IN THE HIGH COURT OF SINDH AT KARACHI

CP D-20 of 2017

Present: **Muhammad Ali Mazhar** and **Agha Faisal**, **JJ**.

Humera Imran
vs.
Government of Pakistan & Others

For the Petitioner:	Mr. Raza Rabbani, Advocate Mr. Zeeshan Abdullah, Advocate Mr. Adnan Abdullah, Advocate
For the Respondent Nos. 1 & 2:	Mr. Liaquat Hussain Sheikh Deputy Attorney General
For the Respondent No. 3:	Mr. Mir M A Talpur, Advocate Mr. Umer Pehchuho, Advocate
Dates of Hearing:	30.10.2018, 31.10.2018 06.11.2018 & 13.11.2018
Date of Announcement:	12.02.2019

JUDGMENT

Agha Faisal, **J**. The present petition was filed assailing the award of the International Defense Exhibition And Seminar ("**IDEAS**") contract for the years 2016, 2018 and 2020 ("**Contract**") on the ground that the process and consequential award of the Contract was incongruous with the mandatory requirements of the Public Procurement Regulatory Ordinance, 2002 ("**Ordinance**") and the Public Procurement Rules 2004 ("**Rules**").

2. Mr. Raza Rabbani, learned counsel for the petitioner, submitted that the award of the Contract, under scrutiny herein, amounted to *mis-procurement* under the law and the arguments advanced in such regard are encapsulated and delineated herein below:

i. It was submitted that the respondent No.2, being a constituent of the Government of Pakistan (respondent No. 1) for the facilitation and coordination of export of high quality products

and services of martial usage, has been empowered to arrange defense exhibitions in Pakistan whereat participation is undertaken by domestic and foreign entities. It was stated that the inaugural IDEAS events took place in the year 2000 and the event has taken place every two years since then, with the exception of the year 2010 when the event was cancelled on account of floods.

ii. Per learned counsel, tenders were invited through leading public newspapers for award of the contracts for IDEAS and in culmination of the said process contract for the events of 2000, 2002, 2004 and 2006 were awarded to M/s. Pegasus Consultancy. It was stated that in the year 2007 tenders were invited for organizing the IDEAS event for the years 2008 and 2010, through public notices in national daily newspapers and as a consequence thereof the said contracts were awarded to M/s. Ecommerce Gateways Limited, as they were determined to be the lowest bidders in respect thereof. It was next argued that the contracts for IDEAS 2012-14 were awarded to respondent No.4 herein after inviting tenders through public notice. It was submitted that respondent No.2 unilaterally decided to award the Contract to the respondent No.4, however, without issuing any tender / public notice and without resort to a competitive bidding process as is required under the law, therefore, it was argued that the process for award of the Contract was in abject violation of the prescriptions of the Ordinance and the Rules. Learned counsel adverted to the constituents of the Ordinance and the Rules to demonstrate that the award of the Contract amounted to *mis-procurement*.

iii. It was argued that a bare perusal of the aforesaid law demonstrated that the award of the Contract was required to be undertaken pursuant to the Ordinance and the Rules as the issue of public funds was clearly involved. Learned counsel read out Article 78 of the Constitution to bolster the argument in this regard.

iv. Learned counsel adverted to recent media reports, wherein it was stated that the IDEAS events were the recipient of

government subsidies. It was argued that while international vendors were required to pay the full amount determined for rental of space at the exhibition, local venders were only required to pay half the said amount and the remaining half was to be paid by virtue of a government subsidy. It was demonstrated that since the definition of public procurement included the terms *wholly* or *partly*, therefore, this aspect of subsidy, in itself, places the IDEAS events squarely within the ambit of the Ordinance / Rules.

v. Per learned counsel, that the methodology employed in respect of the original IDEAS event was that a joint account of the event manager and respondent No.2 was opened wherein all revenues pertaining to the event was credited. The said account was firstly utilized for payment of expenses and then for the payment of the contractual dues of the event Manager. The residual amount was then appropriated by the government. Learned counsel stated that 2016 onwards the modicum was altered slightly in so far as while the collection method remained the same, the amounts so collected remained in the said account from which predetermined royalty due to the government was paid first. The residual amount would then be available to the benefit of the event manager, who would be responsible for the expenses incurred. It was argued that it was only the priority of payments that was altered and simply because the takings of the event manager were postulated on a deferred basis the same could not be construed to oust the jurisdiction of the Ordinance and the Rules. It was further argued that in an open competitive bidding process the successful bidder would be an entity that would offer the highest quantum of royalty and not some predetermined collusive amount buttressed with subsidies.

vi. It was contended that IDEAS events prior to the Contract was advertised and subsequently the tenders were awarded in compliance with the provisions of the Ordinance and the Rules. It was argued that the departure from the law and the established norms of fair play, in the award of the Contract, was a blatant invitation to corruption and nepotism and the same could not be sustained by this Court, hence, it was prayed that the Contract be

declared as illegal, unlawful and having no legal effect in the eyes of law.

vii. Learned counsel for the petitioner cited the authorities of *Adam Sugar Mills Limited vs. Federation of Pakistan & Others* reported as *2012 CLD 1734* ("***Adam Sugar***"), *Ch. Ata ur Rehman Qadri vs. Capital Development Authority & Others* reported as *2016 CLC 125* ("***Qadri***"), *Messrs M. N. Construction Company vs. Federation of Pakistan & Others* reported as *PLD 2013 Islamabad 85* ("***MN Construction***"), *Raja Mujahid Muzaffar & Others vs. Federation of Pakistan & Others* reported as *2012 SCMR 1651* ("***Mujahid Muzzafar***"), *Habibullah Energy & Another vs. WAPDA & Others* reported as *PLD 2014 Supreme Court 47* ("***Habibullah***") and *Messrs Malik Mushtaq Goods Transport Co. Lahore vs. Federation of Pakistan & Others* reported as *PLD 2010 Lahore 289* ("***Malik Mushtaq***") in order to augment their submissions.

3. Mr. Mir Mohammad Ali Talpur, learned counsel for respondent No.3, stated that the present petition was not maintainable and even otherwise was devoid of merit. The arguments of the learned counsel are summarized and presented herein below:

i. Learned counsel stressed that the petition was not maintainable on the grounds that the antecedents of the petitioner and/or persons associated therewith were alleged to be impeachable. It was argued that the petition is a mala fide and vengeful attempt to disrupt the otherwise lawful award of the Contract, merely because the same was not awarded to the petitioner or any person associated therewith. It was further stressed that the issues raised in the present petition were disputed questions of facts, not amenable for determination in the writ jurisdiction of this Court, and even otherwise this petition amounted to frivolous litigation which was required to be nipped in the bud.

ii. The primary arguments of the petitioner, in so far as the merits of the petition are concerned, was that the Ordinance and the Rules did not apply to the present facts and circumstances

since the award of the Contract did not fall within the definition of public procurement, prescribed in the Ordinance.

iii. It was next contended that even if the Ordinance and the Rules were held applicable to the Contract then the exception for national security provided under Section 14(a) of the Rules shall be squarely applicable and hence the provisions of the Ordinance / Rules would remain dis-applied.

iv. Learned counsel adverted to the Rules and submitted that under the provisions of Rule 42 thereof the utilization of alternative methods of procurement was recognized and in the event that this Court was to hold that the Ordinance was applicable to the present facts and circumstances then by virtue of Rule 42 the award of the Contract to respondent No. 3 was afforded legal sanction.

v. Learned counsel submitted that IDEAS was a matter of national security, being a defense exhibition, therefore, it was only just and proper for the Contract to be awarded by private negotiations so as to not share sensitive proprietary information with the public in general. In conclusion, the learned counsel argued that IDEAS was an international exhibition held in Pakistan and that the same was a matter of national prestige and it was improper for the same to be called into question before this Court in the present proceedings, hence, the petition was liable to be dismissed forthwith.

vi. Learned counsel for the respondent No. 3 relied upon the authorities of *Muhammad Maqsood Sabir Ansari vs. District Returning Officer Kasur & Others* reported as *PLD 2009 Supreme Court 28* ("***Ansari***"), *Dr. Sher Afgan Khan Niazi vs. Ali S. Habib & Others* reported as *2011 SCMR 1813* ("***Niazi***"), *Fida Hussain & Another vs. Mst. Saiqa & Others* reported as *2011 SCMR 1990* ("***Fida Hussain***"), *Dr. Akhtar Hassan Khan & Others vs. Federation of Pakistan & Others* reported as *2012 SCMR 455* ("***Akhtar Hassan***"), *Jadeed Education Services & Others vs. Government of Punjab & Others* reported as *2018 YLR 1371*

("***Jadeed***"), *Watan Party & Others vs. Federation of Pakistan & Others* reported as *PLD 2012 Supreme Court 292* ("***Watan Party***") and *A. R. Khan & Sons (Private) Limited & Others vs. Federation of Pakistan & Others* reported as *2010 CLC 1810* ("***AR Khan***") in order to bulwark their submissions.

4. Mr. Liaquat Hussain Sheikh, learned Deputy Attorney General, relied upon the arguments advanced by Mir M A Talpur and in addition thereto read out the following constituents of the respondents' comments filed in response to the present petition:

> "7. Given the very extensive preparation and expense that is involved in managing each exhibition, it is not feasible for an event manager to undertake only on exhibition. Accordingly, contracts have always been awarded for multiple exhibitions to the same event manager.
>
> 8. As noted hereinabove, the first IDEAS exhibition was held in 2000. The event manager for this exhibition and for the exhibitions held in 2002, 2004 and 2006 was Messrs. Pegasus Consultancy.
>
> 9. Due to the poor performance of Messrs. Pegasus Consultancy, Particularly during the 2006 exhibition, the need to identify a new event manager arose. Tenders were floated in 2007 for the appointment of an event manager for the 2008 and 2010 exhibitions. Being the lowest bidder, Messrs. Ecommerce Gateway Pakistan (Pvt.) Limited was awarded the contract for these exhibitions.
>
> 10. It is relevant to note that the model for each exhibition since 2000 was that the entire (and very significant) cost (incurred prior to the holding of an exhibition) for each exhibition was the responsibility of the respondent No.2 and the event manager was entitled to receive a share of the revenues generated by the exhibition at specified rates.
>
> 11. The foregoing was also the basis on which the 2008 and 2010 exhibitions were to be held.
>
> 12. The 2010 exhibition had to be cancelled due to severe floods in Sindh at the time. This resulted in a huge loss to the Respondent No.2 as all advance payments made by the intending participants had to be returned and the opportunity to recover costs that had been incurred was lost.
>
> 13. In view of the foregoing the model for holding future exhibitions was changed in 2011. It was decided that the expenses for holding each exhibition in future would be the sole responsibility of the event manager who would recover the same from revenues generated by the exhibition after paying an agreed amount to the respondent No.2.

> 14. Notwithstanding that no Public Funds were to be utilized in the new model, bids were invited from interested event managers for the 2012 and 2014 exhibitions primarily to assess their ability (particularly financial) to hold the exhibitions. On the basis of their assessed ability and the amount they undertook to pay to the respondent No.2, the contract for these exhibitions was awarded to the respondent No.3.
>
> 15. The 2012 and 2014 exhibitions were successfully managed by the respondent No.3 for the 2014 exhibition additional obligations were placed on respondent No.2 involving very significant additional cots to be incurred by it.
>
> 16. Given the foregoing and the fact that an amount for rupees 350-400 Million has to be spent by the event manager in advance of an exhibition (as well as he experience of the cancelled 2010 exhibition), it was mutually agreed that the respondent No.3 will also handle the 2016, 2018 and 2020 exhibitions."

5. The respondent No. 4, the Public Procurement Regulatory Authority ("**PPRA**") filed its comments in the said petition and the relevant constituent thereof is reproduced herein below:

> "Rule 20 of the Public Procurement Rules, 2004 provides that "save as otherwise provided hereinafter, the procuring agencies shall use open competitive bidding as the principal method of procurement for the procurement of goods, services and works". Any unauthorized breach of any rule shall amount to mis-procurement in terms of Rule 50 of Public Procurement Rules, 2004."

6. We have considered the arguments of the respective learned counsel at length and have appreciated the record and authorities arrayed before us. The questions to be considered by this Court, in order to determine the controversy under scrutiny, may be distilled as follows:

> a. Whether the present petition was maintainable.
>
> b. Whether the Ordinance and the Rules were / are applicable to the award of the Contract under consideration.
>
> c. Whether the Contract was exempted from the operation of the Ordinance and the Rules by virtue of the national security exception contained in Rule 14(a).

d. Whether award of the Contract by private agreement was afforded due legal sanction pursuant to Rule 42.

Question 1: Whether the present petition is maintainable.

7. It was averred that the present petition was not maintainable since the antecedents of the petitioner, and / or persons connected therewith, are impeachable; the petitioner has approached the Court with unclean hands; there are disputed questions of fact which could not be decided in a writ petition and that the petition is frivolous, hence, liable to be dismissed at the onset. It may be illuminating to record that while the respondent Nos. 1, 2 and 3 raised the issue of maintainability of the present petition; the comments filed by PPRA, the respondent No. 4 herein, raised no such plea. On the contrary the comments specifically prayed that the present petition be decided on its merit.

8. The challenge to the antecedents of the petitioner, or persons connected therewith, has no nexus with the issue at hand, which quite simply is whether the applicable law was complied with in the award of the Contract. The respondent No. 3 was unsuccessful in demonstrating any mala fide on the part of the petitioner and mere allegations in regard thereof cannot be made the basis to non-suit a petition. *Ansari* inter alia maintained that a petition could not be maintained to take advantage of a wrong act. The present petition calls into question the acts of the respondents and seeks a determination upon the legality thereof, hence, thwarting such a determination on mere vague allegations of having unclean hands cannot be sustained by this Court. Thus, the reliance of the learned counsel upon *Ansari* is wholly unwarranted in the present facts and circumstances. It is observed that the respondents have been unable to demonstrate the existence of any factual controversy barring the exercise of jurisdiction of this Court. The ratio of *Niazi* and *Fida Hussain* is not attracted in the present circumstances, hence distinguishable, however the case of *Messrs Mia Corporation (Private) Limited vs. Pakistan PWD & Others* reported as *PLD 2017 Islamabad 29* (“***Mia Corporation***”) is pertinent to cite herein as it was maintained that a respondent in a writ petition could not expect to have the petition dismissed by making a vague and general assertions to the effect that

the petition involved disputed questions of fact. This Court has the inherent jurisdiction to assess whether a breach of trust or a violation of public law has taken place and if so then it is incumbent upon us to rectify the breach; the identity or antecedents of the petitioner in such matters pale into insignificance. Reliance is placed in such regard placed upon the judgments in the case of *Popular International (Pvt.) Ltd. vs. Province of Sindh* reported as *PLD 2016 Sindh 19* ("***Popular***"), *Salahuddin Dharaj vs. Province of Sindh* reported as *PLD 2013 Sindh 236* ("***Salahuddin***"). *Popular* maintained that if the facts of a case have a discernible nexus with public interest which merits an expeditious disposal to safeguard and vouch for the rights of general public then such a matter could be referred to and be determined by the exercise of constitutional jurisdiction of this Court. It was observed in *Salahuddin* that any person may bring an issue before the Court if it is related to public functionaries and or work affecting the general public. It was also observed that illegal exercise of powers by a government functionary remained subject to scrutiny by this Court, being the custodian and guardian of the fundamental rights of the citizens. The present petition raises a very serious issue as wrongdoing has been attributed in respect of the award of an international exhibition hosted by Pakistan and notwithstanding the ultimate decision arrived at herein the petition could not be deemed to be frivolous, hence, reliance upon *Akhtar Hussain* case and upon a recent pronouncement of this very bench in *CP D 2987 of 2018 TCS (Private) Limited vs. Pakistan Post & Another* does not augment the case of the respondents in the present facts and circumstances. It is for this Court to see whether there is any infirmity in the decision making process and whether the decision maker correctly applied the law. *Mia Corporation* observed that a test to apply in such cases is to consider whether the impugned action satisfies the test of reasonableness. Thus, the question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of the said case.

9. It is thus the duty of the Court to determine whether there was any infirmity in award of the Contract. It was held by a Division bench of this Court in *Adam* Sugar, cited by the learned counsel for the petitioner, that an award of a contract by a public functionary that lacks transparency could be scrutinized in a Constitutional petition. The award of public

sector contracts without a transparent competitive bidding process was also considered to be within the domain of judicial review by the honorable Supreme Court in *Habibullah*, also cited by the learned counsel for the petitioner. In view of the foregoing it is observed that the present petition is maintainable and warrants determination upon the merits thereof.

> *Question 2: Whether the Ordinance and the Rules were / are applicable to the award of the Contract under consideration.*

10. PPRA is constituted as the Authority vide Section 3 of the Ordinance, section 5 whereof stipulates that the Authority may take such measures and exercise such powers as may be necessary for improving governance, management, transparency, accountability and quality of public procurement of goods, services and works in the public sector. The Rules have been framed in exercise of powers conferred by section 26 of the Ordinance and apply to all procurements made by all procuring agencies of the Federal Government. The definition of procuring agency is contained in Section 2(j) of the ordinance and it is expressed as follows:

> "procuring agency" means:
>
> > i. any Ministry, Division, Department or any Office of the Federal Government;
> >
> > ii. any authority, corporation, body or organization established by or under a Federal law or which is owned or controlled by the Federal Government"

11. It is an admitted fact that the respondent No. 2 is a constituent of the respondent No. 1. The respondent No. 2 herein, as admitted by the respondent Nos. 1 and 2 in its reply, is stated to be an entity established by the Federal Government to inter alia coordinate the export of high quality defense products and services. There was no cavil, advanced by any of the respondents, to the petitioner's assertion that the respondent No. 2 is a procuring agency within meaning of the Ordinance.

12. Public procurements have been defined in Section 2(l) of the Ordinance in the following manner:

> "public procurement" means acquisition of goods, services or construction of any works financed wholly or partly out of the Public Fund, unless excluded otherwise by the Federal Government"
>
> (Underline added for emphasis.)

13. The definitions of services and public fund are contained in Sections 2(o) and 2(k) respectively, content whereof is reproduced herein below:

> "Service" means any object of procurement other than goods or works
>
> "Public Fund" means the Federal Consolidated Fund and the Public Account of the Federation and includes funds of enterprises which are owned or controlled by the Federal Government"

14. In the conspicuous absence of any exclusion carved out by the Federal Government, with respect to the award of the Contract, it would follow that since the Contract was in fact a contract for services it must be considered whether public funds were involved to place the Contracts within the definition of public procurement. The terms federal consolidated fund and public accounts are not defined in the Ordinance or the Rules and guidance in respect thereof is sought from a perusal of Article 78 of the Constitution, that reads as follows:

> "78. Federal Consolidated Fund and Public Account.
>
> (1) All revenues received by the Federal government, all loans raised by that government and all moneys received by it in repayment of any loan, shall form part of a consolidated fund, to be known as the Federal Consolidated Fund.
>
> (2) all other moneys-
> (a) received by or on behalf of the Federal government; or
> (b) received by or deposited with the Supreme Court or any other Court established under the authority of the Federation;
>
> shall be credited to Public Account of the Federation."

15. The treatment of funds / receipts with respect to IDEAS was demonstrated from the relevant bidding documents with respect to IDEAS 2012-2014, wherein it was stated that the event manager and the respondent No. 2 shall open two joint accounts, USD and PKR, and all receipts / income shall be credited thereto. The funds so contained shall be utilized first to pay the pledged royalty to the respondent No. 2

and the remaining constituent shall be released to the event manager. This methodology remained in vogue for the award of the Contracts as well and the said position was admitted by the respondent Nos. 1 and 2 vide their comments, as noted supra. Per learned counsel for respondent No. 3 the pre-2012 model called for payment of expenses first and then an agreed revenue sharing formula was worked out with the event manager and since presently it was the royalty that had precedence in payments, hence, public funds were not involved. We have noted that the pre 2012 and post 2012 formulae merely change the order of payments but not the nature thereof. It is also observed that even though the award of the 2012-2014 contracts or IDEAS was undertaken on the latter deferred payment basis, such contract was awarded after a competitive bidding process. So it is safe to denote that the 2012-2014 contract and the Contract was predicated on the same financial model, however, the competitive bidding process was eschewed for the latter. The question before us now is whether the accumulation of all the receipts in respect of IDEAS into a dedicated account qualifies the same within the definition of Article 78 of the Constitution. It is our view that receipts in respect of IDEAS squarely fall within the phrase “received on behalf of the Federal Government”, hence the Constitutional definition applies thereto.

16. It has also been brought to our attention that the IDEAS events for period under consideration are also the beneficiary of Federal Government subsidies. It was argued before us that the Ministry of Finance gave subsidy to IDEAS in order to promote the local defense industry and while foreign exhibitors paid the full retail price for space at IDEAS, the domestic exhibitors paid only half the said amount. The remaining half being paid by the Ministry of Finance as a subsidy. Learned counsel for the petitioner placed before us press clippings from the Business Recorder, dated 13.02.2018, wherein it was reported that significant subsidies are sought and obtained from the public exchequer for IDEAS. Learned counsel for the respondents, when confronted with the issue of the subsidy, did not controvert the existence thereof. Since the definition of public procurement includes acquisition of services financed wholly or partly out of the public fund, thus, any interplay of a subsidy would further strengthen the petitioner’s contention that public funds are employed in IDEAS.

17. It was demonstrated that Rule 3 required the Rules to apply to all procurements made by all procuring agencies of the Federal Government. It was highlighted that the omission of the word "*public*" was ominous as the Rules were required to apply even when procurements involved were not deemed to be public. The petitioner sought to argue that the omission of the word "*public*", from Rules 3 and 14, and replacement with the word "*all*" was deliberate in order to widen the scope of the Rules and to ensure transparency in respect of procurements by procuring agencies. On the other hand, learned counsel for the respondents have been unable to dispel the applicability of the Ordinance / Rules, therefore, due to the preponderance of reasoning ensconced herein above it is found that the provisions of the Ordinance and the Rules were and remain applicable to the process and award of the Contract under consideration.

> *Question 3: Whether the Contract was exempted from the operation of the Ordinance and the Rules by virtue of the national security exception contained in Rule 14(a).*

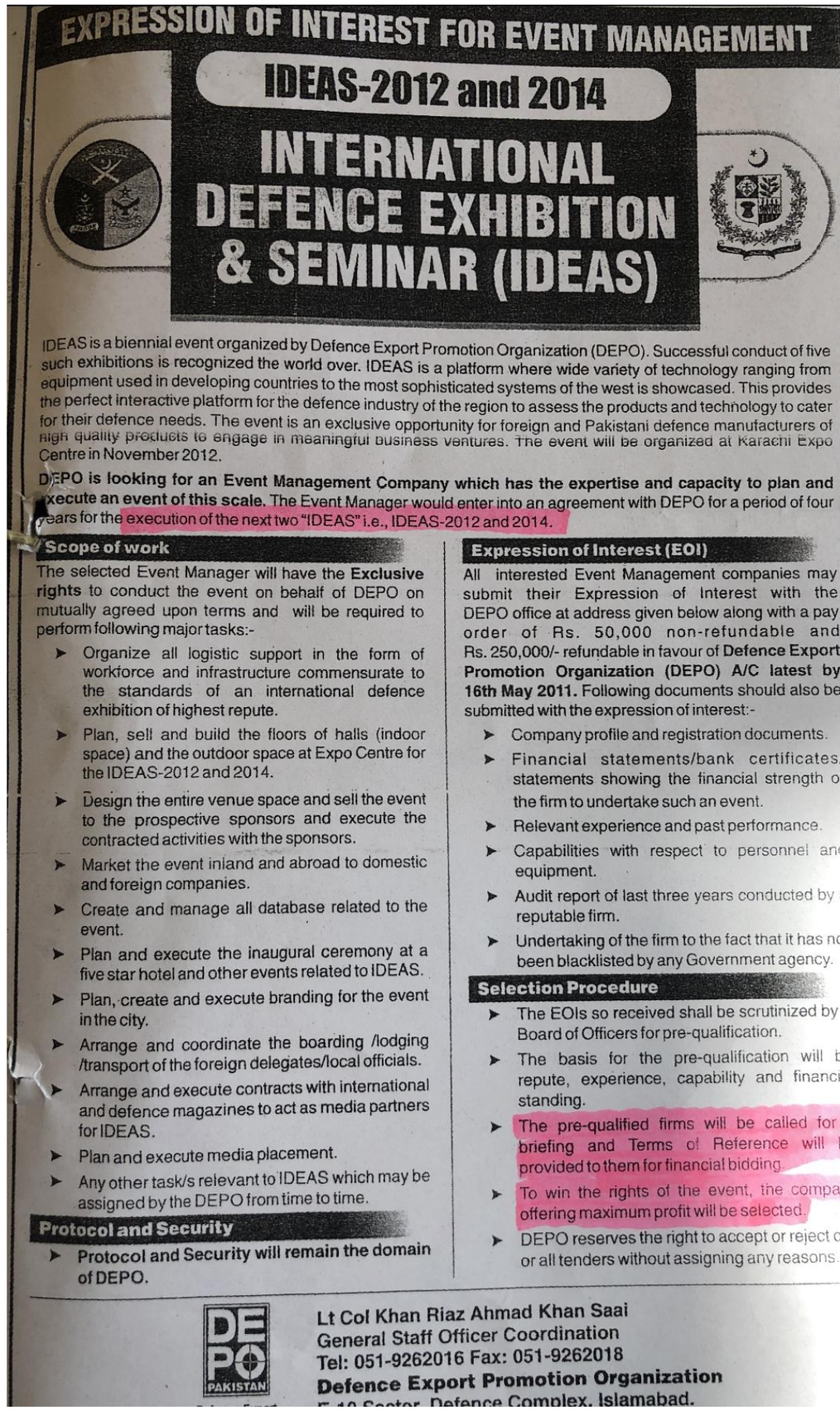
18. It may be prudent to consider the phraseology of the national security exception, pleaded by the counsel for the respondent No. 3. Rule 14(a) stipulates as follows:

> "14. Exceptions. It shall be mandatory for all procuring agencies to advertise all procurement requirements exceeding [prescribed financial limit which is applicable under sub-clause (i) of clause (b) of rule 42]. However under the following circumstances deviation from the requirement is permissible with the prior approval of the Authority,
>
> (a) The proposed procurement is related to national security and its publication could jeopardize national security objectives;"

19. The reference to the prescribed financial limit is a reference to Rs. 100,000/-. Mr. Talpur had cited the case of *Watan Party* to drive home the significance of national security and then articulated that, by virtue of being a defense exhibition, IDEAS and all information related thereto fell within the domain of national security and hence the exception contained in Rule 14(a) was clearly applicable thereto. It may be

poignant to record that the plea of national security is alien to the replies filed by the respondent No. 1, 2, 3 and 4. The cloak of national security, prima facie alien to the pleadings of all respondents, was not raised by the learned Deputy Attorney General, representing the respondent Nos. 1 and 2, even in his arguments; but the counsel for the respondent No. 3 sought, during the course of oral arguments, that the award of the Contract be determined to be exempt from the operation of the Ordinance and the Rules in view of the national security exception.

20. Notwithstanding the foregoing, we prefer to address this issue of national security on merit rather than upon technicalities. It is noted that the IDEAS events are exhibitions, of defense apparatus, open to the general public. Purveyors of martial-ware, international and domestic, display their merchandise at designated retail spaces frequented by all manner of people, and the said exhibits are also featured prominently in the print and electronic media. The Contract, in question herein, does not pertain to the martial merchandise on display but instead to the particulars of the event and the retail space at which the same is to be exhibited. In order to illustrate the point, the petitioner had filed a statement dated 18.10.2018, annexed thereto were the expressions of interest for event management of IDEAS 2008-2010 published in the dailies Dawn and Jang dated 28.01.2007 and expressions of interest for event management of IDEAS 2012-2014 published in the dailies Dawn and Jang dated 29.04.2011. The advertisement for IDEAS 2012-2014 is reproduced herein below as an illustration to demonstrate the benign nature of the constituents thereof:



EXPRESSION OF INTEREST FOR EVENT MANAGEMENT

IDEAS-2012 and 2014

INTERNATIONAL DEFENCE EXHIBITION & SEMINAR (IDEAS)

IDEAS is a biennial event organized by Defence Export Promotion Organization (DEPO). Successful conduct of five such exhibitions is recognized the world over. IDEAS is a platform where wide variety of technology ranging from equipment used in developing countries to the most sophisticated systems of the west is showcased. This provides the perfect interactive platform for the defence industry of the region to assess the products and technology to cater for their defence needs. The event is an exclusive opportunity for foreign and Pakistani defence manufacturers of high quality products to engage in meaningful business ventures. The event will be organized at Karachi Expo Centre in November 2012.

DEPO is looking for an Event Management Company which has the expertise and capacity to plan and execute an event of this scale. The Event Manager would enter into an agreement with DEPO for a period of four years for the execution of the next two "IDEAS" i.e., IDEAS-2012 and 2014.

Scope of work

The selected Event Manager will have the **Exclusive rights** to conduct the event on behalf of DEPO on mutually agreed upon terms and will be required to perform following major tasks:-

- Organize all logistic support in the form of workforce and infrastructure commensurate to the standards of an international defence exhibition of highest repute.
- Plan, sell and build the floors of halls (indoor space) and the outdoor space at Expo Centre for the IDEAS-2012 and 2014.
- Design the entire venue space and sell the event to the prospective sponsors and execute the contracted activities with the sponsors.
- Market the event inland and abroad to domestic and foreign companies.
- Create and manage all database related to the event.
- Plan and execute the inaugural ceremony at a five star hotel and other events related to IDEAS.
- Plan, create and execute branding for the event in the city.
- Arrange and coordinate the boarding /lodging /transport of the foreign delegates/local officials.
- Arrange and execute contracts with international and defence magazines to act as media partners for IDEAS.
- Plan and execute media placement.
- Any other task/s relevant to IDEAS which may be assigned by the DEPO from time to time.

Protocol and Security

- **Protocol and Security will remain the domain of DEPO.**

Expression of Interest (EOI)

All interested Event Management companies may submit their Expression of Interest with the DEPO office at address given below along with a pay order of Rs. 50,000 non-refundable and Rs. 250,000/- refundable in favour of **Defence Export Promotion Organization (DEPO) A/C latest by 16th May 2011.** Following documents should also be submitted with the expression of interest:-

- Company profile and registration documents.
- Financial statements/bank certificates/ statements showing the financial strength of the firm to undertake such an event.
- Relevant experience and past performance.
- Capabilities with respect to personnel and equipment.
- Audit report of last three years conducted by a reputable firm.
- Undertaking of the firm to the fact that it has not been blacklisted by any Government agency.

Selection Procedure

- The EOIs so received shall be scrutinized by a Board of Officers for pre-qualification.
- The basis for the pre-qualification will be repute, experience, capability and financia standing.
- The pre-qualified firms will be called for a briefing and Terms of Reference will be provided to them for financial bidding.
- To win the rights of the event, the compan offering maximum profit will be selected.
- DEPO reserves the right to accept or reject on or all tenders without assigning any reasons.

DEPO PAKISTAN

Lt Col Khan Riaz Ahmad Khan Saai
General Staff Officer Coordination
Tel: 051-9262016 Fax: 051-9262018
Defence Export Promotion Organization
F-10 Sector, Defence Complex, Islamabad.

21. It is apparent that the advertisement delineates the scope of work, application criteria and selection criteria. The petitioner had also placed before us copies of two agreements pertaining to the award of earlier contracts, with respect to IDEAS, dated 28.04.2007 and 29.06.2009 respectively and it is observed from a perusal thereof the information shared therein pertained primarily to the allocation of retail space at the

exhibition and the sharing of rights and obligations in respect thereof. Notwithstanding the foregoing, a bare perusal of Rule 14(a) demonstrates that it contains no blanket exemption from the operation of the Ordinance and / or the Rules. *Mujahid Muzzafar* has analyzed the said rule to reveal that it commences with a declaration that it is mandatory to advertise all procurement requirements exceeding a specific amount, where after an exception has been created permitting a deviation. While the deviation does not permit immunity from the Ordinance and / or the Rules, it merely operates to displace the requirement of an advertisement, subject to prior approval of the authority. In the present case no approval of the authority was obtained to seek the benefit of Rule 14(a) and the consequence of such a failure has been denoted by the honorable Supreme Court, in the case of *Mujahid Muzzafar*, as follows:

> "45. Rule 14 of the PPRA Rules, 2004, also requires that such deviation is permissible only with the prior approval of the Authority …. In the instant case, no such approval later or prior was ever obtained from the authority with regard to the Contract in question. Needless to say that grant of such approval by the Authority would obviously be justiciable. Similarly, the mere raising of the specter of Internal Security would not curtail the jurisdiction of this Court to insist on the implementation of the PPRA Rules, 2004…"

22. It is also worthy to consider that the award of IDEAS events prior to the Contract was governed by the prescriptions of the Ordinance / Rules. It has been maintained by the Islamabad High Court in *MN Construction* that the process of public procurement once started under the Rules could not be stopped or wound up under any circumstances to extend an undue favour. Learned counsel for the respondent No. 3 has been unable to extrapolate any grounds to maintain the award of the Contract within the domain of national security and even otherwise it was never the case of the respondent No. 3 that approval of the authority was ever applied for / or received in order to claim / enjoy the benefit of Rule 14(a). The reliance by the respondent No. 3 upon *Watan Party* has not augmented his argument as the ratio thereof is clearly distinguishable in the present facts and circumstances. Therefore, it is our considered view that the Contract was not exempted from the operation of the Ordinance and the Rules by virtue of the national security exception contained in Rule 14(a).

Question 4: Whether award of the Contract by private agreement was afforded due legal sanction pursuant to Rule 42.

23. Mr. Talpur had argued that the methodology employed for the award of the Contract was afforded legal sanction by virtue of Rule 42, which stipulated that a procuring agency may utilize the alternative methods of procurement stated therein. It was thus inferred by the learned counsel that use of the word “may”, instead of “shall”, implied that non adherence to any provision would not render an entity in violation of the Rules. It was expressed by the said respondent vide the written synopsis filed herein that the present case fell squarely within the exception created vide Rule 42(d)(i) and (ii). Reliance was placed in such regard upon the dictum of *AR Khan*.

24. It may be appropriate to initiate deliberation hereupon by adverting to the relevant provision of the Rules relied upon by the learned counsel for the respondent No. 3:

> “(d) negotiated tendering. A procuring agency may engage in negotiated tendering with one or more suppliers or contractors with or without prior publication of a procurement notification. <u>This procedure shall only be used when</u>, --
>
> (i) The supplies involved are manufactured purely for the purpose of supporting a specific piece of research or an experiment, a study or a particular development;
>
> (ii) For technical or artistic reasons, or for reasons connected with protection of exclusive rights or intellectual property, the supplies may be manufactured or delivered only by a particular supplier;”
>
> (Underline added for emphasis.)

25. Even though in the written synopsis shelter has been sought under Rule 42(d)(i) and (ii), it is hereby recorded that during oral arguments the learned counsel had argued that the provisions of Rule 42 (b) [request for quotations] and subsequently Rule 42(c) [direct contracting] were applicable in the present facts and circumstances. It may be prudent to reproduce the content of the cited provisions herein below:

"(b) request for quotations.

A procuring agency shall engage in this method of procurement only if the following conditions exist, namely:-

(i) the cost of object of procurement is below the prescribed limit of one hundred thousand rupees:

Provided that the respective Boards of Autonomous bodies are authorized to fix an appropriate limit for request for quotations method of procurement subject to a maximum of rupees five hundred thousand which will become financial limit under this sub-rule;

(ii) the object of the procurement has standard specifications;

(iii) minimum of three quotations have been obtained; and

(iv) the object of the procurement is purchased from the supplier offering the lowest price:

Provided that procuring agencies convinced of the inadequacy of the financial limit prescribed for request for quotations in undertaking their respective operations may approach the Federal Government for enhancement of the same with full and proper justifications;

(c) direct contracting.- A procuring agency shall only engage in direct contracting if the following conditions exist, namely:-

(i) the procurement concerns the acquisition of spare parts or supplementary services from original manufacturer or supplier:

Provided that the same are not available from alternative sources;

(ii) only one manufacturer or supplier exists for the required procurement:

Provided that the procuring agencies shall specify the appropriate fora, which may authorize procurement of proprietary object after due diligence; and

(iii) where a change of supplier would oblige the procuring agency to acquire material having different technical specifications or characteristics and would result in incompatibility or disproportionate technical difficulties in operation and maintenance:

Provided that the contract or contracts do not exceed three years in duration;

(iv) repeat orders not exceeding fifteen per cent of the original procurement;

(v) in case of an emergency:

> Provided that the procuring agencies shall specify appropriate fora vested with necessary authority to declare an emergency;
>
> (vi) when the price of goods, services or works is fixed by the government or any other authority, agency or body duly authorized by the Government, on its behalf; and
>
> (vii) for purchase of motor vehicle from local original manufacturers or their authorized agents at manufacturer's price."

26. A bare perusal of the aforesaid provisions of the Rules illustrates that the award of the Contract do not qualify within such parameters by any stretch of the imagination. *AR Khan* is patently distinguishable in the present facts and circumstances. A Division bench of the Lahore High Court in the case of *Malik Mushtaq* dilated at length upon Rule 42 and observed that it could not be employed to thwart the transparent exercise of powers of public functionaries in awarding contracts of valuable right. It is thus opined that in the present facts and circumstances the Contract could not have been negotiated directly and / or by private treaty within the confines of Rule 42.

27. Mis-procurement has been defined in Section 2(h) of the Ordinance in the following verbiage:

> "misprocurement means public procurement in contravention of any provision of this Ordinance, any rules, regulations, orders or instructions made thereunder or any other law in respect of, or relating to, public procurement."

28. In addition to the definition contained in the Ordinance, Rule 50 stipulates that any unauthorized breach of the Rules shall amount to mis-procurement. It has been determined supra that the Ordinance and the Rules were squarely applicable to the exercise of the award of the Contract. It has further been determined that the award under scrutiny was undertaken in prima facie breach of the Rules, hence, we are of the view that the process and award of the Contract amounted to *mis-procurement*.

29. The principles of procurement are laid out vide Rule 4, which states as follows:

> "4. Principles of procurements. Procuring agencies, while engaging in procurements, shall ensure that the procurements are conducted in a fair and transparent manner, the object of procurement brings value for money to the agency and the procurement process is efficient and economical."

30. The requirement for advertising is prescribed vide Rules 12 and 14 respectively, wherein it is maintained as follows:

> "12. Methods of advertisement.
>
> (1) Procurements over one hundred thousand rupees and up to the limit of two million rupees shall be advertised on the Authority's website in the manner and format specified by regulation by the Authority from time to time. These procurement opportunities may also be advertised in print media, if deemed necessary by the procuring agency:
>
> Provided that the lower financial limit for advertisement on Authority's website for open competitive bidding shall be the prescribed financial limit for request for quotations under clause (b) of rule 42.
>
> (2) All procurement opportunities over two million rupees should be advertised on the Authority's website as well as in other print media or newspapers having wide circulation. The advertisement in the newspapers shall principally appear in at least two national dailies, one in English and the other in Urdu.
>
> (3) In cases where the procuring agency has its own website it may also post all advertisements concerning procurement on that website as well.
>
> (4) A procuring agency utilizing electronic media shall ensure that the information posted on the website is complete for the purposes for which it has been posted, and such information shall remain available on that website until the closing date for the submission of bids.
>
> 14. Exceptions.
>
> It shall be mandatory for all procuring agencies to advertise all procurement requirements exceeding prescribed financial limit which is applicable under sub-clause (i) of clause (b) of rule 42…."

31. The methodology of effecting procurements is delineated in Rules 20 and 21, which stipulate as follows:

> "20. Principal method of procurement - Save as otherwise provided hereinafter, the procuring agencies shall use open

> competitive bidding as the principal method of procurement for the procurement of goods, services and works.
>
> 21. Open competitive bidding - Subject to the provisions of rules 22 to 37 the procuring agencies shall engage in open competitive bidding if the cost of the object to be procured is more than the prescribed financial limit which is applicable under sub-clause (i) of clause (b) of rule 42."

32. It has been maintained by the honorable Supreme Court in *Re: Suo Moto Case 13 of 2009* reported as *PLD 2011 Supreme Court 619* that in matters where Government bodies exercise their contractual powers, the principles of judicial review cannot be denied. In such matters the exercise of such powers is intended to prevent arbitrariness or favoritism, with a view to ensure that the public interest was the paramount consideration. It was further observed that the basic test in such regard is to see whether there was any infirmity in the decision making process and interference in such a process is warranted where it appears to be predicated upon arbitrariness, illegality, irrationality, procedural impropriety and / or actuated by mala fides.

33. In a subsequent pronouncement, in *Asif Fasihuddin Vardag vs. Government of Pakistan & Others* reported as *2014 SCMR 676*, the honorable Supreme Court maintained that it is the duty of the Court to determine the legality of a decision and such duty was to be exercised *inter alia* by determining if the 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 person would have reached; or abused its powers. It was reiterated that principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. It was further observed that the right to choose, in the context of awarding contracts, could not be considered to be an arbitrary power and if the said power was exercised for any collateral purpose then such an exercise merited being struck down. The honorable bench went further and maintained that it was the duty of the Courts to ensure that the relevant laws are adhered to strictly in order to exhibit transparency.

34. The process culminating in the award of the Contract, by the respondent No. 2 to the respondent No. 3, without recourse to a competitive bidding process as envisaged under the law, is prima facie

repugnant to the provisions of the Rule 4, 12, 14, 20 and 21. In view of the reasoning and rationale contained herein, we are of the considered opinion that said process ought to have been in consonance with the fiat of the Ordinance and the Rules.

35. In view of the reasoning and rationale contained herein this petition is disposed of with the directions that the Contract, in so far as the IDEAS 2020 is concerned, is hereby set aside and the Respondent No. 1 and 2 may initiate a de novo tendering process for the said event and / or any such future events in due conformity with the Ordinance and the Rules.

J U D G E

J U D G E

*Farooq ps/**