JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.2101 of 2023
Hafeez Ullah Lehri and another
Versus
National Highway Authority and others

Dates of Hearing:	16.10.2023, 06.12.2023 and 12.12.2023.
Petitioners by:	Mr. Muhammad Masood Khan and Syed Faisal Hussain Shah, Advocates.
Respondents by:	M/s Wasim Abid and Mohammad Ahmad, Advocates for NHA. Barrister Ibrahim Shahid and Mr. Hammad Rohila, Advocate for respondent No.5. Mr. Muhammad Waqar Rana, Advocate for the applicant in C.M. No.2711/2023.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioners seek a direction to the National Highway Authority (**"NHA"**) to award the contract for the construction of Bhong Interchange on Sukkur - Multan Motorway (M-5) at the interchange with Bhong – Sadiqabad Road (KM 520+130) (**"Contract"**) to the petitioners in terms of the decision dated 18.05.2023 taken by the Grievance Redressal Committee (**"GRC"**) and the working paper presented in the 436th meeting of NHA's Executive Board. Furthermore, the petitioners seek a declaration to the effect that the decision taken by NHA's Executive Board to award the Contract to respondent No.5, M/s IKAN Engineers Services (Private) Limited, is illegal and unlawful.

2. The documents on the record show that NHA published an advertisement inviting applications from contractors to participate in the prequalification process for the award of the Contract. In response to the said advertisement, the petitioners submitted their prequalification documents and vide letter dated 25.01.2023, NHA informed the petitioners that they had been prequalified. Vide letter dated 17.03.2023, NHA called on the petitioners to submit their bid by 05.04.2023. The bidding documents containing the detailed terms and

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conditions, method of procurement (single stage – one envelope procedure), submission of e-bid, bid security, evaluation criteria, etc. could be downloaded from NHA's website.

3. On 09.04.2023, the petitioners submitted their bid of Rs.1,541,405,098/- for the award of the Contract. Along with the bid, the petitioners submitted Certificate Form IT-1 in which it was stated that an amount equivalent to **2%** of the bid price had been incorporated in the bid which was to be deducted as withholding tax from the bid price quoted by the petitioners.

4. All bids were opened on 11.04.2023 in the presence of all the bidders. On 05.05.2023, the final bid evaluation report was posted on the website of the Public Procurement Regulatory Authority (**"PPRA"**). As per the said report, the petitioners' firm had been declared non-responsive for not having met the requirements under clauses IB 18.3 and IB 26.2 of the bidding documents. The petitioners' ouster left only one bidder, namely M/s IKAN Engineering Services (Pvt.) Ltd. in the field.

5. Aggrieved by their ouster from the bidding process, the petitioners, on 12.05.2023, filed a complaint before the GRC constituted by NHA. Having not received any plausible response, the petitioners filed an appeal before PPRA and deposited a pay order for Rs.2 million as the appeal processing fee. However, on 18.05.2023, the GRC decided that the grievance raised by the petitioners *"seems to be justified."* The GRC issued a direction to hold the process of the award of the Contract to any other bidder. Furthermore, the GRC directed NHA to solicit a clarification from the petitioners and decide the matter in accordance with the Instructions to Bidders (**"ITB"**). NHA did not file an appeal against the said decision before PPRA under Rule 48(7) of the Public Procurement Rules, 2004 (**"PPR-2004"**).

6. Vide letter dated 22.05.2023, NHA sought a clarification from the petitioners regarding Certificate Form IT-1 which had been submitted along with their bid. On 23.05.2023, the petitioners, along with their clarification, submitted a new Certificate Form IT-1 showing that they were not exempt from the payment of income tax and that an amount

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equivalent to **7%** of the bid price had been incorporated in the bid which was to be deducted as withholding tax from the bid price quoted by the petitioners.

7. Vide letters dated 01.06.2023 and 21.06.2023, the petitioners requested NHA to issue a letter of acceptance of the bid in their favour. Having not received any plausible response from NHA, the petitioners, on 26.06.2023, filed the instant writ petition. Vide letter dated 26.06.2023, NHA informed the petitioners that the revised Certificate Form IT-1 had been taken into consideration by the Tender Opening and Evaluation Committee constituted by NHA but it had come to the conclusion that it could not be considered as a part of its bid as it was substantially different from the Certificate Form IT-1 submitted originally along with the bid. Furthermore, it was stated that in terms of paragraph IB 26.3 of the tender documents, a bid will be rejected by the employer if it is not substantially responsive, and may not be subsequently made responsive by correction or withdrawal of non-conforming deviation or reflection.

8. Vide order dated 27.06.2023, this Court issued notices to the respondents but did not issue any injunctive order with respect to the process for the award of the Contract. During the pendency of the instant petition, NHA, on 02.08.2023, issued a letter of acceptance to M/s IKAN Engineering Services (Pvt.) Ltd., which had been impleaded as respondent No.5. Vide application (C.M.No.2444/2023) dated 08.08.2023, the petitioners sought an amendment in the writ petition to challenge the issuance of the letter of acceptance dated 02.08.2023 that had been issued by NHA in respondent No.5's favour.

9. Learned counsel for the petitioners, after narrating the facts leading to the filing of the instant petition, submitted that in view of the GRC's decision dated 18.05.2023, NHA should have accepted the corrected Certificate Form IT-1 submitted along with the petitioners' letter dated 23.05.2023; that in terms of clause 11.1(h)(vi) of the ITB, the petitioners' bid could have been declared as non-responsive only if it was not accompanied by the Certificate Form IT-1 or any space therein had been left blank; that the petitioners did not leave any space

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blank in the Certificate Form IT-1 submitted along with their bid; that the petitioners' bid was accompanied with supporting documents which showed that the petitioners were registered and active taxpayers; that the entry of the figure "2%" in the Certificate Form IT-1 submitted along with the petitioners' bid was the result of a *bonafide* mistake which had no impact on the bid price of Rs.1,541,405,098/-; that NHA ought to have disregarded the said mistake since, under the law, an amount equivalent to 7% of the bid price was liable to be deducted as withholding tax; that clause 12.3 of the ITB required the bidders to include in their total bid price all duties, taxes and other levies payable by the contractors under the Contract; that clause 25.1 of the ITB provides *inter alia* that the response to a request for clarification shall be in writing but no change in the price or substance of the bid shall be sought or permitted; and that the petitioners had submitted a substantially responsive bid in terms of clause 26.2 of the ITB inasmuch as it met all the requirements enumerated in the said clause.

10. Furthermore, it was submitted that respondent No.5's original financial bid was Rs.1,585,065,752/- whereas at all material times the petitioners' financial bid was Rs.1,541,405,098/-; that after the financial bids of the petitioners and respondent No.5 were opened on 11.04.2023, the latter on 02.05.2023 reduced its financial bid to Rs.1,553,364,437/-; that Rule 40(1) of the PPR-2004 permits the procuring agency to negotiate with the successful bidder on methodology, work plan, staffing, and special conditions of the Contract with a view to streamline the work or task execution at the time of Contract finalization provided such negotiation does not change the cost, scope of work or services; that respondent No.5 had not been declared as the successful bidder when it reduced the quantum of its financial bid; that the bid evaluation report issued by NHA on 05.05.2023 shows respondent No.5's reduced financial bid of Rs.1,553,364,437/-; and that the reduction of respondent No.5's financial bid prior to its declaration as the successful bidder is not just unfair but is an actionable wrong and an impetus to manipulation of

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bids. 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 NHA submitted that all that the petitioners were seeking in the prayer clause of the petition was the implementation of the GRC's decision dated 18.05.2023; that vide letter dated 26.06.2023, NHA informed the petitioners as to the decision not to accept the revised / amended Certificate Form IT-1 submitted by the petitioners on 23.05.2023; that the said letter dated 26.06.2023, which gave a fresh cause of action to the petitioners, has also not been challenged by the petitioners either before the GRC or in the instant petition; that the petitioners had filed application (C.M.No.2444/2023) to amend the petition so as to challenge the award of the Contract to respondent No.5, but not to challenge the said letter dated 26.06.2023; and that with the issuance of the said letter dated 26.06.2023, the instant petition has been rendered infructuous and is liable to be dismissed as such.

12. Furthermore, it was submitted that the GRC, in its decision dated 18.05.2023, had required NHA to solicit a clarification from the petitioners and decide the matter in accordance with the ITB; that in the garb of clarification, the petitioners had submitted an altogether new Certificate Form IT-1 on 23.05.2023 containing entries different from the ones in the Certificate Form IT-1 submitted along with their bid; that in the Certificate Form IT-1 submitted by the petitioners along with their bid, it was stated that an amount equivalent to 2% of the bid price was incorporated in the bid which was to be deducted as withholding tax, whereas in the revised Certificate Form IT-1 submitted on 23.05.2023, the figure of "2%" was changed to "7%;" that the said change amounts to a change in the substance of the bid as the tax rate has a direct impact on the bid price; that NHA's letter dated 26.06.2023 whereby NHA's earlier decision to declare the petitioners' bid as non-responsive had been maintained was strictly in accordance with clauses IB 25 and IB 26.3 of the ITB; that the ouster of the petitioners from the bidding process only left respondent No.5 in the field to whom a letter of acceptance was issued on 02.08.2023; that

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NHA's stance is that if the petitioners' original bid had been accepted, they would have insisted for an amount equivalent to only 2% of the bid to be deducted as withholding tax and this would have led to disputes between the parties adversely impacting the progress in the works; that a clarification can only be made on the basis of the figures entered by a bidder in its original bid; that in the process of clarification, the figures entered in the original bid cannot be changed; and that since the revised Certificate Form IT-1 submitted on 23.05.2023 was substantially different from the Certificate Form IT-1 originally submitted along with the petitioners' bid, NHA's decision to declare the petitioners' bid as non-responsive does not suffer from any legal infirmity. Learned counsel for NHA prayed for the instant petition to be dismissed.

13. Learned counsel for respondent No.5 submitted that only two bidders participated in the competitive process for the award of the Contract; that although the letter of acceptance was issued by NHA on 02.08.2023, till date the Contract has not been executed; that the "2%" entered in hand by the petitioners in the Certificate Form IT-1 is not a *bonafide* mistake inasmuch as the Form of Bid submitted by the petitioners also mentions 2%; and that NHA's decision to declare the petitioners' bid as non-responsive was in accordance with clause 11.1(h)(vi) of the ITB. Learned counsel for respondent No.5 also prayed for the writ petition to be dismissed.

14. 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 8 above and need not be recapitulated.

15. Rule 31(1) of PPR-2004 permits a procuring agency to seek and accept clarifications to a bid that do not change the substance of the bid. Furthermore, the said rule provides that no bidder shall be allowed to alter or modify his bid after the bids have been opened. The vital question that needs to be determined is whether in the case at hand the clarification dated 23.05.2023 provided by the petitioners in

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response to NHA's letter dated 22.05.2023 was such that would change the substance of the bid.

16. As mentioned above, NHA, vide letter dated 22.05.2023, had required the petitioners to provide a clarification regarding its Certificate Form IT-1 submitted along with its bid after the GRC, through its decision dated 18.05.2023, had required NHA to solicit a clarification from the petitioners. Now, Certificate Form IT-1 submitted by the petitioners along with their bid had clearly provided that their firm had 2% exemption from the payment of income tax. Furthermore, the said Form provided that an amount equivalent to 2% of the bid price was incorporated in the bid which was to be deducted as withholding tax from the petitioners' quoted bid price. I am of the view that NHA was well within its rights to have rejected the petitioners' bid as the petitioners' stated position regarding 2% exemption from the payment of income tax turned out to be untrue. Additionally, the contesting parties do not dispute that the applicable rate of withholding tax under the law was 7% and not 2%. An acceptance of the petitioners' bid would have clearly resulted in the petitioners' insisting that NHA apply the rate of withholding tax as mentioned by the petitioners in Certificate Form IT-1. In this scenario, NHA would have had to decide whether to apply the rate of 7% of withholding tax in order to avoid becoming an assessee in default by not applying the rate of withholding tax fixed by law or to apply the rate of 2% as quoted by the petitioners in Certificate Form IT-1.

17. Along with the clarificatory letter dated 23.05.2023, the petitioners submitted an altogether different Certificate Form IT-1 which provided that the petitioners were not exempt from the payment of income tax and that an amount equivalent to 7% of the bid price had been incorporated in the bid which was to be deducted as withholding tax from the petitioners' bid price. I would tend to agree with the learned counsel for NHA as well as respondent No.5 that by taking advantage of the process of the clarification, the petitioners wanted to rectify the errors that they had made in their bid. Such a rectification, in my view, did change the substance of the bid.

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18. The petitioners, as prudent commercial persons of business, ought to have been vigilant while making entries in the Form of Bid as well as in Certificate Form IT-1. They knew or ought to have known that they did not enjoy any exemption from the payment of income tax. A misstatement in Certificate Form IT-1 to the effect that they did enjoy such exemption to the extent of 2% was a fatal error which could not have been corrected in the process of providing clarification under Rule 31(1) of the PPR-2004. It is also crucial to bear in mind that the request to correct the entries in Certificate Form IT-1 was not made by the petitioners soon after the submission of the bid but instead after the issuance of the bid evaluation report dated 05.05.2023. It was at this stage that the petitioners realized that they had committed a mistake in the entries in Certificate Form IT-1 and wanted to go back on their footsteps to do well what they had done ill. In the case of Gamalto Middle East FZ-LLC Vs. Federation of Pakistan (2020 CLD 151), it was held *inter alia* that *"where a procuring agency requires bids or prequalification documents to be submitted within a stipulated deadline, a bidder cannot be permitted to satisfy the essential requirements of the tender by supplementing its bid or prequalification documents along with documents filed after the deadline."* Additionally, in the case of National Institutional Facilitation Technologies (Pvt.) Ltd. Vs. The Federal Board of Revenue (PLD 2020 Islamabad 378), this Court held as follows:-

> ***"70. It is well settled that equity does not relieve a party from the consequences of its own negligence. This Court, while exercising equitable jurisdiction, cannot countenance the decision of the G.R.C. to permit a bidder to correct errors in its financial bid after all the bids have been opened and the evaluation report has been issued. If modifications in financial bids are allowed after the results of the bidding were made known, frauds innumerable could be perpetrated against procuring agencies as well as other bidders, and our system of competitive bidding would be placed in jeopardy and would lose stability. It would encourage slipshod bidding and would afford a pretext for unscrupulous bidders to prey on the public. After bids have been opened, a bidder is bound by his error or mistake and is expected to bear the consequences of it. In the case of West Bengal State Electricity Vs. Patel Engineering Co. Ltd. (AIR 2001 SC 682), it was held as follows:-***
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> > ***"In a work of this nature and magnitude where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach***

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> ***otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity."***

19. Paragraph 11.1(h)(vi) of the ITB requires the bidders to complete Form IT-1 as per the format available in the bidding document and, along with the same, attach the national tax number certificate and exemption certificate (if applicable). It also provides that the failure to submit the said Form or leaving any space blank in the certificate will result in declaring the bid as non-responsive. Leaving a space blank in Certificate Form IT-1 is as serious a lapse on the part of the bidder as making incorrect entries in such Form. The incorrect entries made in Certificate Form IT-1 by the petitioners were such as to have a bearing on the contract price and therefore could not have been changed in the process of providing clarifications. Allowing a negligent bidder to make amendments in his bidding documents would amount to conferring an undue advantage and preferential treatment to such a bidder and a reciprocal disadvantage to the other competing bidders.

20. This causes me to hold that NHA did not commit any illegality by rejecting the petitioners' bid document as non-responsive on the basis of incorrect entries made in Certificate Form IT-1 submitted by the petitioners along with their bid.

21. Another aspect of the case is that respondent No.5's financial bid submitted on 10.04.2023 was Rs.1,585,065,752/-. The sealed bids were opened on 11.04.2023. Vide letter dated 02.05.2023 addressed to NHA by respondent No.5, the latter gratuitously reduced its financial bid to Rs.1,553,364,437/-. What is intriguing is that the financial evaluation report dated 05.05.2023 mentions respondent No.5's reduced bid of Rs.1,553,364,437/- and not its original bid of Rs.1,585,065,752/-. Rule 31(1) of the PPR-2004 provides that no bidder shall be allowed to alter or modify his bid after the bids have been

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opened. In the case at hand, the bids were opened on 11.04.2023 but NHA, by mentioning respondent No.5's reduced financial bid of Rs.1,553,364,437/- in the bid evaluation report, in effect allowed it to alter or modify its bid by allowing it to reduce its financial bid to Rs.1,553,364,437/-. This is not just a clear transgression of Rule 31(1) *ibid* but also an actionable wrong and a violation of the norms of transparent tender bidding process. Had respondent No.5's reduced financial bid been lower than the financial bid quoted by the petitioners, this would have been a fit case for annulling the tender bidding process in question, provided the petitioner had been technically qualified. The only reason why I refrain from doing so is that respondent No.5's reduced financial bid is marginally higher than that of the petitioners. NHA is cautioned to henceforth not indulge in the malpractice of allowing bidders to alter their bids in violation of Rule 31(1) *ibid* after the bids have been opened. However, once a bidder is declared as a most responsive bidder in terms of the evaluation report issued by a procuring agency, there is nothing preventing the procuring agency from negotiating the contract price with such bidder prior to the award of the Contract. Such negotiation is permissible within the parameters set out in Rule 40 of the PPR-2004.

22. In view of the above, I do not find merit in the instant petition which is accordingly dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 21.02.2024.

(JUDGE)

APPROVED FOR REPORTING

*Ahtesham**

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