JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.1632 of 2022
Joint Venture of M/s Kamal Nasir Khan (Pvt.) Ltd. and others
Versus
National Highway Authority and others

Dates of Hearing:	01.11.2022, 16.11.2022 and 30.11.2022
Petitioners by:	M/s Babbar Ali Khan and Jawad Rahim Malik, Advocates
Respondents by:	Barrister Asghar Khan, Ali Roshan Gillani and Atif Waheed, Advocates for N.H.A., M/s Naeem Bukhari and Muhammad Imad Khan, Advocates for the applicant in C.M.No.3997/2022

MIANGUL HASSAN AURANGZEB J.- Through the instant writ petition, the petitioners assail the letters dated 08.03.2022 and 30.03.2022 from the National Highway Authority (**"N.H.A."**) whereby they were informed that their technical bids for the award of contracts for (i) Lot-3: Kashmore-Rojhan Section from KM 164+600 to KM 213+500 (KM 48.90) (**"Lot No.3"**) and (ii) Lot-4: Rojhan-Rajanpur Section from KM 213+500 to KM 265+350 (KM 51.85) (**"Lot No.4"**) had been declared as non-responsive, and that the reasons for the rejection of the bids could not be disclosed until information on the contract award was communicated to all the bidders. Furthermore, the petitioners also seek the setting aside of the procurement process for the said contracts.

2. The facts essential for the disposal of this petition are that on 05.04.2021, N.H.A. had published an advertisement inviting bids for the award of contracts of the Construction of Additional Carriageway from Shikarpur to Rajanpur of N-55 (222 KM) under one package comprising of four Lots, including the Lots No.3 and 4. The said advertisement shows that the Islamic Republic of Pakistan (**"I.R.P."**) had applied to the Asian Development Bank (**"A.D.B."**) for financing the cost of Central Asian Regional Economic Cooperation Corridor Development Investment Program. A part of this financing was to be used for payments under the contracts for which the said advertisement had been issued. Bidding was to be conducted in accordance with the A.D.B.'s single stage-two envelop procedure, and bidders were required to submit separate bids for one or several Lots. The deadline for the submission of bids was

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20.05.2021 which was subsequently extended to 09.06.2021. The technical bids were scheduled to be opened on 20.05.2021 in the presence of the bidders' representatives. The financial bids of only those bidders could be opened who were found technically responsive and qualified after the technical evaluation process.

3. Petitioner No.2 (M/s. Kamal Nasir Khan (Pvt.) Ltd.) and petitioner No.3 (M/s. Saadullah Khan and Brothers) participated in the bidding process as a joint venture ("KNK-JV") for the award of contracts for Lots No.3 and 4.

4. During the technical evaluation of the bids, N.H.A., vide letter dated 15.07.2021, requested KNK-JV to provide clarification on its construction experience in key activities and financial requirements for current contract commitments. The position taken by N.H.A. was that the said clarification was sought because KNK-JV's technical bid did not contain supporting documents / information. KNK-JV asserts that the information sought by N.H.A. was provided through letter dated 17.07.2021.

5. Vide letter dated 08.03.2022, N.H.A. informed KNK-JV that it had been disqualified by the Bid Evaluation Committee and its bid for Lots No.3 and 4 had been declared non-responsive. Furthermore, N.H.A. requested KNK-JV to collect its un-opened financial bid as well as the bid security. It is an admitted position that KNK-JV did not collect its financial bid, which still lies un-opened with N.H.A.

6. On 10.03.2022, KNK-JV requested N.H.A. to convey the grounds on which it had been disqualified. KNK-JV also asked whether a Grievance Redressal Committee ("G.R.C.") had been constituted so that it could be approached within the prescribed time. Vide letter dated 30.03.2022, N.H.A. informed KNK-JV that the procurement was being done in accordance with the A.D.B. Procurement Guidelines-2015 and that every activity carried out by N.H.A. was shared with the A.D.B. and their concurrence was obtained. Furthermore, KNK-JV was informed that clause 26 of the Instructions to Bidders ("I.T.B.") provided that information relating to the examination, evaluation, comparison, and post qualification of bids and recommendations of contract award could not be disclosed to bidders or any other person not officially concerned with the process until information on the contract award was communicated to all the bidders. KNK-JV was also informed that in terms of clause 43.2

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of the I.T.B., N.H.A. will respond to any bidder against its request only after publication of the award of contract is communicated to all the bidders.

7. At no material stage has KNK-JV been called for a hearing by N.H.A. On 12.05.2022, the instant writ petition was filed impugning N.H.A.'s letter dated 08.03.2022 whereby the petitioners were disqualified from participating further in the bidding process, and N.H.A's letter dated 30.03.2022 whereby KNK-JV was informed that the reasons for its disqualification could not be disclosed until after the publication of the contract award. The petitioners had also sought a declaration to the effect that it was mandatory for N.H.A. to have constituted a G.R.C. under Rule 48 of the Public Procurement Rules, 2004 (**"PPR-2004"**).

8. Clause 42.1 of the I.T.B. provides that N.H.A. shall award the contract to the bidder whose offer has been determined to be the lowest evaluated bid and is substantially responsive to the bidding documents, provided further that the bidder is determined to be qualified to perform the contract satisfactorily, whereas Clause 43.1 provides that prior to the expiration of the period of the bid validity and upon its expiry of the standstill period or upon satisfactory resolution of a complaint filed within the standstill period, if applicable, N.H.A. shall transmit the Notification of Award of Contract to the successful bidder, in writing, that its bid has been accepted.

9. To put the facts chronologically, during the pendency of the instant petition, the A.D.B. vide its letter dated 26.05.2022 required N.H.A. to; (i) issue Notification of Award to M/s Zahir Khan & Brothers (**"Zahir Khan & Bros."**) in accordance with clause 43.1 of the I.T.B.; (ii) publish details of the contract award in an English language newspaper within two weeks of the award of contract in accordance with clause 43.4 of the I.T.B.; (iii) send the contract agreement to Zahir Khan & Bros. in accordance with clause 44.1 of the I.T.B.; (iv) require Zahir Khan & Bros. to furnish performance security within 28 days in accordance with clause 45.1 of the I.T.B.; and (v) send to the A.D.B. the signed contracts with proof of receipt of the performance securities. Vide letters dated 17.11.2022, N.H.A. informed Zahir Khan & Bros. that its bid for Lots No.3 and 4 had been accepted. Zahir Khan & Bros. was required to furnish performance security within a period of 28 days.

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10. Learned counsel for the petitioners, after narrating the facts leading to the filing of the instant petition, submitted that N.H.A.'s letter dated 15.07.2021 seeking clarifications from KNK-JV had been adequately responded to vide letter dated 17.07.2021; that N.H.A.'s letter dated 08.03.2022, whereby KNK-JV was disqualified from participating further in the bidding process is devoid of reasons; that the refusal on N.H.A.'s part to disclose the reasons for KNK-JV's disqualification has cast a doubt on the fairness and transparency of the bidding process conducted by N.H.A.; that the debriefing process under the A.D.B. Procurement Guidelines-2015 is to be read in conjunction with the provisions of the PPR-2004; that the debriefing process is applicable only in the countries / borrowing States that do not have anti-corruption measures; that it was incumbent on N.H.A. to have constituted a G.R.C. under Rule 48 of the PPR-2004; that the A.D.B. Procurement Guidelines-2015 cannot render inoperative the mandate of the PPR-2004; that on similar A.D.B. funded projects, N.H.A. had constituted a G.R.C.; that the constitution of a G.R.C. by N.H.A. would not be inconsistent with any provision of the A.D.B. Procurement Guidelines-2015; that the omission on N.H.A.'s part to constitute a G.R.C. renders the procurement process to be in violation of the requirements of the PPR-2004; and that this Court ought to direct N.H.A. to open KNK-JV's financial bid or, in the alternative, the procurement process may be set-aside. Learned counsel for the petitioners prayed for the writ petition to be allowed in terms of the relief sought therein.

11. On the other hand, learned counsel for N.H.A. submitted that since the contracts for Lots No.3 and 4 were to be financed from the proceeds of the loan obtained by the I.R.P. from the A.D.B., the provisions of the A.D.B. Procurement Guidelines-2015 will have primacy over the provisions of the PPR-2004; that under clause 2.47 of the A.D.B. Procurement Guidelines-2015 and Clause 26.1 of the I.T.B., the reasons for the rejection of bids can be communicated to the bidders at a stage after the publication of the contract award; that on 26.05.2022, the A.D.B. issued its 'no-objection' for the award of the contracts for Lots No.3 and 4 to Zahir Khan & Bros.; that till date the contracts have not been signed for Lots No.3 and 4 with the most responsive bidder; that in the bidding process in question, the standstill period (i.e., the period

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subsequent to the notification of the intention for award of contract and before making the actual contract award) does not apply; that KNK-JV could, in terms of clause 43.2 of the I.T.B., seek explanations on the grounds on which their bids were not selected in a debriefing meeting after publication of contract award; that KNK-JV has already been made aware of the reasons why its bids for Lot No.3 and 4 were rejected; that KNK-JV can submit its complaint to the Chairman, N.H.A. who will refer the matter to the requisite forum designated for the redressal of a bidder's bidding-related complaint; and that till date the bidding process has been carried out by N.H.A. strictly in accordance with the A.D.B. Procurement Guidelines-2015. Learned counsel for N.H.A. prayed for the writ petition to be dismissed.

12. This Court, vide order dated 01.11.2022, issued a notice to the respondents/petitioners on an application (C.M.No.3997/2022) filed by the intervenor / Zahir Khan & Bros. for impleadment as a party in the instant petition on the ground that it had been declared as the most responsive bidder for the award of the contracts for Lots No.3 and 4. The position taken by the learned counsel for Zahir Khan & Bros. was that since the contracts for Lots No.3 and 4 had not been signed as yet, KNK-JV could invoke the grievance redressal mechanism against the rejection of its bids.

13. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 9 above and need not be recapitulated.

14. On 22.12.2021, a loan agreement was executed between the I.R.P. and the A.D.B., whereby the latter agreed to lend the former an amount of US Dollars 235,000,000/-. The proceeds of the loan were agreed to be allocated for financing projects under the Central Asian Regional Economic Cooperation Corridor Development Investment Program. These projects were agreed to be executed by N.H.A. to whom the proceeds of the loan were to be made available by the I.R.P. Schedule-4 to the said loan agreement obligates the I.R.P. and N.H.A. to ensure that the procurement of works and services is carried out in accordance with the Procurement Policy and the Procurement Regulations.

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15. Rule 5 of the PPR-2004 provides that whenever the provisions of the PPR-2004 are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State or States, or any international financial institution, the provisions of such international treaty or agreement shall prevail to the extent of such conflict.

16. After N.H.A., vide letter dated 08.03.2022, informed KNK-JV as to its disqualification by the technical bid evaluation committee, KNK-JV wanted to challenge its ouster from the bidding process before a G.R.C. For this purpose, N.H.A. was requested vide letter dated 10.03.2022 to provide (i) reasons for its disqualification, and (ii) information about the G.R.C. N.H.A.'s response, vide letter dated 30.03.2022, was that the confidentiality clause in the I.T.B. prevented N.H.A. from disclosing to bidders information relating to the examination, evaluation, comparison and post-qualification of bids and recommendations of contract award until information on the contract award is communicated to all the bidders. Vide letter dated 15.04.2022, KNK-JV informed N.H.A. that it could not be deprived of its Constitutional right to approach the G.R.C.

17. Given the fact that the contracts for Lots No. 3 and 4 were to be financed from the proceeds of the loan given to the I.R.P. by the A.D.B., which is an "international financial institution" in terms of Rule 5 of the PPR-2004, the vital questions that need to be answered are whether, in response to KNK-JV's letter dated 10.03.2022, N.H.A. was obliged to give reasons for KNK-JV's disqualification and whether N.H.A. was obliged to have constituted a G.R.C. under Rule 48 of the PPR-2004 to whom KNK-JV could have submitted its complaint against its disqualification.

<u>DUTY TO GIVE REASONS TO A BIDDER FOR ITS DISQUALIFICATION</u>:-

18. N.H.A.'s letter dated 08.03.2022, informing KNK-JV that it had been disqualified by the technical bid evaluation committee and that its bid for Lots No.3 and 4 had been declared non-responsive does not mention any reasons. Rule 33(1) of the PPR-2004 provides *inter alia* that 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. Rule 16(4) also obligates a procuring agency to communicate to those suppliers or

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contractors who are not pre-qualified the reasons of not prequalifying them.

19. Now, clause 2.47 of the A.D.B. Procurement Guidelines-2015, which is in *pari materia* to Regulation 73 of the Procurement Regulations for A.D.B. Borrowers-2017 (Appendix-7), provides that after the public opening of bids, information relating to the examination, clarification, and evaluation of bids and recommendations concerning awards shall not be disclosed to bidders or other persons not officially concerned with this process until the publication of the contract award. Additionally, clause 26.1 of the I.T.B. provides that information relating to examination, evaluation, comparison, and post-qualification of bids and recommendation of contract award, shall not be disclosed to bidders or any other persons not officially concerned with such process until information on the contract award is communicated to all the bidders. In other words, under Regulation 73 of the Procurement Regulations for A.D.B. Borrowers-2017 (Appendix-7) and Clause 26.1 of the I.T.B., information regarding evaluation of bids cannot be disclosed to bidders until after the publication of the contract award. These provisions do not altogether prevent a procuring agency from disclosing information as to the grounds on which a bidder is disqualified but the stage at which such information could be disclosed is deferred until the publication of the contract award.

20. Clause 43.2 of the I.T.B. provides that unless a standstill period applies, upon notification of the contract award, unsuccessful bidders may request in writing to N.H.A. for a debriefing seeking explanations on the grounds on which their bids were not selected, and that N.H.A. shall promptly respond in writing and / or in a debriefing meeting to any unsuccessful bidder who, after publication of the contract award, requests a debriefing. N.H.A., in paragraph 10 of its written comments, has pleaded that in terms of Clause 43.2 of the I.T.B., after the publication of the award, bidders may request in writing to N.H.A. for de-briefing and that N.H.A. will respond to any bidder on his request, if any, after the publication of the award is communicated to all bidders. Furthermore, in paragraph 4 of N.H.A.'s application (C.M.No.4402/2022), it is pleaded *inter alia* that under the Procurement Regulations for A.D.B. Borrowers-2017 (Appendix-7), after the notification of the contract award, a bidder

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who wishes to ascertain the grounds on which its bid was not selected should address its request to N.H.A., and when such request is made, N.H.A. shall provide an explanation of why such bid was not selected, either in writing or in a debriefing meeting.

21. KNK-JV, being aggrieved by its disqualification and the decision taken by N.H.A. to issue notification of award in favour of Zahir Khan & Bros., does have the remedy, in terms of Clause 43.2 of the I.T.B., to request N.H.A. in writing for a de-briefing seeking explanations on the grounds on which it was disqualified or its bid was not selected. The said clause obligates N.H.A. to promptly respond in writing and /or in a de-briefing meeting to whoever after publication of the contract award requests a de-briefing. Once the reasons for a bidder's disqualification are made known to it either in a de-briefing meeting or through the publication of information envisaged by Clause 43.4 of the I.T.B. a bidder, who is not satisfied with the reasons given by N.H.A. for its disqualification, can (in terms of Clause 46.1 of the I.T.B.) resort to the procedure for dealing with bidding-related complaints prescribed in the Procurement Regulations for A.D.B. Borrowers (Appendix 7).

22. The technical bid evaluation report was sent by N.H.A. to the A.D.B. through letter dated 24.09.2021. This report was brought on record by N.H.A. through an application (C.M.No.4214/2022) and it shows that for Lot No.3 out of fourteen bidders two bidders had submitted bids which were considered substantially responsive, and for Lot No.4 thirteen bidders had submitted their bids out of which two were considered substantially responsive. KNK-JV was declared disqualified for both the Lots due to *"the lower value of the referred construction experience against the requirement."*

23. On 21.11.2022, N.H.A. sent the final evaluation report to the Public Procurement Regulatory Authority ("P.P.R.A."**). The letter dated 21.11.2022 from N.H.A. to P.P.R.A. provides that the unsuccessful bidders may request in writing to N.H.A. for a debriefing seeking explanations on the grounds on which their bids were not accepted.**

24. Learned counsel for N.H.A. has rightly submitted that now that the notification for the contract award has been issued and KNK-JV is aware of the reasons as to why it was disqualified from participating further in the bidding process, it can either request for a debriefing seeking

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explanations on the grounds for its disqualification or submit its complaint to the Chairman, N.H.A. who will refer the matter to the requisite forum designated for the redressal of a bidder's bidding-related complaint.

25. Since Regulation 73 of the Procurement Regulations for A.D.B. Borrowers-2017 (Appendix-7) and Clause 26.1 of the I.T.B. do not altogether prevent a procuring agency from disclosing information as to the grounds on which a bidder is disqualified, but the stage at which such information could be disclosed is deferred until after the publication of the contract award, KNK-JV, if not satisfied with the grounds for its disqualification set forth in the technical bid evaluation report, would be at liberty to request N.H.A. for a debriefing seeking explanations on the grounds for its disqualification. In terms of clause 43.2 of the I.T.B., N.H.A. would be bound to promptly respond in writing to such a request. Hence KNK-JV cannot impeach the bidding process on the ground that N.H.A. did not give reasons for its disqualification in the letter dated 08.03.2022 or in response to KNK-JV's letter dated 10.03.2022.

26. The case of National High Speed Rail Corporation Limited Vs. Montecarlo Limited (A.I.R. 2022 SC 866) has certain common features with the case at hand. As in the instant case, the bidding documents in the said case also contained a confidentiality clause under which the time to know the reasons for the rejection of a bid and the right of an aggrieved bidder to seek a remedy was deferred till the final decision of the award of contract was taken and communicated. The Supreme Court of India, after referring to the provisions of instructions to bidders containing the confidentiality clause and the clause providing for a de-briefing session after the notification of award of contract, held as follows:-

> ***The purpose of the aforesaid clauses appears to be to prevent a possible challenge to the multiple stage tender process midway. The High Court has construed that the said clauses would restrict the right of the bidders to seek judicial scrutiny of the tender process. However, the High Court does not seem to be wholly true. The High Court ought to have appreciated that first of all Clause 28 is a confidentiality clause. On general reading of the aforesaid two clauses, it can be said that it does not take away the right of the Bidders to seek judicial scrutiny at all. Only the stage and time to know the reasons and thereafter if the unsuccessful Bidder is aggrieved can seek the remedy, which is deferred till the final decision on award of contract is taken and communicated. As observed hereinabove, the object and purpose would be no interference in the tender process in between till the final decision to award the contract is***

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taken. By no stretch of imagination, it can be said that it takes away the right of the unsuccessful bidder to seek the judicial scrutiny of the tender process. After the final decision is taken to award the contract and the contract is awarded, thereafter it will always be open for the unsuccessful bidders to ask for the reasons to which the employer is required to furnish promptly and thereafter the unsuccessful bidder may avail the legal remedy, which may be available to it, may be claiming the damages. The High Court ought to have appreciated that it is always advisable that in such a foreign funded Mega project, delay may have a cascading effect and many a times have a financial burden due to delay in projects and therefore, there shall be minimal interference and/or no interference till the entire tender process or till the award of contract is completed. The foreign funded agency therefore is justified in providing such clauses to prevent challenge to the tender process midway. A foreign funded agency, who invests/funds such a huge amount for such a Mega project on bilateral talks between two countries is justified in insisting such clauses and to insist that the information relating to the evaluation of the Bids and recommendation of contract award shall not be disclosed to Bidders or any other person until information on contract award is communicated to all the Bidders and the grounds on which the unsuccessful Bidders' Bids are not selected shall be provided thereafter."

DUTY TO CONSTITUTE A GRIEVANCE REDRESSAL COMMITTEE UNDER RULE 48 OF THE PPR-2004:-

27. On behalf of KNK-JV, it was asserted that N.H.A. should have constituted a G.R.C. under Rule 48 of the PPR-2004 so that a complaint could have been lodged before it soon after N.H.A, vide letter dated 08.03.2022, informed KNK-JV about its disqualification.

28. Rule 48(1) of the PPR-2004 as amended through notification (SRO 834(I)/2021) dated 28.06.2021 obligates a procuring agency to constitute a committee comprising of an odd number of persons, with necessary powers and authorizations, to address the complaints of bidders that may occur prior to the entry into force of the procurement contract. Rule 48(3) gives the right to a bidder aggrieved by any act of the procuring agency after the submission of bids to lodge a written complaint concerning its grievances within seven days of the announcement of the technical evaluation report and five days after issuance of the final evaluation report.

29. Because the project in question is funded by the A.D.B. pursuant to the loan agreement dated 22.12.2021 executed between the I.R.P. and the A.D.B., Rule 5 will come into operation and consequently the provisions of the loan agreement will prevail over those of the PPR-2004, but only to the extent of conflict between them. The mere fact that the tender bidding process initiated by a procuring agency in Pakistan for the

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award of a contract which is funded by an international financial institution like the A.D.B. would not *ipso facto* lead to a complete ouster of the provisions of the PPR-2004. Where the loan agreement executed with an international financial institution does not provide for a bidder's grievance redressal mechanism either expressly or by reference, Rule 48 of the PPR-2004 would continue to be enforced. It is in cases where the loan agreement does provide for such a mechanism but its mode is different from the one envisaged by Rule 48 of the PPR-2004 that the parties will be left to resort to the mechanism provided for in the loan agreement.

30. In the case at hand, the technical bid evaluation report was prepared and sent by N.H.A. to the A.D.B. on 24.09.2021. This report was not revealed to the bidders when it was prepared. It was not until 21.11.2022 that N.H.A. sent the final evaluation report to P.P.R.A. for uploading on its website. Now that the technical bid evaluation report (which contains the reasons for KNK-JV's disqualification) has been brought on record by N.H.A., it needs to be determined whether the Procurement Regulations for A.D.B. Borrowers-2017 (Appendix-7) and / or the I.T.B. provide for a mechanism for an aggrieved bidder to challenge the decision regarding its ouster from the bidding process.

31. Schedule 4 to the loan agreement dated 22.12.2021 places an obligation on N.H.A. to ensure that the procurement of works and services is carried out in accordance with the Procurement Policy and Procurement Regulations of A.D.B. The Procurement Regulations for A.D.B. Borrowers-2017 (Appendix 7) provide guidance on the procedure for dealing with procurement-related complaints arising out of any bidding process specifically subject to the use of the Procurement Regulations for A.D.B. Borrowers-2017 (Appendix-7). Paragraph 7(b)(ii) enables a bidder to challenge, amongst other things, a borrower's decision to declare the bid or proposal non-responsive or the bidder unqualified, if the borrower has made a firm decision to reject the bid or proposal or bidder in advance of the contract award in accordance with the applicable procedure. Whereas paragraph 7(b)(iii) enables a bidder to challenge a borrower's decision to award the contract to another bidder.

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32. The I.T.B. also provides for a mechanism for the resolution of bidding-related complaints. Clause 46.1 of the I.T.B. provides that the procedure for dealing with bidding-relating complaints arising out of the bidding process are specified in the Bid Data Sheet ("B.D.S."). Section 2 of the B.D.S. provides *inter alia* that the procedure for bidding-relating complaints are referenced in the *"Procurement Regulations for A.D.B. Borrowers (Appendix-7)."* Furthermore, paragraph F of the B.D.S. provides that the bidder should submit its complaint following the procedures in writing to the General Manager (Planning), N.H.A. for the attention of the Grievance Redressal Committee.

33. Clause 41.1 of the I.T.B. provides that if standstill provisions apply as specified in the B.D.S., the standstill period shall be defined in the B.D.S. to specify the duration subsequent to notification of the intention for award of contract (before making the actual contract award) within which any unsuccessful bidder can challenge the proposed award. Section 2: Bid Data Sheet provides *inter alia* that *"standstill provisions shall not apply."* Regardless of the fact that the prospective bidder knew well that the I.T.B. did not specify the duration of the standstill period, learned counsel for N.H.A. made it clear that after the issuance of N.H.A.'s letters dated 17.11.2022 intimating to Zahir Khan & Bros. the acceptance of its bid, the bidders aggrieved by their disqualification could challenge the proposed award and N.H.A. would ensure that the challenge was satisfactorily resolved prior to signing of the contract agreement between N.H.A. and the party whose bid is ultimately accepted. This shows that a bidder aggrieved by its disqualification does have a remedy of filing a complaint before the procuring agency for the redressal of its grievances at the stage after the Notification of Award of the contract and before the date of the publication of information referred to in Clause 43.4 of the I.T.B. For the purposes of clarity, Clause 43.4 of the I.T.B. provides that within two weeks of the award of contract or expiry of the standstill period, where such period applies or, if a complaint has been filed within the standstill period, upon receipt of the A.D.B.'s confirmation of satisfactory resolution of the complaint the borrower shall publish in an English language newspaper or widely known and freely accessible website the results identifying the bid and Lot or package number, as applicable information regarding (a) name of

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each bidder who submitted a bid; (b) bid prices as read out at bid opening; (c) name and evaluated prices of each bid that was evaluated; (d) name of bidders whose bids were rejected and the reasons for their rejection; and (e) name of the winning bidder and the price it offered as well as the duration and summary scope of the contract awarded.

34. Since I have held that the Procurement Regulations for A.D.B. Borrowers-2017 (Appendix-7) and the provisions of the I.T.B. do provide a remedy to a bidder aggrieved by its disqualification or the issuance of a notification of contract award to another bidder for the redressal of its grievances *albeit* at the stage after notification of contract award, KNK-JV cannot insist on the constitution of a G.R.C. in terms of Rule 48 of the PPR-2004. In holding so, reliance is placed on the following case law:-

(i) The case of Sardar Muhammad Ashraf D. Baloch Private Limited Vs. Punjab Irrigation Department (2020 CLC 1303), concerned a bidding-related dispute with respect to the award of a contract for the construction of Jalalpur Main Canal Intake Structure including Distribution System and Flood Carrier Channel, Cross Drainage Structure and Road Bridges etc. funded by the Asian Development Bank. The petitioner in the said case had sought a declaration to the effect that the formation of a Grievance Redressal Committee under the provisions of the Punjab Procurement Rules, 2014 was mandatory regardless of the source of funding for the said Project. The Hon'ble Lahore High Court spurned the said prayer by holding as follows:-

> ***It is noticed that constitution of a Grievance Redressal Committee under Rule 67(2) of Punjab Procurement Rules, 2014 shall be in conflict with Asian Development Bank's Procurement Guidelines, 2015 and the rule 5 of the Punjab Procurement Rules, 2014 which stipulates that if any provision of Punjab Procurement Rules, 2014 is in conflict with any obligation or commitment of the Government arising out of an international agreement with a State or States, or any international financial institution, the provision of such international agreement, to the extent of conflict shall prevail. If the procurement process for Jalalpur Irrigation Project funded by Asian Development Bank is carried out under procurement laws of Federal or Provincial Government, then it is against the Asian Development Bank's Procurement Guidelines and provisions of Loan Agreement with Asian Development Bank and also against the rule 5 of Punjab Procurement Rules, 2014. As per Asian Development Bank's Procurement Guidelines, the unsuccessful bidders would be given debriefing to explain the reason of his non-responsiveness at the time of award of contract and if still unsatisfied, the bidder may then approach Asian Development***

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> ***Bank in this regard. The constitution of Grievance Redressal Committee is not covered under Procurement Guideline of Asian Development Bank and rule 5 of Punjab Procurement Rules, 2014 support the process of procurement followed under foreign financial project. As per paragraph 2.65 of Procurement Guideline of Asian Development Bank, any bidder who wishes to ascertain the grounds on which its bid was not selected, should request an explanation from the borrower."***

Law to the said effect has also been laid down in the case of LAC (Pvt.) Ltd. Vs. Government of Punjab (2020 CLC 693).

(ii) In the case of National High Speed Rail Corporation Limited Vs. Montecarlo Limited (*supra*), the appellant issued a tender notice inviting bids in relation to the relevant bid package for the construction of Mumbai-Ahmedabad High Speed Rail Project. The respondent, along with four other bidders, was declared unsuccessful at the technical bid evaluation stage. The writ petition filed by one of the unsuccessful bidders before the High Court of Delhi was allowed and certain provisions of the bid documents were declared unlawful. The appellant's appeal was allowed by the Indian Supreme Court. The said Project had been funded with the proceeds of Concessional Official Development Assistance Loan obtained from the Japanese Government pursuant to a Memorandum of Understanding executed between the Japanese and the Indian Governments. In the said report, it was *inter alia* held as follow:-

> ***"The scope of judicial review in such foreign funded contract should be far much less than the ordinary Government funded contracts funded from Consolidated Fund of India. The scope of judicial review in such foreign funded contracts/projects would be restricted and minimal. In such foreign funded contracts, the only ground for judicial review ought to be on a limited aspect, i.e., the action of the executing authority does not suffer from favouritism or nepotism and based on the grounds which have been concealed from the foreign financing authority, if disclosed, would have persuaded the financing authority to cancel the contract."***

35. The terms of the bidding document have a contractual force between the bidders and the procuring agency. In the case of Tezgas (Private) Limited Vs. Oil and Gas Regulatory Authority (PLD 2017 Lahore 111), the Hon'ble Lahore High Court held *inter alia* that the invitation to tender is in the realm of a contract. KNK-JV as a prudent person of business knew or ought to have known the terms of the I.T.B. when it decided to participate in the tender bidding process. Once it submitted

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the bid without any protest or demur, it would be bound by the terms of the I.T.B. KNK-JV would be deemed to know that the confidentiality clause in the I.T.B. would entitle it to know the reasons for its disqualification not at the stage when it was disqualified but after the information on the contract award is communicated to all the bidders. KNK-JV would also be deemed to be cognizant of the provisions in the I.T.B. that N.H.A. would respond to its request for a de-briefing seeking explanations on the grounds on which its bid was not selected, after the stage of notification of contract award. The provisions of the I.T.B. do not disentitle an unsuccessful bidder from being informed as to the reasons for its disqualification or rejection of its bid, but defers the stage at which this information is to be provided to the stage after the notification of contract award. The fact as to the notification of contract award also does not prevent an unsuccessful bidder from submitting a bidding-related complaint to N.H.A. which, upon receipt of such complaint is to proceed to resolve the same in accordance with the Procurement Regulations for A.D.B. Borrowers-2017 (Appendix-7). As mentioned above, the I.T.B. also envisages a process for the resolution of complaints filed by aggrieved bidders prior to the date when a contract is signed between the procuring agency and the most responsive bidder. Had the project in question not been funded by the A.D.B., KNK-JV was well within its rights to have submitted its grievance regarding its disqualification communicated to it through N.H.A.'s letter dated 08.03.2022 or the technical bid evaluation report dated 24.09.2021 to the G.R.C. which N.H.A. had to constitute under Rule 48 of the PPR-2004.

WHETHER THE REASONS FOR KNK-JV'S DISQUALIFICATION ARE JUSTICIABLE BY THIS COURT IN EXERCISE OF WRIT JURISDICTION:-

36. Clause 32.1 of the I.T.B. provides that N.H.A. shall determine to its satisfaction during the evaluation of technical bids whether bidders meet the qualifying criteria specified in Section 3 (Evaluation and Qualification Criteria). The determination is required to be based on an examination of documentary evidence of the bidder's qualifications submitted by the bidder. Clause 2.4.1 of Section 3 (Evaluation and Qualification Criteria) requires the participation of a joint venture partner in at least one contract that has been successfully or substantially completed within the last seven years and that is similar to the proposed works. For Lot No.3,

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the participation of a joint venture partner is required to be in contracts of a similar size and nature exceeding US Dollars 29 million and for Lot No.4, US Dollars 33 million. Clause 2.4.1 explicitly states that one partner in the joint venture must meet the said requirement.

37. The technical bid evaluation report shows that KNK-JV was disqualified for being unable to show that it had executed a project of a similar size and nature. KNK-JV, in its bid documents, had submitted information about one project by each partner of KNK-JV. One of the projects claimed to have been completed by KNK-JV was Hakla to D.I. Khan Motorway under CEPEC, Package-2A: Rehmani Khel to Kot Bailian including construction of interchange at Kundal. The completion cost of this project awarded to KNK-JV was US Dollars 91.695 million. KNK-JV had claimed that this project had been completed but N.H.A. asserts that KNK-JV had not attached the completion / taking over certificate with its bid. This caused the bid evaluation committee to conclude that a contract of similar size and nature had not been completed by KNK-JV. The bid evaluation committee also took the view that KNK-JV had not submitted complete supporting documents regarding the said project.

38. In the technical bid evaluation report, it is specifically mentioned that the requisite information was provided by KNK-JV in response to the clarification sought by N.H.A. through letter dated 15.07.2021. Learned counsel for the petitioner had submitted that once the petitioner had provided the clarifications sought by N.H.A. through its letter dated 15.07.2021, there remained no valid reason to disqualify KNK-JV. This, according to him, is moreso when the technical evaluation committee, in the technical bid evaluation report, clearly mentioned that KNK-JV *"meets the requirement under clause 2.4.2 of Section 3."* Indeed, KNK-JV had fulfilled the requirements under clause 2.4.2 of Section 3 (Evaluation and Qualification Criteria) which required a bidder to produce documents showing its construction experience in key activities and it is so mentioned in the technical bid evaluation report. However, N.H.A. bases KNK-JV's disqualification solely on the ground that it did not successfully or substantially complete at least one contract of a similar size and nature in the last seven years.

39. Learned counsel for KNK-JV produced a copy of the taking over certificate issued by N.H.A. to KNK-JV on 26.10.2021 and performance

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certificate dated 14.12.2020 in furtherance of his argument that KNK-JV had substantially completed one contract similar to the proposed works within the last seven years and had thereby satisfied the requirement stipulated in clause 2.4.1 of Section 3 (Evaluation and Qualification Criteria). Whether or not KNK-JV's bid was accompanied with documents showing that the said requirement had been fulfilled is not to be determined by this Court but during the process envisaged by the Procurement Regulations for A.D.B. Borrowers-2017 (Appendix-7) and the aforementioned provisions of the I.T.B. for the redressal of the bidders' grievances with respect to decisions taken in the procurement process.

40. KNK-JV has already, vide letter dated 30.11.2022 to the Chairman, N.H.A. voiced its grievance against its ouster from the bidding process and has sought an opportunity to place certain facts on the record. In paragraph 2 of the said letter, KNK-JV stated that after a delay of eight months, N.H.A. has disclosed the reasons for its disqualification before this Court on 30.11.2022. It is now incumbent on N.H.A. to refer KNK-JV's bidding-related complaint for resolution in terms of Clause 46.1 of the I.T.B. read with Section 2 of the Bid Data Sheet. It will be for the forum designated in Section 2 of the Bid Data Sheet to determine whether or not KNK-JV had filed the taking over certificate dated 26.10.2021 along with its bid and whether such a certificate along with its accompanying documents fulfilled the requirement stipulated in Clause 2.4.1 in Section 3: Evaluation and Qualification Criteria of the I.T.B. Since the provisions of the I.T.B. provide an adequate alterative remedy *albeit* different from the one envisaged by Rule 48 of the PPR-2004, the instant petition is accordingly <u>dismissed</u> as not maintainable. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON <u>30/12/2022</u>

(JUDGE)

<u>Qamar Khan</u> ***<u>APPROVED FOR REPORTING</u>***

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