JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A.No.80 of 2022
M/s Muhammad Ramzan & Company
Versus
Federation of Pakistan and others

Date of Hearing:	21.03.2024
Petitioner by:	Malik Muhammad Rafique Rajwana, Advocate.
Respondents by:	Barrister Muhammad Hassan Alam for NHA. Ms. Asia Batool, learned Assistant Attorney-General.

MIANGUL HASSAN AURANGZEB, J:- Through the instant intra Court appeal the appellant, M/s Muhammad Ramzan & Company, assails the judgment dated 27.01.2022 passed by the learned Judge-in-Chambers whereby writ petition No.3053/2019 filed by the appellant was dismissed. Through the said writ petition, the appellant had sought a declaration to the effect that the decision taken by the National Highway Authority (**"NHA"**) not to issue a revised letter of acceptance was unlawful. The appellant had also sought an injunction to restrain NHA from forfeiting the bid security amounting to Rs.82 million.

2. The facts leading to the filing of the instant appeal are that on 12.06.2019, NHA had published an advertisement inviting sealed bids on Net Guaranteed Fixed Revenue basis, excluding all taxes, duties, charges, levies, etc. for the award of the contract for "Operation, Management and Maintenance of Toll Plazas and Collection of Toll on Net Guaranteed Fixed Revenue basis along with Provisions of Allied Services on Lahore-Abdul Hakeem Motorway (M-3) 228KMs for Period 2019-21" (**"the Contract"**). The Invitation for Bids provided that the bidding was to be carried out by adopting a single-stage two-envelope procedure. Bidders were required to submit bid security equivalent to 2% of the bid amount

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along with their financial bids. The technical and the financial bids were required to be submitted by 27.06.2019. This date had been extended to 05.07.2019.

3. The appellant had participated in the competitive process for the award of the Contract. The bids were opened on 05.07.2019. In the Bid Form, which was a part of the bidding documents, the appellant had entered Rs.4,082,400,000/- per year. Since the appellant was declared as the highest bidder, NHA, on 09.08.2019, issued a Letter of Acceptance (**"LoA"**) in its favour.

4. Clause 15.1 of the Instructions to Bidders (**"ITB"**) obligated NHA to notify the successful bidder in writing through an LoA prior to the expiration of the bid validity period. The bid validity period in terms of clause 3.1 of the ITB is 120 days after the date of the bid opening. Since the bids were opened on 18.07.2019, NHA could not delay the issuance of the LoA beyond 20.11.2019. The LoA dated 09.08.2019 and its corrigendum dated 16.08.2019 is within the time period prescribed in the ITB for the issuance of the same.

5. Through the said LoA, the appellant was required to furnish *inter alia* performance security in the amount of Rs.102,060,000/-. The appellant was advised to complete all the requirements stipulated in the bidding documents so that the Contract could be signed. Vide letter dated 16.08.2019, which is in fact a corrigendum to the LoA, NHA categorically advised the appellant to furnish performance security in the amount of Rs.204,120,000/-.

6. It is an admitted position that the required performance security was not furnished by the appellant. Instead vide letter dated 21.08.2019, the appellant informed NHA that it had included income tax and other expenses in the bid amount. The appellant requested NHA to review its bid and issue a revised LoA which mentions the bid amount exclusive of income tax and other expenses. In other words, the appellant wanted NHA to treat its bid to be for Rs.260,772,272/- instead of Rs.4,082,400,000/-.

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7. Vide letter dated 27.08.2019, NHA turned down the said request by taking the position that through clause 5.1 of the ITB, the bidders had been specifically directed that the Net Guaranteed Revenue entered in the Bid Form shall be exclusive of taxes, duties, charges, levies, etc. Furthermore, NHA stated that the LoA had been issued on the basis of the amount entered by the appellant in its Bid Form. The appellant was once again requested to comply with the requirements of the LoA dated 09.08.2019, failing which clause 16.2 of the ITB would be invoked. Clause 16.2 entitled NHA to annul the award of the Contract and forfeit the bid security if the successful bidder did not furnish the performance security within a period of 14 days after the receipt of the LoA. Since the appellant did not furnish the performance security within the said period, NHA vide letter dated 05.09.2019 informed the appellant that its bid security for an amount of Rs.82 million had been forfeited pursuant to clause 16.2 of the ITB.

8. Aggrieved by the said actions of NHA, the appellant on 07.09.2019 invoked the jurisdiction of this Court by filing writ petition No.3053/2019 praying for *inter alia* NHA's letters dated 09.08.2019 and 27.08.2019 to be declared unlawful. Furthermore, the appellant sought a direction to NHA to issue a revised LoA to the appellant. The learned Judge-in-Chambers dismissed the said writ petition vide judgment dated 27.01.2022 which has been assailed in the instant appeal.

9. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the entry of Rs.4,082,400,000/- in the Bid Form as the appellant's total bid was an inadvertent mistake since the appellant had erroneously included income tax and other expenses in the said amount; that the Summary of Cost (FF-5) submitted by the appellant along with its bid had clearly mentioned the bid amount which was exclusive of income tax and other expenses; that since there was a contradiction in the figures entered in the Bid Form and the

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Summary of Cost (FF-5), NHA should have sought a clarification from the appellant instead of issuing the LoA whereby the appellant's bid of Rs.4,082,400,000/-, which was inclusive of taxes, had been accepted; that NHA not only omitted to seek a clarification from the appellant but also forfeited the bid security furnished by the appellant along with its bid; that such forfeiture could not have been made by NHA since it had not suffered any loss due to default on the appellant's part to furnish a performance security in terms of clause 16 of the ITB; that the forfeiture of the bid security had resulted in NHA being unjustly enriched; that even if the amount stated as income tax and other expenses are excluded from the appellant's financial bid mentioned in the Bid Form, the appellant would still be the highest bidder; and that NHA's refusal to issue a revised LoA was unlawful and should have been interfered with by the learned Judge-in-Chambers while deciding writ petition No.3053/2019. Learned counsel for the appellant prayed for the instant appeal to be allowed and for the impugned judgment dated 27.01.2022 to be set-aside.

10. On the other hand, learned counsel for NHA submitted that NHA did not commit any illegality by accepting the appellant's bid of Rs.4,082,400,000/- which was mentioned in the Bid Form submitted by the appellant; that the bids were submitted on 05.07.2019 but it was not until after the LoA was issued on 09.08.2019 that the appellant, through letter dated 21.08.2019, requested NHA to issue a revised LoA mentioning a contract price lower than the amount entered by the appellant in the Bid Form; that even after the announcement of the amounts quoted by each of the bidders, the appellant did not seek to correct the amount entered by it in its Bid Form; that by asking NHA to issue a revised LoA, the appellant wanted the contract price to be reduced from Rs.4,082,400,000/- to Rs.260,772,272/-; that the appellant was well aware that bids had been invited on "Net Guaranteed Fixed

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Revenue Basis (excluding all taxes, duties, charges / levies, etc.);" that in the ITB it was also mentioned that the amount to be entered in the Bid Form had to be exclusive of all taxes, duties, charges / levies etc.; that in clause 13 of the Bid Data Sheet, which is part and parcel of the bidding documents, the successful bidder was required to submit 5% of the net guaranteed revenue for the contract period as performance security; that since the appellant failed to furnish the performance security, NHA committed no illegality by annulling the bidding process and forfeiting the bid security furnished by the appellant; and that the impugned judgment dated 27.01.2022 does not suffer from any legal or jurisdictional infirmity and therefore does not warrant any interference. Learned counsel for NHA prayed for the appeal to be dismissed.

11. We 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 instant appeal have been set out in sufficient detail in paragraphs 2 to 8 above and need not be recapitulated.

12. The terms of the bidding documents are clear and unambiguous. Clause 4.1 of the ITB requires each bidder to furnish bid security in an amount mentioned in the Bid Data Sheet along with the financial bid. Paragraph 12 of the Bid Data Sheet requires bid security to be in the amount equivalent to 2% of the bid amount. Clause 4.7 of the ITB provides that the bid security of the successful bidder will be returned when the bidder has furnished the required performance security pursuant to clause 16 of the ITB. One of the instances provided in clause 4.8 *ibid* for the forfeiture of the bid security is where the successful bidder fails to furnish the required performance security in accordance with clause 16 of the ITB.

13. Clause 16.1 of the ITB requires the successful bidder to furnish to NHA performance security in the amount stipulated in

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the Bid Data Sheet within a period of 14 days after the receipt of the LoA. Paragraph 13 of the Bid Data Sheet provides for the performance security to be in the amount equivalent to 5% of the Net Guaranteed Revenue for the two-year contract period. Clause 16.2 of the ITB entitles NHA to annul the award and forfeit the bid security in the event of the failure on the part of the successful bidder to comply with the requirements of clause 16.1. Therefore, where the successful bidder does not furnish performance security within 14 days of the issuance of the LoA, NHA would have a contractual right to annul the award and forfeit the bid security.

14. In the case at hand, the appellant in compliance with clause 4.1 of the ITB had furnished bid security in the amount of Rs.82 million along with its financial bid. As mentioned above, vide LoA dated 09.08.2019, NHA accepted the highest bid submitted by the appellant, and required it to furnish performance security in the amount equivalent to 2.5% of the bid amount for the contract period. Through corrigendum dated 16.08.2019, NHA corrected its demand regarding the quantum of the performance security to 5% of the bid amount for the contract period.

15. It is an admitted position that the appellant did not furnish the performance security within the stipulated period of 14 days after the issuance of the LoA dated 09.08.2019 or its corrigendum dated 16.08.2019. Consequently, NHA, in exercise of its contractual powers under clause 16.2 of the ITB, annulled the award and forfeited the bid security furnished by the appellant.

16. The appellant is trying to justify the non-furnishing of the bid security by asserting that NHA should have allowed it to correct the figures erroneously entered in the Bid Form as the total bid. As per the contents of the Bid Form submitted by the appellant, the appellant's total bid for the financial year 2019-20 and financial year 2020-21 was Rs.4,082,400,000/-. The appellant asserts that it had erroneously included taxes and other expenses in the said

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amount and that if the taxes and other expenses are excluded from the said amount, the appellant's bid would stand reduced to Rs.260,772,272/-. The appellant further asserts that from the contents of the Summary of Cost (FF-5), submitted along with the bid, it could be easily discerned that on exclusion of taxes and other expenses, the appellant's financial bid was Rs.260,772,272/- and not Rs.4,082,400,000/-.

17. Clause 5.1 of the ITB specifically directed the bidders that the Net Guaranteed Revenue entered on the Bid Form shall be exclusive of all taxes, duties, charges, levies etc. strictly in accordance with the bidding documents. The appellant's case is that the amount of Rs.4,082,400,000/- entered in the Bid Form as the Net Guaranteed Revenue for the two financial years of 2019-20 and 2020-21 was a mistake which should have been corrected by NHA in response to the appellant's request made in letter dated 21.08.2019. This letter was sent a month and a half after the submission of the bids. For the appellant's silence for this period of one and a half month, no explanation has been presented. The bids were opened in the presence of all the bidders on 18.07.2019 and the appellant's highest bid of Rs.4,082,400,000/- was made known to all the bidders. This did not prompt the appellant to seek a correction in the quantum of the bid entered by it in the Bid Form. There is a huge difference in these figures. Any prudent person would have immediately taken issue with the figure announced by the procuring agency as the highest bid if such figure was erroneous. However, it is twelve days after the acceptance of the appellant's bid through LoA dated 09.08.2019 that the appellant for the first time agitated the matter regarding the mistake in the amount entered as its total bid in the Bid Form. The appellant wanted its total bid to be reduced from Rs.4,082,400,000/- to Rs.260,772,272/-. In other words, the appellant wanted to correct its mistake by modifying the figures entered as its total bid in the Bid Form. This, NHA did not allow the appellant to do, and we are

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of the view that NHA was correct in taking this position. In the case of National Institutional Facilitation Technologies (Pvt.) Ltd. Vs. The Federal Board of Revenue (PLD 2020 Islamabad 378), this Court held as follows:-

> ***"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:-***
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> > ***"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."***

18. The non-furnishing of performance security in the amount equivalent to 5% of the Net Guaranteed Revenue entered in the Bid Form as the appellant's financial bid for the two-year contract period left NHA with no option but to invoke clauses 4.8 and 16.2 of the ITB, thereby annulling the award and forfeiting the bid security furnished by the appellant.

19. The appellant as a prudent commercial person of business knew or ought to have known that clause 5.1 of the ITB had required all bidders to enter the Net Guaranteed Revenue on the Bid Form exclusive of all taxes, duties, charges, levies, etc. NHA

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had to take into consideration only the amount entered in the Bid Form as the appellant's financial bid and none other. The appellant could not expect NHA to treat its financial bid in a manner otherwise than provided in clause 5.1 of the ITB. In the cases of Tez Gas (Private) Ltd. Vs. Oil and Gas Regulatory Authority (PLD 2017 Lahore 111) and Tata Cellular Vs. Union of India (AIR 1996 SC 11), it was held *inter alia* that the terms of the invitation to tender are in the realm of a contract.

20. It is well settled that the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favoritism and is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose. However, Government undertakings and statutory bodies should have a free hand while framing terms and conditions of a tender and Courts ought not to interfere with the same unless there is material on the record to demonstrate that they are arbitrary, discriminatory, malafide, or actuated by bias. A Court cannot interfere with the terms and conditions of a tender because it feels that some other term in the tender would have been fair, wiser or logical. Courts should normally not interfere in the contractual matters in exercise of powers of judicial review and it can only be exercised in case it is satisfied that the process adopted was malafide or made to favour someone or the process adopted or decision made is so arbitrary that no man of ordinary prudence could have reached. In the instant case, we are unable to perceive any arbitrariness, favoritism or exercise of power for any collateral purpose by NHA in annulling the bidding process and forfeiting the bid security furnished by the appellant.

21. Since it was the appellant's obligation to submit its bid in conformity with the requirements of clause 5.1 of the ITB, it is our view that NHA did not commit any illegality by not entertaining the

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appellant's belated request to treat its financial bid as Rs.260,772,272/- instead of Rs.4,082,400,000/-. If this Court were to hold otherwise, it would amount to rewriting the terms of the bidding documents. As regards the annulment of the award and the forfeiture of the bid security furnished by the appellant, this was also done by NHA in conformity with the requirements of clauses 4.8 and 16.2 of the ITB.

22. On consideration of the totality of the facts and circumstances, this appeal lacks merit and is accordingly dismissed. No costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(ARBAB MUHAMMAD TAHIR)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 08/04/2024

(JUDGE) **(JUDGE)**

APPROVED FOR REPORTING

*Qamart Khan**

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