Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 2444 OF 2021

M/s Muhammad Hanif & Co. and another.

Vs

Chief Engineer North, Pak PWD, Islamabad and another.

PETITIONERS BY:	Barrister M. Saad Buttar, Mr. Tahir Hussain Anchan and Raja Abdul Qadeer Janjua, Advocates.
RESPONDENTS BY:	M/S Barrister Yousaf Khosa, Malik Omair Saleem and Shahzeb Jaffar, Advocates. Raja Khalid Mehmood Khan, DAG. M. Khurshid, D.D (legal) PPRA.
DATE OF HEARING:	01.09.2022.

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BABAR SATTAR, J.- The petitioners are aggrieved by the actions of respondent No.1 in managing of a procurement process in relation to water supply and works of ancillary nature, advertisement for which was published on 07.05.2021, bids were received on 03.06.2021, and contracts were awarded to respondents No.3 and 4 on 22.06.2021.

2. The learned counsel for the petitioners stated that the manner in which the procurement process has been managed, the bids for which were invited through an advertisement dated 07.05.2021, amounts to mis-procurement under the Public Procurement Rules, 2004 **("PPRA Rules")**. His first contention was that the bid documents were released with a delay in order to skew the playing field for competing bidders as while the bids were supposed to be submitted and opened on 03.06.2021, the

bid documents for one project were released on 31.05.2021 and for the remaining projects the bids documents were released on the day of bid opening. The second contention was that the bidding documents were not in accord with the advertisement as in the advertisement bids were invited from category C-3 to C-6 contractors and the bidding documents excluded other categories and only allowed bid documents to be submitted by category C-3 contractors. The third contention was that technical bids were opened, but subsequently no communication was issued declaring names of bidders who had qualified and whose financial bids were to be opened. He finally submitted that while financial bids have never been opened, the contracts have already been awarded and performance of such contracts is already under way. In view of the fact that the entire bidding process suffers from major breaches and contracts have been awarded without any evaluation report having been issued the remedy before the PPRA under Section 48 of the PPRA Rules has become illusory.

3. On 17.11.2021, the learned counsel for respondents No.1 and 2 took this Court through the documentary record of the procurement process. He stated that Financial Evaluation Report reflecting financial bids of the bidders who have been shortlisted after the technical evaluation was not available with him. He further stated that there was no Final Evaluation Report available, reflecting the manner in which the technical as well as financial evaluation had been undertaken. He further stated that the Final Evaluation Report was also not uploaded on the PPRA

website but sought further time to place on record available documents in relation to evaluation of the financial bids.

4. Learned counsel for respondents No.1 and 2 resumed his arguments on 30.11.2021 and submitted that copies of the contract had not been provided to him. And further that no Final Evaluation Report was issued or published prior to the grant of contracts to respondents No.3 and 4. He placed on record the correspondence in relation to the procurement process and submitted that the provisions of the PPRA Rules were substantially complied with. And further submitted that the contract had not only been granted but had been substantially completed by respondents No.3 and 4.

5. Learned counsel for respondents No. 3 and 4 supported the procurement process. He submitted that the procurement process was in accordance with law and their bids were evaluated as the most beneficial bids after which they were awarded contracts. He submitted that respondents No.3 and 4 awarded work orders on 22.06.2021 and they had performed the contracts.

6. The two questions that arise in the instant petition are the following:

(i) Whether the procurement process was carried out in accordance with provisions of the PPRA Rules or did the procurement amount to mis-procurement?

(ii) In the facts and circumstances this case, what would be the consequence of the Court issuing a declaration that the contracts awarded to

respondents No. 3 and 4 were products of mis-procurement?

7. The undisputed facts in relation to subject-matter of the petition are that respondents No.1 and 2 advertised a tender in the newspapers on 07.05.2021 and published the same on PPRA website on 17.05.2021. Through such advertisement process bids were invited to be submitted by 03.06.2021. The bidding documents were however not published along with the advertisement or placed on the websites of Public Procurement Regulatory Authority **("PPRA")** or Pakistan Public Works Department **("Pak PWD")**. It was the petitioners' contention that the biddings documents were not released to the petitioners up until 31.05.2021 and 03.06.2021 in relation to the projects. While the bids were received on 03.06.2021, they were not opened up until 16.06.2021, as the committee for technical evaluation of the bids was constituted on 14.06.2021 and it convened its meeting on 16.06.2021. The technical results were compiled on 17.06.2021. The bids were received and technical bids were opened on 03.06.2021 in the presence of 21 bidders. It is however unclear as to who authorized the opening of the bids as Chief Engineer (North) Pak PWD constituted a committee for scrutiny and evaluation of the technical bids on 14.06.2021. The committee when convened its meeting on 16.06.2021 in the evaluation process it was found that fourteen bidders had submitted their bids out of which ten were disqualified and four were qualified. No evaluation report was released and the petitioners who were included amongst the bidders that were not technically qualified and were not informed of the reasons for

their disqualifications and also not informed as to the outcome of the technical evaluation. The financial bids of the four qualified bidders were opened on 18.06.2021. The Executive Engineer Pak PWD notified Superintendent Engineer Central, Pak PWD, Peshawar by letter dated 21.06.2021 that respondents No.3 and 4 have been evaluated as the lowest bidders. On 22.06.2021, work orders were issued to respondents No.3 and 4 and according to clause 7 of such work order the second running bill was not to be paid to the selected bidders until the contract agreement had been approved by the competent authority. In other words the work order itself envisaged that at least one running bill would have been released to respondents No.3 and 4 prior to the approval of the agreement by the competent authority within Pak PWD. During the ten hearings convened by this Court, respondents No. 1 and 2 continued to drag the matter without assisting the Court and ultimately presenting the award of the contracts and their performance by respondents No.3 and 4 as fait accompli.

8. Let us consider the provisions of PPRA Rules. Rule 4 provides that procuring agencies are obliged to ensure that procurement is carried out *"in a fair and transparent manner, the object of procurement brings value for money to the agency and the procurement process is efficient and economical".* The record of the impugned procurement as discussed above reflects that it was shrouded in secrecy.

9. Rule 13 of PPRA Rules prescribes that the minimum response time for receipt of bids from the date of publication of

an advertisement is fifteen days where the procurement is subject to national competitive bidding. In the present case while the advertisements in relation to the tender were published on 07.05.2021 and 17.05.2021, the bidding documents were not made available to prospective bidders and the petitioners had to file applications seeking the release of bidding documents, which were finally provided on 31.05.2021 in relation to some projects and 03.06.2021 in relation to other i.e. on the day the bids were due. This is not the first instance when Pak PWD has withheld the release of bidding documents to prospective bidders. In **W.P No. 1651/2021** ***(M/s Riaz & Sons through its Managing Director vs. Chief Engineer (North) Pak. PWD, Islamabad & others)*** a prospective bidder had filed the petition seeking provision of bidding documents and it was after the cognizance taken by this Court that bidding documents were provided to the bidder and the matter was disposed of. There was a similar complaint by a prospective bidders in **Writ Petition No. 52 of 2022 (*M/s Shabbir Ahmad vs. Pakistan Public Works Department, Islamabad, through its Director General & others*)** which was allowed by order dated 29.04.2022 and the procurement process was declared to be in breach of Rule 50 of the PPRA Rules. And the following instructions were issued to Pak PWD and Secretary, Ministry of Housing and Works, Islamabad:

> *15. Before parting with this judgment this Court is constrained to observe that there are innumerable complaints that come to this Court in relation to procurement processes being run by Pakistan Public Works Department (PWD). PWD as a procuring agency for public*

works ought to be well-versed with provisions of the Public Procurement Regulatory Authority Ordinance, 2002, and the Rules. The Rules were promulgated almost two decades back and ample jurisprudence has been produced on the manner in which the procurements are to be run in a transparent manner to maximize competition to derive value for public money expended in such procurement. It therefore appears to this Court that PWD is either incapable or unwilling to comply with provisions of the Rules and run procurement processes in a transparent manner.

16. Let a copy of this judgment be sent to the Secretary, Ministry of Housing & Works, Islamabad, in order for him to initiate an inquiry into the legal challenges made against procurements run by PWD, and derive lessons from the decisions rendered by the courts in such matters in order to take corrective steps and put in place a departmental system of checks to ensure that PWD is able to conduct procurements in accordance with the Rules. Let the Secretary file a report after such inquiry, within a period of three months, detailing the findings as well as the introduction of processes and checks that would ensure the integrity of the procurement processes run by PWD and the disciplinary consequences for public officials who seek to skew procurement processes to create rent seeking opportunities and dispense state largess to favored contractors.

10. Let us now revert back to relevant PPRA Rules. Rule 28 requires that the date for opening of bids and the last date for the submission of bids is to be the same. In the instant case, it is unclear what transpired between 03.06.2021 when the technical bids were submitted and were opened and 16.06.2021 when the technical evaluation committee scrutinized the bids after being constituted on 14.06.2021. The purpose of opening the bids in the presence of bidders is to ensure that the scrutiny process is transparent and credible. Rule 29 read together with Rule 30 of

the PPRA Rules provides that the evaluation criteria would be unambiguous and stated in the bidding documents and the evaluation criteria would not be subsequently changed. It has been admitted by respondents No.1 and 2 that the category of contractors whose bids were invited pursuant to the advertisements dated 07.05.2021 and 17.05.2021 were different from the category mentioned in the bidding documents. While it was contended that the categorization was changed in a manner that did not prejudice the petitioners, what is not disputed is that pursuant to the advertisements bids were invited from contractors in work category C-3 to C-6 while the bidding documents were provided for receipt of bids from contractors falling within category C-3. The learned counsel for respondents No.1 and 2 submitted that the petitioners were not prejudiced by such change in the evaluation criteria. But that is beside the point as PPRA Rules require that the evaluation criteria are to be clearly stated in the bidding documents, which documents are to be released on the date such tender is advertised and the evaluation criteria are not to be changed subsequently. The purpose for such requirement is to ensure that all prospective bidders who deem themselves qualified pursuant to the evaluation criteria are able to determine whether or not they wish to participate in the bidding process. In the event that the category of prospective bidders as published in an advertisement is different from that mentioned in the bidding documents, the discrepancy will discriminate against those who might have been qualified under the evaluation criteria mentioned in the bidding documents but deemed themselves unqualified in view of the

criteria in the newspaper advertisement. This then undermines the requirement of fairness in such procurement process.

11. Rule 35 deals with the announcement of evaluation reports and states the following:

> ***Announcement of evaluation reports.-***
>
> *Based on the procedure adopted for the respective procurement, the procuring agency shall announce the result of bid evaluation, in the form of final evaluation report giving justification for acceptance or rejection of bids at least fifteen days prior to the award of procurement contract:*
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> *Provided that in case where technical proposal is to be evaluated separately, prior to opening of financial proposal, the technical evaluation report shall be announced before opening of the financial proposal.*

What is evident from Rule 35 is that technical evaluation report is to be released after the technical bids have been evaluated. This becomes relevant within the context of Rule 48 of the PPRA Rules, which provides the bidder whose bid has been rejected on technical grounds to avail a remedy before the Grievance Redressal Committee **("GRC")** and subsequently before PPRA. Likewise, Rule 35 also requires that the final evaluation report also be released and anyone aggrieved by such final evaluation report also has a remedy under Rule 48 of PPRA Rules before the GRC and subsequently before PPRA. Provisions of Rule 48(3)(4) and (5) provide the following:

> ***48. Redressal of grievances by the procuring agency.-***
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> *(3) Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written*

complaint concerning his grievances within seven days of announcement of the technical evaluation report and five days after issuance of final evaluation report.

(4) In case, the complaint is filed against the technical evaluation report, the GRC shall suspend the procurement proceedings.

(5) In case, the complaint is filed after the issuance of the final evaluation report, the complainant cannot raise any objection on technical evaluation of the report:

Provided that the complainant may raise the objection on any part of the final evaluation report in case where single stage single envelope bidding procedure is adopted.

12. It is evident from the above provisions of Rule 48 that the procurement process itself gets suspended till such time that the GRC decides any complaint in relation to a technical evaluation report. In the event that a procuring agency does not issue a technical evaluation report it simply ousts the bidder who has been technically disqualified and usurps the statutory remedy provided to such bidder to contest the disqualification. Rule 38 provides the acceptance of bids and Rule 44 provides for the entry into the force of the procurement contract. And the said provisions are subject to requirement of Rule 35 that no procurement contract is to be awarded for a minimum period of fifteen days after the issuance of Final Evaluation Report giving justifications for the acceptance or rejection of the bid. The purpose of this scheme is to provide for a grievance redressal mechanism allowing those who participated in the public procurement process an opportunity to contest their disqualification during the bid evaluation process. In the present case respondents No.1 and 2 never issued a technical evaluation

report after competition of technical evaluation on 17.06.2021. They also did not issue a final evaluation report after opening of the financial bids on 18.06.2021. Admittedly the work orders were issued by respondents No.1 and 2 on 22.06.2021 without waiting for a period of fifteen days after the issuance of final evaluation report. Thus the work orders were issued merely four days after the opening of the financial bids without even informing all other bidders that their bids had been rejected. When the instant petition was filed on 05.07.2021 the petitioners had not received any correspondence from respondents No.1 and 2 stating that the bid of the petitioners had been rejected.

13. From the above it is apparent that the procurement process has been carried out by respondents No.1 and 2 in breach of Rules 4, 10, 13, 23, 28, 29, 30, 35 and 48 of the PPRA Rules.

14. The object of the Procurement Regulatory Authority Ordinance, 2002 **("PPRA Ordinance")** was to improve the transparency, accountability and quality of the public procurement. The principles of fairness, transparency, efficiency and economy lie at the heart of the PPRA framework. Transparency requires clearly defined procurement parameters and prohibits opaqueness or secrecy in the process during the bidding and evaluation stages of the process, which create opportunities for corruption and manipulation to confer benefits on favorites. PPRA framework requires that all prospective bidders should have equal and similar access to information related to the tender and an equal opportunity to compete and

submit their bids. It further requires that the process be run in a manner that engenders maximum competition as opposed to favoring a particular bidder or class of bidders.

15. PPRA Ordinance and PPRA Rules are inspired by recognition of the restraints that apply to state authority vested in public officials while dealing with state largesse. In contrast to the role and actions of private citizens, state authority vested in public office holders is of a fiduciary nature, which is to be exercised as a trust for the benefit of the citizens and not in an arbitrary manner. It was held by Indian Supreme Court in ***Ramana Dayaram Shetty vs. The International Airport Authority*** **(AIR 1979 SC 1628)** that, *"the government is not and should not be as free as an individual in selecting the recipients of its largesse… whatever its activity, the government is still the government and will be subject to restraints, inherent in its position in a democratic society… a democratic government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal… it must be taken to be the law that where the government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting them other forms of largesse, the government cannot act arbitrarily at its sweet will and, like a private individual deal with any person it pleases, but its actions must be in conformity with a standard or norm which is not arbitrary, irrational or irrelevant"*.

16. The august Supreme Court in ***Alleged Corruption n Rental Power Plants*** **(2012 SCMR 773)** cited the dicta in

Ramana Dayaram Shetty with approval while declaring that the rental power contracts were in breach of law and holding that a key feature in procurement of public contracts was, *"maintaining openness and transparency in the bidding process".*

17. Also useful for our purposes is the enumeration of the concept of level-playing field by Indian Supreme Court in ***Reliance Energy Limited vs. Maharashtara State Road Development Corporation*** **(2007) 8 SCC 1)** in the following terms:

> *"level-playing field" is an important concept while construing Article 19(1)(g)… while Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level-playing field"… In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine, which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to sub-serve the larger public interest… Decisions or acts which result in unequal or discriminatory treatment, would violate the doctrine of "level-playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14, which refers to the principle of "equality" should not be read as a standalone item but it should be read in conjunction with Article 21, which embodies several aspects of life. There is one more aspect, which needs to be mentioned in the matter of implementation of the afore-stated doctrine of "level playing field" According to Lord Goldmith commitment to "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act or the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."*

18. The Constitution of Pakistan and particularly Articles 9, 18 and 25 read together create the right to a "level-playing field" when it comes to citizens and private entities competing for the receipt of state largesse within the domain of public procurement. This constitutional right to a level-playing field is protected by the principle of transparent and open competitive bidding enshrined within the PPRA Framework.

19. The august Supreme Court has declared that PPRA Rules are mandatory and binding on procuring agencies undertaken public procurement, as defined under Section 2(j) and 2(l), respectively, of the PPRA Ordinance and any contract awarded through a process that amounts to mis-procurement in terms of Rule 50 of the PPRA Rules is illegal and liable to be set aside. It was held by the august Supreme Court in ***Raja Mujahid Muzaffar vs. Federation of Pakistan*** **(2012 SCMR 1651)** that a contract awarded was, *"illegal and invalid having been executed in violation of the mandatory provisions of the Public Procurement Rules, 2004"*, after it determined that the entire transaction was carried out in a non-transparent manner.

20. The answer to the first question raised in Para No. 6 above is that the procurement process undertaken by respondents No.1 and 2 is tantamount to mis-procurement within the meaning of Rule 50 of the PPRA Rules, and as a consequence of such procurement contracts were awarded to respondents No.3 and 4 in breach of the mandatory requirements of the PPRA Rules.

21. We now come to the question of consequences of mis-procurement. It was held by the august Supreme Court in

Molana Abdul Haq Baloch vs. Government of Balochistan (PLD 2013 SC 641) that a contract that had been awarded in a uncompetitive and non-transparent manner was illegal and was to be declared void as it was against public policy. As has already been mentioned above, the august Supreme Court in ***Raja Mujahid Muzafar*** set aside an awarded contract for being in breach of the mandatory provisions of PPRA Rules even though funds had been disbursed in the contract. The august Supreme Court also directed that the procurement be undertaken *de novo.*

22. Similarly in ***Alleged Corruption in Rental Power Plants*** **(2012 SCMR 773)** the august Supreme Court declared that grant of contracts was illegal where they were awarded in a non-transparent manner. The consequence of the finding that a contract was awarded through a process which amounted to mis-procurement was considered by this Court in ***Messrs MIA Corporation (Pvt.) Ltd vs. Pakistan PWD*** **(PLD 2017 Islamabad 29).** There too the Pak PWD had presented the award of contract as fait accompli and had contended that the petition should be dismissed as the awarded contract had been partly performed. The Court after considering the law laid down in various cases and relying on (*Pacific Multinational (Pvt.) Ltd. v. Inspector-General of Police, Sindh Police Headquarters and 2 others (PLD 1992 Karachi 283), Huffaz Seamless Pipe Industries Ltd. v. Sui Northern Gas Pipelines Ltd. (1998 CLC 1890), Airport Support Services v. The Airport Manager, Quaid-i-Azam International Airport, Karachi (1998 SCMR 2268), Ittehad Cargo Service v. Syed Tasneem Hussain Naqvi (PLD 2001 SC 116), Kay Bee International (Pvt.) Ltd. v. Secretary to the Government*

of Punjab (PLD 2002 SC 1074)) and *Iqtedar Ali Khan v. Department of Mines and Minerals (PLD 2004 SC 773)*, held the following:-

> *As regards the contention of the learned counsel for respondent No.3 that the writ petition should be dismissed because the re-procurement contract awarded by respondent No.1 to respondent No.3 had been partly performed, I am of the view that if the Court finds the process by which such a contract is awarded to be illegal, it cannot turn into a legality simply by virtue of the fact that it has been performed or partly performed. There are several instances where the Superior Courts have, on accounts of violations of law in a bidding process, struck down concluded contracts regardless of whether they were performed or partly-performed. For instance, in the case of Habibullah Energy Limited v. WAPDA through Chairman (supra), a process adopted for the award of contract/lease in 2006 was declared illegal in 2013. Furthermore, in the case of Khawaja Muhammad Asif v. Federation of Pakistan (PLD 2014 SC 206), an agreement executed in 2003 was set aside in 2013 on account of aberrations in the bidding process.*

23. The contention of the respondents that once a procurement process culminates in a contract such contract cannot be set aside even if the Court comes to the conclusion that the contract is a product of mis-procurement is without merit. No sanctity attaches to a contract, which is a product of an illegal procurement process. Given that this Court has found that the award of contracts to respondents No.3 and 4 were in breach of PPRA Rules, in absolute disregard of principles of transparency, and the procurement process was run in a manner so as to deny the petitioners and other bidders any opportunity to contest their disqualification during the technical evaluation process, the award of contracts is declared to be illegal.

24. For the above reasons, the instant petition is **allowed**. While declaring the contracts to be void, this Court cannot automatically conclude that respondents No.3 and 4 were complicit in the illegality in the award of contracts committed by respondents No.1 and 2. No material has been placed before this Court by the parties during these proceedings to establish that respondents No.3 and 4 aided and abetted the illegally committed by respondents No.1 and 2. Given that they have already performed services pursuant to the awarded contracts, in the event that the Court was to direct recovery of the contractual amount paid to them it would result in unjust enrichment of the state, with the state benefiting from its own wrong by illegally awarding contracts and receiving services pursuant to them and then also denying payments to the contractors who provided such services. Notwithstanding the declaration of illegality, given that the contracts having been completely performed the performance of services pursuant to such contracts will be treated as a past and closed transactions. Respondents No.1 and 2 must, however, be held accountable for the illegality in the award of contracts through mis-procurement. It is therefore directed that the Ministry of Housing and Works, Islamabad will initiate disciplinary proceedings against all individuals within Pak PWD who oversaw the procurement process starting from the release of tender documents to the acceptance of the bid and issuance of work orders and contracts to respondents No.3 and 4 for undertaking the process in breach of mandatory conditions of the PPRA Rules. The disciplinary proceedings will be concluded within a period of six months and the report of the outcome of

such proceedings shall be filed with the Deputy Registrar (Judicial) for perusal of this Court in Chambers. The Secretary, Ministry of Housing and Works will also ensure compliance with the directions issued by this Court in ***Writ Petition No. 52 of 2022*** by order dated 29.04.2022 and place a copy of the report solicited pursuant to Paras 15 and 16 of such judgment within a period of one month.

25. This Court had already directed Secretary, Ministry of Housing and Works to initiate an inquiry into the malpractices of Pak PWD in conducting public procurements in **Writ Petition No. 52 of 2022 (*M/s Shabbir Ahmad vs. Pakistan Public Works Department, Islamabad, through its Director General & others*)** and submit a report to this Court, which direction has not been complied with yet.

26. Let office issue a notice to Secretary, Ministry of Housing and Works, Islamabad to show cause why contempt proceedings may not be initiated against him for non-compliance with the direction of this Court issued in ***Writ Petition No. 52 of 2022.*** Let the office prepare a separate file for such proceedings and the matter be fixed before the Court on **07.12.2022.**

(BABAR SATTAR)
JUDGE

Announced in the open Court on 16.11.2022.

JUDGE

Shakeel Afzal/-

Approved for reporting.