JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 1426/2022

KAC-RMC (Joint Venture) through its Authorized Representative & others
Vs.
National Highway Authority, Islamabad, through its Chairman & others

PETITIONERS BY:	Mr. Babbar A. Khan and Mr. Jawad Malik, Advocates.
RESPONDENTS BY:	Barrister Syed Masood Raza and Barrister Momin Ali Khan, Advocates for NHA. Mr. Farrukh Shahzad Dall, Assistant Attorney General alongwith Mr. Faizan Ali, Assistant Chief, and Mr. Zohair Fazil, Chief (T&C), Ministry of Planning, Development & Special Initiatives, Islamabad. Mr. Zaheer Iqbal, Section Officer (Litigation-II), Cabinet Division.
DATE OF HEARING:	03.08.2022.

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BABAR SATTAR, J.- Petitioner No.1 ***("Petitioner")*** is aggrieved by an order dated 30.10.2018, pursuant to which a procurement, in which the Petitioner had participated, had been qualified after technical evaluation and had submitted the lowest financial bid, which was ultimately annulled.

2. The learned counsel for the petitioners stated that no reasoning was provided for annulment of the procurement process in which after opening of the technical and financial bid, the Petitioner had emerged as the lowest bidder. He submitted that the grievance in relation to the impugned order was raised before the Grievance Redressal Committee (GRC) constituted by the National Highway Authority (NHA), which by order dated

27.02.2019, set-aside the annulment order and directed that the P&CA Section of NHA shall proceed with the award of works in accordance with the Public Procurement Rules, 2004 ***("Rules")***. He submitted that while the decision of the GRC remains in the field, NHA has refused to give effect to it. He further submitted that notwithstanding the non-issuance of an award letter, the Petitioner was directed by NHA to commence work, which it did. And further that an engineer and certain other staff were also appointed in relation to the said project. He submitted that NHA is acting in breach of the directions of its own GRC. He further submitted that the dispute relates to an award for a construction project for Dera Ghazi Khan Northern Bypass. After the invitation of tender and technical and financial evaluation of the bids, the Petitioner was declared a substantially responsive bidder and was found to be lowest financial bidder. The approval of the project was granted by the Executive Committee for the National Economic Council. And the Ministry of Planning, Development & Special Initiatives, Islamabad, by letter dated 21.03.2018, communicated the approval to NHA. He submitted that the budget for the said project had also been approved and allocated by NHA and administrative approval by the President was also granted subsequent to such approvals. The inauguration of the project took place on 31.03.2018, and the project opening ceremony was convened, which was attended by the Prime Minister of Pakistan. He submitted that the contractor also initiated bills for mobilization and the engineer was also appointed for the project and an award for design consultant was also made. He submitted that by order dated 30.10.2020 the

tender was annulled, which annulment was challenged before the GRC pursuant to rule 48 of the Rules. The GRC after hearing the parties by order 27.02.2019 set-aside the annulment and directed that the project be awarded in accordance with the Rules. He submitted that pursuant to rule 38 of the Rules, as the lowest bidder, the Petitioner was entitled to be awarded the contract, but NHA has refused to abide by the decision of the GRC, which is still in the field.

3. The learned counsel for NHA stated that while the annulment notification was set-aside, the consequence is that project would have to be re-tendered pursuant to rule 34 of the Rules. He submitted that it has been held by the learned Sindh High Court in ***Messrs Pakistan Gas Port Limited vs. Messrs Sui Southern Gas Co. Limited and 2 others*** **(PLD 2016 Sindh 207)** that where a tender has been annulled, the GRC has no jurisdiction to adjudicate any dispute regarding the annulment. He submitted that the GRC was obliged to render a decision within ten days of being seized of the complaint but rendered the decision after almost ninety days, which itself makes the decision a nullity. He stated that there was no work order or letter of acceptance issued to the contractor and in the event that the contractor mobilized without the issuance of any contract, it did so at its own risk and expense. He further submitted that the petition also suffers from *laches* as the decision of the GRC was passed on 11.02.2019 and the Petitioner has challenged NHA's action before the Court almost after two and half years.

4. The following questions arise for the adjudication of the petition:-

1. Whether the Petitioner had a right to have its bid accepted and granted procurement contract under rule 38 read together with rule 44 of the Rules?
2. Whether a bidder has a right to seek a remedy against the decision of a procuring agency to reject all bids under rule 33 of the Rules?
3. Is the GRC vested with authority under rule 48 of the Rules to grant a remedy against the decision of the authority to reject all bids under rule 33 of the Rules? and
4. Whether the decision of the GRC is binding on the procuring agency?

5. The Invitation for Bids was published in daily national newspapers (i.e. The News and Nawa-e-Waqt on 16.12.2017 and 17.12.2017), pursuant to which the Petitioner had submitted its bid on 25.01.2018. After opening the technical and financial bids NHA, as the procuring agency, annulled the procurement process in exercise of its authority under rule 33(1) of the Rules by letter dated 30.10.2018 and advised the Petitioner to collect its bid security from NHA. The said annulment order was challenged by the Petitioner before the GRC, which by order dated 27.02.2019 held that the annulment order *"should be withdrawn as the reasons for annulment do not seem to be valid."* It further directed that the P&C Section of NHA should proceed for award of works as per the Rules. The grievance of the Petitioner is that

NHA has not acted in compliance with the order of the GRC, which in its detailed order had found that the reasons for annulment of the procurement process, including, *inter alia,* that land acquisition remained under process, selection of Design Consultant was under process, administrative approval and Implementation Authorization had not been granted, the project could not proceed due to insufficient allocation of funds in PSDP 2018-2019 and the audit reports submitted by the lowest evaluated bidder were not found satisfactory by NHA Finance Wing and were not found to be logical and valid.

6. Let us first consider the conditions of Invitation for Bids dated 16.12.2017, pursuant to which the Petitioner had submitted its bid. Clause-8 of the Invitation for Bids as published in the newspapers on 16.12.2017 and 17.12.2017 stated that *"the authority reserves the authority to reject any or all the bids as per the Public Procurement Rules, 2004."* Clause-29 of the detailed Instructions to Bidders stated that *"the Employer will award the Contract to the bidder whose bid has been determined to be substantially responsive to the Bidding Documents and who has offered the lowest evaluated Bid Price…"* Clause-30.1 then provided the following:-

> ***IB.30 Employer's Right to Accept any Bid and to Reject any or all Bids***
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> *30.1 Notwithstanding Clause IB.29, the Employer reserved the right to accept or reject any Bid, and to annul the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected bidders or any obligation except that the grounds for rejection of all bids shall upon request be recommended to any bidder who submitted a bid, without*

justification of grounds. Rejection of all bids shall be notified to all bidders promptly.

7. The power of a procuring agency to reject all bids and annul the procurement process is provided under rule 33 of the Rules. Rules 33 & 34 of the Rules, which are relevant for our present purpose and state the following:-

33. Rejection of bids.-

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

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

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

34. Re-bidding.-

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

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

8. What emerges from the above is that the Invitation for Bids as published in the newspapers as well as the detailed Instructions to Bidders very clearly put all bidders on notice that the procuring agency had the right to annul the procurement process and reject all bids prior to the award of a contract. The

reservation of such power is in consonance with rule 33 of the Rules. Rule 33 of the Rules vests a power in the procuring agency to reject all bids and proposals prior to their acceptance. The only obligation in case of a procuring agency is to communicate to a bidder the grounds for rejection of all bids and proposals, if so requested by such bidder, but without the need to justify those grounds. Rule 33(2) of the Rules clarifies that the procuring agency will incur no liability by virtue of exercising its power under rule 33(1) of the Rules to reject all bids or proposals prior to the acceptance of any bid. Rule 34 of the Rules then provides for the next steps i.e. the procuring agency may call for fresh tender and re-bidding after exercise of authority and its power under rule 33 of the Rules and after choosing to reject all bids and proposals and annulling the bidding process.

9. Let us also re-produce here rules 38, 44 and 50 of the Rules, which are relevant for our discussion:-

> ***38. Acceptance of bids.-***
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> *The bidder with the most advantageous bid, if not in conflict with any other law, rules, regulations or policy of the Federal Government, shall be awarded the procurement contract, within the original or extended period of bid validity.*
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> ***44. Entry into force of the procurement contract.-***
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> *A procurement contract shall come into force,-*
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> *(a) Where no formal signing of a contract is required, from the date the notice of the acceptance of the bid or purchase order has been given to the bidder whose bid has been accepted. Such notice of acceptance or purchase order shall be issued within a reasonable time; or*

(b) Where the procuring agency requires signing of a written contract, from the date on which the signatures of both the procuring agency and the successful bidder are affixed to the written contract. Such affixing of signatures shall take place within a reasonable time:

Provided that where the coming into force of a contract is contingent upon fulfillment of a certain condition or conditions, the contract shall take effect from the date whereon such fulfillment takes place.

50. Mis-procurement.-

Any unauthorized breach of these rules shall amount to mis-procurement.

10. In order for the Petitioner to prevail in its challenge to the exercise of authority by the procuring agency in annulling the bidding process under rule 33 of the Rules, this Court would need to reach a conclusion that once bids have been evaluated in accordance with the tender conditions, the procuring agency has no discretion, but to award a contract to the bidder whose bid has been evaluated as the most advantageous bid. In other words, the Petitioner seeks rule 38 of the Rules to be read such that power to annul a bidding process and reject all bids under rule 33 of the Rules is only available prior to evaluation of the bids and determination of the most advantageous bid. This Court is not convinced that that is how rule 38 of the Rules is to be read.

11. Rule 38 of the Rules does create a mandatory obligation for the procuring agency to not accept any bid other than that which has been evaluated as the most advantageous bid. However, rule 38 of the Rules does not limit the availability of

the power to reject all bids under rule 33 of the Rules up to a certain point in the bidding process. So, while in view of rule 38 of the Rules, the procuring agency cannot accept any bid other than that which is declared as the most advantageous bid, it can reject all bids under rule 33 of the Rules and annul the procurement process. This is evident from the language of rule 33 of the Rules, which clearly provides that a procuring agency can reject all bids *"at any time prior to the acceptance of a bid"*. Consequently, in the event that the procuring agency chooses not to accept even the most advantageous bid under rule 38 of the Rules, there is no creation of any procurement contract within the meaning of rule 44 of the Rules. To put it another way, the bidder who has submitted the most advantageous bid has no vested right to be granted the procurement contract under provisions of the Rules or under provisions of the Contract Act, 1872 ***("Contract Act")***, unless such bid is formally accepted by the procurement agency.

12. The Public Procurement Regulatory Authority Ordinance, 2002 ***("Ordinance")***, was promulgated for purposes of *"regulating public procurement of goods, services and works in the public sector as provided in the preamble of the Ordinance".* Public procurement has been defined under Section 2(l) of the Ordinance as *"acquisition of goods, services or construction of any works financed wholly or partly out of the public fund unless excluded otherwise by the Federal Government."* The *raison d'être* for its promulgation was to ensure that the State and procuring agencies owned and controlled by the State do not dispense State largesse at their whims to benefit favorites.

Therefore, where cost of procurement is being paid from public money, the manner in which goods and services ought to be procured is regulated under the Ordinance and the Rules. However, regulation of the procurement process does not mean that the hands of the procuring agencies are tied, even when they are engaging in commercial activity and seeking to procure goods and services. The Rules do not bind procuring agencies to accept the bid evaluated as the most advantageous and execute a procurement contract even if the terms of the bid, while being most advantageous from amongst the available bidders, are not desirable. The intent of the Rules as evident from the text of its provisions, especially rules 33 & 34 of the Rules, makes it evident that a procuring agency can choose not to proceed with a procurement process even after it has received and evaluated the bids and finds even the best bid not to its liking. The duty imposed on the procuring agency under rule 33 of the Rules is to record its reasons for rejecting the bids and annulling the procurement process. This obligation is meant to uphold the right to a bidder to information as to why its bid has been rejected and is in consonance with the obligation of a procuring agency as a public authority to record reasons for its decisions in view of provisions of Section 24A of the General Clauses Act, 1897. However, rule 33 of the Rules itself provides that the reasons stated need not be justified. What that also means is that a Court while exercising its judicial review powers would not engage in a searching scrutiny of the reasons and grounds recorded by a procuring agency for rejection of bids and annulment of the procurement process.

13. This scheme makes eminent sense. The purpose of the PPRA framework is to create a level-playing-field and afford interested bidders equal opportunity to participate in a procurement process, so that the process is carried out in a transparent manner and brings value for money to the procuring agency as reflected in rule 4 of the Rules. The PPRA framework does not seek to force a procuring agency to execute a contract for procurement of goods or services that it doesn't wish to enter into. There is no reason in law or public policy to bind the hands of a procuring agency using public funds for procurement of goods and services to execute a procurement contract on the basis of a bid that is not to the liking of the procuring agency even if it is determined to be the best bid received by such procuring agency. The exercise of judicial review in such situation would be deferential, as on the one hand, there would be no public funds involved where the decision taken by the procuring agency is that of annulling the procurement process, and on the other hand there would be no vested rights of the bidder involved on the basis that the bid submitted has been evaluated as the best bid.

14. It is the settled position within the realm of jurisprudence produced under the Contract Act that an Invitation to Bids is merely an offer inviting bids. It is the bid which is treated as a proposal from the bidder and it is the acceptance of such proposal by a procuring agency that then leads to an agreement on the compensation payable by the procuring agency and the conclusion of a contract within the meaning of

Section 10 of the Contract Act read together with Section 2 (a) (b) (d) & (e) of the Contract Act.

15. It is settled law that a lowest bidder cannot claim right to be awarded contract (see for example ***Munshi Muhammad and another vs. Faizan ul Haq and another (1971 SCMR 533)***, ***City Schools Private Limited, Lahore Cantt. vs. Privatization Commission, Government of Pakistan and another (2002 CLD 1158)*** and ***Petrosin Corporation Private Limited Singapore and 02 others vs. Oil and Gas Development Company Limited, through Managing Director, Islamabad (2010 SCMR 306)***.

16. The question of entitlement of the lowest bidder to be granted a contract came before the learned Sindh High Court in ***Messrs Reliance Consultancy and Engineering Works Private Limited vs. Federation of Pakistan and 02 others (2010 CLC 1046)***, which dismissed the petition. In the said case the petitioner was the lowest bidder and prior to the acceptance of its bid the procuring agency scrapped the tender on the basis that all of the bids were non-responsive. In this case the learned Sindh High Court distinguished between the determination by a procuring agency were one bid is found non-responsive and the procuring agency moves ahead to accept the bid of another bidder versus the situation where all bids are declared non-responsive and the tender is annulled. As has been discussed above, where the procurement process is annulled, there is no procurement that takes place and consequently, a bidder who deems itself to be the best bidder

within the tendering process cannot claim to have acquired a vested right to be granted a contract.

17. The question came before the learned Sindh High Court once again in ***Pakistan Gas Port Limited*** and the learned Sindh High Court held that the law conferred no right on the lowest bidder to be awarded a contract as the annulment of the procurement process meant that no contract had come into existence within the meaning of Section 2(a) (b) (d) & (e) of the Contract Act, which could then be enforced through Court intervention. It further observed that exercise of authority under rules 33 & 34 of the Rules did not give any undue advantage to any of the participants of the bidding process and further held that, *"when rules 33 and 34 are invoked by the procuring agency, the bidders cannot make a grievance out of it... rules 33 and 34 fully empower the procuring agency to reject all bids without incurring any liability and call for rebidding."*

18. The scope of the power of a procuring agency to annul the procurement process was adjudicated by the learned Lahore High Court in ***M/s Bio-Labs Private Limited vs. Province of Punjab & others (PLD 2020 Lahore 565)*** where while agreeing with the law laid down by the learned Sindh High Court in ***Pakistan Gas Port Limited***, it was held that the lowest bidder had no vested right to be granted a contract and the declaration at the time of opening of the mentioned proposals that particular party was the lowest bidder did not automatically mean that its bid stood accepted.

19. This Court agrees with the judgments rendered by the learned Singh High Court in ***Pakistan Gas Port Limited*** and by the learned Lahore High Court in ***Bio-Labs Private Limited***. Let us summarize the findings in this regard as follows:-

1. The power conferred on a procuring agency to annul the bidding process and reject all bids under rule 33 of the Rules is not limited to a stage in the bidding process prior to the issuance of the final evaluation report. Rule 33 of the Rules provides that a procuring agency may reject all bids at any time prior to the acceptance of a bid. The acceptance of a bid is an affirmative process and unless a procuring agency accepts a bid leading to the issuance of a procumbent contract within the meaning of rules 38 and 44 of the Rules, it is free to exercise its authority to reject all bids under rule 33 of the Rules. The constraint that rule 38 of the Rules applies on the authority of the procuring agency is that it may not accept a bid other than a bid that has been evaluated and found to be the most advantageous bid. Rule 38 of the Rules, however, does not fetter the authority vested in a procuring agency under rule 33 of the Rules to reject all bids up until the procuring agency has taken the affirmative step of formally accepting a bid.

2. The bidder, who is found to have submitted the most advantageous bid, has the status of a party having made the best offer. Until such offer is accepted by the procuring agency there does not come into existence a

contract within the meaning of Section 10 of the Contract Act read together with Section 2(a) (b) (d) & (e) of the Contract Act. The party making the best offer has no vested right to be granted a contract or to seek the indulgence of the Court to force a procuring agency to issue it a procurement contract.

3. A procuring agency is under an obligation to record reasons and make them available to a bidder in the event that it exercises its authority to annul the bidding process under rule 33 of the Rules. The obligation to record reasons is a requirement of law in view of Section 24A of the General Clauses Act, 1897, as the procuring agency in question is a public authority and is reaching decisions in exercise of its public authority. If such reasons are impugned before a Court that is invited to exercise judicial review powers on grounds of illegality, irrationality or procedural impropriety, the Court would exercise its judicial review powers in a deferential manner if basis of challenge is irrationality of the grounds that inform the annulment decision. A constitutional Court is not best placed to second-guess the decision of a procuring agency not to enter into a contract for procurement of goods or services. Except in extreme cases of *malafide*, where a consistent pattern followed by the procuring agency reflects that the procurement is being repeatedly annulled because of the identity of the best evaluated bidder (and the onus to establish such *malafide* is on such bidder), the Court

would be loath to interfere with a decision to annul a procurement process and force a procuring agency to procure goods or services that it has otherwise decided not to procure.

4. The grievance redressal mechanism provided under rule 48 of the Rules is meant to ensure that the principles of procurement as enshrined in the Rules and the procedures prescribed there are abided by a procuring agency while procuring goods and services. A bidder has no vested right to seek the issuance of the procurement contract, even where its bid is found to be a most advantageous bid. Consequently, a bidder will not be deemed to be aggrieved by the act of the procuring agency to annul the procurement process in exercise of its power under rule 33 of the Rules as rule 33(2) of the Rules provides that the procuring agency shall incur no liability towards bidders who have submitted their bids, if it elects to reject all bids and annul the procurement process. A bidder may be aggrieved where its bid has been rejected and the bid of another competitor has been accepted. But where all bids have been rejected, the bidder, whose bid might be deemed to be a most advantageous bid, cannot claim to have a justiciable legal grievance the redressal of which can be sought under rule 48 of the Rules. It is an old maxim of equity that where there is a right, there is a remedy. A party making the best bid in a tender process has no right to be granted a contract and consequently,

it cannot seek a legal remedy forcing the procuring agency to accept its bid and enter into a contract.

5. In commercial and contractual matters constitutional Courts do not exercise searching scrutiny when invited to undertake judicial review of decisions rendered by public authorities. Constitutional Courts exercise their judicial review powers to ensure that the State does not dispense its largesse in an illegal, arbitrary or whimsical fashion. But where the State and its instrumentalities choose not to dispense any largesse and elect not to enter into a contract to procure goods and services, the Court is loath to force a procuring agency exercising authority on behalf of the State to enter into a contractual relationship for procurement of such goods and services. This is more so in view of rule 34 of the Rules where in the aftermath of annulment of a procurement process, a procuring agency can initiate a procurement process afresh, which then provides an equal opportunity to all interested parties to enter into the bidding contest and the decision to annul a previous procurement process can therefore not be seen as serving the interest of any particular bidder.

20. In the instant case the GRC of NHA declared that the decision of NHA to annul the procurement process was not backed by valid reasons and ought to be recalled, and it further directed that NHA may proceed with the procurement process in accordance with the Rules. As has been held above, the Petitioner had no vested right to have its bid accepted in terms

of rule 38 of the Rules or be granted a procurement contract within the meaning of rule 44 of the Rules. Further, the GRC was vested with no authority to sit in judgment over the exercise of power by NHA under rule 33 of the Rules to annul the procurement process. Consequently, the decision rendered by the GRC was not backed by law and was not sustainable in view of provisions of the Rules as explained above.

21. There is also the additional issue of the delay with which the petitioners have approached this Court. The decision of the GRC that is sought to be enforced was rendered on 26.02.2019 and the instant petition was filed on 31.04.2022 after the lapse of over three years. Even, if the analysis of law were different, the petition would not be maintainable on grounds of *laches*, as it would be inconceivable that a commercial offer made by a bidder back in 2019 might still be valid in the year 2022 in view of changing rates or that a procurement contract could now be offered on the basis of such bid submitted in 2019.

22. In view of the above, the petition is without merit and is ***dismissed*** with no order as to cost.

23. The material placed on record suggests that the project in question was inaugurated on 31.03.2018. The Chairman NHA will constitute an inquiry committee to determine under whose authority the project was directed to be inaugurated and whether the Petitioner was directed to make arrangements for such purpose formally or informally. In the event that instructions were issued by NHA for such purpose, Chairman

NHA will determine the just compensation payable to the Petitioner in lieu of expenses incurred by the Petitioner in arranging for the compensation and order disciplinary proceedings against officials was passed such directions without the acceptance of the Petitioner's bid and award of a contract. This exercise will be completed in ninety (90) days.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 21.11.2022.

JUDGE

Approved for reporting

A.Rahman Abbasi.