ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

(JUDICIAL DEPARTMENT)

Writ petition no. 3933/ 2022

M/s APLOI (Private) Limited

versus

FOP through Ministry of Interior, Pakistan Secretariat and others

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
5	19.12.2022	Mr. Muhammad Ahmad Pansota, Advocate for the petitioner. Hafiz Ahmad Rasheed, AAG for respondent no.1 Mr. Afnan Karim Kundi, Advocate for the respondents no.2 to 5.

The petitioner is aggrieved by the *impugned letter dated 24.08.2022*, whereby the respondent NADRA cancelled tender no.121/2021 for the supply, installation, commissioning, support, maintenance and upgrade of servers and software for issuing dematerialised identity cards with cryptographic-hash-based dynamic QR authentication codes. The reason given in the impugned letter for cancellation of tender is that NADRA for various reasons did not wish to proceed with implementing the suggested solution.

2 Learned counsel states, citing several rules of Public Procurement Rules, 2004 (**PPRA Rules)**, that once the *purchase order dated 04.03.2022* was issued to his client, it could not have been withdrawn by NADRA, and that too without giving the petitioner company a right of hearing. He cites *Messers FAST TRACK vs. FIA etc* (2021 CLC 1160 Islamabad) in support.

3 Fast Track case was about the delivery of printing, office stationery and office equipment, which per the law report had already been delivered before the tender was cancelled. In the instant case, the project entailed several activities noted above, which could be carried out only once the project commenced, such as installation, commissioning, support, maintenance and upgrade of servers and software. Learned counsel stated on the date this petition was admitted that the software had already been delivered and installed, and that it was useable by NADRA. This statement is vehemently controverted by NADRA's learned counsel, and today the learned counsel for the petitioner no longer insisted on this point. That is to

say, Fast Track case is entirely distinguishable from the instant case, in that no part-performance of the contract deliverables by the petitioner is established in this case.

4 On the first date of hearing, the following order was passed:

> I would not have been inclined to admit this petition, were it not for the submission that the software stands delivered and installed. Issuing the writs of *certiorari* and *mandamus* prayed for in this petition will effectively translate into compelling the procurement agency to proceed with a procurement that it for various reasons might not find feasible to do. A Constitutional Court cannot compel a procuring agency to perform a contract when it no longer wishes to, for that would tantamount to specific performance of a software supply contract. The petitioner in such a case is not without remedy, for it can sue for damages.
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> However, given the submission that the purchase order stands part-performed by delivery of the software, I consider it appropriate to issue pre-admission notice to NADRA before deciding this petition.

5 The hearing following the pre-admission notice was held today.

6 Learned counsel for the petitioner refers to the impugned letter, which cites rule 33 of PPRA Rules, to say that under rule 33 rejection of the bids can occur only prior to the acceptance of bids. He then referred to rule 38 to say that the bidder with the most advantageous bid was to be awarded the contract, and that his client's bid was the most advantageous one. Continuing, he cited rule 44 to claim that the procurement contract had 'come into force' on the date the notice of acceptance of bid vide the purchase order dated 04.03.2022 was given to his client.

7 However, the rules cited by the learned counsel for his prayers of certiorari and mandamus are not valid in this case. Rule 33 cannot be turned on its head to say that, just because a bid cannot be rejected after it is accepted, it becomes mandatory for a procuring agency to proceed with a procurement when it no longer desires to. What rule 33 is meant to convey is that, amongst competing bids, if any bid is to be rejected, then that is to be

done before any is accepted. Rule 38 is also premised on that the procurement was going ahead, and clarifies that the most advantageous bid was to be accepted in that case; it does not mandate that the procurement itself becomes mandatory for the procurer. The submission premised on rule 44 is answered similarly; in fact, the effectiveness of a contract of procurement under rule 44 from the date the acceptance is given is subject to the condition "…where no formal signing of a contract is required…", and the purchase order in the instant case was unequivocally conditional upon a formal definitive contract being signed.

8 Learned counsel for the petitioner's references to the aforesaid PPRA Rules to claim that it was not necessary to sign a contract and that the purchase order itself constituted the contract do not prevail with me. We have to see the nature of the project in question. This was a software supply contract, and it is legend that software supply, installation and maintenance contracts go into minute details in relation to the performance of the solution as well as other matters such as on-going maintenance and troubleshooting in the software once it is installed, and a mere purchase order in and of itself rarely meets the requirements of such contracts. That is why the purchase order was issued by NADRA subject to a definitive binding contract being signed, which was yet to be signed, and it is a basic legal rule that an agreement to agree does not create a concluded and enforceable contract. However, even if it is assumed for the sake of argument that a contract was concluded when the purchase order was issued, even then the remedy for its breach would lie in a suit and not by way of a Constitutional petition.

9 Learned counsel contended next that the entire information of the bidder (whatever that means) is with NADRA, and that NADRA has capitalized on that information to develop the solution in-house. Assuming that to be true, though that may be a sharp practice, if that indeed is the case, but that still does not translate into any legal right to be enforced in the Constitutional jurisdiction. If NADRA while developing the in-house solution uses any proprietary know-how of the petitioner that constitutes intellectual property protected against unauthorised use by the intellectual property laws, then surely the petitioner would have a remedy under such laws. This of course is

denied by learned counsel for NADRA, stating that no protected intellectual property not available in the public domain was received by NADRA as a consequence of the petitioner's proposal.

10 The next and final submission was premised on natural justice, in that the learned counsel claims that an opportunity of hearing was not given before the abandonment of the project by NADRA. This submission is not valid. No adverse order against the petitioner was passed for it to be heard first. The petitioner had an expectation of winning the contract, *if the project was going ahead*, but by no means it can be held that the petitioner by submitting the bid acquired the right that the project must be implemented by NADRA using external suppliers. No bidder has an unqualified right for a project to be implemented. I reiterate that this is not a case of rejection of a bid, as dressed up by the petitioner, but one of abandonment of an externally sourced project, and no right of a bidder is violated if such a project is abandoned for the bidder to be heard before abandonment.

11 In a nutshell, a Constitutional Court will not order mandamus to compel a public procurement agency to implement the project solely for the reason that it has earlier issued a bid acceptance letter. It is not for a Constitutional Court to determine which projects NADRA wishes to implement, and whether it wishes to do so through external sourcing or in-house. Neither the PPRA Rules nor the terms of the tender, and for that matter nor does the law, bind NADRA to enter into and perform a contract unless it is specifically enforceable, and a software supply and maintenance contract is not one. The petitioner's remedy, if any, may lie elsewhere, but it does not lie before this Court in its Constitutional jurisdiction by writs of certiorari and mandamus as prayed for.

12 This petition is **dismissed**.

(Sardar Ejaz Ishaq Khan)
Judge

Rana.M.Ift

APPROVED FOR REPORTING.