a petitioner to seek judicial review of the process for the award for a contract or grant of a licence by the State or its instrumentality it is not even required for it to be a bidder. A rank outsider or a public interest litigant can also invoke the jurisdiction of the High Court under Article 199 of the Constitution for the judicial review of the process adopted by an instrumentality of the State for the award of a contract. Reference in this regard may be made to the following case law:-

(i) In the case of Afzal Motors (Pvt.) Ltd. Vs. Higher Education Archives and Libraries Department (2010 CLD 1182), the Hon'ble Peshawar High Court held as follows:-

> ***"13. Regarding maintainability of constitutional petitions relating to contractual matters, as in the present petition, the law has been settled that the issue relating to contracts can be agitated in constitutional jurisdiction. However, the condition precedent for such a judicial review is, where the impugned order or an action or inaction is based on mala fide, against the principles of transparency and the same it does not have any contentious contested questions of fact determinable from the record of the case.***
> ***It is also an admitted and settled principle of law that bidders do have rights to be considered in a lawful manner by the respondents. Moreso, in view of the rules, wherein the procedure for tendering, evaluation of tenders and the award of the contract has been clearly stipulated. Thus any violation of the rules could be duly agitated in constitutional jurisdiction."***

(ii) Additionally, in the case of Zahir Enterprises Vs. Government of Balochistan (1999 MLD 3112), the Hon'ble Balochistan High Court held as follows:-

> ***"It is well-known by the time, that to invoke the Constitutional jurisdiction under Article 199 of the Constitution, it is necessary that petitioner must show a vested right to claim discretionary relief. This condition of being an aggrieved person, stands fulfilled, particularly in the matter, which involves public interest litigation, if it has been established that the petitioner is an interested person and the object of invoking the jurisdiction is not to claim relief, essentially in his favour, but only to show that by means of an administrative action, unlawful proceedings have been drawn, which are required to be rectified by exercising judicial review."***

The Hon'ble Judges who authored the said reports rose to grace the Hon'ble Supreme Court. Therefore, the ratio in the said reports is to be revered and respected.

36. An objection to the maintainability of a writ petition on the very same ground as the one taken by the learned counsel for N.R.T.C. was taken in the case of Tera Software Ltd. Vs. Director of School Education, Hyderabad (2002 (2) ALD 688) * before the High Court of Andhra Pradesh. In that case the writ petitioner (who was one of the members of a consortium which had participated in a bidding process) had challenged the negotiations initiated by the Government with another bidder whose bid was alleged to be defective. It was held that each member of the consortium was deemed to be aggrieved and had

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* www.manupatra.com@ MANU/AP/0264/2002;

the *locus standi* to file the petition. In paragraph 15 of the said report, it was *inter alia* held as follows:-

> ***"When a person is aggrieved of an action and complains of the infringement of a legal right or fundamental right, such a person definitely will fall within the meaning of aggrieved person so as to maintain a writ petition. In the present case, the writ petitioner is raising a question of the alleged arbitrary action on the part of the authorities in calling the 3rd respondent for negotiations despite the fact that the essential particulars which are mandatory had not been furnished in full by the 3rd respondent, the consequence of which should be the very rejection of the tender itself and in this view of the matter, it cannot be said that the writ petitioner is not an aggrieved person. It may be that the other Companies in the consortium also could have jointed as co-writ petitioners along with the writ petitioner, but however, on the mere non-impleading of such parties it cannot be said that the writ petition has to be thrown out at the threshold on this ground when a serious question had been raised by the writ petitioner relating to the infringement of his legal right to be called for negotiations in preference to the 3rd respondent whose tender is liable to be rejected, according to the writ petitioner Company, for non-compliance of certain mandatory conditions by omitting to fill up all the columns which the 3rd respondent is expected to do in law and also as per the terms and conditions of the tender and hence I have no hesitation in rejecting the contention of the 3rd respondent that the writ petition has to be thrown out only on this ground."***

37. Reliance placed by the learned counsel for N.R.T.C. on the case of S.I.S. Corporation (Pvt.) Ltd. Vs. Federation of Pakistan (PLD 2018 Islamabad 150) is also misplaced since in that case the writ petitioner was not a member of a consortium that had participated in the bidding process, but holding an authority to act as bidder's legal representative with respect to the tender. In that case the petitioner's contention that in the event the contract was awarded to the bidder, the petitioner was to perform certain obligations under the contract was held to be a far-fetched idea to consider the petitioner as an aggrieved party. Additionally, it was held that the petitioner (who was not a bidder) could not be allowed to plead the case of the bidder, who was not before the Court as a party to the *lis*.

38. In view of the above, I hold that the petition filed by N.I.F.T. to the exclusion of its consortium members is maintainable. It ought to be borne in mind that N.R.T.C. had also formed a consortium with (i) Evolution Track and Trace (Pvt.) Ltd., (ii) INEXTO SA (Swiss), and (iii) PERUM PERCETAKAN UANG RI (Indonesian) for participating in the bidding process in question. This consortium shall hereinafter be referred to as "N.R.T.C. Consortium". The consortium agreement was executed by and between the said parties on 22.09.2019. Under the

said agreement, N.R.T.C. was the consortium lead and its responsibility was to take the financial liability of the N.R.T.C. Consortium. All the contracts for the supply of the track and trace solution was to be between N.R.T.C. and the tobacco manufacturers. N.R.T.C. was also to be responsible for providing a secure warehousing facility, managing the supply chain of the stamps in Pakistan, and for liaison with tobacco manufacturers, invoicing the consumer, collection of payments and distribution of payments amongst the members of the N.R.T.C. Consortium. Evolution Track and Trace (Pvt.) Ltd. was to be responsible for project rollout, software installation, running the solution and support for the duration of the contract and hardware commissioning at the tobacco manufacturers' factories. INEXTO SA was to provide the N.R.T.C. Consortium with the exclusive licence of the Software for the Project, and PERUM PERCETAKAN UANG RI had the responsibility of providing the N.R.T.C. Consortium with stamps as per the agreed specifications. There is no provision in the said agreement for the licence to be issued by the F.B.R. only to N.R.T.C. I noticed that the F.B.R., vide letter dated 29.10.2019, addressed only to N.R.T.C., informed the latter that the Board was pleased to grant a licence to it at a price of Rs.731 per 1,000 stamps for a period of five years. For the purposes of clarity, the last paragraph of the said letter is reproduced herein below:-

> ***"4. In view of the above, the Board is pleased to grant to M/s Radio & Telecommunication Corporation (NRTC) at price of Rs.731 per 1000 stamps for a period of 05 years to establish, maintain and operate the whole process/system of track and Trace System for tobacco products in Pakistan subject to terms and conditions as stipulated in Licencing Rules, 2019, Invitation for Licence (IFL) and other relevant laws."***

39. The said letter does not contemplate the execution of an agreement between the F.B.R. and all the members of the N.R.T.C. Consortium. Learned counsel for the F.B.R. had clarified that if the members of the N.R.T.C. Consortium do not perform the obligations divided between them under the consortium agreement dated 22.09.2019, this would furnish a cause for the F.B.R. to cancel the licence.

40. The mere fact that N.R.T.C. had been authorized by the other members of the N.R.T.C. Consortium to execute an agreement on their behalf with the F.B.R. does not mean that an agreement is to be

executed or the licence is to be issued to N.R.T.C. only. Of course, N.R.T.C. can sign the agreement on behalf of the other members of the N.R.T.C. Consortium, but such other members cannot be left out from being made parties to the contract or from being made licencees.

41. It is well settled that if a bid is submitted by or on behalf of a consortium and if such a consortium is evaluated as the most responsive bidder, then the contract is to be executed by the procuring agency with the members of such consortium or their authorized representative/attorney. A consortium member on the basis of whose credentials the procuring agency declares the consortium as the most responsive bidder, is to be made a party to the contract for which the procurement process was carried out. Such a consortium member cannot be permitted to exit the contractual scheme even after the award of the contract. One member of a consortium cannot be permitted to piggyback on the financial and technical ability of another member of the consortium and not make such a member as a party to the contract. Additionally, privity of contract between the procuring agency and all the members of the successful consortium must exist for the entire duration of the contract. In holding so, I derive guidance from the law laid down in the following cases:-

(i) In the case of Ishaq Khan Khakwani Vs. Railway Board (PLD 2019 SC 602), pursuant to the recommendations of the bid evaluation committee, the Railway Golf Club, Lahore was given on lease by Pakistan Railways to a consortium of three companies. The subsequent exit of one of the consortium members (whose credentials were instrumental in the grant of the lease in favour of the consortium) was deprecated by the Hon'ble Supreme Court in the following terms:-

> ***"25. Furthermore, it is an undisputed fact that Maxcorp left the consortium through a shareholder buyout by Husnain Construction Company on 15.01.2003 after building the first nine holes of the golf course although subsequently it was given a subcontract by the latter to build the remaining nine holes. Thereafter vide Certificate of Incorporation on Change of Name dated 20.07.2004 issued by the Securities and Exchange Commission of Pakistan, the name of "Maxcorp Husnain Pakistan Limited" was changed to "Mainland Husnain Pakistan Limited", i.e. respondent No.17. A public notice regarding the shareholder buyout and the change of name was issued in "The News" on 06.08.2004. We have been apprised that certain outstanding dues of Maxcorp remain unsettled in which regard litigation is pending in Pakistan. Such a***

convenient exit should not have been allowed under the Agreement in view of the fact that the name, antecedents, experience, financial resources and know-how of Maxcorp consortium in setting up and operation golf and country clubs was used as a major qualification to win the project. Be that as it may, this makes it apparent having fraudulently used the name of Maxcorp for the sole purpose of winning the project, Husnain Construction Company and Unicon Consulting maliciously elbowed it out to run the project on their own despite the fact that they did not have any prior experience in construction, development or financing of a golf club which was necessary for pre-qualification, for winning the project in the first place."

(Emphasis added)

(ii) **In the case of Wattan Party Vs. Federation of Pakistan (PLD 2006 SC 697), the privatization process of the Pakistan Steel Mills Corporation was subjected to judicial review before the Hon'ble Supreme Court under Article 184(3) of the Constitution. A consortium comprising (i) M/s Arif Habib Group of Companies, (ii) M/s Al-Tuwairqi Group of Companies and (iii) M/s Magnitogorsk Iron and Steel Works, Russia was declared successful bidder at the rate of Rs.16.80 per share. However, the Share Purchase agreement was executed by the Privatization Commission with a consortium comprising (i) PSMC SPV (Mauritius) Limited, (ii) Arif Habib Securities Limited and (iii) Mr. Arif Habib. The execution of the Share Purchase Agreement with a consortium with a different composition than the one which had been declared as the successful bidding was one of the grounds on which the privatisation process was declared unlawful. In paragraph 90 of the said report, it was held as follows:-**

"It is clear that bidders are different than the purchasers. The names of the purchasers shown in the Agreement dated 24.04.2006 have not been approved by the C.C.O.P. When asked to explain the anomaly, learned counsel for successful bidder explained that the afore-referred arrangement was devised with a view to provide a corporate vehicle through which the successful bidder could exercise corporate control on P.S.M.C. He further attempted to explain that this devise was adopted to save the double taxation. We fail to understand that the Privatization Commission readily accepted the arrangement which was to the benefit of the bidders for the purpose of entering into the Sale Purchase Agreement knowing well that under the law of our country no such permission can be granted because the contract is to be entered between the seller and the purchaser as approved by the Privatization Commission Board and the CCOP in terms of Rule 4(2) of the Privatization Commission (Modes and Procedure) Rules, 2001."

(Emphasis added)

WHETHER THIS COURT IN EXERCISE OF JURISDICTION UNDER ARTICLE 199 OF THE CONSTITUTION CAN INTERFERE IN CONCLUDED CONTRACTS:-

42. Learned counsel for N.R.T.C. had also submitted that since a licence has already been granted to N.R.T.C., this Court, in exercise of its jurisdiction under Article 199 of the Constitution, cannot interfere in concluded contracts. There is a catena of case law to negate the said contention. The scope of interference with the decision of a public authority to award a contract has been the subject matter of various decisions of the Superior Courts. What emerges from these decisions is that in such matters, the scope of judicial review by the High Court is limited and Courts are, generally, slow to interfere. However, it has consistently been held that the discretion of a public authority in contractual matters is not unfettered. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. The limited scope of judicial review envisages examination of the question whether there are any *malafides*, arbitrariness, material irregularity, or unreasonableness in the decision-making process leading to the award of the public contract. Judicial review is concerned with reviewing not the merits of the decision by an executive authority, but the decision-making process leading to the award of a public contract. The Court can examine the decision-making process and interfere if it is found vitiated by *malafides*, unreasonableness, arbitrariness, or material irregularity. Before interference the Court has to be satisfied that the decision is such that no responsible authority acting reasonably and in accordance with the relevant law could have reached. Reference in this regard may be made to the following case law:-

(i) In the case of Iqtedar Ali Khan Vs. Department of Mines and Minerals (PLD 2004 SC 773), the Hon'ble Supreme Court upheld the cancellation of the lease because the manner in which the lease was awarded lacked transparency and fairness.

(ii) In the case of Kay Bee International (Pvt.) Ltd. Vs. Secretary to the Government of Punjab (PLD 2002 SC 1074), it was held that the approach of the Government in awarding contracts and licences shall be rational, reasonable and transparent and it should not be based upon arbitrariness and discrimination. In this case, the

Hon'ble Supreme Court cancelled the award of contract on account of aberrations in the bidding process.

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

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

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

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

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

> ***"There could be no cavil with the proposition that enforcement of a purely contractual obligation could not properly form the subject matter of proceedings under Article 199 of the Constitution. However, it could not be ignored that the State had a Constitutional obligation to act fairly even when performing an administrative function. Therefore, when a party complained before the Court that the State while awarding a contract to a party had acted in an unfair or arbitrary manner or had discriminated against one of the parties who contested for the***

award of the contract, such grievance could be looked into by superior Court in exercise of its powers of judicial review under Article 199 of the Constitution and if the Court was satisfied that the Government while entering into a contract had acted arbitrarily or in an unfair manner or had discriminated between the parties before it in matter of awarding the contract, it could interfere and strike down such action."

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

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

The appeal against the said judgment was dismissed by the Hon'ble Supreme Court of Pakistan vide judgment reported as Ramna Pipe and General Mills (Pvt.) Ltd. Vs. Sui Northern Gas Pipelines (2004 SCMR 1274) wherein it has been held as follows:-

"Now to attend the proposition advanced by the learned counsel for Messrs Huffaz, namely, that the High Court cannot rewrite a contract in exercise of its jurisdiction under Article 199 of the Constitution, it is to be seen that in view of dictum in the case of Commissioner Income Tax, Peshawar (ibid) it would be seen whether the contract between the parties is valid one arid the functionaries of SNGPL have entered into a just, fair transparent, reasonable and free of any taint of mala fides contract to pursuance whereof it has picked up liability to pay sales tax, etc. after receiving tenders from participants for the supply of steel line pipes."

(vii) In the case of Mia Corporation (Pvt.) Ltd. Vs. Pakistan PWD (PLD 2017 Islamabad 29), I had the occasion to hold as follows:-

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

43. In view of the above, I hold that there is no force in the contention of the learned counsel for N.R.T.C. that this Court is bereft of jurisdiction to judicially review the process adopted for the award of the licence to N.R.T.C. Now, the question whether the process for the grant of the licence to N.R.T.C. was tainted by any of the aforementioned factors which makes interference with contracts awarded by the State or its instrumentalities permissible is to be answered on the facts and peculiar circumstances of the instant case.

THE ISSUANCE OF TWO CONTRADICTORY OPINIONS BY THE LAW DIVISION ON 28.10.2019:-

44. The G.R.C., vide its letter dated 25.10.2019, sought an opinion/clarification from the Law Division on questions arising out of N.R.T.C.'s request to treat its financial bid to be Rs.731/- per 1,000 stamps, and the interpretation of Rule 31 of the P.P.R. As mentioned above, the Law Division's first opinion dated 28.10.2019 was that (i) a written or verbal explanation cannot be taken as part of the bid, therefore, the bid shall be examined as it is submitted; (ii) the explanation given is tantamount to changing the bid price from 0.731 per 1000 to 731 per 1000 which is a clear cut change; and (iii) the F.B.R. should decide this issue in line with applicable PPRA rules as this is not a legal question.

45. It may be recalled that vide letter dated 28.10.2019, the G.R.C. requested the Law Division *"to cite the case law and judgments to substantiate"* its first opinion dated 28.10.2019. The G.R.C. had also *inter alia* requested the Law Division *"to recall the legal opinion and tender an advice in consonance with the case law"* if the case law from the Superior Courts was at variance with its opinion.

46. The Law Division is said to have recalled its first opinion dated 28.10.2019 on the strength of the law laid down in the cases of Ghulam Nabi Vs. Sardar Nazir Ahmed (1985 SCMR 824), Muhammad Anwar Vs. Muhammad Ashraf (PLD 2001 SC 209), and Atiq-ur-Rehman Vs. Muhammad Amin (PLD 2006 SC 309). In its second opinion dated 28.10.2019, the Law Division's opinion was *inter alia* that N.R.T.C. may be permitted to submit a clarification in terms of Rule 31 of the P.P.R. so as to rectify an obvious arithmetical and accidental typographical slip in

its bid. The Law Division's second opinion led the G.R.C. to accept N.R.T.C.'s request to treat its financial bid as Rs.731/- per 1,000 stamps.

47. But for the G.R.C.'s decision dated 28.10.2019, the F.B.R. would not have granted the licence to N.R.T.C. at the rate of Rs.731/- per 1,000 stamps. The F.B.R.'s letter dated 29.10.2019, whereby the licence was granted to N.R.T.C., makes explicit reference to the G.R.C.'s decision dated 28.10.2019. As mentioned above, on 28.10.2019, the G.R.C. accepted N.R.T.C.'s representation for treating the price quoted in its financial bid to be Rs.731 per 1,000 stamps. A glance at the G.R.C.'s said decision shows that it was solely taken on the basis of the Law Division's second opinion dated 28.10.2019. The G.R.C., in its decision, after reproducing the Law Division's said opinion in its entirety, gave the following findings:-

> ***"7. Relying on the above clarification of Law & Justice Division the representation filed by M/s NRTC regarding the correction of quoted price of Rs.731 per 1000 Stamps instead of Rs.0.731 per 1000 Stamps is hereby accepted."***
> **(Emphasis added)**

48. The question of accepting N.R.T.C.s' request to treat its financial bid to be Rs.731/- per 1,000 stamps would not have arisen if the Law Division's first opinion dated 28.10.2019 remained in the filed. Now, the learned counsel for the F.B.R., consistent with his high stature and repute, very fairly submitted that the said judgments on which reliance had been placed by the Law Division in giving its second opinion, were "irrelevant". This strikes at the root of the Law Division's second opinion and renders it flawed and unreliable.

49. It is my view that an opinion based on irrelevant case law would not be worth the paper it is written on. Since the F.B.R.'s decision to grant the licence to N.R.T.C. was based on the G.R.C.'s decision dated 28.10.2019, which in-turn was solely based on the Law Division's second opinion dated 28.10.2019, and since the said opinion was based on "irrelevant" case law, the entire edifice raised on the basis of the said opinion is liable to crumble. In the case of Yousaf Ali Vs. Muhammad Aslam Zia (PLD 1958 SC 104), it has been held *inter alia* that if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them must, unless some statute or principle of law

recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded. The law laid down in the said case has consistently been followed by the Superior Courts of this country in several cases including but not limited to Muhammad Tariq Khan Vs. Khawaja Muhammad Jawad (2007 SCMR 818), Rehmatullah etc. Vs. Saleh Khan (2007 SCMR 729), Talib Hussain Vs. Member Board of Revenue (2003 SCMR 549), Pakistan Industrial Promoter Vs. Nawazish Ali Jafri (2003 YLR 1277), and Crescent Sugar Mills and Distally Limited Vs. Central Board of Revenue (PLD 1982 Lahore 1).

50. The admission made by the learned counsel for the F.B.R. that the Law Division's second opinion dated 28.10.2019, which forms the sole basis for the G.R.C.'s decision dated 28.10.2019, was based on "irrelevant" case law was enough to allow the instant petitions, but nevertheless I propose to examine each of the judgments referred to the Law Division's second opinion dated 28.10.2019 to see as to whether they have any relevance, howsoever remote, to the matter with respect to which its opinion had been sought.

(a) Ghulam Nabi Vs. Sardar Nazir Ahmed (1985 SCMR 824)

51. The facts of this case were that the appellant purchased land in District Sheikhupura from its owner through a registered sale deed. The respondent had filed a suit for pre-emption on the ground that he was the vendor's collateral in the same estate. The appellant, in his written statement, took the plea that a suit for partial pre-emption was not maintainable. It was also pleaded that details of the land were incorrectly mentioned. One of the issues framed by the learned trial Court was "whether the suit was bad for partial pre-emption?" After the arguments were heard and the case was fixed for the announcement of judgment, the respondent realized that there were certain omissions in the plaint. He filed an application under Order VI, Rule 17 C.P.C. for amendment in the plaint so that the omissions could be supplied. The said application was dismissed on the ground that it was filed belatedly. The learned trial Court dismissed the respondent's suit holding that the suit suffered from the defect of partial pre-emption. The Hon'ble High Court allowed the respondent's appeal against the dismissal of the suit, and the Hon'ble Supreme Court dismissed the appellant's appeal against the judgment of the Hon'ble High Court. The Hon'ble Supreme

Court spurned the appellant's argument that the respondent could not seek an amendment in the plaint to correct the description of the land, in the following terms:-

> ***"Section 153, C.P.C. preserves the power of the Court to amend, inter alia, any proceeding in a suit at any time and Order V1, rule 17, C.P.C. vests the Court with the power to allow any party to amend his pleadings particularly when such amendment is necessary for the purposes of determining the real question in controversy between the parties. This power in the express terms of the provisions quoted can be exercised at any time during the pendency of such proceedings and even after the passage of the decree at the appellate stage. There is authority for the proposition that correction regarding the description of the property in dispute can be allowed. From the nature of the errors in the description of the property in this case, it is quite clear to us that these errors and omissions were accidental and no part of the property was intentionally omitted from being included in the claim set up in the suit. This is clear from the facts that the suit itself was brought in order to pre-empt the sale as a whole and it appears that long before the application for amendment was submitted, during the evidence the respondent had produced the copy of the registered sale deed and the mutation pertaining to it. The appellant was, therefore, on notice as to the claim of the respondent to have extended to the entire property under sale on which the suit was based. No detailed averment with reference to the correct description of the portions of the property which were either mis-described or omitted from being included in the plaint, was made in the written statement nor was an issue raised specifically in this behalf. In such circumstances as held by this Court in Wazir Muhammad v. Abdul Aziz 1982 SCMR 189 the omission was obviously a clerical error and so was the mis-description."***

(b) <u>Muhammad Anwar Vs. Muhammad Ashraf (PLD 2001 S.C. 209)</u>

52. The facts of this case were that the appellant purchased land in Tehsil *Chiniot* through a registered sale deed. The respondent filed a suit for pre-empting the sale on the basis of a superior right of pre-emption. The respondent's application for substituting the name of the defendant was dismissed by the learned trial Court and so was the suit for pre-emption. It was *inter alia* held by the learned trial Court that the suit was hit by partial pre-emption. The respondent's appeal was allowed by the appellate Court and his suit for pre-emption was decreed. The appellant's regular second appeal was dismissed by the Hon'ble High Court. The appellant's petition against the judgment of the Hon'ble High Court was dismissed by the Hon'ble Supreme Court, which held *inter alia* that the non-mentioning of the defendant's correct name was an omission which was always subject to correction by invoking the provisions contained in Section 153 C.P.C. It was also held that Courts possessed inherent powers for the misdescription of a

party in a suit to be corrected independent of the express jurisdiction conferred by Section 153 C.P.C.

(c) Atiq-ur-Rehman Vs. Muhammad Amin (PLD 2006 S.C 309)

53. The facts of this case were that the appellants purchased land in Tehsil *Wazirabad*, District *Gujranwala*. The respondent, claiming to have a superior right of pre-emption, filed a suit for pre-emption. The ground taken by the respondent in his suit was that he was the co-owner of the land and that he was owner of adjacent land with a common source of irrigation. The learned trial Court decreed the said suit, but the learned appellate Court allowed the appellants' appeal and dismissed the suit. The Hon'ble High Court allowed the respondent's civil revision petition and restored the judgment of the learned trial Court whereby the respondent's suit was decreed. At first, the appellant filed a civil petition for leave to appeal before the Hon'ble Supreme Court, but he withdrew the said petition after realizing that he should have filed a direct appeal against the judgment of the Hon'ble High Court. He filed a direct appeal after the expiry of the limitation period for filing such an appeal. The position taken by the appellant was that since the delay in filing the appeal was not deliberate it should be condoned in the interests of justice. Since the Hon'ble Supreme Court found that the civil petition had been filed due to a *bonafide* mistake, the delay in filing the direct appeal was condoned and the appeal was decided on merits.

54. Neither could N.R.T.C.'s request for the correction of the mistake in its financial bid be treated as an application under Order VI, Rule 17 C.P.C., nor could the G.R.C. arrogate to itself powers of the Court akin to Section 153 C.P.C., which empowers the Court to amend any defect or error in any proceeding in a suit for the purpose of determining the real question or issue raised by or depending on such proceeding. In the case of Pallipurayil Asan Kutti Vs. Mukkolakkal Koyyaman Kutti (AIR 1937 Madras 342), it was held that the term "proceedings" employed in Section 153 C.P.C. means *"any application to a Court of justice however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages or for any remedial object."* The F.B.R. or the G.R.C. are not a Court of justice and do not have the powers of a Civil Court. If the Law Division believed that on the basis of the law laid down in the three judgments referred to its second opinion, the G.R.C.

could allow N.R.T.C.'s request for the correction of its financial bid so as to read "Rs.731/- per 1,000/- stamps" instead of "Rs.0.731 per 1,000 stamps," it bespeaks of a sorry state of affairs to say the least.

55. As mentioned above, the Secretary, Law Division had endorsed the view taken by the Senior Consultant (Contract) only on the basis of the judgment in the case of Atiq-ur-Rehman Vs. Muhammad Amin (PLD 2006 SC 309). In other words, in the estimation of the Secretary, Law Division, the judgment of the Hon'ble Supreme Court to condone the delay in filing a direct appeal on the ground that earlier a civil petition had been filed by the appellant as a result of *bonafide* mistake could form the basis for the Law Division's second opinion, that the G.R.C./F.B.R. could allow N.R.T.C.'s application for the correction of a mistake in its financial bid after the bids had been opened.

56. It needs to be determined what actually caused the Law Division to take a volte-face by giving a second opinion which was in absolute contrast to the first one. I have carefully gone through the written comments filed on behalf of the F.B.R. in all the petitions. There is nothing mentioned in these comments about the matter being referred back to the Law Division on 28.10.2019. In paragraph 14 of the written comments filed on behalf of the Law Division, it is clearly pleaded that the Law Division reviewed its first opinion because the referring Division/F.B.R. had sought its reconsideration in accordance with Instruction No.38 of the Secretariat Instructions, 2004 according to which the Law Division could reconsider its first opinion and issue a fresh opinion in view of the "difference of opinion" between the Law Division and the referring Division/F.B.R. The F.B.R., in its written comments, has not alluded to any difference of opinion between the Law Division and the referring Division/F.B.R. over the first opinion dated 28.10.2019.

57. The F.B.R.'s said letter dated 28.10.2019 also does not show any difference of opinion or disagreement by the F.B.R. with the Law Division's first opinion dated 28.10.2019. Paragraph 14 of the Law Division' written comments makes it amply clear that in fact the matter was referred back to the Law Division on 28.10.2019 because the F.B.R. did not agree with the first opinion dated 28.10.2019. The F.B.R. was most prompt in agreeing with the Law Division's second opinion dated 28.10.2019.

58. A Division seeks an opinion from the Law Division pursuant to Rule 14(1) of the Rules of Business, 1973, which have been made by the Federal Government in exercise of the powers conferred by Articles 90 and 99 of the Constitution. Rule 14(1) of the said Rules reads thus:-

> ***"14. Consultation with the Law and Justice Division**-- (1) The Law and Justice Division shall be consulted--*
> *(a) on all legal questions arising out of any case;*
> *(b) on the interpretation of any law;*
> *(c) before the issue of or authorization of the issue of an order, rule, regulation, by-law, notification, etc. in exercise of statutory powers;*
> *(d) ...*
> *(e) before instituting criminal or civil proceedings in a court of law in which the Government is involved;*
> *(f) whenever criminal or civil proceedings are instituted against the Government at the earliest possible stage; and*
> *(g) before the appointment of a legal adviser in any Division or any office or corporation under its administrative control and the Law and Justice Division will make its recommendations after consultation with the Attorney General."*
> **(Emphasis added)**

59. The Rules of Business, 1973 made by the Federal Government in exercise of the powers conferred by Articles 90 and 99 of the Constitution, have been held to be based on public policy and designed to safeguard the State's interests effectively. To act in consonance with these Rules is clearly a duty cast on all the Divisions and Ministries of the Federal Government. The Superior Courts have, time and again, emphasized that due weight was required to be given to these Rules. Reference in this regard may be made to the cases of Tariq Aziz-ud-Din (2010 SCMR 1301), Federal Government of the Islamic Republic of Pakistan Vs. General (R) Pervez Musharaf (2014 P.Cr.LJ 684), and Amin Jan Vs. Director General, T&T (PLD 1985 Lahore 81). In the case of Sardar Muhammad Vs. Federation of Pakistan, (PLD 2013 Lahore 343), it has been held as follows:-

> ***"43. Adherence to the rule of law, in general, and to the Rules of Business, in particular, in conducting its business determines the quality of governance of the government in power. Rules of Business flow out of the Constitution, and are the sinews of a workable government. Besides providing a departmental organogram of a workable democracy, these Rules are a fine weave of democratic principles including: participatory engagement, written and reasoned dialogue, divergence of opinion, open and transparent deliberations, etc. These Rules of Business besides providing a procedural manual for the Federal Government to conduct its business also act as constraints on governmental power."***

60. Rule 14(1) of the Rules of Business, 1973 casts an important duty on the Law Division to render an opinion strictly in accordance with the

law *"on all legal questions arising out of any case,"* and *"on the interpretation of any law"* in the process of consultation with the referring Division. The said Rule envisages the Law Division to hold a position of special trust, calling for an ability to take exceptional responsibility in giving opinion to the referring Divisions. There ought to be no room for error in a legal opinion given by the Law Division to another Division. Although a wrong legal opinion by an advocate has been held not to constitute professional misconduct, a flawed opinion from the Law Division can have disastrous consequences. The Law Division must have an impartial approach and in its opinion, it must not tell the referring Divisionf what it wants to hear but what it ought to hear. It is expected to withstand pressure applied on it to approve some step in a process which the administration is keen to advance. The reason why a provision for consultation with the Law Division has been made in the Rules of Business, 1973 is that the opinion of the Law Division can serve as a guiding torch in the resolution of a matter with respect to which its legal opinion is sought. What would be the worth of the Law Division's opinion if it could be changed/reversed with the drop of a hat or, as in this case, by a request from the referring Division to buttress the opinion with case law. The issuance of contradictory opinions or the issuance of a legal opinion based on "irrelevant" case law diminishes the credibility of the Law Division.

61. The Law Division attempted to justify a prompt dramatic U-turn in giving a second opinion, which is in stark contract to its first opinion of the same day, by pleading that it could reconsider its first opinion by exercising powers under Instruction No.38 of the Secretariat Instructions, 2004. The Secretariat Instructions, 2004 were issued by the Establishment Division in pursuance of Rule 5(15) of the Rules of Business, 1973 for the disposal of business in the Federal Secretariat. Instruction No.38 of the said Instructions reads thus:-

> ***"38. When a file has been referred to or returned from another Division and a difference of opinion between the Divisions is disclosed, personal discussion shall as a rule be substituted for further noting. If the difference of opinion is not resolved at the level at which the case was taken up, the level of personal discussion shall be appropriately raised. In any particular case where the two Ministers agree after personal discussion, the Secretaries shall, if necessary meet and record a joint note embodying the decision and there shall be no further noting."***
>
> **(Emphasis added)**

62. Perusal of the said Instruction shows that the matter could be returned by the Revenue Division to the Law Division upon disclosure of a difference of opinion between the two Divisions. Now the G.R.C.'s letter dated 28.10.2019 to the Law Division does not disclose any difference of opinion between the two Divisions. Vide the said letter, the G.R.C. simply asked the Law Division to "*cite the case law and judgments to substantiate*" the first opinion, and if the case law is at variance, to recall the said opinion and tender an advice in consonance with the case law. Since the said letter dated 28.10.2019 from the G.R.C. or any other document on the record does not disclose any difference of opinion between the Law Division and the Revenue Division with respect to the Law Division's first opinion, it is safe to hold that the requirements of Instruction No.38 had not been satisfied for the matter to be referred back to the Law Division or for the Law Division to have given a fresh opinion which was contrary to its first one.

63. It ought to be borne in mind that at first the F.B.R. had referred the matter for the Law Division's opinion on 25.10.2019. The Law Division took three days to render its first opinion on 28.10.2019. This must have been a thought over opinion. But astoundingly, it just took at the most a few hours for the Law Division to render an opinion contrary to its first one. Now, the F.B.R./G.R.C. did not provide any further information to the Law Division which caused it to undo its first opinion. At least in the F.B.R.'s letter dated 28.10.2019 to the Law Division, no such information is provided. Whatever the disagreement or difference of opinion was between the F.B.R./G.R.C. and the Law Division regarding the first opinion dated 28.10.2019, it was never reduced into writing.

64. What intrigues me is how could (i) the Law Division render its first opinion, which the referring Division/F.B.R. had disagreed with; (ii) the F.B.R. examine the said opinion and refer the matter back to the Law Division; (iii) the Law Division render its second opinion, which was in contrast to its first opinion and which the F.B.R. did not disagree with; and (iv) the G.R.C. accept N.R.T.C.'s grievance petition, all during the working hours of one day, i.e., 28.10.2019? I do not want to begrudge the Law Division and the F.B.R./G.R.C. for their unmatched efficiency, but all the said events transpiring on the same very day are indicative of

an "indecent haste," a term coined in our jurisprudence by the Hon'ble Supreme Court in the case of Wattan Party Vs. Federation of Pakistan (PLD 2006 S.C. 697). Such haste was one of the grounds on which the Hon'ble Supreme Court declared the process for the privatization of Pakistan Steel Mills to be unlawful. The manner in which the decision was taken to award the licence to N.R.T.C. was taken by the F.B.R., when tested on the touch stone of the Wednesbury principle of reasonableness, cannot, in my view, withstand the test of judicial review. All these circumstances and, in particular a 'no' from the Law Division turning into a 'yes' in one day on the basis of a difference of opinion or disagreement with the F.B.R. (which the F.B.R. chose not to disclose in its written comments), cause me to hold that the process culminating in the decision to accept N.R.T.C.'s grievance petition and to award the licence to it casts a reasonable doubt on the transparency of the exercise, rendering the decision to grant the licence to N.R.T.C. unlawful.

WHETHER N.R.T.C.'S FINANCIAL BID WAS IN ACCORDANCE WITH THE REQUIREMENTS OF ANNEX-6 TO THE I.F.L.:-

65. The I.F.L. was a document of central significance in explaining how the bidders were to bid for the tender. Annex-6 to the I.F.L. in clear and unambiguous terms required the bidders to quote the price for 1,000 tax stamps with unique identification markings. The rationale behind requiring the bidders to quote an amount for 1,000 stamps in their financial bids is that clause 2.8 of the I.F.L. provided that the *"licencee shall charge a fee from tobacco manufacturers and importers on the basis of fee per one thousand stamps (Unique Identification Marks) during the duration of the licence."*

66. All the bidders, save N.R.T.C., understood the requirements in annex-6 to the I.F.L., i.e. that the bidders had to quote a price for 1,000 stamps. No explanation was presented by the learned counsel for N.R.T.C. as to why his clients could not comprehend the plain and simple requirements in annex-6 to the I.F.L. Clearly, N.R.T.C. was negligent in not submitting its financial bid in accordance with the requirements in annex-6 to the I.F.L. Had N.R.T.C. been vigilant in checking their bid documents before submitting them, the mistake in its financial bid could have been averted. This is not a case where N.R.T.C. was seeking a reasonable opportunity to correct an obvious mistake in

its bid. The mistake committed by N.R.T.C. in its financial bid cannot be termed as inconsequential since its correction would have the consequence of fundamentally changing the amount quoted in the financial bid from "Rs.0.731 per 1,000 stamps" to Rs.731/- per 1,000 stamps". It could also not be termed as a "typographical slip" since the amount, "Rs.0.731" in N.R.T.C.'s financial bid was hand written.

67. All the bidders, including N.R.T.C., had submitted their respective bids on 27.09.2019. The financial bids were opened on 14.10.2019. It was not until the opening of the financial bids that N.R.T.C. took the position, albeit verbally, that its financial bid was not what was written by it in its bid but Rs.731/- per 1,000 stamps. No explanation was presented by the learned counsel for N.R.T.C. as to why N.R.T.C. remained silent for seventeen days before realizing that it had made a 'mistake' in its financial bid and that too after the bids had been opened.

68. The reason for N.R.T.C.'s mistake is in no manner attributable to the F.B.R.'s fault or any ambiguity in the terms of the I.F.L. or annex-6 thereto. It was not N.R.T.C.'s case that the requirements in annex-6 to the I.F.L. were either vague or uncertain. If at all there is any general duty of an instrumentality of the State to let bidders correct obvious mistakes in their bids this duty is severely circumscribed where there are several bidders in the competitive arena who all have a right to be treated equally. Such duty cannot afford a bidder an opportunity to amend its bid and improve its prospects of success in the competition after the date for the submission of the bids has passed. Merely because Rs.731/- per 1,000 stamps would have been the lowest bid could not be a ground to accept N.R.T.C.'s bid in violation of the tender conditions.

69. It is an admitted position that N.R.T.C. had raised a host of queries with respect to the I.F.L. prior to the date fixed for the submission of the bids. The F.B.R, through a consolidated document, provided clarifications to queries raised by N.R.T.C. as well as the other bidders and IT Solutions providers. N.R.T.C. did not feel the need to ask the F.B.R. whether a bidder was required to quote an amount for one or 1,000 stamps. If N.R.T.C. was under any doubt whether annex-6 of the I.F.L. required the bidders to quote an amount for one stamp or 1,000 stamps, it could have sought a clarification from the F.B.R. in the pre-

bid conference. This shows that N.R.T.C. understood the requirements in plain and unambiguous language in annex-6 to the I.F.L. that a bidder was required to quote an amount for 1,000 stamps. N.R.T.C., with its eyes open, had quoted Rs.0.731 per 1,000 stamps in its bid. Whether N.R.T.C.'s financial bid of Rs.0.731 per 1,000 stamps was mistaken, ridiculous or unrealistic, it was the result of its own culpable negligence and could have been avoided by reasonable care, diligence or caution.

70. It is well settled that equity does not relieve a party from the consequences of its own negligence. This Court, while exercising equitable jurisdiction, cannot countenance the decision of the G.R.C. to permit a bidder to correct errors in its financial bid after all the bids have been opened and the evaluation report has been issued. If modifications in financial bids are allowed after the results of the bidding were made known, frauds innumerable could be perpetrated against procuring agencies as well as other bidders, and our system of competitive bidding would be placed in jeopardy and would lose stability. It would encourage slipshod bidding and would afford a pretext for unscrupulous bidders to prey on the public. After bids have been opened, a bidder is bound by his error or mistake and is expected to bear the consequences of it. In the case of West Bengal State Electricity Vs. Patel Engineering Co. Ltd. (AIR 2001 SC 682), it was held as follows:-

> ***"In a work of this nature and magnitude where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity."***

71. Adherence to the requirements in annex-6 to the I.F.L. could not have been given a go-bye by the G.R.C. by treating N.R.T.C.'s bid to be Rs.731/- per 1,000 stamps. It has consistently been held that in order to maintain the sanctity and integrity of the process of tender, the tender conditions are required to be complied with scrupulously. N.R.T.C.'s stance that its quotation of Rs.0.731 per 1,000 stamps in its bid was a

mistake or oversight, and that it actually intended to quote Rs.731/- per 1,000 stamps is a tacit admission that its bid was not in conformity with the requirements of annex-6 to the I.F.L. Upon the communication of this fact by N.R.T.C. to the F.B.R. vide letters dated 17.10.2019 and 22.10.2019, it was incumbent upon the latter to have rejected N.R.T.C.'s bid as invalid. Submission of a bid, which fails to comply with any of the essential terms of the tender, warrants outright rejection.

72. Much emphasis was placed by the learned counsel for N.R.T.C. on the judgment dated 07.01.2009 passed by the High Court of Punjab and Haryana in C.W.P. No.970/2008, titled, "SAB Industries Limited Vs. State of Haryana" in support of his contention that an obvious mistake in a bidder's financial bid can be permitted to be corrected by a procuring agency. In that case for one of the items in the financial bid, the petitioner had quoted Rs.45,000/- per MT in figures, but Rs. "Forty five only" per MT in words. Soon after the submission of the bid, the petitioner brought the error to the notice of the Public Works Department and prayed for the correction of the *bonafide* mistake. The said request was rejected and the petitioner's bid was accepted at the unit rate of Rs.45/- per MT. Since the petitioner did not furnish performance security within fifteen days of the acceptance of the bid, the award of the contract was cancelled and the bid security submitted by the petitioner was forfeited. Before the High Court, the petitioner had restricted his prayer to allow him to withdraw the bid security.

73. In that case, there was a discrepancy between the amount/unit rates in figures and words for one of the items in the financial bid. However, in the financial bid, the petitioner had correctly mentioned the overall cost. The High Court allowed the writ petition and directed the respondent to release the bid security submitted by the petitioner. In the said judgment, it was held *inter alia* as follows:-

> ***"The difference in Rs. forty five and forty five thousand is so huge that to have accepted the rate as Rs. forty five only, is on the face of it unreasonable, unfair and ridiculous."***

74. The decision cited at the bar in the case of SAB Industries Limited *(supra),* in my view, does not support the contention of the learned counsel for N.R.T.C. inasmuch as the facts of the case at hand are distinctly different and the observations of the High Court of Punjab and Haryana are required to be viewed in the light of the facts narrated in

the said judgment. The factual context of the said case shall be considered to appreciate those observations. In that case there was a matter of a discrepancy in figures and words for the unit rates of one of the items in the financial bid, whereas the overall cost mentioned in the financial bid was correct. This element is absent in the case at hand. There is nothing in N.R.T.C.'s bid to indicate that it in fact wanted to quote Rs.731/- per 1,000 stamps, but due to a clerical or typographical error quoted Rs.0.731 per 1,000 stamps in its financial bid. Additionally, in the case of SAB Industries Limited *(supra),* the petitioner's request for correction of the mistake was immediate whereas in the case at hand, N.R.T.C. waited until the date fixed for the opening of the bids to verbally raise the issue regarding the mistake in its bid. It was not until the bid evaluation report was issued that it made a request for the correction of the mistake in its bid in writing. Therefore, it is my view that the judgment in the case of SAB Industries Limited *(supra)* does not come to N.R.T.C.'s aid.

75. Learned counsel for N.R.T.C. also placed reliance on the judgment in the case of Spina Asphalt Paving Vs. Fairview (304 N.J. Super. 425) in support of his contention that the error in N.R.T.C.'s financial bid was nonmaterial. In that case the plaintiff had quoted a unit price of US Dollars 400/- for one of the twenty-five items. The day the bids were opened, the plaintiff discovered that its secretary had erroneously indicated the unit price for one item as US Dollars 400/- when it should have been US Dollars 4/-. The next morning, the plaintiff told the respondent authority that the intended unit price was US Dollars 4/- for that single item. The error in the plaintiff's bid was held to be "nonmaterial and subject waiver." The facts of the said case are also different from the one at hand. In that case there was no error in the total bid for all the twenty-five items submitted by the plaintiff. Additionally, there is no provision in the P.P.R. under which such a mistake could be waived by the procuring agency.

76. Learned counsel for N.R.T.C. also placed reliance in the case of Qamar Mahmood Vs. Rukhsana Kausar (2012 CLD 981). Vide the said judgment, the Hon'ble Lahore High Court dismissed a revision petition against the order passed by the learned Civil Court whereby a sale certificate was issued with respect to a property which was auctioned in execution proceedings. The Court Auctioneer had mistakenly

mentioned the sale consideration to be Rs.1,00,00,000/- when in fact the amount quoted in writing by the bidder was Rs.1,10,00,000/-. It was held that the sale could not be set-aside due to the Court Auctioneer's mistake. Since this was not a case of correction of the amount quoted in the bid, but a mistake by the Court Auctioneer, it does not advance N.R.T.C.'s case in any respect.

WHETHER A CHANGE IN THE AMOUNT ENTERED IN THE FINANCIAL BID WAS PERMISSIBLE UNDER RULE 31 OF THE P.P.R.:-

77. The Law Division's position in its second opinion was that N.R.T.C.'s stance clearly fell within the ambit of Rule 31 of the P.P.R. In Suo Moto Case No.5/2010 (PLD 2010 S.C. 731), the Hon'ble Supreme Court held that *"it is duty of the Court to ensure that the Public Procurement Regulatory Authority Ordinance, 2002 read with the Public Procurement Rules, 2004 are adhered to strictly to exhibit transparency."* It was also held that it was a universally recognized principle that such type of transactions must be made in a transparent manner for the satisfaction of the people, who are the virtual owners of the national exchequer, which is being invested in these projects. Now, it needs to be determined whether the acceptance of N.R.T.C.'s request for the correction of the mistake in its financial bid was in accordance with Rule 31 of the P.P.R. The said Rule reads thus:-

> ***"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."*

78. The use of the negative words in Rule 31(1) of the P.P.R. viz "*no bidder shall be allowed to alter or modify his bid after the bids have been opened*" plainly make the requirements of the said Rule imperative. It is a settled principle of interpretation that when a statute is couched in negative language, it is all the more mandatory and peremptory. Reference in this regard may be made to the law laid down in the cases of Shujat Hussain Vs. The State (1995 SCMR 1249), Allied Bank of Pakistan Vs. Khalid Farooq (1991 SCMR 599), Mukhtar Hussain Shah Vs. Wasim Sajjad (PLD 1986 SC 178), Atta Muhammad Qureshi Vs.

Settlement Commissioner (PLD 1971 SC 61), Muhammad Hanif Vs. Karachi Building Control Authority (2007 CLC 315), Muhammad Khalid Vs. K.A.S.B. Bank Ltd. (2007 CLD 232), Tariq Irshad Vs. The State (PLD 2006 Karachi 25), Haji Sheikh Noor Din Vs. Muhammad Intizar (2006 PLC 606), Saadat Khiyali Vs. City Coordination Officer (PLD 2005 Lahore 190), and Inder Lal Vs. The State (1996 MLD 464).

79. Rule 31(1) does, however, permit such changes in the bid to be accepted by the procuring agency as do not *"change the substance of the bid"* and that too where a clarification is sought by the procuring agency. Rule 31(2) provides for the mode and manner in which (i) the clarification is to be sought by the procuring agency, and (ii) how the response to a request for a clarification is to be given by a bidder. Rule 31(2) does not recognize or envisage a request for clarification made by a procuring agency and a bidder's response to such a request in a mode other than *"in writing."* Therefore, the verbal request made by N.R.T.C. on the day the bids were opened to rectify the mistake in its financial bid so as to treat the same as Rs.731/- per 1,000 stamps instead of Rs.0.731 per 1,000 stamps, cannot be considered as a clarification in terms of Rule 31 of the P.P.R.

80. There is no denying the fact that either before or after the opening of the bids, the F.B.R. did not seek any clarification in writing or otherwise from N.R.T.C. with respect to its financial bid. Prior to the opening of the financial bids or the issuance of the bid evaluation report, N.R.T.C. did not provide any clarification *"in writing"* with respect to its financial bid. The bid evaluation committee constituted by the F.B.R. also did not feel the need to seek any clarification from N.R.T.C. It was not N.R.T.C.'s case that the bid evaluation committee had committed any oversight or mistake in evaluating its bid. Its case, in essence, is that the bid evaluation committee should have overlooked or ignored N.R.T.C.'s mistake of quoting Rs.0.731 per 1,000 stamps, and should have treated its financial bid as Rs.731/- per 1,000/- stamps.

81. Learned counsel for N.R.T.C. was vociferous in his argument that since N.R.T.C.'s financial bid was "ridiculously low", it could not have been correct, and that the G.R.C. acted lawfully in allowing N.R.T.C.'s request for rectification of the mistake committed by N.R.T.C. in its financial bid. This argument does not appeal to me for the simple reason that it would be most irrational, rather improper for a procuring

agency or a G.R.C. to rectify a mistake in the amount quoted by a bidder in its financial bid just to change it from being "ridiculous" to "realistic." If this Court were to hold that it was lawful for a procuring agency or a G.R.C. to allow requests by bidders for a change in the amount entered in their financial bids after all the bids had been opened, it would set a terrible judicial precedent and be a transgression of the norms of propriety in a tender bidding process for the award of contracts by the State or its instrumentalities. It would make it permissible for bidders to submit financial bids and wait until all the bids of the contesting bidders are opened and their contents revealed, and thereafter to assert that its financial bid was not what was explicitly quoted in its bid but a different amount. In the case of West Bengal State Electricity Vs. Patel Engineering Co. Ltd. *(supra)*, it was held *inter alia* that negligent mistakes in bid documents cannot be permitted to be corrected on the basis of the equity, and that where facts indicate that (i) it was not beyond the control of a bidder to correct the error before submission of a bid; (ii) that he was not vigilant, and (iii) that he did not seek to make corrections at the earliest opportunity, such bidder cannot be permitted to correct his bid documents afterwards. It was also held that rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism, which are contrary to the rule of law and Constitutional values.

82. The "clarification" that N.R.T.C. sought to make with respect to its financial bid went beyond clarifying an ambiguity therein but extended to rewriting the amount quoted in the financial bid. The G.R.C., by allowing N.R.T.C.'s application to treat its financial bid as Rs.731/- per 1,000/- stamps instead of Rs.0.731 per 1,000 stamps, in my view, offended the principles of equality and transparency, and in fact permitted N.R.T.C. an opportunity to improve its bid. This advantageous treatment was given to N.R.T.C. after the financial bids of the technically qualified bidders had been made known and after the evaluation report had been issued. In the case of Muhammad Ayub and Brothers Vs. Capital Development Authority (PLD 2011 Lahore 16), the Capital Development Authority had invited bids for the award of a construction contract. One of the tender conditions was that the bids had to be accompanied with bid security in the form of a Deposit at Call

or a Bank Guarantee. One of the bidders (whose bid was the lowest) submitted an insurance bond as bid security. At first its bid was declared to be invalid on account of not being accompanied with a Deposit at Call or a Bank Guarantee, but a day after the opening of the tenders, C.D.A. permitted the bidder to submit a Deposit at Call. C.D.A.'s decision to allow the bidder to substitute the insurance bond with a Deposit at Call was challenged by another bidder in a writ petition before the Hon'ble Lahore High Court. C.D.A.'s stance that Rule 31 of the P.P.R. permitted a procuring agency to allow a bidder to substitute an insurance bond with a Deposit at Call was spurned by the Division Bench of the Hon'ble Lahore High Court in the following terms:-

> ***"12. It needs to be seen if in the light of the afore-quoted Public Procurement Rules, 2004, CDA was bound to reject respondent No.6's bid or consider it for award of contract. Rule 25 prescribes the bid security of 5 per cent but the form of such bid security as to whether it should be an insurance guarantee or Deposit at Call is left to the option of the procuring agency. Rule 30 mandates that the bids have to be evaluated in accordance with the terms and conditions set forth in the prescribed bidding documents. In the present case, the bidding documents not only prescribed bidding security in the form of Deposit at Call or bank guarantee but also emphasized that if a bid was not accompanied by Deposit at Call or bank guarantee, the same was to be rejected. CDA's failure to reject respondent No.6's non-responsive bid and accept it for consideration was, thus, in violation of Rule 30. In fact, by allowing respondent No.3 to substitute its insurance guarantee with a Deposit at Call, CDA allowed respondent No.6 to alter or modify its bid after the opening of a tender which is prohibited by Rule 31. In this view of the matter, the argument that substitution of insurance guarantee by Deposit at Call is a case of clarification rather than alteration or modification is ex-facie misconceived and untenable. There is also no doubt that respondent No.6 was unduly favoured whereas the appellant, who had submitted a responsive bid, was ignored despite having a right to be considered for award of a contract for being the lowest bidder in view of Rule 38 read with Rule 2(h)."***
>
> **(Emphasis added)**

WHETHER THE P.P.R. WAS APPLICABLE TO THE PROCUREMENT PROCESS UNDERTAKEN BY THE F.B.R.:-

83. Learned counsel for N.R.T.C. somewhat feebly contended that the P.P.R. did not apply to the procurement process in question since the procuring agency (i.e. the F.B.R.) was neither procuring any goods or services for itself, nor was any amount going to be paid to the successful bidder out of the national exchequer. This contention was met with a frown and a head-shake by the learned counsel for the F.B.R. True, the party to whom the licence is granted is to recover the licencing fee from the tobacco manufacturers and not from the F.B.R.,

and through the tender process in question no property of the State is being sold, but nonetheless through the said biding process a benefit of the grant of a licence would be bestowed to the successful and most responsive bidder, and is for this reason that the provisions of the P.P.R. have been made applicable to the bidding process. The public notice published by the F.B.R. explicitly provided that *"P.P.R.A. Rules regarding single stage, two envelope process of procurement shall be followed in letter and spirit."* The F.B.R.'s consolidated response to the queries raised by the prospective bidders also mentioned more than once that the provisions of the P.P.R. applied to the procurement process. The F.B.R., in its written comments, has also pleaded that *"[a]ll applicants have been considered in a lawful manner, in view of the PPRA Rules, 2004."* Despite this, if N.R.T.C.'s view is that P.P.R. did not apply to the procurement process in question, it demonstrates its scant understanding regarding such process. This also explains why N.R.T.C. did not appreciate the requirements in annex-6 to the I.F.L. that the bidders had to quote an amount for 1,000 stamps and not one stamp.

WHETHER THE WRIT PETITIONS WERE LIABLE TO BE DISMISSED DUE TO THE AVAILABILITY OF AN ALTERNATE REMEDY UNDER RULE 48 OF THE P.P.R. READ WITH RULE 150ZQQ OF THE SALES TAX RULES, 2006:-

84. After the judgment in these cases was reserved by this Court, the learned counsel for the F.B.R. and N.R.T.C. provided a copy of the judgment dated 09.03.2020 passed by the Hon'ble High Court of Sindh in C.P.No.6540/2019 titled, "SICPA SA Vs. Federation of Pakistan" *(supra)*, to bring home the point that the writ petitions were not maintainable due to the presence of an alternative remedy. Neither the F.B.R. nor N.R.T.C, in their respective written comments, had raised an objection to the maintainability of the writ petitions on the said ground.

85. Vide the said judgment, the Hon'ble High Court of Sindh dismissed writ petitions wherein the procurement process undertaken by the F.B.R. was assailed by bidders who had participated in the said process. An objection to the maintainability of the said petitions was taken on the ground that petitioners had the alternative remedy of filing a grievance petition before a G.R.C. under Rule 48 of the P.P.R. and Rule 150ZQQ of the Licencing Rules, 2019. The latter Rules provide that *"[i]f any dispute arises during or after the process of licencing, the*

matter shall be referred to Dispute Resolution Committee to be notified by the Board on an application by an aggrieved party."

86. As mentioned above, vide office order dated 09.10.2019, the F.B.R. constituted a three-member Dispute Resolution/G.R.C. which was empowered to address complaints of the bidders pertaining to the licencing under the Licencing Rules, 2019 and the P.P.R. There is no denying the fact that on 29.10.2019, N.I.F.T. had submitted a complaint before the said committee/G.R.C. against the decision to grant the licence to N.R.T.C. Vide the F.B.R.'s letter dated 13.11.2019, N.I.F.T. was informed that its complaint had been rejected by the G.R.C. Perusal of the said letter shows that N.I.F.T.'s complaint was rejected entirely on the basis of the Law Division's second opinion dated 28.10.2019. Since N.I.F.T. had availed the alternative remedy provided by Rule 48 of the P.P.R. and Rule 150ZQQ of the Licencing Rules, 2019, the said judgment of the Hon'ble High Court of Sindh is of no avail to the F.B.R. and N.R.T.C.

87. Having said that, I am of the view that given the manner in which the G.R.C. accepted N.R.T.C.'s request to treat its financial bid to be Rs.731/- per 1,000 stamps, rejected N.I.F.T.'s complaint against the grant of the licence to N.R.T.C., the remedy of going before the G.R.C. could hardly be terms as adequate of efficacious. The G.R.C.'s said decisions are solely based on the Law Division's second opinion dated 28.10.2019 and do not show any independent application of mind by the members of the G.R.C. A remedy before such a forum cannot be considered as an effective alternative remedy for the purpose of denying relief to a petitioner under Article 199 of the Constitution. Perusal of the said judgment of the Hon'ble High Court of Sindh shows that the matter going to-and-fro between the Law Division and the G.R.C./F.B.R. was not in issue.

RELIEF:-

88. In the result, both the writ petitions are allowed; the F.B.R.'s letter dated 29.10.2019 whereby the licence was granted to N.R.T.C. is set-aside; the decision of the G.R.C. dated 13.11.2019 whereby N.I.F.T.'s complaint was rejected is also set-aside; it is declared that the process adopted for allowing N.R.T.C.'s request for the correction of the mistake in its financial bid suffered from material irregularity and unreasonableness; and the F.B.R. is at liberty to initiate a fresh bidding

process strictly in accordance with the law. Since Section 35C of the C.P.C. as amended by the Costs of the Litigation Act, 2017 provides that the Government shall not be liable to costs under Section 35, 35-A and 35-B C.P.C., these petitions are being allowed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING

SCHEDULE-A

3. The matter has been re-examined in light of the referral made by the FBR through its letter bearing C.No.1(1)PD(T&TS)/2018(Part), dated 25.10.2019 and the response of this Division bearing U.O.No.755/2019-Law-I, dated 28-10-2019. It appears that M/s NRTC, which is an entity of the Ministry of Defence, mentioned 0.731 per 1000 stamps in Annex-6 of the IFL. The considered stance of M/s NRTC before the licensing committee so also before the GRC has been that the price should be corrected so as to read Rupees 731 per 1000 stamps instead of Rupees 0.731 per 1000 stamps. According to M/s NRTC, this mistake is bona fide, apparent on the face of record and nothing but an accidental or typographical slip because 1000 stamps cannot possibly, by any connotation, can be supplied or bought for Rupees 0.731, which is even less than One Rupee.

4. The record actually confirms the stand of M/s NRTC which clearly falls within the ambit of Rule 31 or the PPRA Rules, which permit a party to submit clarifications which do not change the substance of the bid, if such clarification does not amount to alteration or modification. Even if there are any obvious mistakes which are clerical or arithmetical in nature, occasioned on account of accidental steps or omissions which crop in any judgment order or decree can be corrected in terms of section 152 of the Code of Civil Procedure, 1908 (CPC). The equitable principles found in section 152 of the CPC are applicable across the board. In Ghulam Nabi v. Sardar Nazir Ahmad 1985 SCMR 824 (a), it was held that a bona fide mistake, of an accidental or clerical nature which had led to the errors or omissions and mis-descriptions could be corrected. To similar effect is another judgment reported in Muhammad Anwar v. Muhammad Ashraf PLD 2001 SC 209, wherein it was further held that valuable rights cannot be created on the basis of bona fide mistakes and hence the question of their infringement does not arise. Also in Atiq-ue-Rehman v. Muhammad Amin PLD 2006 SC 309, the Supreme Court condoned delay which had been caused on account of any intentional or deliberate act but rather which was a result of a bone fide mistake.

5. In light of the above, especially taking into consideration the case law from the honorable Supreme Court, which is binding under Article 189 of the Constitution, this Division may recall its earlier opinion bearing U.O.No.755/2019-Law-I, dated 28.10.2019 and states that M/s NRTC, an entity of the Ministry of Defence, may be permitted to submit a clarification in terms of Rule 31 of the PPRA Rules so as to rectify only an obvious arithmetic and accidental typographical slip and, therefore, their quoted price may be read as Rupees 731 per 1000 Stamps, instead of Rupees 0.731 per 1000 stamps.

6. Submitted please."