

JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR.

JUDICIAL DEPARTMENT

**Writ Petition No. 1367-P/2017
with Interim Relief.**

JUDGMENT

Date of hearing 06-07-2017, Announced on 12.07.2017

Petitioner: (The Contractors Association Khyber Pakhtunkhwa) By Barrister Waqar Ali Khan.

Respondents: (Government of Khyber Pakhtunkhwa and others) by M/s. Abdul Latif Yousafzai, Advocate-General, and Waqar Ahmad Khan, AAG, Khyber Pakhtunkhwa, for Provincial Government i.e respondents No.1,2 & 5, Mr. Aamir Javed, Advocate, for respondent No.3, Mr. Ihsanullah Khan, Advocate, for respondent No.4, Mr. Muhammad Ali, Advocate, for respondent No.6, Mr. Muhammad Tariq Afridi, Advocate, for respondent No.7 and Sardar Tariq Hussain, Advocate, for respondent No.8.

YAHYA AFRIDI. C.J- The Contractors

Association Khyber Pakhtunkhwa, the petitioner, invokes the Constitutional jurisdiction of this Court seeking;

“a. Declare/direct contracting/ sourcing to Government organizations over private sector organizations through Rule 3(2)(c) of the KPPRA Rules as being illegal, unfair, discriminatory and a mis-procurement in terms of 2(1)(n) of the KPPRA Act;

b. Declare Rule 3(2)(c) of the KPPRA Rules as being against the spirit and purpose of the KPPRA Act, thereby creating disharmony and discord and

as such are ultra vires of the KPPRA Act and are unconstitutional and of excessive delegation;

- c. Direct that the KPPRA Rules be harmonized with the KPPRA Act;*
- d. Declare the stringent financial requirements and guarantees listed in the Standard Form Bidding Documents of KPPRA as illegal and unfair, harsh and beyond jurisdiction;*
- e. Declare the non-inclusion of performance guarantee from AA rating insurance companies in the shape of Bid Security in the KPPRA Standard Form of Bidding documents as being illegal, unfair, harsh and discriminatory, especially since the same exists in the KPPRA, PPRA (Punjab) and even the PEC Standard Form of Bidding documents;*
- f. Direct that performance guarantee from AA rating insurance companies in the shape of Bid Security in the KPPRA Standard Form of Bidding documents be included as a financial requirement/guarantee;*
- g. Declare the impugned meeting dated 27.2.2017 and the awarding of the contract through direct contracting to NLC in respect of the (i) Flyover at Warsak Road-Ring Road intersection, (ii) Level-II flyover at GT Road and Ring Road intersection (Pir Zakoori flyover) Peshawar, (iii) Internal road rehabilitation projects in Peshawar City, (iv) Peshawar Uplift program and (v) Flyovers at Jawad Chowk and Katlang Chowk Mardan as illegal and without lawful authority.*

Any other relief not specifically prayed for but found just in the given facts and circumstances of the case may also graciously be allowed.”

2. In essence, the grievance of the petitioner is twofold; **Firstly**, that rule 3(2)(c) of

the Khyber Pakhtunkhwa Public Procurement of Goods, Works and Services Rules, 2014 (“KAPPRA Rules”) is *ultra vires* of the Khyber Pakhtunkhwa Procurement Regularity Authority Act, 2012 (“KAPPRA Act”), and **Secondly**, that the very grant of five projects to National Logistic Cell (“NLC”) by the Provincial Government through direct sourcing is in complete violation of the spirit of KAPPRA Act and KAPPRA Rules.

3. The worthy counsel for the petitioner vehemently argued that the very spirit of KPPRA Act was to promote transparency, economic, value for money, accountability and swift grievance handling in the public procurements in Khyber Pakhtunkhwa, as was clearly provided in section 3 of the KAPPRA Act, and this theme was followed in the entire KAPPRA Act, and in particular sections 14-A and 14-B *supra*; that direct sourcing and that too as provided under sub-clause (c) of Sub-Rule-2 of Rule 3 of the KAPPRA Rules is beyond the mandate of KAPPRA Act and hence, *ultra vires*; that the provision of direct sourcing of contract, as provided in Rules 3(2) (c) of KAPPRA

Rules was violative of Articles 4, 18 and 25 of the Constitution of the Islamic Republic of Pakistan (“**Constitution**”); that direct sourcing of procurement of works in the impugned five projects was in violation of the clear provisions of KAPPRA Rules; that no preferential treatment could be given to NLC, as it was a commercial entity and had to compete with other private commercial concerns. Reliance was placed on *Shaukat Ali’s case* (PLD 1997 SC 342), *Syed Munir Hussain Shah’s case* (1998 SCMR 1326), *Muhammad Umer Rathore’s case* (2009 CLD 257), *A.R Khan’s case* (2010 CLD 1648), *Pakcom Limited’s case* (PLD 2011 SC-44), *Rental Power Plants case* (2012 SCMR 773), *Raja Mujahid Muzaffar’s case* (2012 SCMR 1651), *Messrs M.N Construction Company’s case* (PLD 2013 Islamabad-85), *Flying Cement’s case* (PLD 2015 Lahore 146), *National Electric Power Regulatory Authority’s case* (2016 SCMR 550), *Haroon-ur-Rashid’s case* (2016 SCMR 931), *Messrs Muhammad Tufail’s case* (PLD 2017 SC-

53), and Syed Rehan Ahmed's case (2017 SCMR 152),

4. In response, Mr. Waqar Ahmad Khan, the worthy Additional Advocate-General vehemently opposed the contention of the worthy counsel for the petitioner and submitted that Rule 3(2)(c) was *intra vires* of KAPPRA Act in view of the clear provisions for providing direct sourcing contained in Clause (b) of sub-section (2) of section 33 of KAPPRA Act, read with the authority to frame rules, as provided under section 36 *supra*. As far as the restrictive provisions provided in the *proviso* to sections 14-B of KAPPRA Act was concerned, the worthy AAG contended that it did not effect procurements allowed under the KAPPRA Act; that the restrictions placed on the *procuring entity* in the *proviso* to section 14B *supra* cannot be read as restriction on the Government. In this regard, he explained from the data of C&W Department collected from ten Divisions of the Province that a total of five hundred and seventy contracts had been awarded through open competitive bidding

with exception of only the three, which were awarded through direct sourcing to Frontier Works Organization in the financial year, 2016-17.

5. The worthy counsel for the KAPPRA/ respondent No.3 contended that section 33(2) (b) of Khyber Pakhtunkhwa Public Procurement Regulatory Authority Act, 2012, expressly allowed direct contracting of procurements from public sector organization within Pakistan, the mechanism for the same was provided in Rules 3(2) (c), 10(C) and 18 (c) of Khyber Pakhtunkhwa Public Procurement Regulatory Authority Rules, 2014; that a statute is to be interpreted holistically and no word should be rendered meaningless or declared as redundant; that each Provincial Government was to act independently in its constitutionally defined spheres of legislative and executive competence; that this Hon`ble Court while deciding W.P.No.4091-P/2016 vide judgment/order dated 07.12.2016 had already approved the KAPPRA Rules; that the rule of constitutional interpretation was that there exists a presumption in favour of constitutionality of

legislative enactment, and that law *leans* to protect legislation than to strike it down. Reliance was placed on PLC 1977 (LHC) 587(B), Muzaffar Khan's case (2013 SCMR 304), Multiline Associates's case 1995 SCMR 362 and Dr.Tariq Nawaz's case 2000 SCMR 1956.

6. The worthy counsel for the PDA/ respondent No.4 also opposed the contention of the worthy counsel for the petitioner and submitted that the impugned rule was *intra vires* and the five projects were legally awarded to NLC for the projects to be completed expeditiously, which was difficult in case of open bidding process . Reliance was placed on Zaman Cement Company's case (2002 SCMR 312), Syed Aizad Hussain's case (PLD 2010 SC 983) and Lahore Development Authority's case (2015 SCMR 1739).

7. Valuable arguments of the worthy counsel for the parties were heard and record carefully perused.

8. Let us first address the challenge made by the petitioner to the *vires* of Rule 3(2)(c) of KAPPRA Rules, contending it to being *ultra*

vires of KAPPRA Act. No doubt, the intention of the legislature is apparent from the clear principle of governing the public procurements, as expressly provided in sections-3 and 14-A of the KAPPRA Act, which reads that;

“3.General principles of public procurement.- *All public procurement shall be conducted in such a manner as provided in this Act, rules and regulations made under this Act and shall promote the principles of transparency, economic, value for money, accountability and swift grievance handling.”*

9. To the extent of the general theme envisaged in KAPPRA Act, promoting *transparency, open and fair competition* in public procurements process, there is no cavil to the stance taken by the worthy counsel for the petitioner. However, the legislature in its wisdom has also provided for an alternative procuring method through direct sourcing in certain specific circumstances. For allowing this exceptional procuring method, a strict regulatory regime has been incorporated in terms of provisions contained in section 14 of the KAPPRA Act, which provides that;

“14. Responsibility of procuring entity.”

(1) *Each Procuring Entity shall be responsible for carrying out public procurement subject to the provisions of this Act, and the rules the administrative instructions and the standard bidding documents made there-under;*

Provided that-

(i) *Government on a specific request of the procuring entity or in public interest may exempt a procuring entity from some or all of the provisions of this Act for which reasons shall be recorded in writing.* *Government may seek comments of the Authority, if so required;*

(ii) *For District Governments, the procuring entity may route a justifiable case for exemption to the Government by the District Coordination Officer, through Secretary Local Government Department;*

(iii) *Government may exempt the procurement of an object or a class of objects, in national/public interest, from some or all provisions of this Act, for which reasons shall be recorded in writing; and*

(2) *Government shall notify the exemption and publish the same for public consumption in the print media.*

(emphasis provided)

10. The bare reading of section 14 of KAPPRA Act reveals that the *Government* on the specific request of the *procuring entity* or in *public interest* may exempt a procuring entity from ***some or all*** of the provisions of the KAPPRA Act. This discretion vested in the Government is conditional

upon *reasons of public interest*, which are to be recorded in writing and have to be made public in the print media to promote transparency and avoid abuse of authority. Surely, the legislature has aptly provided for the said discretion of the Government to be structured.

11. In addition to the wide powers vested in the Government to exempt the procuring entity from *some or all* of the provision of the KAPPRA Act including the much cherished open, competitive bidding process provided under section 3 read with sections 14A, 14B, 23, 24 and 33 of the KAPPRA Act, the legislature has also provided specific circumstances, stated in the *proviso* to section 33, wherein the exception to the general policy of open bidding has been made permissible, which reads that;

“Section-33 *Methods of procurement.*

- (1) *The procuring entities shall resort to open competitive bidding as the preferred method of procurement.*
- (2) *The selection of the procurement procedure shall be made in accordance with the rules, and shall be approved by the concerned procuring entity prior to commencement of any procurement proceedings.*

Provided that the procuring entities may exceptionally use other methods, including negotiations, in the following

eventualities in accordance with the rules to cater for;

- (a) *Procurements of small value through petty purchase or through request for quotations; and*
- (b) *Procurements through direct contracting in an emergency caused by nature or governments, for urgent requirements caused by unforeseeable events, single repeat order not exceeding fifteen percent of the original procurement, for considerations of intellectual property, if price is fixed by a Government in the country or procurement from another procuring entity/public sector/ organization within Pakistan.*

(emphasis provided)

12. Relevant to the challenge made by the petitioner in the instant case is clause (b) of the *proviso* to section 33 of the KAPPRA Act, whereby, *inter-alia*, procurement from another public sector organization within Pakistan has been exempted from the open competitive bidding process. This exempting provision has also been made subject to the conditions, which are to be governed under the rules to be framed by the Government under the KAPPRA Act. It is for this purpose that clause-c of sub-section (2) of Rule 3 of KAPPRA Rules was framed. The said rule provides that;-

“3. Applicability of these rules.

- (1) *These rules shall be applicable to all public procurements.*
- (2) *Under following circumstances deviation from the requirements of advertisement and response time under these rules is permissible;*
 - (a) *In cases of emergency as provided in the National Disaster Management Act, 2010 (Act No.XXIV of 2010), subject to the condition;*
 - (i) *That all such procurements along with its emergent nature has to be recorded by the Procuring Officer and approved by the technical head of the procuring entity under intimation to the Principal Accounting Officer, Secretary at Provincial or Deputy Commissioner at District level;*
 - (ii) *That these have to be immediately intimated to the Accountant General Office or District Accounts Office, as the case may be;*
 - (iii) *That quantities in all such procurements shall be limited to the assessed requirement of emergency only; and*
 - (iv) *That these shall be used only for procurements upto maximum for three months, which may be extended for such a period that Government may deem fit, depending on the nature of emergency;*
 - (b) *The procurement of sensitive nature and related to National Security; Provided that the direct sourcing of all such procurements shall be duly recorded; and*
 - (c) *The direct sourcing to a government organization for provision of works; goods or services under a cost plus or fixed contract provided that the Public Sector Organization shall not involve a private sector enterprise as a partner or in the form of a joint venture or a sub-contractor. The government organization shall be totally government owned and controlled or semi-autonomous and autonomous agencies under the*

administrative control of Federal Government or Provincial Government."

(emphasis provided)

13. As far as the contention of the worthy counsel for the petitioner regarding section 14B of the KAPPRA Act is concerned, let us review the same;

"14B.Competition. *Except as otherwise provided for in this Act and the Rules, all procurement shall be conducted so as to maximize competition and to achieve value for money.*

Provided that the exception shall be made only for acquisition of services for reasons to be recorded in writing by the procuring entity."

(emphasis provided)

14. On simple reading of the aforementioned section, the intent of the legislature is clear from the commencing words employed therein. The restrictive scope of its applicability, and exclusion of any process permissible under the KAPPRA Act or the KAPPRA Rules, is evident. Thus, when sections- 14 and 33 of KAPPRA Act, expressly provides for exempting from open competitive bidding in procurements of *works* from public sector organization, then the restriction provided in the *proviso* to public procurement of *services* would

not be applicable to the case in hand, and the challenge so made by the petitioner to the impugned rule 3(2) (c) is legally misplaced.

15. Moving on to the challenge made to impugned KAPPRA Rules on the touch stone of Articles 4, 18 and 25 of the Constitution, suffice it to state that as sections 14 and 33 of the KAPPRA Act are in the field and having not been impugned by the petitioner, striking down the provision for direct sourcing in public procurements in the KAPPRA Rules would **not** be legally appropriate.

16. Having dealt with the challenge made to the *vires* of Rule 3(2)(c) of KAPPRA Rules, let us now move on to the award of the five contracts by the Provincial Government to NLC, the particulars of the same are;-

- i)- Flyover at Warsak road-Ring road intersection, Peshawar;**
- ii)- Level-II flyover at GT road and Ring road intersection (Pir Zakoori flyover), Peshawar;**
- iii)- Internal road rehabilitation projects in Peshawar City;**
- iv)- Peshawar Uplift programme;**
- v)- Flyovers at Jawad Chowk and Katlang Chowk Mardan.**

17. The summary for approval of the above five projects for the worthy Chief Minister Khyber Pakhtunkhwa was initiated by the worthy Secretary C&W, Government of Khyber Pakhtunkhwa, which was finally approved by the worthy Chief Minister and the Cabinet. However, no formal work orders have been issued in favour of NLC to commence the *works* entailed in the impugned five projects.

18. The perusal of the record provided by the parties, revealed the following striking features:

1. Despite the initiation of the approval for the projects by the worthy Secretary C&W, Peshawar Development Authority (“PDA”) was made the *procuring entity*.
2. The PDA was made the *procuring entity* for projects outside the territorial limits of Peshawar and in the instant case for a project in District Mardan.
3. The Director General, PDA was awarded/ sanctioned a *honoraria* of Rs.1.000 million vide order dated

7.6.2016, and the same was later on also extended to the Secretary Local Government. This grant was sanctioned despite the clear objecting note of the worthy Secretary Finance, Government of Khyber Pakhtunkhwa, dated 5.6.2016.

4. The sanction of the five projects by the Provincial Cabinet was obtained after the worthy Chief Minister had approved the same and that too during the pendency of the instant petition.
5. The negotiated rates approved for the five projects awarded to NLC were beyond the governmental approved Market Rate Schedule (“MRS”) of 2016.
6. The rates for the five projects approved by the worthy Chief Minister, does not justifiably reason the objecting note of the worthy Secretary Finance duly endorsed by the worthy Chief Secretary both dated 16.11.2016 regarding the exemption from the Finance Department Notification dated 10.04.2016.
7. The reasons for the direct sourcing of the five projects to NLC required to

be published under sub-section (2) of section 14 of the KAPPRA Act has not been complied with.

19. When the worthy Advocate-General was confronted with the above noted manner in which the approval was granted by the Provincial Government to the impugned five projects, he undertook to ensure that the Provincial Government would consider the impugned contracts afresh, strictly in accordance with the law, and in particular the provisions provided for direct sourcing in the KPPRA Act and the Rules. The worthy Advocate-General further submitted that the respective administration departments of the Provincial Government would be the *procuring entity* in seeking the said public procurements.

Accordingly for the reasons stated herein above, this Court holds and directs that:

(I) The provisions contained in Rule-3(2)(c) of the Khyber Pakhtunkhwa Public Procurement of Goods, Works and Services Rules, 2014 are *intra vires* of the Khyber

Pakhtunkhwa Procurement Regulatory Authority Act, 2012.

(II) Direct sourcing of public procurements of *works* is permissible under sections-14 and 33 of the KAPPRA Act, read with Rule-3 of the KAPPRA Rules.

(III) Direct sourcing of public procurements of *works* being an exception to the general rule of open bidding, the conditions precedent enumerated for the same under the KAPPRA Act and KAPPRA Rules are to be strictly followed.

(IV) The mode and manner in which the approval of the five projects has been granted to National Logistic Cell by the Provincial Government through direct sourcing is in complete violation of the spirit of KAPPRA Act and KAPPRA Rules.

(V) The sanction accorded to the impugned five projects by the worthy Chief Minister of Khyber Pakhtunkhwa is against the clear provisions of the KAPPRA Act and the

settled principles of law and are devoid of legal force, and thus set aside.

(VI) “Government” envisaged under section-14 of the KAPPRA Act, means the Cabinet of the Province of Khyber Pakhtunkhwa.

(VII) Peshawar Development Authority cannot be a *procuring entity* for a project in Mardan.

(VIII) In case the Government intends to grant the five projects through direct sourcing, the objecting note of the worthy Secretary Finance duly endorsed by the worthy Chief Secretary of Government of Khyber Pakhtunkhwa, both dated 16.11.2016 have to be placed before the worthy Cabinet, while deliberating upon its approval under the enabling provisions of the KAPPRA Act.

(IX) In case the Provincial Cabinet agrees to grant direct sourcing, the *reasons* for the same are to be published in print media, as per requirements of Sub-section-2 of Section-14 of the KAPPRA Act.

(X) That the *honoraria* of rupees one million granted to the worthy Director General, PDA, and the worthy Secretary Local Government is beyond the terms of their appointments and rules, and hence declared illegal, and in case the same have been disbursed, the same be returned to the public exchequer.

The writ petition is disposed of in the above terms.

Announced:

Dated. 12.07.2017

CHIEF JUSTICE

J U D G E

F.Jan/*