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

WRIT PETITION NO. 1489 OF 2022

WSKB Operator Private Limited, Islamabad

Vs

The National Highway Authority and others

PETITIONER BY:	Syed Riaz Hussain, Advocate.
RESPONDENTS BY:	Barrister Masood Raza, Advocate for NHA. Mr. Abdul Rehman Khan, Advocate for respondents No. 4 and 5. Malik Akhlaq Ahmed Awan, Advocate for respondent No.3. Sardar Sami Ahmed, Director (Revenue), Mr. Asad Rehman AD Legal and Mr. Aurangzaib, AD (Revenue), NHA. Mr. Abdul Nabi, Director (Legal), Mr. M. Khurshid, DD Legal and Mr. Noor ul Najam Chaudhry, Assistant Legal, PPRA.
DATE OF HEARING:	01.09.2022.

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***BABAR SATTAR, J.*-** The petitioner has impugned letter of award dated 23.04.2022 issued by National Highway Authority (NHA) to respondents No.4 and 5 in the aftermath of a procurement process that the petitioner participated in.

2. The learned counsel for the petitioner submitted that the petitioner filed a grievance petition before the Grievance Redressal Committee **(GRC)** of NHA, which by order dated 15.02.2022 had annulled the procurement process and ordered that the procurement was to be carried out afresh in accordance with the Public Procurement Rules, 2004 **("PPRA Rules")**. He

stated that notwithstanding the decision of the GRC, NHA awarded the contract through the impugned letter to respondents No. 4 and 5. He stated that in view of provisions of rule 48 of the PPRA Rules, the employer could not disregard the decision of the GRC. The learned counsel for the petitioner submitted that the GRC had held that conditions mentioned in invitation to bidders were vague and vested unstructured authority in the procuring agency and on the basis of forming an adverse opinion regarding the evaluation criteria the GRC declared that the procurement had been carried out in breach of rule 35 of PPRA Rules and was liable to be annulled and that technical evaluation had to be determined afresh before initiating fresh procurement. Learned counsel for the petitioner further submitted that technical evaluation report had not been uploaded on websites of PPRA and NHA in accordance with rule 35 of the PPRA Rules and this infirmity alone was sufficient to set-aside the procurement process. He took the Court through the requirements of the evaluation criteria to argue that the criteria was set-up in a manner that it would benefit some contractors who would erstwhile not have qualified to participate in bidding process and that evaluation criteria therefore ought to have been revised.

3. Learned counsel for NHA submitted that there was no infirmity in the procurement process. He submitted that the petitioner had not challenged provisions of the tender documents or the evaluation criteria that the petitioner was entitled to do pursuant to rule 48(2) of the PPRA Rules. The petitioner participated in the bidding process and submitted his

technical bid without demur and it was only after the financial bids were opened and the petitioner realized that it was not the successful bidder in view of the technical and financial evaluation that it raised a grievance before the GRC. He submitted that the petitioner was not the only bidder who challenged the procurement process. The procurement was also challenged by M/s Abdul Kareem Builders and the GRC passed identical orders in relation to both complaints. He submitted that in both complaints the GRC made observations regarding the evaluation criteria and held that evaluation criteria for purposes of future procurements were to be streamlined. However, the GRC, notwithstanding its observations regarding restating the evaluation parameters for future procurements, held in its recommendations that the procurement had been carried out in breach of rule 35 of the PPRA Rules and directed that the procurement be annulled. He submitted that the decision of the GRC in relation to the complaint filed by M/s Abdul Kareem Builders, which was identical to the decision rendered in the complaint filed by the petitioner, was challenged by M/s Ittehad Enterprises JV KKBA Enterprises before PPRA pursuant to rule 48(7) of the PPRA Rules. PPRA in exercise of its authority under rule 48(7) accepted the appeal and set-aside the decision of GRC for being breach of rule 48(1), 48(2) and 48(6) of PPRA Rules. He submitted that as the identical decision of GRC was set-aside by PPRA, NHA gave effect to such decision by PPRA and did not annul the procurement process in accordance with such decision.

4. Learned counsel for PPRA submitted that the decision of PPRA in Appeal No. 3(46) of 2021 filed by M/s Ittehad Enterprises JV KKBA Enterprises, in relation to the procurement process in question, had been rendered in accordance with rule 48 of the PPRA Rules. PPRA had taken into account that Rule 48(2) contemplated that any prospective bidder aggrieved by the terms and conditions prescribed in the bidding documents ought to challenge such conditions prior to the proposal submission deadline, which was not done by the bidders who filed complaints before the GRC. He submitted that on the basis of objections to the conditions in the bidding documents, (including the evaluation criteria stated in the bidding documents), the procurement process could not be annulled on behest of unsuccessful bidders after the evaluation of bids had been completed. He further submitted that the GRC had only found that reports of technical and financial evaluation had not been uploaded on websites of NHA and PPRA. But that such evaluation reports were released to the successful and unsuccessful bidders. And while NHA must comply with the requirements of rule 35 of the PPRA Rules in letter and spirit the facts as presented before the GRC as well as PPRA did not reflect that the manner in which the evaluation report was released was not transparent or that it benefited one bidder at the expense of others, and on such basis the procurement process could not have been annulled.

5. Learned counsel for respondents No. 4 and 5 submitted that they had participated in the bidding process in accordance with requirements of bidding documents and had been declared

successful bidders in view of the technical and financial evaluation undertaken by NHA. He submitted that the petitioner had failed to point out any illegality in the manner in which evaluation had been undertaken by NHA either before GRC or before this Court. And once the petitioner had been declared to not be the successful bidder he could not challenge the conditions in the bidding documents, as by submitting a bid the petitioner has acquiesced to the bidding conditions.

6. The challenge brought by the petitioner to the procurement by NHA is three-fold. One, the GRC's decision rendered in his case was not set-aside by PPRA but was disregarded by NHA nevertheless. Two, the evaluation report was not uploaded in accordance with the requirement of rule 35 of the PPRA Rules and this procedural misstep is sufficient to annul the procurement process. And three, the terms and conditions in the bidding documents were discriminatory and were designed to benefit certain contractors and the evaluation criteria was vague and consequently any procurement undertaken pursuant to such evaluation criteria was in breach of principles of fair and transparent procurement mandated by rule 4 of the PPRA Rules.

7. This Court while hearing the matter on 18.08.2022 had temporarily suspended the contract awarded for the reason that it had been awarded in breach of the decision of GRC in relation to the complaint filed by the petitioner. The Court had summoned the relevant authorities of NHA to determine whether there was any colorable exercise of authority by NHA. The legal

argument of the learned counsel for NHA was that the decision rendered by PPRA in an appeal filed against an identical decision of the GRC directing that the procurement process be annulled was a judgment in rem and automatically annulled the decision of GRC in relation to the petitioner's complaint. This argument is without merit. PPRA is a dispute resolution forum created under PPRA Rules which is a sub-statutory legal instrument. As an appellate dispute resolution forum created under rule 48(7) of the PPRA Rules, PPRA, in such capacity, is only vested with authority that flows to it from the PPRA Ordinance and the Rules framed thereunder. PPRA is neither a court nor is vested with the authority to issue judgments within the meaning of term as defined in section 2(9) of the Code of Civil Procedure, 1908. PPRA consequently has no authority to issue judgments in rem as it is not a part of the judicial branch of the state and is not vested with authority to render declarations regarding rights and liabilities of parties in general. PPRA, under rule 48(7) of the PPRA Rules, is vested with limited authority to sit in judgment over the decision rendered by the GRC of the procuring agency to consider the correctness or lack thereof of such decision in accordance with provisions of PPRA Ordinance and PPRA Rules in its capacity as a regulator of the public procurement process.

8. The factual aspect of the matter, however, reflects that while M/s Ittehad Enterprises JV KKBA Enterprises filed its complaint with PPRA in which NHA was a party. NHA ought to have brought the decision of the GRC rendered in the petitioner's complaint to the attention of PPRA or ought to have challenged the same to the extent that it was defending the procurement

process conducted by NHA. Likewise, PPRA too is under an obligation to act in a just, fair and reasonable manner. And the Federal Government and PPRA ought to consider amending the relevant procedural rules to enable PPRA to notify bidders who might be effected by PPRA's decision as an appellate authority and provide such bidders an opportunity to be heard. By doing so the Federal Government would be upholding the principles of natural justice. The Court is however not convinced that in not challenging the decision of GRC rendered in favour of the petitioner, while an identical decision in the complaint filed by another bidder i.e. M/s Abdul Kareem Builders was set-aside by PPRA, NHA acted with malice. Given that PPRA had set-aside the decision of GRC in relation to another bidder in which GRC had made the same recommendations in view of the same reasoning and use of identical language, the procurement process does not suffer from such infirmity that requires this Court to exercise judicial review over the decision to award contract to respondents No. 4 and 5.

9. The second objection of the petitioner is that the evaluation report was not uploaded on the websites of NHA and PPRA. Doing so is a requirement of rule 35 of PPRA Rules. The NHA Board and Chairman NHA must ensure that the procurement process is managed and administered by NHA in a manner that it complies with the letter and spirit of PPRA rules. The record, however, does not reflect that technical and financial evaluation reports had not been released to the bidders or that they were unaware of the manner in which the evaluation was carried out. The grievance of the petitioner in this regard is of a

technical nature and it seeks annulment of the process for failure of NHA to fully comply with the requirements of rule 35 of PPRA Rules. The failure of the procuring agency to comply with the requirement to upload evaluation report might create adverse consequences for the public officials within the procuring agency who were administering the process. But such irregularity does not automatically create a right for an unsuccessful bidder to have the procurement process set-aside. The procedure prescribed in rule 35 is a stepping stone to ensure that procurement process is carried out in a fair and transparent manner and the evaluation of bids is not shrouded in secrecy.

10. In view of the facts of the present case, it is evident that technical and financial evaluation was duly carried out and evaluation reports were provided to the contesting bidders. Thus, the procedural breach of not uploading evaluation reports in itself does not undermine the principles of fair and transparent procurement and non-compliance with the requirement does not give a cause of action to the petitioner as it does not adversely affect the manner in which evaluation of the petitioner’s bid was carried out. The NHA Board and Chairman NHA will, however, ensure that they review the administration of the procurement protocols and procedures and put in place Standard Operating Procedures so that each and every procedural and substantive requirements prescribed by PPRA Rules is complied with and lack of compliance with procedural requirements does not lead to unnecessary litigation.

11. The third contention of the petitioner was that conditions in bidding documents were vague and for such reason the procurement process undertaken ought to be annulled. Let us consider rule 48(2) of the PPRA Rules which states the following:

> ***48. Redressal of grievances by the procuring agency.-*** *(2) Any party may file its written complaint against the eligibility parameters, evaluation criteria or any other terms and conditions prescribed in the bidding documents if found contrary to the provisions of the procurement regulatory framework, and the same shall be addressed by the grievance redressal committee (GRC) well before the proposal submission deadline.*

12. The grievance redressal scheme prescribed under the PPRA Rules requires that a grievance redressal committee be put in place at the time when the procurement process kicks off and bidders are invited to participate in it. Rule 48(2) provides that any party who is a prospective bidder and interested in the procurement can challenge the terms and conditions prescribed in the bidding documents, if such terms and conditions are contrary to the principles and requirements enshrined in the PPRA Rules. Once a bidder chooses to make a bid in accordance with terms prescribed in the bidding documents the stage to challenge the terms and conditions in the bidding document is passed. Subsequent to such stage any bidder aggrieved by the manner in which the technical or financial evaluation is undertaken has a right to file a complaint before the GRC against the manner of evaluation. This is evident from the language used in Rule 48(2) versus the language used in Rule 48(3). Rule 48(2) creates a right for <u>any party</u> to file a complaint against the eligibility parameters, evaluation criteria or any other terms and

conditions prescribed in the bidding documents. Rule 48(3) in comparison creates a right for a bidder to file a complaint within a certain period after announcement of technical or financial evaluation. The language of the remedy created under Rule 48 therefore suggests that any interested party can challenge the evaluation criteria and such challenge must be brought before the proposal submission deadline to enable the GRC to render its decision and for the procuring agency to comply with it. However once proposal submission deadline is crossed, it is only a bidder who can claim to be aggrieved by the manner in which the evaluation has been carried out and has a right to file a grievance before the GRC.

13. This statutory remedial scheme is in consonance with the principles of fairness. At the time when the terms and conditions for procurement are published by procuring agency, any party interested in the procurement can challenge rules of the game prescribed within the bidding documents if they are found to be unfair or suspected of being tailored in favour of vested interests or otherwise in breach of the procurement regulatory framework. However, after a party acquiesces in the rules of the game and agrees to participate in the contest subject to such rules, it cannot be allowed to cry foul if it loses the contest. The principle is simple: once a party chooses to participate in a contest subject to certain terms and conditions, it cannot seek to have the contest annulled after it is found to have lost in an evaluation carried out in accordance with the terms and conditions prescribed for such contest.

14. It was held by the august Supreme Court in ***Echo West International (Pvt.) Ltd. Lahore Vs. Government of Punjab, etc.*** ***(2009 CLD 937)*** that the challenge to a procurement process brought by a public spirited person in the form of public interest litigation is different from the challenge brought by a bidder who has an interest in the outcome of the bidding process. While the former can impugn the bidding process on more general grounds if it is in breach of principles of fairness and transparency, the latter can only have a grievance if it can establish that it has been treated in an unfair or discriminatory manner pursuant to the terms prescribed in the tender for the evaluation of the bids.

15. The issue of a disgruntled bidder challenging the terms of bidding documents came before this Court in ***Messrs S.I.S. Corporation (Pvt.) Ltd. Vs. Federation of Pakistan, etc.*** ***(PLD 2018 Islamabad 150)*** and it was held that, "in the case at hand, the petitioners, having agreed to the conditions contained in the tender documents, and having consciously participated in the tender bidding process are estopped from seeking any relief contrary to the said conditions. The tender conditions cannot be altered after the parties have entered into the arena."

16. In a more recent case ***Gemalto General Trading LLC Vs. Federation of Pakistan, etc.*** (***W.P No. 2954 of 2020)*** in its decision dated 27.06.2022 this Court approvingly cited decision in relation to procurement from the Indian jurisdiction. The Calcutta High Court in ***Nikhil Ch. Das and others Vs. State***

(W.P No. 4575(W) of 2010) reiterated the principle laid down by the Indian Supreme Court in ***OM Parkash Shukla Vs. Akhilesh Kumar Shukla (AIR 1986 SC 1043)*** to hold that "if a party has taken a chance of selection without protest but remained unsuccessful on merit, he cannot be permitted to challenge the process of selection on the ground of some illegality ..."

17. In view of the scheme of PPRA Rules together with the law laid down above, a bidder who chooses to accept the terms and conditions prescribed in the bidding documents by submitting his bid pursuant to such terms and conditions is estopped from challenging such terms or the outcome of the procurement process on the basis that the terms and conditions of the procurement process were discriminatory or vague or otherwise beneficial to competing bidders. In the event that an interested bidder finds the terms and conditions prescribed in the bidding document are discriminatory or tailored to benefit certain bidders, the time for bringing in challenge such terms and conditions is prior to the bid submission date. Once the bid has been submitted the challenge to the procurement process by a bidder can only be brought in relation to the manner in which the evaluation has been undertaken and the terms and conditions of the bidding documents cannot be impugned, as held in ***S.I.S Corporation***. A bidder, after an evaluation has been undertaken, is estopped from bringing a challenge to the terms and conditions prescribed within the bidding documents in compliance with which the bid is to be submitted. This principle also makes sense in terms of public policy. Public procurement

costs time and resources of both the procuring agency as well as participating bidders. If the procurement process is to be stopped on the basis that its terms and conditions are liable to challenge for being vague or discriminatory, such challenge must be brought before the process is commenced to save the procuring agency and the interested bidders time and resources. Once the process is under way and bids have been received and evaluated, a contesting bidder cannot then be allowed to turn the hands of the clock back and argue that rules of the game were doctored in the first place and for such reasons the procurement process should be annulled.

18. The question of ability by bidder to challenge the terms and conditions of bidding document came before the learned Lahore High Court in ***Tez Gas (Private) Limited Vs. OGRA and others (PLD 2017 Lahore 111)***, wherein it was held that "the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of a contract. Normally speaking, the decision to accept the tender or award the contract is reached through a process of negotiation and deliberations through several tiers… In such cases, if the terms and conditions of the contract are not suited to a party, they need not participate in the tender process or accept the contract. However, if they choose to participate, they are bound by the terms offered to them as the terms represent the commercial deal offered by [the procuring agency] and other respondents."

19. In view of the law laid down by the learned Lahore High Court in ***Tez Gas***, the Court will not exercise strict scrutiny re terms of the tender or second guess the wisdom or desirability the terms and conditions prescribed in the bidding documents. It is for the procuring agency to determine the terms and conditions of procurement and even PPRA cannot sit in judgment over the terms and conditions prescribed by the procuring agency. The exception to this general rule is that in matters of public procurement the state is not allowed to dispense state largesse at its whim and the terms of the tender must be designed to nurture competition. Public procumbent regulatory framework has been put in place to ensure that while undertaking procurement, the state and its functionaries are not allowed to play favorites, but carry out public procurement in a fair and transparent manner by affording a level-playing field to all parties interested in such procurement. Thus, where an interested party can establish before the court that the terms and conditions prescribed in the bidding documents are tailored to game the system and garner benefits on favored parties, the court would consider exercise of its judicial review powers. But as mentioned above, the standard of judicial review would be rational-basis standard and not strict-scrutiny standard and the onus would be on the contesting party to establish to the satisfaction of the court that the rules of the game have been engineered and fixed to grant undue benefit to favored parties in a manner that denies competing parties a level-playing field.

20. In the instant case the petitioner submitted its bid without challenging terms and conditions of the bidding documents

under rule 48(2) of PPRA Rules and is consequently estopped from challenging such terms and conditions of the tender after evaluation of the bid, once it was declared pursuant to such evaluation that the petitioner was not the successful bidder. The petitioner has also failed to establish that the manner in which its bid was evaluated, pursuant to the terms of the tender, was discriminatory or suffered from illegality.

21. For the reasons stated above, the instant petition is without merit and is **dismissed.**

22. Let a copy of this judgment be sent to the Chairman, National Highway Authority, as well as Managing Director, Public Procurement Regulatory Authority to take into account the observations of this Court in paras 8 and 10 above.

(BABAR SATTAR)
JUDGE

Approved for reporting.

Saeed.