# JUDGMENT SHEET
# IN THE ISLAMABAD HIGH COURT, ISLAMABAD
# JUDICIAL DEPARTMENT

**C.R.No.468 of 2016**
**Kundi Development Corporation through its Managing Director**
**Versus**
**National Highway Authority and others**

**Date of Hearing:** 09.02.2017
**Petitioner by:** Mr. Atta Ullah Hakim Kundi, Advocate,
**Respondents by:** Shah Khawar, learned ASC.

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**MIANGUL HASSAN AURANGZEB J:-** Through the instant civil revision petition, the petitioner, Kundi Development Corporation (Private) Limited, impugns the order dated 19.12.2016, passed by the Court of the learned Additional District Judge, Islamabad, whereby respondent No.1's appeal against the order dated 01.11.2016, passed by the Court of the learned Civil Judge, Islamabad, was allowed. Vide the said order dated 01.11.2016, the learned Civil Court had allowed the petitioner's application under Order XXXIX, Rules 1 & 2 of the Code of Civil Procedure, 1908 ("C.P.C.") for the grant of interim relief. The said application was filed along with the petitioner's suit for declaration, mandatory injunction, recovery of damages, etc., praying for the setting aside of letter dated 31.08.2016, issued by respondent No.5 (Director, (South Zone)/Secretary, National Highway Authority, Karachi), whereby the petitioner's technical bids for the construction of three Toll Plazas were rejected. Since the petitioner's technical bids were rejected, the respondents did not open the petitioner's sealed financial bids.

2. The record shows that respondent No.1 (National Highway Authority) through a public advertisement invited sealed bids from licensed contractors for the construction of three Toll Plazas, and two Weigh Stations on Sehwan-Ratodero Section (N-55). In response to the said advertisement, the petitioner submitted its bids for the said works. As per the Invitation for Bids, issued by respondent No.1, the financial threshold required to be met by a bidder for the three of the works (construction of

Toll Plazas) was Annual Turn Over of more than Rs.144 Million, and Cash Flow of more than Rs.18 Million for each of the three works. The bidders were also required to establish their financial competence by submitting their financial statements, cash flow statements, and balance sheets for the last two years supported with an audit report of a charted accountant. The threshold set in the Invitation for Bids regarding the Annual Turn Over and Cash Flow was stated to be mandatory. According to Paragraph 3.1(f) of the Instructions to Bidders, each bidder had to have the capacity to generate cash flow to the tune of more than Rs.18 Million for each contract for the construction of Toll Plaza.

3. Sealed bids were required to be delivered at the NHA Complex, Karachi on or before 20.07.2016. The petitioner submitted its technical and financial bids for all the five advertised works within the time stipulated in the advertisement posted on respondent No.1's web site. It is not in dispute that the petitioner met the required threshold for Annual Turn Over and Cash Flow for two of the works i.e. construction of Weigh Stations. As regards the three works regarding the construction of Toll Plazas, the petitioner's ability to meet the required financial threshold is in dispute.

4. Vide impugned letter dated 31.08.2016, respondent No.1 informed the petitioner that the petitioner did not qualify to participate in the opening of the financial bids, because upon scrutiny of its technical proposal, it was found that the petitioner did not have the financial capacity to meet the required criteria for the three works for which required financial threshold was Annual Turn Over of more than Rs.144 Million and cash flow of Rs.18 Million for each of the three works. Vide another letter of the same date, the petitioner's technical bid was found to be "responsive" regarding the construction of Weigh Station works. Furthermore, the petitioner was invited for the opening of the financial bids on 05.09.2016.

5. Aggrieved by the rejection of the petitioner's technical bids for the construction of the three Toll Plazas, the petitioner, on 03.09.2016, filed a civil suit for declaration, mandatory

injunction, recovery of damages etc., before the Court of the learned Civil Judge, Islamabad. Along with the said suit, the petitioner filed an application for interim injunction praying for the suspension of the said letter dated 31.08.2016, whereby the petitioner's technical bids were rejected. The respondents contested the said suit by filing a written statement. Vide order dated 01.11.2016, the learned Civil Court, allowed the petitioner's application for interim injunction and directed *status quo* to be maintained. The said order dated 01.11.2016, was impugned by the respondents in an appeal before the Court of the learned Additional District Judge, Islamabad. Vide judgment dated 19.12.2016, the learned Appellate Court, allowed the respondents' appeal by setting aside the said order dated 01.11.2016, and dismissing the petitioner's application for interim relief. The petitioner in the instant civil revision petition has impugned the said judgment dated 19.12.2016.

6. Learned counsel for the petitioner submitted that the petitioner's financial statements, cash flow statements, and balance sheets, have not been properly examined by the respondents; that a professional scrutiny of the said documents would have revealed that the petitioner had satisfied the required threshold of having an Annual Turn Over of greater than Rs.144 Million and Cash Flow of more than Rs.18 Million for each of the three works for the construction of Toll Plazas; that the learned Civil Court was correct in holding that there was no requirement in the advertisement or Instructions to Bidders that each bidder is to have 'Net Cash Flow' of more than the required threshold; that the learned Civil Court was correct in taking account of the standard practice adopted by respondent No.1 of using the formula of determining cash flow by adding the working capital with the credit line minus the current commitments; that the learned Civil Court was also correct in taking account of the investments made by the petitioner, and the acquisition of long term assets in order to determine the petitioner's cash flow; that the learned Civil Court was also correct in including the cash flow from the petitioner's

investment activities, so as to hold that the petitioner had qualified the financial threshold for participating in the tender bidding process for the above mentioned three works; that in the tender documents, there was no requirement regarding the bidder's net cash in flow and out flow; and that while evaluating the petitioner's bids, the respondent/NHA was supposed to see the petitioner's ability to generate cash flow.

7. Learned counsel for the petitioner drew the attention of the Court to the petitioner's cash flow statement for the year ending on 03.06.2015, to show that the petitioner's cash flow from investment activities was stated to be in the negative because of the investment made by the petitioner. He explained that these figures, which were stated to be in the negative, should have been included by the respondents as part of the petitioner's financial strength, because the investment had, in fact, belonged to the petitioner. Learned counsel for the petitioner further submitted that the learned Appellate Court misconstrued the petitioner's financial statements by holding that the petitioner had fallen short of meeting the required threshold of Annual Cash Flow of Rs.18 Million for each of the three works.

8. On the other hand, learned counsel for the respondent submitted that the execution of the projects have been delayed on account of the injunctive orders granted by the learned Civil Court; that the respondents had no ill will against the petitioner, because they were held to be technically qualified for two of the projects advertised by the respondents; that they had met the required financial threshold for the said two projects; that the advertisement as well as the Instructions to Bidders had made it explicitly clear that a bidder had to have the capacity to generate Cash Flow of more than Rs.18 Million for each of the contracts for the construction of Toll Plazas; that the advertisements issued by the respondents made the requirement for each bidder to meet the stipulated financial threshold mandatory; that the report of the charted accountants (Safdar and Sahrish) shows that the petitioner's balance sheet as on 30.06.2015 had been audited; that the petitioner's cash flow statement for the year

**ending on 30.06.2015 shows that the petitioner's net cash in flow/out flow for the year 2015 to be Rs.28,316,797/-, and for the year 2014 to be Rs.1,314,065/-; and that accordingly, the petitioner's average cash flow for the years 2015 and 2014 was less than the required threshold. Learned counsel submitted that the impugned judgment of the Appellate Court was strictly in accordance with the law.**

**9. 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 civil revision petition have been set out in sufficient detail in paragraphs 02 to 05 above, and the same need not be recapitulated.**

**10. When the instant petition was first taken-up for hearing, this Court, vide order dated 22.12.2016, restrained the respondents from returning the petitioner's sealed financial bids and from awarding the contract. I am told that the petitioner's sealed financial bids are still with the respondents.**

**11. The reasons for the rejection of the petitioner's technical bids have been explained by the respondents in their written statement filed before the learned Civil Court, in the following terms:-**

> ***"7. That the Para No.7 is incorrect because "cash flow statement" submitted and dully endorsed by the contractor (in technical bid). The statement is prepared by the plaintiff and verified by their appointed charted accounted, Saffder & Sahrish. In the statement it clearly states the net cash in flow/out flow for two years, 2015 & 2014 as Rs.28.317/- and Rs.1.314/- million respectively. For these two years the average folliculated is Rs.14.815/- million which is below the required criteria of Rs.18 million or above for pre-qualification."***

**12. The terms of the advertisement issued by respondent No.1 have to read in conjunction with the Instructions to Bidders. Paragraph 3.1(f) of the Instructions to Bidders reads as follows:-**

> ***"f. The Applicant has the capacity to generate Cash Flow Millions for each contract of Construction of Toll Plaza as follows:-***

| *Contract No.* | *Engineer's Estimate (Rs. in Millions)* | *Financial Thresholds Required (Rs. in Millions)* |
|---|---|---|
| *No.TP-IHP-N55-01* | *95.689* | *Cash Flow ≥ 18* |

| | | |
|---|---|---|
| ***No.TP-IHP-N55-02*** | ***95.689*** | ***Cash Flow ≥ 18*** |
| ***No.TP-IHP-N55-03*** | ***95.689*** | ***Cash Flow ≥ 18*** |

**13. What was required by the Instructions to Bidders was petitioner's capacity to generate cash flow of Rs.18 Million for each of the contracts for the construction of Toll Plazas. The petitioner's bids were not to be evaluated on the basis of its 'net cash flow'.**

**14. The statement of cash flow for a company, which is not a financial institution, consists of:-**

> ***"(1) Operating flows (i.e. the net cash generated from operations);***
> ***(2) Investing flows (i.e. the net result of capital expenditures, investments, acquisitions etc.); and***
> ***(3) Financing flows (i.e the net result of raising cash to fund the other flows or repaying debts)."***

**15. Operating cash flow is simply the amount of cash generated by a company from its operations. The larger the operating cash flow coverage, the greater the company's ability to meet its obligations. The purpose of a 'Cash Flow Statement' is to provide information about a company's gross receipts and gross payments for a specified period.**

**16. The petitioner's net cash flow from operating activities after deduction of income tax for the years 2014 and 2015 was Rs.31,147,108/- and Rs.61,473,694/-, respectively. The average annual cash flow from the petitioner's operating activities for years 2014 and 2015 comes to Rs.46,310,401/-. The cash outflows from the petitioner's investment activities, i.e. purchase of fixed assets, for the years 2014 and 2015 were Rs.31,623,593/- and Rs.11, 557,827/-, respectively. There were also significant outflows on account of the petitioner financing activities (i.e. deposit for shares) in year 2015. Had the petitioner not made the said investment in 2014 and 2015, and not carried out the said financing activity in 2015, its net cash flow would have been equal to the cash flow from operating activities (i.e. Rs.31,147,108/- for the year 2014, and Rs.61,473,694/- for the year 2015).**

**17. Paragraph 3.1(f) of the Instructions to Bidders, required the bidders to have the "*capacity to generate* cash flow" to the tune of more than Rs.18 Million for each contract for the construction of Toll Plaza. The Instructions to Bidders did not require the bidders to have a net annual cash flow of more than Rs.18 Million. A bidder's capacity to generate cash flow can be determined on the basis of cash generated by it from its operations. Cash generated by the Petitioner from its operations in years 2014 and 2015 before deduction of income tax was Rs.71,570,953/- and Rs.86,897,593/-, respectively. The average cash generated for the said two years was Rs.79,234,273/-, which is far in excess of the minimum financial threshold of Rs.18 Million plus cash flow for each of the three works.**

**18. Net cash flow refers to the difference between a company's cash inflows and outflows in a given period. A company's net cash flow cannot be equated with its capacity to generate cash flow in a given period. The petitioner's net cash flows for the years 2014 and 2015 is not the same thing as the petitioner's capacity to generate cash flow, and therefore, the figures of the petitioner net cash flow in its Cash Flow Statement could not form the basis of its ouster from the bidding process.**

**19. The mere fact that the suit contained an alternative claim for damages would not frustrate the petitioner's prayer of interim injunction. In view of the above discussion, I am of the view that the petitioner has been able to establish a *prima facie* case in its favour. Since the contracts for the Toll Plazas have not been awarded as yet, and since the petitioner's sealed financial bids are still with respondent No.1, the balance of convenience is also in the petitioner's favour.**

**20. As the works which are the subject matter of this petition are public works, I am of the view that the interim injunction should not operate indefinitely. Respondent No.1 is admittedly a procuring agency as contemplated by the provisions of the Public Procurement Regulatory Authority Ordinance, 2002, and the Rules made thereunder, it would be appropriate if respondent No.1 constitutes a Committee comprising of officials**

higher in rank to the ones who decided to oust the petitioner from the bidding process to afford an opportunity of hearing to the petitioner for the redressal of its grievance in the light of the observations made by the learned Civil Court in its order dated 01.11.2016 and this judgment. Such a Committee shall decide the petitioner's grievance strictly in accordance with the law, and through a well reasoned order. The interim injunction shall continue to operate until the decision of such a Committee. Of course, the petitioner shall be at liberty to challenge the decision taken by such a Committee before an appropriate forum if the decision it is not in its favour.

21. In view of the aforementioned, this revision petition is allowed, and in consequence thereof, the impugned order dated 19.12.2016, passed by the learned Appellate Court is set aside, and the order dated 01.11.2016, passed by the learned Trial Court is restored, but modified in the above terms.

**(MIANGUL HASSAN AURANGZEB)**
**JUDGE**

**ANNOUNCED IN AN OPEN COURT ON _____/2017**

**(JUDGE)**

Qamar Khan*

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