JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.1503 of 2025

M/S CH. A. Latif & Sons [Private] Limited and others

Versus

National Highway Authority (NHA) and another

Petitioners by:	Mr. Waseem Sajjad ASC, Mr. Idrees Ashraf, Raja Muhammad Ali and Barrister Mahrukh, Advocates.
Respondents No.1and 2 by:	Barrister Asghar Khan and Mr. Atif Waheed Advocates along with Abdul Rehman, Director (P&CA) and Asad Rehman AD, Legal, NHA
Research Assistance by:	Muhammad Fahad Khattak, Advocate.
Date of Hearing:	**22.05.2025**

INAAM AMEEN MINHAS, J:- Through the instant writ petition, the petitioners have assailed the letter dated 27.03.2025 **("Impugned Letter")** issued by the respondent No.1 i.e. National Highway Authority **("NHA")**, whereby the petitioners were informed regarding their disqualification from the bidding process.

2. Brief facts are that the petitioners, comprising M/s Ch. A. Latif & Sons (Pvt.) Limited, M/s Maqbool Associates (Pvt.) Limited, and M/s Shaanxi Water Resources and Hydropower Engineering Group Company Limited, formed an unincorporated Joint Venture for participation in the **"Dualization & Rehabilitation of Karachi-Quetta-Chaman Road (N-25)"** project, as advertised on 11.08.2024 by the NHA, a statutory body responsible for national highways in Pakistan. The petitioners submitted a comprehensive application for pre-qualification for all project sections and

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were pre-qualified for multiple sections by letter dated 29.11.2024 issued by NHA. Subsequently, all prequalified bidders including present petitioners were invited to submit financial bids on 23.04.2025 as final bid submission date. However, the petitioners were abruptly disqualified vide the Impugned Letter dated 27.03.2025 on the grounds of alleged non-compliance with pre-qualification requirements upon re-evaluation of the petitioners documents under clause 2.1 of Section-III of the Pre-Qualification Documents **("PQD"),** specifically referring to non-performance of a contract with the Lahore Development Authority **("LDA")**. The petitioners challenged the Impugned Letter by filing a complaint before the Grievance Redressal Committee **("GRC")** on 11.04.2025, and the same was dismissed on 14.04.2025 as time barred. Being aggrieved of the Impugned Letter, the petitioners have invoked constitutional jurisdiction of this Court in the instant petition.

3. The learned counsel for the petitioners contended that the abrupt disqualification of the petitioners, without affording an opportunity of being heard is a violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 **("Constitution")**, which guarantees the right to a fair process, and offends the principles of natural justice; that the unilateral action of the NHA, taken without notice or substantiated evidence is arbitrary, discriminatory, and in breach of Articles 14, 18, and 25 of the Constitution, thereby unlawfully obstructing the petitioners' right to participate in public procurement and tarnishing its professional reputation.

4. The learned counsel for the petitioners further contended that the disqualification was based on a factually incorrect assumption of alleged non-performance in relation to Orange Line Metro Train Project (Package II), whereby LDA terminated the contract of petitioner No.1 on account of alleged unsatisfactory performance; that the said matter is sub-judice before the arbitrators and yet to be decided hence the claim of NHA is unsupported by any cogent evidence, and thus contravenes Rule 18 of the Public Procurement Rules, 2004, **("PPR, 2004")** as well as settled jurisprudence requiring fairness and transparency in public procurement; that the public

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authorities are required to act fairly and transparently in matters of public procurement, whereas the actions of NHA are unilateral and violate the requirement of good governance and public trust, and against section 24-A of General Clauses Act, 1897.

5. The learned counsel for the petitioners also contended that the Impugned Letter is explicitly illegal and without jurisdiction, procedurally flawed, and timed to exclude the petitioners from the tender process without legal basis or due process, especially as the technical evaluation phase had already been cleared. The learned counsel also submits that the statutory grievance redressal mechanism under Rule 48 of the PPR, 2004 is inapplicable, as it was excluded from the bidding process prior to submission of a financial bid, leaving it without an adequate alternate remedy and such disqualification being unlawful the Impugned Letter is liable to be set aside and the petitioners' prequalification status may be reinstated.

6. Conversely, the learned counsel for respondents/NHA contended that the instant petition does not fulfil the conditions precedent for invoking the constitutional jurisdiction of this Court under Article 199 of the Constitution, wherein it is expressly provided that the High Court shall not exercise its jurisdiction where an adequate and efficacious remedy is available under the law, whereas in the present case, the petitioners had and continue to have, an adequate and efficacious statutory remedy available under Rule 48 of the PPR, 2004; that the petitioners voluntarily approached the GRC under the PPR, 2004 framework but they did not file any appeal against the dismissal of their complaint, therefore, the petitioners are estopped from bypassing the appellate remedy making this petition not maintainable and liable to be dismissed. It was further asserted that the instant petition has become infructuous as an extended deadline for financial bid submission was 23.04.2025, and financial bids were opened at 11:30 am on the same day in the presence of the bidders as communicated by the NHA to all the participating bidders beforehand, hence, the financial proposals have been disclosed to the public prior to the issuance of interim injunction,

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which was granted ex-parte on 23.04.2025 after the opening of the financial bids.

7. The learned counsel for NHA further contended that the petitioners have approached this Court with unclean hands, having deliberately and wilfully failed to pursue the appropriate legal remedies within the statutory time limits as the Impugned Letter is dated 27.03.2025 and the petitioners, by their own admission, had knowledge of the disqualification on the very same day. Despite having such knowledge, the petitioners failed to file a timely complaint before the GRC within the prescribed period and did not file an appeal before the PPRA under Rule 48 (7) of the PPR, 2004, instead, the petitioners filed the instant petition a day before final submission of financial bids and failed to exhaust all available remedies.

8. The learned counsel for NHA also contended that the petition involves disputed questions of fact such as the petitioners' alleged non-performance in previous projects, contract termination, a pending NAB reference and misstatements in the forms under clause 2.1 of Section-III of the pre-qualification documents which fall outside the limited scope of Article 199 and the petitioners have approached this Court with unclean hands by concealing material facts, including a terminated contract by LDA and ongoing NAB proceedings, thereby disentitling them to equitable relief and allowing the instant petition would compromise the integrity of the procurement process and appears to be a *mala fide* attempt to delay the project; that pre-qualification does not confer any vested right and may be re-evaluated at any time under the applicable rules. Lastly, the learned counsel for NHA prayed for dismissal of the instant petition not being maintainable.

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 NHA had published an advertisement on 11.08.2024 clearly stipulating all the requirements and terms and conditions

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for prequalification in PQD. The PPR, 2004 envisages that while engaging in pre-qualification, a procuring agency may tailor the evaluation criteria while taking into consideration relevant experience and past performance; capabilities with respect to personnel, equipment, and plant; financial position; and appropriate managerial capability, along with any other factor that the procuring agency may deem relevant that is not inconsistent with the Rules. The issue revolves around clause 2.1 of PQD that requires prospective bidders/applicants to demonstrate satisfactory past performance, absence of contract non-performance within last 10 years along with Form CON-2. The relevant clause is reproduced as under:-

Eligibility and Qualification Criteria			**Documentation**	
Sr. No.	**Subject**	**Requirement**	**Joint Venture (Each Party)**	**Submission Requirements**
2.1	Performance of the applicant and history of Non-performing contracts	Non-performance of a contract did not occur within the last 10 years prior to the deadline for application/ proposal submission based on all information. Past or present performance of the applicant as contractor (individual or all partners of a JV) is satisfactory with NHA or any other executing agency and the Applicant has not been blacklisted by any government agency/authority/ organization. Applicant shall provide an undertaking on the Applicant's letter head that the company is not blacklisted by any government agency/ authority/ organization. Detail of litigation pending (if any) be also provided (Form CON-2). The Employer shall also evaluate the performance of the applicant against its completed and ongoing project with the recommendations of Regional/ Maintenance wing of NHA. NHA may disqualify the applicants to whom a slow progress notice has been issued.	Must meet	Form CON-2

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11. In pursuance of the particulars mentioned above the record reflects that eligible parties were invited to submit their proposals for pre-qualification for the award of the contract. In response the petitioners submitted their pre-qualification documents. Subsequently, the petitioners were pre-qualified for multiple sections of the project. However, the petitioners pre-qualified status was terminated by NHA due to non-performance of contract with LDA. It is observed that the petitioners initially opted for statutory remedy by approaching the GRC by filing a complaint under Rule 48 of PPR, 2004, prior to filing the instant petition. However, the complaint before the GRC was dismissed on the ground of being time-barred. Subsequently, the petitioners did not avail the statutory remedy of appeal under Rule 48(7) before the relevant forum, i.e. Public Procurement Regulatory Authority **("PPRA")**, rather the petitioners have now invoked the constitutional jurisdiction of this Court, challenging the Impugned Letter issued by NHA instead of the decision of GRC dated 14.04.2025.

12. The PPR, 2004 provides a complete mechanism for redressal of grievance of an aggrieved person. Rule 48 of the PPR, 2004 provides that the procuring agency shall constitute a committee comprising of odd number of persons, with proper powers and authorizations, to address complaints of bidders that may occur prior to the entry into force of the procurement contract. Sub-Rule (2) further provides that any bidder feeling aggrieved by any act of the procuring agency after submission of bid may lodge a complaint concerning his grievances. It has been further provided that if the bidder is not satisfied with the decision of the committee, the bidder may file an appeal within thirty (30) days of the decision of GRC under Rule 48(7) of PPR, 2004 before PPRA. For purpose of clarity Rule 48 of PPR, 2004 is reproduced as under:-

> ***"48. Redressal of grievances by the procuring agency:-***
>
> *(1) The procuring agency shall constitute a committee comprising of 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.*

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(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.

(3) Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written complaint concerning his grievances within seven days of announcement of the technical evaluation report and five days after issuance of final evaluation report.

(4) In case, the complaint is filed against the technical evaluation report, the GRC shall suspend the procurement proceedings.

(5) In case, the complaint is filed after the issuance of the final evaluation report, the complainant cannot raise any objection on technical evaluation of the report:
Provided that the complainant may raise the objection on any part of the final evaluation report in case where single stage single envelope bidding procedure is adopted.]

(6) The GRC shall investigate and decide upon the complaint within ten days of its receipt.

(7) Any bidder or party not satisfied with the decision of the GRC, may file an appeal before the Authority within thirty days of communication of the decision subject to depositing the prescribed fee and in accordance with the procedure issued by the Authority. The decision of the Authority shall be considered as final".

13. The GRC constituted pursuant to Rule 48 of PPR, 2004, is an adequate alternate forum, where a bidder can raise his grievance with respect to any matter regarding the tender bidding process after the submission of the bid. In the case at hand, the petitioners having the alternate remedy of appeal under Rule 48(7) of PPR, 2004, after dismissal of complaint by GRC, has invoked the constitutional jurisdiction of this Court without exhausting the alternate remedy. The scope of judicial review in matters of public procurement has been expounded in a number of cases by superior Courts, and it is well settled that Courts do not sit in appeal over the decisions of executive authorities or instrumentalities. A constitutional Court is essentially concerned with only the lawfulness of a decision and not its soundness. As such, while allegations of illegality, irrationality and

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procedural impropriety would constitute grounds for a Court to assume jurisdiction, it would only be the decision making process that would come under inquiry and that does not ordinarily mean that the aggrieved person can bypass the adjudicatory process prescribed under the laws. It ought to be demonstrated for purpose of resort to the writ jurisdiction. Reliance is placed on ***Badar Expo Solutions through Managing Director Vs Federation Of Pakistan through Chief Executive Trade and Development Authority of Pakistan and 12 others (PLD 2022 Sindh 33).*** An observation in this regard was made by the Supreme Court of India in the case reported as ***Jagdish Mandal v. State of Orissa (2007) 14 SCC 517***, as follows:-

> *"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/ procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :*
>
> *i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.*
>
> *OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no*

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responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

14. 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 following precedents; in the case of ***Techno Time Construction Company v. Punjab Highway Department (2014 MLD 874)***, wherein it was held that the High Court cannot interfere with the terms and conditions as prescribed in Tender/Contract documents unless it was established that the same were contrary to public interest; in the case of ***TEZ Gas (Private) Limited v. Oil and Gas Development Authority (PLD 2017 Lahore 111)***, wherein it was held that the terms of the invitation to tender cannot be opened 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 to participate in the tender process or accept the contract. However, if they choose to participate, they are bound by the terms offered to them. Moreover, the Honourable Supreme Court in ***Suo Motu Case No.13 of 2009, PLD 2011 SC 619*** held that in such matters the exercise of judicial oversight is intended to prevent arbitrariness or favouritism, with public interest as the paramount consideration. It was further observed that the basic test in such regard is to see whether there was any infirmity in the decision making process and interference in such a

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process is warranted where it appears to be predicated upon arbitrariness, illegality, irrationality, procedural impropriety and/or actuated by *mala fides*.

15. As far as the argument advanced by the learned counsel for the petitioners that Rule 48 is inapplicable on the ground that the petitioners cannot be considered *'bidder(s)'* due to their disqualification prior to the submission of the financial bid is misconceived and untenable. It is pertinent to observe that the petitioners, having initially invoked the alternate remedy by assailing the Impugned Letter before the GRC and subsequently abandoning the same upon dismissal of their application, now seeks to re-agitate the very same grievance in writ jurisdiction on the pretext of not being a bidder is not only devoid of merit but also not a valid justification for bypassing the alternate remedy. The moment the petitioners entered the prequalification stage of the procurement process, they squarely fell within the ambit of Rule 48 of PPR, 2004. However, instead of availing the remedy within the framework of Rule 48 and adhering to the prescribed limitations, the petitioners opted to shift forums midway, and such act amounts to forum shopping, which cannot be countenanced by this Court. The petitioners' conduct reflects a deliberate attempt to circumvent the statutory procedure, and such misuse of the process of law is impermissible.

16. It is well setlled principle of law that once the aggrieved person chooses or elect forum amongst the available remedies under any law he cannot resort to other available remedy midway. The petitioners approaching GRC against the Impugned Letter issued by NHA had elected a statutory remedy available under Rule 48 of PPR, 2004 cannot therefore be allowed to avail remedy under constitutional jurisdiction of this Court. Honourable Supreme Court in number of cases have settled down this proposition; particularly in ***Chief Executive Officer Npgcl, Genco-III, Tps Muzafargarrah Vs. Khalid Umar Tariq Imran and others*** **(2024 SCMR 518)** held that:-

> *"11. It is a well-settled proposition of law that when an aggrieved person intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or*

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choose from amongst the actions or remedies available under the law. The choice to initiate and pursue one out of the available concurrent or co-existent actions or remedy from a forum of competent jurisdiction vest with the aggrieved person. Once the choice is exercised and the election is made then the aggrieved person is prohibited from launching another proceeding to seek relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/ action and or remedy, which in legal parlance is recognized as doctrine of election , which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, rule (2), C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order 1984 and principles of res judicata as articulated in section 11, C.P.C. and its explanations."

17. Under the given circumstances, there is in fact no cogent material from which it can be gathered or ascertained that the procurement proceedings were marred by any procedural lapses on the part of NHA and no substantial case on merit as to arbitrariness or a contravention of the PPR, 2004 stands made out so as to require remedy by way of judicial review. The right forum would be GRC and PPRA to redress the grievance of the petitioners within prescribed time of limitations. The bare allegation that petitioners were not afforded a proper right of audience in the matter by the NHA is also not a factor that can be agitated by the petitioner in writ jurisdiction. On the contrary, keeping in view the scope of the project and the time sensitive nature of the works to be procured, any undue interference would hamper if not cripple the ongoing procurement proceedings.

18. In view of the above discussion, the Impugned Letter has been issued in accordance with procurement mechanism and does not call for interference by this Court. Consequently, the instant writ petition is hereby ***dismissed*** being not maintainable.

(INAAM AMEEN MINHAS)
JUDGE

Announced in open Court on 27.05.2025

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APPROVED FOR REPORTING.

R.Anjam.

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