

**JUDGMENT SHEET  
PESHAWAR HIGH COURT PESHAWAR  
JUDICIAL DEPARTMENT**

**W.P. NO. 1939-P of 2014**

**JUDGMENT**

**Date of hearing : 20.11.2014**

**Petitioners (Sinotec Co. Limited) M/s. Akram Sheikh and Khalid  
Mehmood, Advocate.**

**Respondent (The Province of Khyber Pakhtunkhwa etc.) By  
Shumail Ahmad Butt, Advocate.  
Mr.Umair Majeed Malik, advocate for added  
respondent No.6.**

**MAZHAR ALAM KHAN MIANKHEL, CJ.-** The petitioner,  
in this writ petition as well as in the connected Writ Petition  
No.1938-P/2014, challenges the orders passed by the Project  
Directors Pakhtunkhwa Energy Development Organization  
(**PEDO**) for 69 MW Lawi Hydropower Project and 84 MW  
Matiltan Hydropower Project, whereby the bidding process for  
the above Projects was cancelled/annulled.

2. The petitioner claims to be a multinational technology and  
services providers, delivering international EPC/Turnkey projects  
in the area of infrastructure development, renewable energy and  
environmental protection, among other fields. The petitioner took

part in the tendering process for the Projects in question as part of a joint venture by the name of M/s. Sinotec-SIDRI-GRC JV (**the “Sinotec JV”**) of which Sinotec was the leading partner. According to them, earlier too the bidding process for the above projects was annulled by PEDO where after the said Projects were re-advertised for the second time, wherein the petitioner procured the complete set of bidding documents from PEDO. The technical bids were opened on 04.02.2014 and it was communicated to the petitioner vide letters dated 25.02.2014 that his bids have qualified as responsive by the Bid Evaluation Committee and that the financial bids would be opened on 27.02.2014. On 27.02.2014, the financial bids were opened by the Bid Evaluation Committee in the presence of the bidders’ representatives. The bid prices with inclusion of 11% discount offered by the petitioner were the lowest one. Subsequent to the completion of bid opening process, a bidder by the name of M/s. LIMAK-ZKB JV (added respondent No.6 herein) made a complaint to the Chief Minister of the Province, on which the Chief Minister constituted an inquiry committee headed by the Secretary Finance and vide

letter dated 2<sup>nd</sup> May, 2014, an employee of Sinotec was asked to appear before the said enquiry committee. It is averred that without providing a copy of the alleged complaint despite repeated requests of the petitioner, the impugned decision was received by the petitioner from PEDO whereby the tendering process was annulled for re-inviting the bids for the said Projects.

3. Learned counsel for the petitioner raised a three-fold contention; firstly, that the PEDO has not constituted a committee under the law and the alleged inquiry was conducted by a committee which lacked lawful authority and was *coram non-judice*; secondly, that the PEDO being an independent entity was not bound by the findings and conclusion reached by the inquiry committee and by doing so it has undermined its own independence; and thirdly, PEDO as an executive agency was under a general duty to act within the confines of the law in its conduct of the bidding process, therefore, the Chief Executive of the Province has usurped the jurisdiction of PEDO. The learned Senior Counsel Mr. Akram Sheikh while elaborating his arguments submitted that the entire action of the respondents

canceling/annulling the tender process for the Projects was wholly illegal, arbitrary and violative of Article 4 and 10-A of the Constitution of Islamic Republic of Pakistan. He submitted that no reasons were assigned in the impugned decision, which was nothing but an attempt to veil the illegalities and irregularities committed by the respondents in the tender evaluation process in order to render them opaque for the purposes of judicial scrutiny. The PEDO, while invoking clause IB.32.1 of the Instructions to Bidders, has failed to abide by the mandatory provisions of law contained in Rules 47 and 48 of the Khyber Pakhtunkhwa Public Procurement of Goods, Works and Services Rules, 2008 (**the “Procurement Rules”**) rendering the impugned decision illegal, because the procuring agency under Rule-47 is placed under a duty to provide grounds for such rejection i.e. to say that the procuring agency has no power under the law to cancel or annul the bidding process without first having grounds for rejecting all the bids. The learned counsel placed reliance on the **Suo Motu Case No.5 of 2010** reported in **PLD 2010 Supreme Court 731**

and **Raja Mujahid Muzaffar and others versus Federation of Pakistan and others (2012 SCMR 1651)**.

4. As against this, learned counsel for respondents No.1 to 5 argued that the writ petition itself is not maintainable as the matter falls in the contractual spheres between the Government and the petitioner. Even otherwise, the power of judicial review cannot be exercised to set aside the decision of the Government canceling the bid. The learned counsel submitted that on the complaint of respondent No.6, the Government received credible information that some fraudulent practices had crept in the tendering process and therefore, an inquiry committee was constituted for considering the allegations leveled against the petitioner in the tender process. The petitioner was provided proper opportunity of hearing and on receipt of report of the inquiry committee it was decided to cancel the tenders. He submitted that even if it is presumed that the tender submitted by the petitioner was the lowest one, still it is open for the Government to reject his tender without assigning any reasons as the bidding process had not matured into grant of any final

contract and was annulled much earlier. The learned counsel referred to the case of RELIANCE CONSULTANCY AND ENGINEERING WORKS PRIVATE LIMITED vs FEDERATION OF PAKISTAN (2010 CLC 1046), and stated that had petitioner's bid been rejected for being not responsive and bid of some one else been accepted, then High Court could enter into question, whether treating of petitioner's bid as not responsive was justified in circumstances or not, but the position in this case is that all the bids have been cancelled by the respondents and fresh tenders have been invited wherein the petitioner can also participate. Further submitted that it was merely due to a gross violation of the bid solicitation documents by the petitioner alone, when the entire process had to be scrapped resulting in annulment of all the bids and consequent re-advertisement of the procurement process; that the petitioner has an efficacious and adequate alternate remedy in shape of Appeal under Section 35 of the Khyber Pakhtunkhwa Public Procurement Regulatory Authority Act, 2012. He further submitted that not only the petitioner submitted the discount offer in a separate

envelope in violation of Clause 22.3 of the Bidding Documents but when seen in context of 55 km transmission lines, the financial bid of petitioner becomes non-responsive. The learned counsel also questioned the competency of the writ petition on the ground that the same has been filed without associating the other joint venture partners or furnishing any documentary evidence to the effect that their concurrence was sought before invoking the constitutional jurisdiction of this Court.

5. Learned counsel for the added respondent No.6 submitted that if the separate discount letter of the petitioner is found in violation of the bid documents, then respondent No.6 being the lowest bidder is entitled to be awarded the contract in question.

6. Arguments of the learned counsel for the parties were heard and the available record was perused.

7. Sub-section (3) of Section-10 of the Pakhtunkhwa Hydel Development Organization (Amendment) Act, 2013 is to the effect that; *“Every scheme prepared by the Organization*

*under sub-sections (1) and (2) shall be processed in accordance with Government procedures or instructions, which may be issued to the Organization from time to time. The Organization will submit to the Government periodical reviews and other reports required by it.*” Under Chapter-II of the Act above, a Board has been constituted, the Chairman of which is the Chief Minister of the Khyber Pakhtunkhwa Province. Besides, under Article-129 of the Constitution also the executive authority of the Province is the Provincial Government, consisting of the Chief Minister and Provincial Ministers, which shall act through the Chief Minister. Thus, the law has given a definite role to the Government, which may issue instructions from time to time to PEDO in respect of every scheme prepared by it. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. There can be no question of infringement of right under Article 4 of the Constitution, if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of



course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

8. A look at the bid documents attached with the writ petition would reveal that under IB 22.3, it was provided that:-

*“Any Bid Price or discount which is not read out and recorded at Bid opening will not be taken into account in the evaluation of Bid. Any discount offered by the Bidder on its quote prices, shall only be considered if such discount is shown on the duly filled-in, quoted amount for Lump sum contract/bill of quantities as applicable. In case of any discrepancy or difference in the rate or amount of discount mentioned in the Form of Bid/Letter of price bid (as duly filled-in and signed), and on the Summary Page of the Priced BOQ, the discount shown on the Priced BOQ shall prevail. Discount if offered, through a separate letter of discount submitted with the Bid, will not be entertained and shall be considered null & void.”*

The recommendations of the Bid/Opening Evaluation Committee reveal that the bid of petitioner contained a separate discount letter with its bid.

9. The complaint, on which the Chief Minister constituted an inquiry committee contained two violations committed by the petitioner i.e. submission of discounted price

through a separate letter, not considerable as per Clause IB 22.3 of Instructions to Bidder and that the petitioner was required to have quoted total price of 55 KM Transmission Line instead of Unit Price of Rs.30 Million, which after arithmetical correction would come to 21483 Million as against the total price of Rs.1650 Million. This complaint was submitted on 31.03.2014 and the Chief Minister happened to be the Incharge of the Organization on that very date. Annexure-R/1 with the comments of respondents is a letter of Transparency International-Pakistan written to the Chief Minister KPK, wherein it is stated in Para.4 and 5 of the letter that, as per the eligibility clause of the instruction to bidders (IB.13) which pertains to establishing the bidder's eligibility and qualifications, the contractor must have completed at least two EPC contracts as a contractor, sub-contractor or management contractor during the last ten years prior to submitting the application, but PEDO (then called PHYDO) had qualified Sinotec for both the projects, although they had no experience of undertaking such massive projects. On Page 19 of the comments, there is a certificate issued by National

Transmission and Despatch Company Limited, wherein it was certified that Sinotec Co. has handled the Management, Design and Construction of 500KV Muzaffargarh-Gatti Overhead power Transmission Line, 280KM long under contract MG-1(Package-II). The Additional Secretary (Regulation) Finance Department, KPK vide letter dated 02.06.2014 sought verification from the NTDC about the certificate in question, who replied vide letter dated 19.06.2014 that M/s. Sinotec Co. Ltd was neither main contractor nor the sub-contractor in the subject project.

10. It was in these circumstances when the Chief Minister KPK constituted an inquiry Committee in his capacity as Minister Incharge of the Energy & Power vide Notification dated 03.01.2014 consisting of the Secretary Finance, Secretary Law and Mohsin Aziz Vice Chairman, BOIT. Para.8 of the report of the inquiry Committee would reveal that the representatives of M/s Sinotec GRC JV were called for hearing. The contents of the complaint were read out to them and the representative of M/s. Sinotec FRC JV were asked to clarify their version of the case. It

means that proper opportunity of hearing was provided to the petitioner by the Committee.

11. It may be mentioned here that three companies had submitted their tenders including the petitioner and respondent No.6. The inquiry Committee found that the bid of petitioner with one KM Transmission Line did not correspond to actual requirements of the Project and, therefore, could not be considered as standard specification for calculation of the lowest bid whereas the bid of respondent No.6 was incomplete due to lacking of Schedule J, K and L as required by the Bidding Instructions to Contractors.

The cases relied upon by the learned counsel for the petitioner, with utmost respect, are distinguishable from the facts and circumstances of the instant case. In the Suo Motu Case No.5 of 2010, it was brought to notice of the apex Court that for awarding contract of supply of LNG, huge loss was caused to the public exchequer as a result whereof public at large was deprived from this amount, which could be utilized for their welfare. Their

lordships of the august Supreme Court of Pakistan while deciding the case observed that such type of transactions must be made in transparent manner for the satisfaction of people, who were the virtual owners of national exchequer, which was being invested in such projects. It has been held in Para.10 of the judgment that the Ministry of Petroleum and SSGCL had not followed the process for awarding contract for LNG supply for Mashal or Short Term project seriously and with high order of transparency. Similarly, in the case of Raja Mujahid Muzaffar contract for the supply and implementation was executed between the Government and Chinese Company for the procurement of goods, equipment and services for the purpose of establishing a Command Center and Network called Islamabad Safe City Project. Another Project called GOTA was also being sponsored by the Ministry of Information Technology with the involvement of Chinese Company and both the projects were competitive and obviously overlapping and only one of the two projects could go through. The matter was brought to the notice of the then Prime Minister, who formed a Technical Committee, which submitted its report,

whereafter summaries were prepared by the respective Ministries for the Prime Minister regarding the said Projects. The main thrust of the summary appeared to be for seeking exemption from the operation and application of Public Procurement Regulatory Authority Ordinance, 2002 and the Public Procurement Rules, 2004. In the light of Summary the agreement was executed, which was called into question before the apex Court in a Constitutional Petition. The said petition was clubbed with the Human Rights Application and heard together. Subsequently, the constitutional petition was withdrawn and CP No.91 of 2011 and CP No.57 of 2012 were filed challenging the award and implementation of the contract. The august Supreme Court through an elaborated judgment came to the conclusion that the Supreme Court in exercise of its jurisdiction of judicial review conferred by Art. 184(3) of the Constitution could scrutinize matter where public money was being expended through procurement or public property was being sold, so as to ensure that transactions were undertaken and contracts executed in a transparent manner, legally, fairly and justly without any arbitrariness or irrationality.

The facts of instant case are quite different from the facts of the above cases, in that, the bids offered by the three companies were annulled without any further process and tenders for the Projects were ordered to be re-advertised.

12. Under the KPK Public procurement Regulation Authority Act 2012, a forum has been provided that if there is any objection on the bid, the aggrieved party can file an appeal under Section 35 thereof; hence the right of appeal was available to the petitioner but the same has not been availed. Moreover under IB.32 of the Instructions to Bidders it is provided that the Employer reserves the right to accept or reject any Bid and to annul the bidding process and reject all Bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidders or any obligation to inform the affected Bidders of the grounds for the Employer's action except that the grounds for its rejection shall upon request be communicated to any Bidder who submitted a Bid, without justification of grounds. Rejection of all Bids shall be notified to all Bidders promptly. Thus, right to accept any bid and to reject any or all bids rested

with the Employer and similarly the employer was not supposed to provide grounds for the Employer's action unless requested for by the Bidder. The apex Court in the case of **Munshi Muhammad and another versus Faiznul Haq and another** (1971 SCMR 533) has held that:-

*“Bidders at auction, in circumstance, in absence of final approval of their bids, not clothed with any right in auctioned properties and had no locus standi to challenge transfer competently made.”*

In the case of **Rehmat Ali and 2 others versus The Revenue Board, West Pakistan, Lahore and another** (1973 SCMR 342) it was laid down:-

*“In our opinion, the petitioners, by giving highest bid have not acquired any legal title in the property in dispute and the mere fact that the auction in their favour has not been confirmed does not give them any right to file a writ petition.”*

Similar views were expressed by their lordships of the august Supreme Court of Pakistan in the case of **Babu Parvez Qureshi versus Settlement Commissioner, Multan & Bahawalpur Divisions, Multan and 2 others** (1974 SCMR 337) as under:-



*“A mere right to bid does not give a right to a person to oppose the transfer of the property to another person under the relevant law. A mere bid at an auction if the bid is subject to confirmation, does not create any contractual right until the bid is confirmed. It is in the discretion of the auctioneer to confirm or not to confirm it. A person who was a successful bidder at the auction cannot claim to be a person aggrieved by the order of cancellation of the auction.”*

Latest authority of the august Supreme of Pakistan on the subject is the case of **Petrtozin Corporation (Pvt.) Ltd. Singapore and 2 others versus Oil and Gas Development Company Ltd. (2010 SCMR 306)** wherein it was again held that:-

*“There might be cases in which a contract might involve number of documents including exchange of correspondence between parties in process of finalization of award of contract. Principle of natural justice was not attracted in absence of infringement of any vest rights of appellants. Bids of appellants had not been confirmed finally, therefore, contract could not be said to have been completed. Even the lowest bid would not confer an absolute title for award of a contract. In mega projects host of other considerations become relevant to avoid any unnecessary risk. General letter of intent merely implied an intention to enter into a contract and*

*authority to contract to start work before completion of contract in anticipation of signing of contract with a right to contractor for compensation of work, if any, he had already done. Letter of intention could not be treated to be synonymous to a completed contract. Bid of no other bidder had been accepted and respondent company had decided quite justifiably to re-advertise tenders.”*

The guidelines provided by the august Supreme Court of Pakistan in such like cases are on all fours applicable to the facts and circumstances of instant case, wherein the competent authority cancelled all the bids offered by various companies including the petitioner before any contract is awarded or signed with any party and thus no contractual right has created in favour of petitioner even if, for the sake of arguments it is presumed, that his bid was the lowest one. Nothing is available on file that the petitioner had requested the Employer for providing the grounds for rejection/annulling the bid process. Rules 47, 48 of the KPK Procurement Rules, 2014 also provide that the bidder shall first ask the employer to show the reason for rejection of the bid and thereafter file the appeal. Moreover, the Projects in question have already been re-advertised.

13. The duty of the Court is to confine itself to the question of legality. Its concern should be:

- (1) *Whether a decision-making authority exceeded its powers?*
- (2) *committed an error of law,*
- (3) *committed a breach of the rules of natural justice,*
- (4) *Reached a decision which no reasonable Tribunal would have reached or,*
- (5) *Abused its powers.*

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) *Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*
- (ii) *Irrationality; and*
- (iii) *Procedural impropriety.*

It is well settled that there should be fair play in action in a situation like the present one. This Court in the circumstances is of the view that the respondents have acted fairly, their action was legitimate, fair and the decision was without any aversion, malice or affection. Nothing has been done which gives the impression of favouritism or nepotism.

14. The terms of inviting tenders cannot be open to judicial scrutiny because the invitation to tender is in the realm of authority. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must be free from arbitrariness not affected by bias or actuated by *mala fides*. The technical capability of any of the three bidders to undertake the works is not in question. Two of the bids are very similar in price. If the discount offered by the

petitioner would not have been in contradiction to the Instructions to bidders at the time of opening of the tenders and if the petitioner would have given the total cost of the Projects instead of one KM and if the experience certificate of the petitioner would not have been termed as bogus, the outcome would have appeared to favour the award of contract to the petitioner. The fraudulent practices indulged in the tendering process are grave and serious in nature which necessitated cancellation of the bids and calling for fresh tenders. As per Rules of Business, the PEDO is merely an attached entity of the Provincial Government that functions in terms of Constitution. Where the Minister-in-Charge heads the Department and can competently constitute a Committee, which he exactly did, while upholding the spirit of good governance, fairness and independence, then it was in the public interest that the tendering process should be cancelled by rejection of bids and that the tendering process be initiated by inviting fresh tenders.

15. In this view of the matter, this Court comes to the conclusion that the decision making process adopted by the

Government does not suffer from any infirmity nor it can be termed as arbitrary. Since we are not sitting in appeal over the decision taken by executive, the order passed annulling the tender process cannot be interfered with in the constitutional jurisdiction of this Court. Both the writ petitions are found to be devoid of any merit and the same are dismissed through this single judgment in W.P.No.1939-P/2014 with no order as to costs.

**Announced**  
**20.11.2014**

**CHIEF JUSTICE**

**J U D G E**