JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

1. Writ Petition No. 1636 of 2022

M/s. Steel Complex (Pvt.) Limited

Versus

Islamabad Electric Supply & Company and others

2. Writ Petition No. 1637 of 2022

M/s. Steel Complex (Pvt.) Ltd Limited

Versus

Islamabad Electric Supply Company and others

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Petitioner by:	Mr. Faisal Zafar, Advocate. (in both petitions)
Respondents No.1and 2 by:	Mr. Muhammad Asif Khan, Advocate.(in both petitions)
Respondent No.3 by:	Mr. Sharjil Ahmad Sadiq, Legal Expert, PPRA. (in both petitions)
Research Assistance by:	Muhammad Fahad Khattak
Date of Hearing:	**09.05.2025**

INAAM AMEEN MINHAS, J:- This judgment shall decide the afore-titled Writ Petitions, as they involve common questions of law and facts.

2. The petitioners have assailed the Enhancement Orders dated 23.09.2021 **("Impugned Enhancement Orders")** in afore-titled writ petitions issued by respondents i.e. Islamabad Electric Supply Company Limited **("IESCO").**

3. The brief facts in W.P No. 1636 of 2022 are that IESCO invited bids under Tender No. IESCO/101/2020-21 for procurement of ACSR Rabbit Conductors, and pursuant thereto, IESCO accepted bid of the petitioner company for purchase of 1300km ACSR Rabbit Conductors at the rate of Rs. 76,500/- per unit vide Letter of Intent dated 29.03.2021 **("LOI")**. In consequence, Purchase Order No. 3588 dated 15.04.2021 **("P.O.")** was issued. The petitioner company upon successful completion of manufacturing and supplying the said P.O., received the final inspection call dated 12.07.2021, and the final supply of goods were delivered on 31.08.2021. Thereafter, IESCO issued impugned enhancement order dated 23.09.2021 for an additional supply of 195km (15% of Original Purchase Order) of the same conductor.

4. The facts in W.P No. 1637 of 2022 are that IESCO invited bids under Tender No. IESCO/102/2020-21 for procurement of AAC Ant Conductors, and pursuant thereto, IESCO accepted bid of the petitioner company for purchase of 1600km AAC Ant Conductors at the rate of Rs. 61,000/- per unit vide LOI dated 29.03.2021. In consequence, P.O. No. 3587 dated 15.04.2021 was issued. The petitioner company upon successful completion of manufacturing and supply under the said P.O., received the final inspection call dated 12.07.2021, and the final supply of goods were delievered on 09.01.2021. Thereafter, IESCO issued impugned enhancement order dated 23.09.2021 for an additional supply of 240km (15% of Original Purchase Order) of the same conductor.

5. The learned counsel for the petitioner company contended that the Impugned Enhancement Orders in both the petitions were issued unlawfully, after the conclusion of the original contracts, which had already stood completed upon issuance of final delivery and inspection certificates by the IESCO. It was submitted that the issuance of a repeat orders, five months after the original P.O. and two months post-completion of the delievery, is in sheer violation of Rules 42 and 45 of the Public Procurement Rules, 2004 **("PPR, 2004")**. He further argued that once the contract is closed, no enhancement order can be issued, and any such demand is devoid of legal sanction. Learned counsel for the petitioner also asserted that supplying

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additional 195km ACSR Rabbit Conductors in W.P No. 1636, and 240km of AAC Ant Conductors in W.P No. 1637 at the original rates in prevailing market escalations and currency depreciation are impossible for the petitioner company, and IESCO is taking benefit of its dominant position and misusing authority.

6. The learned counsel for the petitioner also submitted that public functionaries must act within the bounds of law and cannot unilaterally impose obligations that were neither agreed upon nor legally permissible and IESCO also threatened encashment of the performance guarantee, despite completion of the original contracts, is also an unlawful act intended to compel compliance with an illegal demand and such arbitrary and *mala fide* actions infringe the petitioner's company fundamental rights, particularly the right to carry on business free from unlawful interference, and warrants interference by this Court in exercise of its constitutional jurisdiction.

7. Conversely, the learned counsel for IESCO has raised a preliminary objection to the maintainability of the afore-titled writ petitions on the ground that the dispute pertains to a contractual matter governed by the PPR, 2004, and the specific terms set out in the bidding documents, LOI and P.O., all of which were accepted by the petitioner company without reservation. He further submitted that clause 16 of the LOI and the P.O. provides a mechanism for dispute resolution through arbitration, thereby excluding recourse to the constitutional jurisdiction of this Court. The learned counsel for IESCO further contended that the petitioner company had an adequate, proper, and efficacious alternate remedy, which was not availed at the proper time, attracting the bar of estoppel. Moreover, as the case involves factual controversies requiring deeper appreciation of evidence, it falls outside the scope of judicial review under Article 199 of the Constitution.

8. The learned counsel for IESCO also submitted that the Impugned Enhancement Orders were lawfully issued in accordance with clause 35.2 of the standard bidding documents and clause IV of the LOI and P.O., which expressly permit repeat orders up to fifteen percent (15%) of the original quantity within six months of the issuance of the P.O., and the petitioner

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company failed to fully perform the original contracts, and no completion or overall delivery certificates were ever issued, hence the contracts remained in force, and having accepted all terms without demur, the petitioner company is estopped from disputing their applicability at this stage. Lastly, the petitions are thus misconceived, *mala fide*, and aimed to obstruct the lawful procurement process, and are liable to be dismissed with costs.

9. I have heard the contentions of the learned counsels for the parties and perused the record with their able assistance.

10. As narrated in the facts that IESCO had invited bids under Tenders No. IESCO/101/2020-21 and IESCO/102/2020-21 for procurement of ACSR Rabbit Conductors and AAC Ant Conductors respectively, and clearly stipulated all the requirements, and terms and conditions in the bidding documents. The PPR, 2004 envisages that while engaging any bidding, a procuring agency may tailor the terms and conditions according to its requirements. The record reflects that sub-clause (iv) of clause 1(b) of the purchase orders states that IESCO reserves the right to increase or decrease the supply during the currency of contract up to 15%. The relevant sub-clause is reproduced hereunder:-

> *"iv. The IESCO reserves the right to increase or decrease the quantity of the supply during the currency of contract up to 15%. Currency of contract will be up to six months from the issue of P.O. or the actual delivery period whichever is more."*

11. The bidding documents published by IESCO also in clause 35.2 stipulates that IESCO reserves the right to increase or decrease the supply during the currency of contract up to 15%. The said clause is reproduced hereunder:-

> *"35.2 At the time the Contract is awarded, the Purchaser reserves the right to increase or decrease the quantity of Goods originally specified in Delivery and Completion Schedules, provided this does not exceed the percentages indicated in the Bidding Data, and without any change in the unit prices or other terms and conditions of the Bid and the Bidding Document."*

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12. The petitioner company neither challenged the specific terms stipulated in original purchase orders nor in the bidding documents before entering into bidding process and agreed to the said terms and conditions without any reservation even when the original purchase orders issued. IESCO issued the Impugned Enhancement Orders within the currency of contract and in accordance with terms and conditions stipulated in the original purchase orders and bidding documents.

13. As far as the argument of the learned counsel for the petitioner company that Rule 45 of PPR, 2004 was violated by IESCO on the ground that procuring agency cannot issue repeat orders since the performance of the contracts was concluded upon final supply on 31.08.2021. In order to address this issue, it is imperative to examine the legal framework, particularly Rule 2(j) and Rule 45 of PPR, 2004, which are reproduced hereunder:-

> ***"2(j) "repeat orders"*** *means procurement of the same commodity from the same source without competition and includes enhancement of contracts;*
>
> ***45. Closing of contract:-*** *(1) Except for defect liability or maintenance by the supplier or contractor, as specified in the conditions of contract, performance of the contract shall be deemed close on the issue of over all delivery certificate or taking over certificate which shall be issued within thirty days of final taking over of goods or receiving the deliverables or completion of works enabling the supplier or contractor to submit final bill and the auditors to do substantial audit.*
>
> *(2) In case of defect liability or maintenance period, defect liability certificate shall be issued within thirty days of the expiry of the said period enabling the supplier or contractor to submit the final bill. Except for unsettled claims, which shall be resolved through arbitration, the bill shall be paid within the time given in the conditions of contract, which shall not exceed sixty days to close the contract for final audit."*

14. A bare perusal of the above reffered Rule 2(j) shows that any procuring agency can procure same goods or commodity or services from

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the same supplier without initiating new competitive bidding process and also includes enhancement of contracts. Moreover, the Rule 45 clearly stipulates that performance of the contract shall be deemed close on the issue of overall delivery certificate or taking over certificate, which shall be issued within thirty days (30) of final taking over of goods or receiving the deliverables or completion of works. In the present matter the record shows that IESCO issued last delivery notes instead of overall delivery certificates on 31.08.2021 for the final supply of 497 km of original P.O. of 1300 km ACSR Rabbit Conductors in W.P No. 1636, and 482km of original P.O. of 1600km of AAC Ant Conductors in W.P No. 1637; therefore, IESCO never issued overall delivery certificates as per Rule 45 of PPR, 2004. Resultantly, the Impugned Enhancement Orders were issued well within the timeframe stipulated in the contracts, therefore the contentions regarding violations of PPR, 2004 are misconceived and untenable.

15. Moreover, it is a well-settled principle of law that the terms and conditions stipulated in an invitation to tender are not ordinarily amenable to judicial scrutiny. The Courts have consistently refrained from interfering with such terms, recognizing the domain of contractual freedom exercised by the procuring agency. However, judicial intervention may be warranted where the impugned conditions are found to be manifestly arbitrary, discriminatory, unreasonable, or vitiated by mala fides. In this regard, reference may be made to the case of ***TEZ Gas (Private) Limited and others vs. Oil and Gas Development Authority and others, (PLD 2017 Lahore 111)***, wherein it has been 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, and the decision to accept the tender or award the contract is reached through a process of negotiation and deliberations through several tiers. Moreover, such decisions are made qualitatively by experts and the government is free to settle the terms of the contract with the parties. 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.

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16. Before parting with the instant judgment, it is worth pointing out that the matter is primarily in respect of a contractual dispute, and appropriate remedies were available to the petitioner company including the invocation of the arbitration clause expressly stipulated in the contractual arrangement. Since, alternate remedies, perfectly adequate in nature, were available to the petitioner company and were not availed for any justifiable reason, the petitions are even otherwise not maintainable, and are liable to be dismissed on this distinct and independent ground also.

17. In view of the above discussion, the Impugned Enhancement Orders have been issued in accordance with the terms and conditions of bidding documents and Original Purchase Orders, and do not call for any interference by this Court. Consequently, the afore-titled petitions are hereby ***dismissed*** with no order as to costs.

(INAAM AMEEN MINHAS)
JUDGE

Announced in open Court on 07.07.2025

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Approved For Reporting

M. Yahya Khan Niazi, L.C.

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