

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.491 of 2017

Date	Order with signature of Judge
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Present:

Mr. Justice Muhammad Ali Mazhar

SINOTEC Co. Limited.....Plaintiff

Vs.

Province of Sindh & others.....Defendants

For hearing of CMA No.2651 and 3820/2017

Dates of hearing: 19.4, 26.4, 29.6 & 30.6.2017.

Mr. Kashif Sarwar Paracha, Advocate for the Plaintiff.

Ms.Chen Wan, Representative of the Plaintiff

Mr. Chris Hall, (Chief Resident Engineer, Project Implementation Consultants)

Mr.Shafqat Hussain Wadho, P.D, S.B.I Project along with Mr.Abdul Razzaque Memon and Dr.Ali Asghar Mahessar.

Mr.Irfan Ahmed Qureshi, Advocate for the Defendant No.3.

M/s. M. Anas Makhdoom & Ahmed Farhaj, Advocates for the Defendant No.6.

Mr. Ziauddin A. Junejo, Addl. A.G. Sindh.

Muhammad Ali Mazhar, J: This suit has been filed to entreat a declaration that the acceptance of financial bid of defendant No.6 for the award of tender for Sindh Barrages Improvement Project (Contracts G2 Barrage Rehabilitation Works, Guddu, Kashmore) is in violation of Sindh Public Procurement Rules 2010. The

plaintiff has also impugned the letters dated 08.2.2017 and 19.4.2016 to the extent of pre-qualification of the defendant No.6 and sought the directions against the defendants No.1 to 4 to complete the procurement process in accordance with the Sindh Public Procurement Rules 2010.

2. The evanescent facts are that the plaintiff is a multinational integrated technology and services provider and delivers international EPC/Turnkey projects in the areas of infrastructure development, renewable energy, and environmental protection. The plaintiff participated in the tender process of a World Bank financed Sindh Barrages Improvement Project IDA CREDIT 5684-PAK Contract: SBIP/G2 Building Works at Gudu Barrage, Kashmore and Sukkur Barrage, Sukkur; and Barrage Rehabilitation Works at Guddu Barrage, Kashmore (Tender). The tender was essentially in relation to 'electrical and mechanical works' or 'electromechanical works' which are in relation to the barrage gates and its barrage gate mechanics. On 30.8.2016, the defendant No.3 announced the defendant No.6 as lowest bidder for the tender. The plaintiff on or about October,2016 came to know that the defendant No.6 has no experience in electromechanical works but only carried out civil works in the past. The plaintiff filed a suit No.2445/2016 which was disposed of on 23.11.2016 with the directions to the Review Committee to decide the grievance of the plaintiff. However on 08.2.2016, the decision of Review Committee was informed to the plaintiff that the Sindh Public Procurement Rules 2010 are not applicable in the instant tender and the complaint was dismissed.

3. The plaintiff has moved an interlocutory application under Order 39 Rule 1 & 2 C.P.C (C.M.A No.3820/2017) to solicit restraining order against the defendant No.1 to 5 not to award tender in question to the defendant No.6. Whereas a further application has been filed under Section 151 C.P.C, (C.M.A No. 2651/2017) for suspending the operation of the letter of acceptance dated 22.2.2017 whereby the bid of defendant No.6 was accepted and they were called upon to furnish performance security. With this application, the plaintiff has also attached a copy of letter dated 7.3.2017 through which the defendant No.3 communicated the regret to the plaintiff that on evaluation, the plaintiff's bid was not found successful.

4. The learned counsel for the plaintiff argued that the defendant No.6 was declared pre-qualified in violation of Rule 4 and 13 of Sindh Public Procurement Rules 2010. The pre-qualification and bidding process was non-transparent and the defendant No.1 to 3 acted with bias and mala fide intention. The defendant No.6 has no specific construction experience particularly electro-mechanical works so they failed to meet the condition 4.2 (a) and 4.2 (b) of tender document. The defendant No.6 was pre-qualified on the basis of Jinnah Barrage Rehabilitation Project, however their projects did not meet requirements of the 4.2(a) and 4.2(b) of PQD. The Jinnah Barrage Project was a Joint Venture Project by defendant No.6 with another Chinese company namely China National Electric Wire & Cable Corp ('CCC'). The defendant No.6 had completed civil work and its JV partner performed Electro-Mechanical work which fact is clearly reflecting from Joint Venture Agreement of Jinnah Barrage Project. The defendant No.6 has neither applied

with any joint venture member nor can sub-contract the electro-mechanical work. Furthermore, Clause 24.3 of ITA clarifies that maximum percentage of permitted subcontracting is 20% of the total value of the contract but in the instant project 60% of the work is electro-mechanical.

5. The learned counsel further counteract the summation of the Project Implementation Consultant (PIC) with the plea that his submissions are contradictory to the Pre-Qualification Report. The Consultant in his brief note submitted that defendant No.6 met the requirement of 4.2 (a) of the PQD on the basis of Jinnah Barrage Project, while for 4.2 (b) condition, New Khanki Project of defendant No.6 was accepted on the basis that condition of substantial completion in the last five (5) years is not required for 4.2(b). However, from Pre-Qualification Report of Consultant, it is clear that even for 4.2(b) requirement, defendant No.6 was pre-qualified on the basis of Jinnah Barrage Project and not on New Khanki Project. The learned counsel further pointed out that one of the participant M/s. Shah Rukh-CLIC Joint Venture was disqualified for relying on a project not completed in the last five (5) years as per 4.2(a) and (b). Similarly, another participant namely M/s. PCCC was disqualified because M/s. PCCC was claiming experience of its joint venture partner M/s. Sinohydro Corporation. It was further averred that the defendant Nos.1 to 3 have not only acted in a nontransparent and unfair manner by violating the terms and conditions of the PQD and Rule 4 of the Sindh Public Procurement Rules 2010 but they have also acted with malice. The learned counsel added that this court may review the cases where exercise of

public power is found to have been violative of law or tainted with mala fide.

6. While focusing on the minutes of Bid opening meeting dated 30.8.2016 the learned counsel contended that the plaintiff had conveyed no objection to bid opening process which does not mean that the plaintiff has waived its rights of challenging the process. The lowest bid of defendant No.6 does not create any right. Even after being declared lowest bid, defendant No.3 is required to see whether it is substantially responsive to the terms, conditions and specifications in the PQD and Bidding. On 23.11.2016 the Suit No.2445/2016 was disposed of without prejudice to the rights of the parties to avail the remedy including plaintiff who may raise the pleas as in the instant suit. The defendant No.3 issued letter of acceptance despite pendency of the grievance as well as the above-mentioned suit which shows the malice and bias in favour of defendant No.6. The World Bank Guidelines does not make the SPPR 2010 inapplicable nor oust the jurisdiction of this court hence reliance on Rule 5 is misconceived.

Judicial precedents cited by the plaintiff's counsel:

1. AIR 2005 Delhi 298 (Patel Engineering Ltd. & another vs. National Highways Authority of India and others). Contract Invitation to offer in commercial transaction. Project executed as Joint Venture (JV) by two firms. Correct perspective is to see actual experience or participating entity and not label of firm.

2. AIR 1991 Punjab and Haryana 38 (M/s. Driplex Water Engineering Limited vs. The Punjab State Electricity Board and another). If at all, it wanted to consider the experience of a collaborator as experience of the tenderer it should have given notice of this fact in the notice inviting tenders in order to enable the other concerns or companies to file tenders on the basis of their collaboration with other concerns. Due to lack of requisite experience, not only the huge amount of the public exchequer is at stake. Thus, it being a matter of immense public importance, the High Court inclined to interfere at this

stage. The fact that the bid of the tenderer was lowest would not be of much consequence.

3. 2016(3) Bom CR 552, [2016] 135 SCL 122 (Bom) (Hitech Audio Systems Pvt. Ltd. vs. The State of Maharashtra and others). Once tender process did not meet requirements of fairness and reasonableness, then there was no alternative but to interfere.

4. 1999 (4) ALD 5, 1999 (4) ALT 176 (Lanco Constructions Ltd. vs. Govt. of A.P., Irrigation). The administration of the Government must be fair and transparent and there should not be any scope for either suppression or suspicion. The petitioner has no vested right to the award of work, but he has a right to claim that his bid should be considered objectively in a fair and proper atmosphere more especially when his bid was found to be lowest and recommended by the Superintending Engineer and Chief Engineer.

5. (1979) 3 Supreme Court Cases 489 (Ramana Dayaram Shetty vs. International Airport Authority of India and others). Administrative authority is equally bound by the norms, standards and procedures laid down by it for others – Disregard of the norm or standard would invalidate its action unless based on some valid principle which is neither irrational or unreasonable nor discriminatory. Standard of eligibility laid down in the notice for tenders, held, cannot be departed.

6. 2014 SCMR 676 (Asaf Fasihuddin Khan Vardag vs. Government of Pakistan & others). Discharge of constitutional duty by the State functionaries in deviation to the spirit of the Constitution was anathema to the Constitution and was challengeable on diverse grounds including mala fide and colourable exercise of power for ulterior motive. In exercise of power of judicial review it was not possible for the judiciary to confer validity and immunity to the acts or actions which suffered from mala fide.

7. PLD 2014 S.C. 47 (Habibullah Energy Limited vs. WAPDA & others). All public functionaries must exercise public authority, especially while dealing with public property, public funds, and assets; in a fair, just, transparent, and reasonable manner, untainted by mala fide without discrimination and in accordance with law.... While exercising its jurisdiction, superior courts neither sit in appeal over administrative actions nor interfere on account of inconsequential deviations; however, where Administrative Authority acted in a discriminatory manner, and action failed the test of reasonableness, transparency and/or was otherwise unjust and unfair or suffered from mala fide, the courts not only were vested with the jurisdiction to set aside such actions but any failure in such an eventuality to exercise power of judicial review....

7. The learned counsel for the defendant No.3 argued that in fact seventeen firms participated in the tender proceedings but only six were pre-qualified. The defendant No.6 was declared successful after complying

with all requisite formalities in the transparent manner. The name of qualified firm was announced four months back but no firm raised any objection. The invitation of bid was issued on 16.5.2016 and bids were opened on 25.08.2016. The defendant No.6 bid of Rs.9.5 Billion was found lowest whereas the plaintiff's submitted the bid for Rs.12.5 Billion while China harbor Engineer Guanxi Hydroelectric Construction Bureau submitted their bid for Rs. 18.9 Billion. The defendant No.6 also submitted their experience in the related fields. In compliance of the orders passed in Suit No.2445/2016, a meeting of review committee was convened by the Sindh Public Procurement Regulatory Authority on 08.2.2017 and they decided that the instant procurement does not come within the ambit of SPPRA and with this observation they rejected the complaint.

8. He added that the project is assisted and financed by the World Bank which has been commenced according to the World Banks Guidelines, procurement under IBRD loans and IDA credits January, 2011 updated in July, 2014. The project also hired Food and Agriculture Organization (FAO) as project management consultant for the procurement process and transparency international acted as observer in all bid openings. The work order includes the replacement of the barrage gates, rehabilitation and replacement of the mechanical electrical equipment for operating the barrage gates, provision of equipment and workshop for the future operation and maintenance of the barrage, minor repairs to the barrage and head work structures and construction within the river of a new left hand pocket divide wall. The plaintiff failed to allege any mala fide. The World Bank on 18.04.2017 through email informed

the Project Director that they have reviewed the procurement process and concurred the final evaluation conducted by the Project Director, so there is no pending issue from the Bank side. They also replied to the Project Director that the application moved by the Sinotec Engineering (plaintiff) has no force. The learned counsel maintained that after completion of pre-qualification process, the tender was awarded to the defendant No.6. He referred to judgment of apex court reported in **PLD 2017 S.C. 83** and expressed that in this case as well, the procedure was completed according to the World Bank Guidelines therefore the plaintiff has no right to challenge the proceedings conducted fairly and transparently.

9. The learned counsel for the defendant No.6 argued that the plaintiff is motivated by its own self- interest and not in public interest. The result of prequalification in particular the prequalification of Descon was intimated to Sinotec on 19.4.2016 and the bidders (including Sinotec) were asked if they had any objections at the pre-bid meeting on 13.6.2016 but no objection was raised by Sinotec. Bidders were then again asked the objections at the Bid Opening Meeting on 30.8.2016, but no objection was raised by the plaintiff. They filed complaint to the Review Committee of SPPRA on 1.11.2016 after seven months of pre-qualification. The defendant No.6 submitted its bid for Rs.9.58 billion whereas the plaintiff bid was for Rs.12.49 billion. If the plaintiff succeeds, it has a net gain of over Rs.3 billion, which additional amount will be borne by the people of Pakistan. The decision to prequalify a party is that of the IDA and was reviewed by various outside consultants. The present proceedings are not maintainable for the reason that a

decision to prequalify a party is a commercial or policy decision, which is beyond the scope of judicial review and requires specialized knowledge and further on the ground that the International Development Association/World Bank has not been made party. The defendant No.6 (Descon) met the criteria set out in the pre-qualification documents and it has considerable requisite experience. He further argued that the scrutiny of SBIP related documents i.e Project Agreement, the Financing Agreement and the applicable World Bank Guidelines clearly establish that the entire process including pre-qualification was within the control of and all decisions in respect thereto were made by the IDA so the Review Committee rightly decided that it has no jurisdiction to decide the complaint filed by the plaintiff. The defendant No.6 was considered fully compliant with this requirement because of its experience of undertaking the Jinnah Barrage and Uch II Projects. The defendant No.6 has also filed a number of additional documents setting out its past experience of large and complex infrastructure projects with elements specific to the present project i.e. electromechanical elements such as gates and regulators. The email dated 15.2.2017 filed by the learned A.G.Sindh on 4.5.2017 shows that the World Bank even after filing of the complaint by the plaintiff and the present and previous suits gave its no objection for awarding the contract to defendant No.6.

**Judicial precedents cited by
the counsel for defendant No.6:**

- 1. 2012 SCMR 455 (Dr.Akhtar Hassan Khan & others v. Federation of Pakistan & others). Article 184(3). Constitutional petition. Judicial review of award of contract by government. Scope and limitations. Duty of the court is to confine itself to the question of legality and its concern should be, whether a decision-making authority, exceeded its powers; committed an error of law; committed a breach of the rules of natural justice;**

reached a decision which no reasonable tribunal would have reached, or abused its powers. Question whether a particular policy of a particular decision taken in the fulfillment of that policy is fair, is not for the court to determine and it is only concerned with the manner in which those decisions have been taken. Court must exercise its discretionary powers of judicial review with circumspection and only in furtherance of public interest and not merely for making out of a legal point and it should always keep the larger public interest in mind to decide whether to interfere or not. Only when the public interest overwhelms any other consideration, the court should interfere.

2. PLD 2017 S.C. 83 (Messrs Power Construction Corporation of China Ltd. v. Pakistan Water and Power Development Authority & others). The court held as under:-

“26. Developing countries like Pakistan may need to invest in a large infrastructure projects to ensure its economic and social development. Such projects are usually very expensive and may require huge funds which may have to be raised through loans. Such loans may be obtained from International Financial Institutions, which are a reality in today's world and are catered for in the law i.e. International Monetary Fund and Bank Act, 1950.

If the loans are obtained from International Financial Institutions like the IDA, the same come coupled with conditionalities, which includes the mode and method of the award of contracts for the Projects and the process of pre-qualifications of bidders. Such conditionalities are also catered for in the law, as is evident from Rule 5 of the PPRA Rules, 2004, reproduced herein above. Thus, obviously, the World Bank Guidelines, including paragraph 2(a) of the Appendix-I thereof and its enforceability and effectiveness are contemplated in law.

27. In the instant case, the decision of the IDA to pre-qualification of the Petitioner Company and make a “reasonable request” for deletion of its name from the list of pre-qualified bidders is not the subject-matter of the instant lis, in as much as, the said decision and request by the IDA was not challenged in the Constitutional jurisdiction nor was the IDA impleaded as a party to the proceedings. In the absence of any finding, in this behalf, it is legally impossible to adjudicate upon the reasonableness or otherwise of the “request” by the IDA or to determine whether the Respondent/WAPDA was obliged to accede to such request. The decision of the Respondent/WAPDA not to agitate the matter further with the IDA at the behest of the Petitioner Company is not too difficult to discern. It appears that a pragmatic commercial decision was taken not to jeopardize the funding from the IDA and thereby putting the entire project at risk. Such decision falls within the realm of the Public Policy and the Courts in the exercise of their powers of judicial Review, ordinarily, do not interfere therewith and exercise judicial restraint, as has been held by this Court not only in the case, reported as Dossani Travels Pvt. Ltd and others v. Messrs. Travels Shop (Pvt.) Ltd. and others (PLD 2014 SC 1) but also in the judgment, reported as Cutting of Trees for Canal Widening Projects, Lahore: In the matter of Suo Motu Case No.25 of 2009 (2011 SCMR 1743). While we may not totally agree with the interpretation of the paragraph 2(a) of the Appendix-I of the Guidelines, as has been

done by the learned High Court by way of the impugned judgments but such an exercise is not necessary by this Court, as in our opinion, the Constitutional Petition filed by the Petitioner Company was not maintainable, as it sought to encroach into the domain of the Policy Matters in respect whereof the judicial restraint is to be exercised”.

10. Mr. Chris Hall, Chief Resident Engineer (Project Implementation Consultant) had also addressed the court and presented concise annotation that prequalification document was based on the Standard World Bank Document obtained from the World Bank Website. Modifications to the standard documents were not permitted except where provision is made for contract-specific criteria. The prequalification document was developed in the year 2015 by the project Implementation Consultants (PIC). The World Bank on 21.09.2015 conveyed their no objection to proceed with the prequalification process. The Prequalification for Guddu Barrage was duly advertised in accordance with WB guidelines on 04.10.2015. Seventeen companies submitted applications and the Prequalification Assessment Report (PQAR) was prepared by the PIC and forwarded to PMO for review which recommended six applicants out of the seventeen. The WB reviewed the document and gave their no objection on 16.04.2016. The applicants were notified the outcome of prequalification assessment on 19.04.2016. Section III of the Prequalification Document contains the methods, criteria, and requirements to evaluate Applicants. 4.1a General Construction Experience seeks to establish that the Applicant's track record in Construction activities over at least the last 5 years. 4.2.a requires the Applicant to demonstrate that it has worked over the last five years, on contracts of a specified size (one contract exceeding \$ 110 million or two contracts exceeding \$ 55 million). Item

4.2a is intended to demonstrate that the applicant is capable of the management and execution of substantial components of challenging major projects. The defendant No.6 submitted the details of 38 Contracts executed over the last 22 years in Pakistan and internationally. Of these 38 Contracts 10 are equal to or exceed US\$ 55 Million and 5 exceed US\$ 110 Million. Descon's eligibility and bona fides in relation to Item 4.1a are not contended by the plaintiff. PIC assessed Descon fully compliant with this item. They also submitted details of three contracts to demonstrate compliance with Item 4.2a. such as Rehabilitation of Jinnah Barrage valuing PKR 11,794 million/US\$ 130.6 million. The defendant No.6 was the lead partner in the JV with a 70% share. A letter from the Engineer (M/s. ACE, Nespak and SMEC) was provided confirming completion of civil and mechanical works. In the New Khanki Barrage (July 2013–ongoing) contract valuing PKR 21,300 million/US\$ 222.97 million, Descon is the main contractor. A letter from the Engineer (M/s. SMEC, Atkins, EGC, Barqaab JV) was provided confirming 65% complete and 450 MW UCH-II combined Cycle Power Plant (November 2010 to August 2013) Contract value PKR 11,344 million/US\$ 134 million in which also Descon is the main Contractor. A letter from the Engineer (M/s. Lahmeyer) was provided certifying successful testing carried out in April, 2014. PIC assessed Descon's use of Jinnah Barrage as acceptable for the reasons that it was conducted over last 5 years, Descon's share of the value of the Works executed was US\$ 91.4 million i.e. greater than £55 million, and the works executed are similar in complexity and size to those of Contract SBIC/G2. However New Khanki Barrage was excluded from this list by PIC as it was not

substantially (80%) complete at the time of submission of applications.

11. The learned A.A.G too argued that Sindh Public Procurement Rules 2010 are not applicable in the instant tender process hence the plaintiff cannot rely on it. Being lowest bid of the defendant No.6, their bid was accepted after due consideration by the chain of command in a fair and transparent manner. The plaintiff has not approached this court to point out any illegality or complaining to any favoritism or corruption in the larger public interest as whistleblower but they have approached with malice to mileage personal vendetta and vengeance just for the reason that their bid was rejected being higher than the bid offered by the defendant No.6. For rest, the learned A.A.G adopted the arguments advanced by the learned counsel for the defendant No.3.

12. Heard the arguments. To begin with, I would like to jot down the backdrop and scenery of erstwhile legal battle set in motion by the plaintiff for challenging the tender process. The chronicle indicates that the plaintiff had filed Suit No.2445/2016 in which they strived for declaration that the letters dated 1.11.2016 and 19.4.2016 proclaiming the prequalification of the defendant No.6 was illegal. They sought further declaration that the award of tender to the defendant No.6 is illegal. Directions were also entreated against the defendant No.5 in the said suit to transfer the plaintiff's complaint dated 1.11.2016 to the Review Committee constituted by the Sindh Public Procurement Regulatory Authority. When the suit was fixed before the learned Single Judge on 23.11.2016, the matter was disposed of with the directions to the Review Committee to decide the

grievance of the plaintiff. The learned Single Judge further observed that this would be without prejudice to the right of the parties to avail remedy including the plaintiff subsequently if they are found aggrieved by the decision of Review Committee. However, till the decision of the Review Committee it was directed that the subject contract shall not be awarded. The record reminiscences that a meeting of the Review Committee of Sindh Public Procurement Regulatory Authority was subpoenaed in view of the order passed in Suit No.2445/2016 and the committee decided the matter as under:-

“The Committee after hearing the arguments of the complainant (M/s.Sinotec Co. Ltd.) and all others present in the meeting has decided that the Sindh Public Procurement Rules pertaining to Review Committee is not applicable in the instant procurement and the same has to be decided/ redressed in the light of the World Bank Procurement Procedure/Guidelines.”

13. As a domino effect and fall out of the abovementioned decision, the plaintiff instituted this lawsuit for similar relief and when the matter was fixed in the court on 24.3.2017, the learned Judge observed in the order that the award of the tender in favour of defendant No.6 shall be subject to the outcome of the pending applications. At the very outset, I would like to analyze and denote Paragraph No.4 of the plaint wherein the plaintiff self-admitted that they participated in the tender process for a World Bank financed project pinpointed as *“Sindh Barrages Improvement Project IDA CREDIT 5684-PAK Contract: SBIP/G2 Building Works at Guddu Barrage, Kashmore and Sukur Barrage, Sukkur; and Barrage Rehabilitation Works at Guddu Barrage, Kashmore”*. The finance agreement for Sindh Barrages Improvement Project between Islamic Republic of Pakistan and International Development Association

dated 26.8.2015; project agreement for Sindh Barrages Improvement Project between International Development Association and Province of Sindh executed on 26.8.2015 and guidelines for procurement of goods, works and non-consulting services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers are already on record. The purpose of guidelines is to enlighten the mechanics and nitty-gritties for carrying out a project which also provides the minutiae with regard to the finance in whole or in part by a loan from International Bank for Reconstruction and Development (IBRD), a credit or grant from the International Development Association (IDA), a Project Preparation Advance (PPA), a grant from the Bank or a Trust Fund administered by the Bank and executed by the recipient. In the general conditions the responsibility for the implementation of the project for the award and administration of the contracts under the project rests with the Borrower and the Bank for its part, is required to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted with due attention to consideration of economy and efficiency. The guidelines inter alia encompass modus operandi and protocol for International Competitive Bidding, Bidding documents, Bid Opening, Evaluation and Award of Contract and other methods of procurement. Whereas the Appendix 1 pertains to review by the Bank of procurement decisions and publication of awards of contracts, whilst the Appendix 2 germane to guidance en route for the bidders with some other prerequisites and stipulations for the accomplishment and fulfillment by the borrower. Where prequalification is used, the borrower shall before prequalification submissions are invited is required to

furnish the Bank with the draft documents to be used, including the text of the invitation to prequalify, the prequalification questionnaire, and the evaluation methodology together with a description of the advertisement procedure to be followed with added incumbent and inexorable obligation that after receiving bids and its evaluation, the borrower shall before a final decision on the award, furnish the credentials to the Bank for its review with a detailed report by expert acceptable to the Bank on the evaluation and comparison of the bids received.

14. The *raison d'être* of accentuating the background is to put on view that much emphasis was made by the plaintiff's counsel that defendants Nos.1 to 3 failed to ensure the procedure laid down for awarding tender or its prequalification under the Sindh Public Procurement Rules, 2010. The plaintiff stick around to the prayer not in this suit alone but in the previous suit also that the present bidding process should be annulled and fresh tender process should be initiated under the Sindh Public Procurement Rules, 2010. An austere survey to the niceties of Rule 5 of the Public Procurement Rules, 2004 makes it clear that whenever these rules are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State or States or any international financial institution the provisions of such international treaty or agreement shall prevail to the extent of such conflict. Homogeneous rider is postulated under the Rule 5 of Sindh Public Procurement Rules, 2010 which for the ease of reference is reproduced as under:-

“5.Conflict with International and Inter-Governmental Agreements. In the event that these rules are inconsistent with, or in conflict with, any obligation or commitment of Government arising out of an international treaty or an agreement with a foreign country or countries, or any international financial institution, the provisions of such international treaty or agreement shall override the provisions of these Rules to the extent of that inconsistency or conflict as the case may be.”

15. Here the project in issue is financed by the World Bank and a range of documents have already been discussed in the foregoing paragraphs which are not in dispute. Now distinction has to be made as to whether for the purposes of tender and award of instant contract the World Bank guidelines are applicable or the exactitudes of Sindh Public Procurement Rules 2010 shall be applied. To contend with this legal proposition, the judgment of apex court rendered in the case of **Messrs. Power Construction Corporation of China Ltd.** reported in **PLD 2017 S.C. 83** is somewhat expedient and opportune in which the apex court observed that the development countries like Pakistan may need to invest in a large infrastructure projects to ensure its economic and social development and may require huge funds which may have to be raised through loans. If loans are obtained from International Financial Institutions, like IDA the same are coupled with conditionalities which includes mode and methods of the award of contract for the project and the process of prequalification of bidders. The apex court further held that such conditionalities are also catered for in the law as is evident from Rule 5 of the PPRA Rules, 2004 thus obviously, the World Bank Guidelines and its enforceability and effectiveness are contemplated in law. In the case in hand what deciphers to me is that the finance agreement has been executed by the International Development Association with Islamic

Republic of Pakistan for Sindh Barrages Improvement Project whereas on the same date International Development Association executed Project Agreement for the same project with the Province of Sindh. So for all intent and purposes the guidelines issued for procurement of goods, works and non-consulting services under IBRD and IDA credit and grant made by World Bank borrower revised in July, 2014 shall prevail and predominate which is also commanded and mandated by Rule 5 of the Sindh Public Procurement Rules, 2010. It appears that the parties had failed to provide proper assistance to this court at the time of disposing of earlier Suit No.2445/2016 vide order dated 23.11.2016 when the grievance petition of the same plaintiff was transferred by the learned judge of this court to the Review Committee to decide and on transfer of the complaint, the Review Committee constituted under the provisions of Sindh Public Procurement Rules, 2010 rightly decided that the Sindh Public Procurement Rules are not applicable in the instant procurement and the same has to be decided/redressed in the light of World Bank Procurement Procedure Guidelines. So in my view the directions sought by the plaintiff against the defendant Nos.1 to 4 to complete the project tendering/procurement process in accordance with the Procurement Rules, 2010 is misconceived and miscomprehended and the complaint filed by the plaintiff under the aforesaid Rules was also not maintainable in terms of the bar contained under the Rule 5 of the Sindh Public Procurement Rules, 2010.

16. The next point urged by the plaintiff in essence is that the defendant No.6 has no experience of

electromechanical work so they failed to meet the condition No.4.2(a) and 4.2(b) of tender document. A quick look and preview of the condition 4.2(a) of the Section IV of the tender documents manifests the requirements of minimum number of similar contracts specified that has been satisfactorily and substantially completed as a prime contractor, joint venture member, management contractor or sub-contractor in the last five years prior to the application submission deadline either two contracts, each of minimum value US\$ 55 million or one contract with a minimum value of US\$ 110 million. In the foot note appended to above clause it is further provided that the similarity shall be based on the physical size, complexity, methods/technology and or other characteristic described in Section VI, Scope of Works. It is further quantified that substantial completion shall be based on 80% or more works completed under the contract. As far as general construction experience is concerned, it is specified in the eligibility and qualification criteria with experience under construction contract in the role of prime contractor, joint venture, member, sub-contractor or management contractor for at least 05 years prior to the application submission deadline and with activity in at least 09 months in each year. Whereas 4.2(b) speaks of the above and any other contracts completed and under implementation as prime contractor, joint venture member, management contractor or sub-contractor in the last five years prior to the application submission deadline a minimum construction experience in the following key activities successfully completed such as the removal of existing gates and the fabrication and installation of five steel gates with associated hoisting

and operating equipment of a minimum span of ten meters in 6 months; the execution of reinforced concrete works of at least 30,000 cft/month; constructing or rehabilitating and existing structure in flowing river water of 300,000 cusecs.

17. The plaintiff's counsel made profuse stress that while awarding tender to defendant No.6 their Jinnah Barrage Project was considered which was a joint venture project of the defendant No.6 with another Chinese Company wherein the defendant No.6 done civil work and its joint venture partner performed electromechanical work but here the defendant No.6 has not applied with any joint venture partner to accomplish the project. On the contrary the Chief Resident Engineer (Project Implementation Consultant) pointed out that the defendant No.6 submitted the details of 38 works executed in last 22 years in Pakistan and internationally and out of 38 contracts 10 were equal or exceeding US\$ 55 million and 05 exceeded US\$ 110. The defendant No.6 also submitted the details of 03 contracts in compliance of condition 4.2(a) as rehabilitation of Jinnah Barrage valuing US\$ 130.6 million in which the defendant No.6 was a lead partner in joint venture with 70% share. In New Khanki Barrage the contract value was US\$ 222.97 million in which also defendant No.6 is said to be a main contractor, however, the New Khanki Barrage was executed from the loan by PIC but it was not 80% completed at the time of submission of bid documents.

18. The case profile further ruminates that 17 participants submitted applications and the prequalification assessment report was prepared and forwarded/recommended 06 applicants out of 17. The

World Bank reviewed the documents and gave their no objection. Subsequently, the applicants were notified the outcome of prequalification assessment on 19.4.2016. The invitation of bid was issued on 16.5.2016 and bids were opened on 25.8.2016. The defendant No.6 submitted their bid for Rs.9.5 billion whereas the plaintiff submitted the bid for Rs.12.5 billion, while one more company China Harbour submitted their bid for Rs.18.9 billion. Since the bid of defendant No.6 was found lowest, therefore, the competent authority decided to award the contract to the defendant No.6. The project also hired Food and Agricultural Organization (FAO) as Project Management Consultant for the procurement process and the transparency international also acted as an observer. It is discernible from the record that despite having opportunity to raise objection at the time of announcement of prequalification result and even at the time of bid opening, the plaintiff failed to raise any objection. All the more so there is nothing on record which may demonstrate or expound that the plaintiff at the relevant time ever raised any objection with regard to the alleged non-experience of the defendant No.6. However the plaintiff filed a complaint to the World Bank, Grievance Redress Service on 20.10.2016 with a subject misprocurement/corrupt and fraudulent practices in the procurement of Sindh Barrages Improvement Project IDA CREDIT 5684-PAK Contract: SBIP/G2. Though the plaintiff raised some allegations in the complaint for misprocurement/corrupt and fraudulent practices but nothing has been placed on record in this suit to substantiate this allegation. It is further pertinent to point out that the prequalification criteria was prepared by the project consultant, which was adopted by

Irrigation Department with the clearance by United Nation Food and Agriculture Organization Team appointed by the Planning and Development Department, Government of Sindh as the project management consultant and the criteria was forwarded to the World Bank which raised no objection.

19. The learned AAG submitted photocopies of few emails. The email dated 15.11.2016 was communicated to PD-PMO-SBIP by Toru Konishi which is reproduced as under:-

“Dear Aijaz,

While we will send the electronic no objection shortly, please kindly informed the following no objection from us.

Based on the provided information, the Bank has no objection to the recommendation of award to M/s.Descon at the contract price not exceeding Rs.9,585,161,481, subject to:

1.satisfactory clarification of the technical points listed on Section 5.2 and 5.51 of the Bid Evaluation Report by the recommended bidder;

2.additional due diligence to ensure that the recommended bidder will be able to execute the contract successfully at the price that it has offered; and

3.clearance by the Bank of the final award recommendation after the clarification process.

Toru”

One more email dated 15.2.2017 is available which was communicated by Uzma Sadaf, Sr. Procurement Specialist, World Bank Group to the same person (Shafquat Hussain Wadho) which reads as under:-

“Dear Mr.Shafquat Hussain,

The Bank has reviewed the minutes of negotiations which covered the clarifications of some technical aspects for the recommended bidder. Based on the provided information and further to the conditional NOL issued on Nov. 15, 2017, the Bank has no objection

for your awarding the contract to M/s.Descon at the contract price not exceeding Rs.9,585,161,481.

Please send us a copy of the signed contract for record.

**Kind regards.
Uzma Sadaf
Sr. Procurement Specialist”**

[N.B: it appears to me that while mentioning the date of NOL, instead of 15.11.2016, the author has wrongly typed 15.11.2017 which is evident from the e-mail of 15.11.2016 reproduced above.]

Whereas on 18.4.2017 one more e-mail was communicated by Toru Konishi, Task Team Leader of the World Bank for Sindh Barrages Improvement Project to Shafquat Hussain Wadho, P.D., PMO, SBIP. For the ease of reference the text of email is reproduced as under:-

“Shafquat,

Sorry for delayed response as I thought that I have responded to you. Our INT Department has concluded that this complaint is not related to integrity and corruption but to the procurement issue; therefore, it has closed the case. Further, our Operation Committee, which is responsible for procurement oversight, has also review the procurement process and concur with the final evaluation conducted by you, so there is no pending issue from the Bank side.

Hope that this is clear to you.

Toru.”

20. It is clear from the aforesaid correspondence that no weightage was given by the World Bank to the plaintiff's complaint and what's more they observed that the complaint was not related to any integrity or corruption issue, therefore, case was closed. The e-mail dated 15.11.2016 conveying no objection to the award of contract to defendant No.6 with some queries/clarifications were seem to have been satisfied which is demonstrating from subsequent e-mail dated 15.2.2017 that the Bank reviewed the minutes of negotiations which covered the clarifications of some technical aspects for the recommended bidder and based

on the provided information, the Bank conveyed no objection for awarding the contract to M/s.Descon at the contract price and also asked the signed copy of contract.

21. Throughout the proceedings the plaintiff has failed to draw my attention to any mischievousness, malevolence and or any mala fide perpetrated by the defendants either at the time of prequalification stage or at any later stage including the event of taking the decision to award the contract to the defendant No.6. It was well-defined in the invitation for prequalification that loan was applied from International Development Association (IDA) towards the cost of Sindh Barrages Improvement Project i.e the barrage rehabilitation works at Guddu, Kashmore which include the replacement of the barrage gates, and the gates for three of the four canal head regulators at Guddu Barrage; rehabilitation and replacement of the mechanical and electrical equipment for operating the barrage gates; provision of equipment and workshop for the future operation and maintenance of the barrage and minor repairs to the barrage and head work structures and construction within the river of a new left hand pocket divide wall. The purpose of embarking upon an acid test of prequalification by any authority is always meant to ensure and reinforce that persons applied for tender are in point of fact capable of performing and accomplishing the task/assignment or not. The competence and eligibility of the defendant No.6 was considered by the competent authority according to the eligibility criteria set out in the tender document and at that time present and past experience was also taken into consideration. After due satisfaction and the endorsement by the World Bank, the contract was

awarded to the defendant No.6. The entire process was conducted and concluded in accordance with the guidelines of procurement goods, works and non-consulting service under IBRD loans and IDA Credit and grant made by the World Bank Borrower.

22. There was also sizeable disparity and difference in the figure of bid submitted by the plaintiff and defendant No.6. The defendant No.6 submitted bid for Rs.9.5 billion whereas the plaintiff's submitted the bid for Rs.12.5 billion which means the net difference of 03 billion. In this set of circumstances the bid of defendant No.6 was rightly found lowest. It is not the case here that regardless of being found lowest bidder, the plaintiff has been deprived from the award of contract or the work order and the defendant No.6 has been accommodated on the spur of the moment and or thoughtlessly or negligently. In the case of **Dr.Akhtar Hassan Khan** (supra), the apex court has held that the duty of the court is to confine itself to the question of legality and its concern should be, whether a decision-making authority, exceeded its powers; committed an error of law; committed a breach of the rules of natural justice but whether a particular policy of a particular decision taken in the fulfillment of that policy is fair, is not for the court to determine. In the case of **Messrs Power Construction Corporation of China Ltd**, (supra) the court held that if a decision falls within the realm of the public policy, the courts in the exercise of their powers of judicial Review, ordinarily, do not interfere therewith and exercise judicial restraint, as has been held in the case of *Dossani Travels Pvt. Ltd and others v. Messrs Travels Shop (Pvt.) Ltd. and others* (**PLD 2014 SC 1**) and the *Suo Motu Case No.25 of 2009* (**2011 SCMR 1743**). The apex court further

observed that court must exercise its discretionary powers of judicial review with circumspection and only in furtherance of public interest and not merely for making out of a legal point and it should always keep the larger public interest in mind to decide whether to interfere or not. Only when the public interest overwhelms any other consideration, the court should interfere.

23. Though the present case has not been moved by the plaintiff as a whistle blower but moved to shield and harbor self-interest and egocentricity rather than public interest at large. The plaintiff has approached with a strange aspiration and entreaty that despite submitting higher bid than defendant No.6, they should have been awarded contract which claim is totally unwarranted and unjustified. The plaintiff neither can dictate nor give orders to the competent authority to accept their bid and award contract to them no matter the bid was higher than the bid submitted by the defendant No.6 nor they can claim any vested right in this regard. The documents available on record unequivocally elucidate and expound that the entire proceedings were conducted assiduously with fairness and transparency. The plaintiff has also failed to point out any illegality or any instance of corruption or favoritism which may command the exercise of discretionary powers of judicial review by this court. It is also well-entrenched and deep-rooted principle of judicial review of administrative action that in the absence of some un-rebuttable material on record qua mala fides, the court would not annul the order of Executive Authority which otherwise does not reflect any illegality or jurisdictional defect. Neither I have find out or detected nor could the learned counsel for the plaintiff depict or explicate any mala fide.

24. Learned counsel for the plaintiff referred to the case of **Patel Engineering Ltd.** in which the Delhi High Court held that correct perspective is to see actual experience of participating entity and not label of firm. This case is distinguishable predominantly for the reasons that the petitioner in this case before the Delhi High Court lodged the grievance that they had submitted two bids for prequalification and they relied on the experience certificates issued by National Highways Authority of India so the court held that statutory body cannot refuse to give effect to experience certificates issued by it. In the next case of **M/s. Driplex Water Engineering Limited** the Punjab and Haryana High Court held that if Punjab State Electricity Board wanted to consider the experience of a collaborator as experience of the tenderer it should have given notice of this fact in the notice inviting tenders to enable the other concerns to file tenders on the basis of their collaboration. I do not think that any such eventuality has arisen in the case in hand, so the dictum laid down in this case is also not helpful to the plaintiff. In the case of **Hitech Audio Systems Pvt. Ltd.** the court held that once tender process did not meet requirements of fairness and reasonableness, then there was no alternative but to interfere. The plaintiff in this case failed to point out any issue that may demonstrate the lack of fairness and or reasonableness. The case of **Lanco Constructions Ltd.** is also not beneficial to the plaintiff's case. The court held that though the petitioner has no vested right to the award of work, but he has a right to claim that his bid should be considered in a fair and proper atmosphere more especially when his bid was found to be lowest. Here it is an admitted position that

the lowest bidder was defendant No.6 and not the plaintiff. In the case of **Ramana Dayaram Shetty** the court held that the standard of eligibility laid down in the notice for tenders cannot be departed from arbitrarily. The plaintiff has not alleged any departure by the competent authority from the terms and conditions mentioned in the tender notice. In the case of **Asaf Fasihuddin Khan Vardag** reported in **2014 SCMR 676**, the hon'ble Supreme Court held that in exercise of power of judicial review it was not possible for the judiciary to confer validity and immunity to the acts or actions which suffered from mala fide. As I already observed and noticed that throughout the proceedings the plaintiff has failed to allege any mala fide in the tender proceedings and award of contract. Lastly the learned counsel referred to the case of **Habibullah Energy Limited** reported in **PLD 2014 S.C. 47**. The apex court held that while exercising jurisdiction superior courts neither sit in appeal over administrative actions nor interfere on account of inconsequential deviations; however, where Administrative Authority acted in a discriminatory manner and action failed the test of reasonableness, transparency and/or was otherwise unjust and unfair or suffered from mala fide, the courts not only vested with the jurisdiction to set aside such actions but any failure in such an eventuality to exercise power of judicial review. The dictum laid down in this case is also distinguishable and hardly helpful to the case of the plaintiff where they have failed to point out any discrimination or lack of transparency or reasonableness to show that award of contract to the defendant No.6 suffers from any mala fide or illegality.

25. Injunction is an equitable relief based on well-known equitable principles. Since the relief is wholly equitable in nature, the party invoking the jurisdiction has to show that it is not at fault. The phrase prima facie case in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried and this phrase 'prima facie' need not to be confused with 'prima facie title'. Before granting injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. A party seeks the aid of the court by way of injunction must as a rule satisfy the court that the interference is necessary to protect from the species of injury which the court calls irreparable before the legal right can be established on trial. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy. In the case in hand, neither the plaintiffs have made out any prima facie case nor does balance of convenience lies in their favor nor any question of irreparable injury arise. An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential

to justice or restraining an act, which it esteems contrary to equity and good conscience. Reference can be made to the orders authored by me in the case of **Al-Tamash Medical Society vs. Dr. Anwar Ye Bin Ju, reported in 2017 MLD 785, Sayyid Yousaf Husain Shirazi v. Pakistan Defence Officers' Housing Authority, reported in 2010 MLD 1267, Naseem-ul-Haq versus Raes Aftab Ali Lashari, reported in 2015 YLR 550 [Sindh] and unreported order passed in Suit No.866/2017, Hajj Organizers Association of Pakistan & others vs. Federation of Pakistan.**

26. In the wake of above discussion, both the applications (C.M.A Nos.3820/2017 and 2651/2017) are dismissed.

**Karachi:-
Dated. 15.9.2017**

Judge