

IN THE HIGH COURT OF SINDH AT KARACHI

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

C P D – 7687 of 2017
Assetlink Asia (Private) Limited
vs.
Federation of Pakistan & Others

C P D – 8172 of 2017
E-Movers (Private) Limited
vs.
Federation of Pakistan & Others

For the Petitioners:	Mr. Haider Waheed, Advocate Mr. Abdul Moiz Jaferi, Advocate (in CP D 7687 of 2017)
	Mr. Asad Iftikhar, Advocate (in CP D 8172 of 2017)
For the Federation: Respondent No.1	Mr. Ishrat Zahid Alvi Assistant Attorney General (in both petitions)
For the FBR: Respondent No.2	Mr. Shahid Ali, Advocate (in both petitions)
For Falcon-I (Pvt.) Ltd: Respondent No.3	Mr. Ali Aziz, Advocate (in CP D 7687 of 2017)
For NLC Construction Solution (Private) Limited: Respondent No.3 Respondent No.4	Mr. Kashif Imaduddin, Advocate Mr. Abdul Hameed, Advocate (in CP D 8172 of 2017) (in CP D 7687 of 2017)
Date of Hearings:	22.11.2018, 06.12.2018 & 10.01.2019
Date of Announcement:	12.02.2019

JUDGMENT

Agha Faisal, J: The present petitions challenge the tendering process and the consequential award of a contract by the Federal Board of Revenue (“**FBR**”) for the monitoring of bonded cargo transportation from

the point of customs entry to the point of customs existing within the territory of Pakistan (“**Contract**”) to NLC Construction Solution Private Limited (“**NCSPL**”), being a respondent in both the petitions, inter alia, on the grounds that the conferment of such a contract was a result of *misprocurement*, as defined under the public procurement laws.

2. The petitioner filed CP D 7687 of 2017 on the premise that the petitioner, being a constituent of one of the bidders, was aggrieved on account of such the Contract having been awarded through misprocurement. The other petition, being CP D 8172 of 2017, is filed challenging the award of the same Contract but the petitioner, despite not having participated in the process, seeks the exercise of jurisdiction by this Court on the grounds of public interest being involved in the matter. The controversy in each of the two petitions is identical, hence, this common judgment shall determine the fate thereof.

3. Mr. Haider Waheed, Advocate argued on behalf of the petitioner in CP D 7687 of 2017 and submitted that the tender under consideration came about as a result of the National Logistic Cell (“**NLC**”) having lost 28,000 containers entrusted into its custody for safe transit upon arrival in Pakistan. It was argued the aforesaid matter was the subject matter of *suo moto* proceedings before the honorable Supreme Court and subsequently it was decided that independent tracking mechanism be put in place so as to mitigate the chances of such a catastrophe happening again. It was contended that the procurement laws were willfully flouted in order to award the Contract to NCSPL, admittedly a fully owned subsidiary of NLC. Per learned counsel the award of contract to a party to monitor and track its own operations is an inherent conflict of interest and violates the directives of the honorable Supreme

Court and the enshrined principles of transparency in administration. The arguments advanced by the learned counsel in such regard are encapsulated and resented herein below:

- i. It was submitted that the petitioner was a joint venture partner, and subsequently shareholder of the entity that participated in the bidding process / tender for the award of the Contract. It was submitted that at the time of the tender the petitioner was independently competent to perform the tasks required in respect of the tender on its own accord and met the standards of prequalification laid down in the Monitoring and Tracking in the Cargo Rules 2012 (“**2012 Rules**”). It was categorically submitted that the advertised tender was a two stage process and that NCSPL was demonstrably not a participant therein.
- ii. Per learned counsel, NCSPL was belatedly and unlawfully parachuted in to the tender process and further that the terms of the tender were unilaterally altered, post opening of bids, to facilitate NCSPL, at the cost of the actual bidders. Learned counsel argued that the subsequent variation in the evaluation criteria, alien to the bidding documents, could not be undertaken by the procurement authority. It was further stated that the bids once opened stood frozen and the underlying terms could not be modified thereafter without recourse to an open process, by virtue whereof equal opportunity would be available to all concerned.
- iii. Per learned counsel, the entity whereof of the petitioner was constituent was the highest bidder for the Contract and the same was demonstrated from the record. It was shown that upon the

evaluation criteria being unlawfully and unjustifiably altered the status of the highest bidder was diluted, in order to confer declare NCSPL successful, who was otherwise least qualified in respect thereof.

4. Mr. Asad Iftikhar, Advocate, representing the petitioner in CP D 8172 of 2017, adopted the arguments articulated by Mr. Waheed and in addition thereto placed reliance 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**") and *Atta Ullah Khan Malik vs. Federation of Government of Pakistan* reported as *2010 PLD Lahore 605* ("**Atta Ullah**") to justify the maintainability of the said petition as on the ground of it being public interest litigation.

5. Mr. Shahid Ali, Advocate argued on behalf of the FBR and submitted that the present petitions were misconceived; and that CP D 7687 of 2017 was even otherwise not maintainable as the petitioner was demonstrably not an aggrieved party. It was submitted that the said petitioner was admittedly not a bidder in the tender process and was merely a joint venture partner / shareholder in the entity that participated in the said process. It was submitted that the entity that participated in the process had initiated legal proceedings in respect of the Contract but had subsequently withdrawn the same. It was contended that while the said petitioner may have a cause of action against its joint venture partner, it certainly had no justifiable cause to prefer the present petition. Learned counsel sought to argue that NCSPL was always contemplated as a constituent of the original bidders, however, the same was not reflected in the relevant documentation at the earlier stage merely on

account of non-completion of some minor formality within time. Learned counsel relied upon rule 17 of Public Procurement Rules, 2004 ("**Rules**") and stated that procurement agency was empowered to seek further information at any stage of the procurement proceedings. Learned counsel also relied upon rule 36(c)(iv) of the Rules to demonstrate that the power to revise was always available with the FBR. In order to augment his contentions, learned counsel sought to place reliance on the case of *Pakistan Gas Port Ltd. vs. Sui Southern Gas Co. Ltd and Others* reported as *PLD 2016 Sindh 207* ("**Pak Gas Port**").

6. Mr. Kashif Imaduddin, Advocate representing NCSPL submitted that the present petitions merit dismissal forthwith. It was submitted that NCSPL is a wholly owned subsidiary of NLC and that the issue of the so called NLC scam was disposed of by the honorable Supreme Court vide order dated 28.06.2018. It was submitted that the suit filed in respect of the Contract had already been withdrawn by the unsuccessful bidder, of whom the petitioner in CP D 687 of 2017 was a mere constituent and that no demure was raised by the said petitioner in respect of such withdrawal. It was stated that there is no vested right for award of a contract in any entity and hence the same could not be made the basis for maintaining the present petition. Learned counsel relied upon the case of *Habibullah Energy Limited vs. Water and Power Development Authority* reported as *2008 YLR 2612* ("**Habibullah**") to augment his submissions in such regard. It was argued that the award of the Contract to NCSPL was in due conformity with the public procurement laws and that no infringement had taken place in such regard. It was further submitted that the two initial bidders were given the status of probable solution providers and that presence of the term "probable" precludes any right to expect or demand that no other probable

applicant should have been included in that list at any subsequent stage.

7. We have heard the arguments advanced by respective learned counsel and have also appreciated the voluminous documentation and case law arrayed before us. The question before this Court is whether the tendering process culminating in the award of the Contract was in accordance with the law, however, prior to entering into the said deliberation it is considered paramount to determine the question of maintainability of the present petitions.

8. It is noted that a Letter of Invitation issued by FBR, dated 20.10.2015, in favor of Falcon-I, being the respondent No. 4 in CP D 7687 of 2017 (“**Fi**”). The petitioner was stated to be a joint venture partner of Fi and a deed to such effect was also placed on the record. The letter issued by the FBR dated 09.12.2015 intimated Falcon-i (Private) Limited (“**FiPL**”) that their technical bid has qualified for further consideration. Per learned counsel of the petitioner, FiPL was the successor in interest of Fi specifically constituted for the purpose of participating in the tender under consideration and that the petitioner was a shareholder in the said entity. It is thus apparent that the petitioner being a distinct corporate legal entity itself was not a bidder in respect of the tender process under consideration. A suit, being Suit 1007 of 2016, was filed by FiPL against the respondents herein, whereby the procurement process under challenge herein was called into question. Admittedly, the petitioner was not a party to the said proceedings and nor did the petitioner ever seek to become a party to the said proceedings. The aforesaid suit was unconditionally withdrawn by FiPL and the same is manifest from the order dated 19.10.2017

rendered in Suit 1007 of 2016. It is within our contemplation that while the petitioner claims to be a shareholder of FiPL, it is a distinct legal entity independent thereof and thus was entitled to initiate proceedings if any grievance was occasioned thereto. In this connection it was brought to our knowledge that the petitioner did institute Suit 2358 of 2017 against FiPL wherein the petitioner prayed, inter alia, for damages on the assertion that FiPL having acted contrary to the interests of the petitioner in respect of the tender process under consideration. It has been alleged by the petitioner in its memorandum of petition that Fi/FiPL has alienated the rights of the petitioner whilst illegally colluding with NCSPL in sabotaging the challenge to the tender process under consideration. It is thus manifest that upon the unconditional withdrawal of Suit 1007 of 2016 by FiPL on 19.10.2017, the petitioner instituted Suit 2358 of 2017 there-against on 10.11.2017. In this manner the petitioner appears to have determined the course of action available thereto and filed the requisite proceedings to remedy its grievances. However, on 09.05.2018, the petitioner opted to withdraw Suit 2358 of 2017 and hence divested itself of the remedy that it may have been entitled to in such regard. In view of the discussion it is considered opinion of the Court that the petitioner in CP D 7687 of 2017 is not an aggrieved party and while recourse may be available thereto to remedy any grievance that it may have, resort to the Constitutional jurisdiction of this Court could not be invoked in the present facts and circumstances.

9. The other petition, CP D 8172 of 2017, was filed in the nature of public interest litigation. The learned counsel for the petitioner had relied upon the ratio of the earlier Division Bench pronouncements of this Court in *Popular* and *Salahuddin* and also a judgment of a Division Bench of the honorable Lahore High Court in the case of *Atta Ullah*.

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 Division Bench of the Lahore High Court maintained in *Atta Ullah* that once the Court assesses that a breach of trust or a violation of public law has taken place, the Court must immediately to rectify the breach and the identity or antecedents of the petitioner pale into insignificance. It was also noted that while the learned counsel for the respondents objected to the maintainability of CP D 7687 of 2017 on the grounds that the petitioner therein had no *locus standi* to maintain the said petition, no objection was raised with regard to the maintainability of CP D 8172 of 2017. In view of the ratio of the judgments cited herein it is hereby determined that CP D 8172 of 2017 is maintainable on account of being in the public interest, therefore, we now proceed to address the merits of the matter before us.

10. At this juncture it is pertinent to record that there was no cavil to the fact that the tender process culminating in the Contract qualified as public procurement, under the laws for the time being in force, and it was never the respondents' case that the relevant public procurement laws were not applicable herein. On the contrary it was argued on behalf of the respondents that the tender process and the consequential award of the Contract were in due consonance with the public procurement

laws. In this backdrop the detailing of the relevant provisions of the public procurement laws, delineating the tendering process and the consequential award of the Contract to be within the ambit therein, is eschewed for the sake of brevity.

11. Adverting to the facts under consideration, it was observed that a request for expression of interest was disseminated in the national media by the FBR for the Safe Transportation and Environment Project. The said advertisement, published in the national dailies, stipulated that the Safe Transpiration Project was launched in 2013 covering Afghan forward transit cargo and the FBR now intended to enhance the project to cover the entire spectrum of bonded cargo transportation, including but not limited to Afghan forward and retro cargo, inter port movement, transshipment to and from dry ports and transit cargo, from Customs point of entry to Customs point of exit, maintaining en-route integrity of cargo on real-time basis ("**Project**"). The advertisement instructed interested persons to obtain information regarding the terms of reference as notified by the Rules 2012 and required that the requisite expression of interest containing the technical and financial proposals for delivery of the aforementioned services be submitted no later than 15.042015. It was then noted that in pursuance of the aforesaid advertisement, bids were submitted by the interested parties within the timeframe and that no bid was received from NCSPL in such regard within the timeframe stipulated for submission of the same. It was demonstrated from the bid documents that the determination for the bid price was to be undertaken in pursuance of the criteria prescribed in clause 15 thereof, contents whereof is reproduced herein below:

"15.1 The Bidder shall indicate on the appropriate for prescribed in this Standard Bidding Document the fee and charges per

tracking operation and total cost of Investment of the Project for three years, under the contract.

- 15.2 Form prescribed for quoting of prices is to be filled in very carefully, preferably typed. Any alteration/correction must be initiated. Every page is to be signed and stamped at the bottom, Serial number of the quoted item may be marked with red/yellow marker.
- 15.3. The Bidder should quote the prices of goods and services according to the technical specifications as provided in Part-Two section III of this document. The technical specifications of goods and services, different from the required specifications, shall straightway be rejected.
- 15.4. The Bidder is required to offer a competitive price which must include all the taxes, duties, prescribed price and any other price as mentioned in the Bid Data Sheet (BDB) where applicable, if there is no mention of taxes, the offered/quoted price shall be considered as inclusive of all prevailing taxes/duties, etc.
- 15.5. The benefit of exemption from or reduction in the taxes and duties shall be passed on to the Importer or exporter.
- 15.6. Prices offered should be for the unique tracking and monitoring service and/or a tracking device along with the cost of Investment for three years demanded in the Schedule of Requirement; partial service provision offers shall straightaway be rejected. Conditional or alternate offer shall also be considered as non-responsive Bid.

(Underline added for emphasis.)

12. A letter of Invitation, dated 29.10.2015, was issued by FBR clearly stipulating that only two entities stood shortlisted, NCSPL not being constituent thereof. It may be pertinent to reproduce the contents of the relevant content herein below:

“The Federal Board of Revenue, Islamabad, government of Pakistan hereby intends to recourse, under National Competitive Bidding (NCB), providing technical solution and licensing services for tracking and monitoring of cargo/container security under the Tracking and Monitoring of Cargo Rules-2012 under Single Stage Two Envelop bidding through Merit Point Evaluation methodology under Federal PPRA Rules 2004.

2. This assignment aims to license service providers for performing the functions of tracking and monitoring of cargo under the Tracking and Monitoring of Cargo Rules 2012. Details on the software, hardware and related services to

be acquired are provided in the Standard Bidding Documents (attached).

3. The Licensing committee has therefore identified probable solution integrators/solution providers by shortlisting the Expressions of Interest (EOIs) received from firms that have stated in their EOIs related track record with large scale solution implementations for the monitoring of cargo. You are among the said shortlisted firms.

4. This Request for Proposal (RFP) has therefore been communicated to the following shortlisted solution integrators/solution providers/Technology Consultants:

- 1) M/s. United Track System (Pvt.) Ltd.
- 2) M/s Falcon-i (Pvt.) Ltd.

(Underline added for emphasis.)

5. It is not permissible to transfer this Invitation to any other firm.

6. A firm will be selected under Single Stage Two Envelop bidding through Merit Point Evaluation Methodology under rule 36(b) of the PPRA Rules 204 and under Monitoring and Tracking rules 2012 wherever applicable, to ensure selection of Solution Providers/Solution Integrators/Technology consultants for providing a high quality container tracking and monitoring solution and services at the most economical cost....”

13. Notwithstanding the belated parachuting in of NCSPL in the tender process, it is seen from the record that the public opening of financial bid was held on 12.12.2015 in front of the bidders' representatives and the members of the Financial Evaluation Proposal Committee, the highest bidder was determined to be FiPL and that the lowest bid was submitted by NCSPL. However, the criteria for evaluation of the bids was subsequently altered and by way of a novel accounting methodology, alien to the bidding documents, employed to completely change the priority and ranking of bids received. This is demonstrated from the relevant documents, uncontroverted by the respondents, available on file and the relevant content whereof is reproduced herein below:

“The public opening of financial bids was held on 12.12.2015. Financial proposals were then opened on the same date in front of the bidders’ representatives and the members of Financial Proposal evaluation committee. The total prices of the technical qualified firms were read out publicly and recorded as follows:

Read out price				
Charges per tracking operation (Rs.)			Cost of Investment	
Company Name	Transit	TP	ST	
M/s Falcon.I	5899	5899	5899	Rs.1288.68 million
M/s NLC	6274	5945	6393	Rs.665 million
M/s United Track	7500	6500	6500	Rs.996.78 million

M/s NLC vide letter dated 16.11.2015 raised the objection that for proper financial evaluation, only the cost of capital investment may be taken into consideration and recurring/operating expenses are not to be considered for financial evaluation. The matter was referred to Procurement Specialist Mr. Mohammad Ali Raza. He was of the view that recurring cost is only provided by the bidder when it is specifically required in the Instructions To bidders (ITB) and in General Conditions of contract (GCC) and Special Conditions of Contract (SCC) sections of the Standard Bidding Document in I, ICT or other technology contracts. Recurrent cost commences at the expiry of the Warranty period of the hardware and services and usually extends from 4-5 years – the breakup of which is then required by the Client through a Standard Proforma for Recurrent Cost. He point out that the said Recurring Cost component was neither mentioned nor required by the Client in the RFP document and may be excluded from the cost of Investment. As per his advice he applicants were asked to furnish the bifurcation of the cost investment quoted in the financial bid/proposal I terms of the capital investment (investment in establishment of Central & regional control Rooms, storage and testing facilities for tracking devices, liaison offices at entry/exit points, mobile enforcement units, tracking devices, palm held devices) and recurring/operation expenses for proper financial evaluation. The information furnished by the applicants was thoroughly deliberated upon by the:

S. No.	Company	Cot of Investment as per Financial Evaluation (Rs.in million)
1.	NLC Constructions Solutions	664.51
2	M.S. Falcon-I (Pvt.) Ltd.	386.78
3	United Track System (Pvt.) Ltd.	5592.82

In the light of financial evaluation, marking criteria and related formula, laid down in the Standards Bidding Document, the Financial Proposal Evaluation committee awarded the following score to the applicants (Financial Evaluation Report enclosed, Annex-B)”

FINANCIAL SCORE						
Sr. No.	Firm	Charges per tracking investment operation				Cost of
		Total Marks	Marks obtained	Total marks	Marks obtained	Marks obtained (total)
1.	M.S. Falcon-I	5	5	15	8.73	13.73
2	M/s NLC	5	4.75	15	15	19.75
3	M/s United Track	5	4.32	15	13.38	17.70

14. The entire premise for the belated modification in the criteria was the opinion of a person, who was stated to be a specialist in such regard, and it was also stated therein that such an exercise was predicated on the basis of letter dated 16.11.2015 issued by NLC to the FBR. The reservations with regard to the aforesaid and the uncalled for reliance upon a stranger’s opinion, predicated upon a letter of an interested party, were denigrated by the petitioners in the following terms:

“The view of the “procurement expert”, Mr. Muhammad Ali Raza, i.e, that recurring / operational expenses are only provided when specifically required in the bidding documents and that the recurring cost commence at the expiry of the warranty period of the hardware and services extending usually from 3-5 years, was plainly incorrect and has no basis in law or fact for the following reasons:

- (i) Seeking an opinion from a procurement expert on a criterion that has not been mentioned explicitly or implicitly in the RFP is a clear violation of the Rule 30 of the Rules 2004. The evaluating criteria cannot be changed after bids have been submitted and opened simply on the basis of the opinion of an alleged expert.
- (ii) As mentioned earlier, the only phrase used in the RFP is “cost of investment for the project for three years”. This does not simply refer to the “capital cost of the project”

since any provision of services for three years contains a significant recurring/operational cost. Moreover, it is obvious that for the project feasibility and appropriate pricing of a project over three years, the bidders would have to take into consideration the recurring operational cost of running the project. If a bifurcation of the financial proposal was required, it should have been communicated to the bidders. Requesting the bidders to provide a bifurcation of the financial proposal for the submission of the bid clearly indicates that the evaluation criteria of the financial bid was changed by the FBR as an afterthought.

- (iii) The tender was for the provision of a service in which there are few major capital costs. The capital costs include investing in tracking devices (which will then be purchased by users) and establishing a monitoring centre (with computer terminals etc.). To evaluate such a project on the basis of capital costs only, makes no financial sense.
- (iv) The procurement expert's view that recurring expenses are incurred only after the expiry of the warranty period of the hardware is clearly erroneous. It is obvious that the following costs that would be incurred by the bidders for provisions of services of tracking the monitoring cargo have no relation to the expiry of the warranty period for hardware:
 - (a) Inter-operator payment (monthly payment to telecommunication operators for local SIMs);
 - (b) Monthly fixed fee of container devices (payable as software cost on a monthly basis to hybrid device manufacturer);
 - (c) Satellite communication cost (payable on a monthly basis to satellite company for date usage);
 - (d) Staff salaries (payable to employees of a month basis);
 - (e) Costs of fuel for vehicles and maintenance costs; and
 - (f) Office expenditure".

15. The narrative contained hereinabove demonstrates the progression of the tendering process which culminated in the award of the Contract by FBR to NCSPL. While the respective petitioners sought to demonstrate from the record that the Contract was awarded as a result of misprocurement, the respondents submitted that the award of the Contract was in due consonance with the law and relied upon the same narrative and documentation as discussed hereinabove.

16. It is noted that the pricing mechanism for the bid price was manifest from the bidding document referred to supra and that the respective bidders, including the belated entrant NCSPL, had submitted their bids in pursuance of the same formula. This fact is apparent from the admitted documentation available on file wherein the Fi has been shown to be the highest bidder and NCSPL has been shown to have been the lowest bidder. The sanctity of the bidding documents is manifest from rule 23 of the Rules wherein it is, inter alia, stated that procuring agency shall formulate precise and unambiguous bidding documents that shall be made available to the bidders immediately after the publication of the invitation to bid and the form of the bid is expressly included as a constituent of the bidding documents. Rule 30 states that all such bids shall be evaluated in accordance with the evaluation criteria and other terms and conditions set-forth in the prescribed bidding documents and that no other criteria shall be used for evaluating the bids that had not been specified in the bidding documents. The provisions of Rule 30 further state that bids once opened in accordance with the prescribed procedure shall be subject to only those rules, regulations and policies that are enforced at the time of issue of notice for invitation of bids. It is thus manifest that the criteria for pricing of bids contained in the bidding documents did not place NCSPL in the category of the successful bidder and on the contrary deemed NCSPL to be the least qualified to be awarded the Contract. The subsequent modifications in the pricing criteria, inspired a stranger to the proceedings and upon the request of NCSPL itself, cannot be considered to be transparent or tenable. While a procurement agency remains competent to ask for additional information pursuant to Rule 17, and had the competence to revise any aspect of the evaluation criteria,

pursuant to Rule 36(c)(iv), such power could only be exercised if such revisions were communicated to all bidders equally at the time of invitation to submit bid and sufficient time was allowed to the bidders to revise their bids. In the present circumstances, the said prescription was not followed and the modification in the evaluation criteria was undertaken subsequent to the opening of the technical bids and also post opening of the financial bids.

17. It is our considered opinion that there could be no subsequent variation in the terms of a tender, especially when such a change is to the manifest advantage of an otherwise unsuccessful bidder. In *Muhammad Ayub & Brothers vs. Capital Development Authority Islamabad* reported as *PLD 2011 Lahore 16* a Division Bench of the Lahore High Court deprecated the alteration of terms post opening of bids. The subsequent pronouncement in *Toyota Garden Motors (Private) Limited vs. Government of Punjab & Others* reported as *PLD 2012 Lahore 503* maintained that the evaluation criteria prescribed in the bidding documents was required to be adhered to and that belated setting out of new specifications, alien to the bidding documents, could not be approved as such conduct was commensurate to abuse of the procurement process. It is thus maintained that the respondents have been unable to justify the modification of the pricing criteria, post opening of the bids. Such modification is further unmerited as not only was it undertaken upon the express request of the least qualified bidder but that it was the sole reason for the least qualified bidder, albeit belated, to have been awarded the Contract.

18. We now advert to the issue of whether or not NCSPL could be considered a bidder in the tender process under consideration. The

counsel for the FBR and NCSPL have submitted that NCSPL was an original bidder, however, that its name was not included in the list, as manifest vide FBR's letter dated 29.10.2015, on account of some minor technical formalities remaining to be fulfilled. We had asked the respective learned counsel to demonstrate from the record whether the NCSPL's expression of interest was submitted prior to 15.04.2015 and also whether the technical and financial proposals for the tender under consideration were submitted prior to the said date, as was an express requirement of the FBR advertisement in regard thereof. The respective learned counsel remained unable to demonstrate anything from the record to such effect. It is noted from the subsequent letter of invitation, dated 04.11.2015, that the FBR Licensing Committee had initially identified two possible entities by shortlisting, however, NCSPL was not shortlisted as allegedly they had not submitted audited accounts in support of their financial statements, hence, it was argued that NCSPL be considered an original bidder and not a belated entrant. While there is nothing on the record to demonstrate any submissions having been made by the NCSPL in the past, the aforesaid letter clearly stated that the audited accounts supposedly submitted were those of NLC, and not NSPCL. Notwithstanding the fact that NLC is the parent entity of NCSPL, it is apparent that the two are distinct and mutually exclusive corporate legal entities and no justification was advanced to demonstrate as to the reason why the submissions of audited accounts of an associated undertaking would enhance or diminish the documented financial standing of the distinct bidder entity. The earlier letter of invitation, dated 29.10.2015, make no reference to NCSPL being a contender at all, despite the subsequent letter stating that the relevant documents were submitted by NCSPL on 21.10.2015 and the subsequent corroboratory documents were submitted by NLC on

29.10.2015. It is also apparent from the record, and not denied by the respective respondents, that while a precondition for participating in the tender process was having relevant experience and past performance in regard to the services sought for the Project, NCSPL did not even possess the requisite license to undertake the Project until 15.04.2016, which date is a year after the date upon which all technical and financial bids were to have been submitted and at least a quarter after NCSPL had already been deemed to have been the successful bidder by FBR for the Contract. In this context it may be pertinent to record that the respective learned counsel for the respondents made no attempt to argue or demonstrate whether NCSPL was even qualified at the relevant times, on the anvil of the 2012 Rules, to participate in the tender process.

19. During the three month period, encompassing the respective dates of hearing herein, FBR and NCSPL failed to show any document to corroborate their stance of being original bidders. No document whatsoever was produced despite several opportunities having been proffered in such regard. However, in a written synopsis submitted on behalf of NCSPCL, much after this matter was reserved for hearing, copies of documents were attached to show that certain documentation, sought by the FBR vide its letter dated 20.10.2015, was purportedly provided thereto by NLC vide their letter dated 21.10.2015. Even if the veracity of this document is presumed it merely demonstrates that FBR sought some information from NLC which was provided the next day. There is no rationale provided for why this communication was undertaken by NLC and not NCSPL. There is a copy of a letter, dated 20.10.2015, addressed by FBR to NCSPL wherein certain information has been sought. This letter, dated just the day prior to the reply

received in respect thereof, appears to be the first exchange of communication between FBR and NCSPL with regard to the Contract. Nothing has been demonstrated to show if NCSPL had submitted its technical and financial proposal prior to the cut-off date, being 15.04.2015 or at any time thereafter. We had specifically asked the respective learned counsel for the respondents to place before us the original bid/s of NCSPL or copies thereof so as to put the controversy of the belated parachuted entry to rest, however, no such documentation was ever shared with us. Even if we consider for the moment that the inclusion of other entrants would make the process more competitive, hence, the same may be condoned, it would follow that the same could only have been done if the initial tender was substituted and the field was opened to all new entrants. In such a scenario we are constrained to draw the irresistible conclusion that the insertion of NCSPL in the tender process at the belated stage has not been found to be justifiable from the record arrayed before us.

20. The honorable Supreme Court has expounded 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 held that the basic test in such regard is the determination 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. 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.

21. Learned counsel for NCSPL had relied upon *Habibullah* to augment his contention that no party could claim a vested right for the award of a contract. The case of *Pak Gas Port* was relied upon by the learned counsel representing FBR to argue that the entity, wherein the petitioner in CP D 7687 of 2017 was a joint venture partner / shareholder, did not have any vested right to be awarded the Contract. While there is no cavil to the ratio enunciated vide the cited pronouncements, however, the same does not assist the respondents' case. The tender process culminating in the Contract has been assailed on the grounds of it amounting to misprocurement and not on the grounds of there being any vested rights.

22. Mis-procurement has been defined in Section 2(h) of the Public Procurement Regulatory Authority Ordinance 2002 to mean public

procurement in contravention of any provision of the said Ordinance, any rules, regulations, orders or instructions made thereunder or any other law in respect of, or relating to, public procurement. In addition to the definition contained in the aforesaid Ordinance, rule 50 of the Rules stipulates that any unauthorized breach of the Rules shall amount to mis-procurement. It is an admitted position that the relevant provisions of the procurement laws were squarely applicable to tender process culminating in the award of the Contract, and it is our considered opinion that adherence thereto could not be demonstrated before us.

23. In view of the reasoning and rationale contained herein, we are constrained to observe that the belated unjustified parachuting of NCSPL into the tender process; the manner adopted for modification of the evaluation criteria post opening of bids; and the implementation of such modification cannot be considered to be transparent and / or in the public interest. The tender process culminating into the Contract is hereby determined to be in manifest violation of the law, hence, the Contract is hereby set aside. The respondent No. 2 may initiate a de novo tendering process in accordance with the law for the award of the Contract, preferably within a period of one month, in which all eligible parties may participate.

24. Therefore, we do hereby dismiss CP D 7687 of 2017, along with pending applications, with no order as to costs. The CP D 8172 of 2017 is allowed in terms herein.

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