

**IN THE HIGH COURT OF SINDH AT KARACHI****Present:**

1. Mr. Justice Yousuf Ali Sayeed
2. Mr. Justice Mohammad Abdur Rahman

**C.P No. D-2779 of 2023****NISAR AHMED KHAN                    ...                    PETITIONER****VERSUS****N.H.A. AND OTHERS                    ...                    RESPONDENTS****C.P No. D-2780 of 2023****M/S SHAHBAZ WORLD BUILDERS  
(PVT) LTD                                    ....                    PETITIONER****VERSUS****N.H.A. AND OTHERS                    ...                    RESPONDENTS****C.P No. D-2781 of 2023****MOULA BUX JATOI                    ....                    PETITIONER****VERSUS****N.H.A. AND OTHERS                    ...                    RESPONDENTS****C.P No. D-2782 of 2023****HAFEEZ ULLAH LEHRI.                    ...                    PETITIONER****VERSUS****N.H.A. AND OTHERS                    ...                    RESPONDENTS**

Mr. Muhammad Masood Khan advocate for the Petitioners.

M/s. Touqeer Ahmed Seehar and Hafeezullah advocates for the Respondents.

Mr. Yasir Ahmed Shah, Assistant Attorney General, along with Ghulam Hussain Deputy Director (Legal) National Highway Authority, Islamabad.

Dates of hearing                    : 15 June 2023, 16 June 2023 and 22 June 2023.

## ORDER

**MOHAMMAD ABDUR RAHMAN, J:** The Petitioners each maintain these Petitions under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 each challenging identical letters dated 29 May 2023 that have been issued by the Respondent No. 1, purportedly exercising its discretion to demand Bank Guarantees as opposed to Insurance Bonds from the Petitioners for securing the performance of their obligations to perform on various contracts.

### A. The Contracts

2. The Petitioners have, after participating in a competitive tender process that had been advertised by the Respondent No. 1, been awarded Letters of Acceptance (hereinafter referred to "LOA") to the following Contracts:

S.NO.	CONTRACT NO.	WORK DESCRIPTION/ ROUTE/CHANGE	DETAILS
1.	PM-2020-21-SS-06	Periodic maintenance (functional overlay) KM 140-160 (N-55)NBC Sehwan -Boubak	Awarded to Petitioner in CP No. 2779/2023 pursuant to LOA dated: 19-04-2023
2.	RH-2015-16-SN-01	Rehabilitation work KM 320-330 (N-5) NBC More Sadujha	Awarded to Petitioner in CP No. 2780/2023 pursuant to LOA dated: 19-04-2023
3.	PM-2020-21-SS-07	Periodic maintenance (functional overlay) KM 160-180 (N-55)NBC Ban Saeedabad Khudabad	Awarded to Petitioner in CP No. 2781/2023 pursuant to LOA dated: 19-04-2023
4.	PM-2015-16-SN-03	Periodic maintenance (Structural overlay) KM 320-335 (N-55) Larkana -Ratodero	Awarded to Petitioner Hafeez Ullah Lehri ) in CP No. 2782/2023 pursuant to LOA dated: 19-04-2023

3. The LOA issued by the Respondent No. 1 to each of the Petitioners, contained the following stipulations:

- “ ... 2. Your bid, as defined above, together with this “Letter of Acceptance” thereof shall constitute a bidding contract between yourself and the National Highway Authority (hereinafter called “The Employer”). You will be required , however, to execute in due course , a Contract Agreement as per sample form included in Chapter “Forms” . Of the Tender Documents in accordance with Clause mentioned in the Instructions to Bidders.
3. Attention is drawn towards Clause of the Instructions to Bidders whereby as precedent to commencement of work and not later than then day you sign the form contract agreement, you will be required to deposit with the Employer upon receipt of the Letter of Acceptance as per Clause IB- 32.1 and IB -33 for due performance of this contract as per clause 10.1 of the Special Stipulations of COC.
4. You are therefore required to attend the office of the Director (Cord) South Zone, NHA Karachi for submission of Performance Security along with non-judicial paper of Rs. 2000/- only for Contract Agreement within the stipulated time as mentioned above, failing which your bid shall be cancelled and NHA will proceed further accordingly.”

## **B. Standard Form Bidding Documents**

4. It is common ground as between the Petitioners and the Respondent No. 1 that the terms of the Contract that would regulate the obligations as between the Petitioners and the Respondent No. 1 were, as per the terms of the tender, to be based upon “Standard Form Bidding Documents” that have been prepared by the Pakistan Engineering Council i.e. the Respondent No. 5 (hereinafter referred to as “PEC”). These “Standard Form Bidding Documents” that were prepared by the PEC were pursuant to a directive of the Executive Committee of the National Economic Council Been dated 12 November 2007 to be made applicable to the:

“ ... procurement of engineering goods, works and services.”

The directives of the Executive Committee of the National Economic Council were *inter alia* implemented by two instruments:

- (i) a Notification dated 12 February 2008 issued by the “Government of Pakistan, Planning & Development Division, Planning Commission” giving directions to all “Federal, Provincial Departments/ Organizations and District

Governments” to implement the decision of the Executive Committee of the National Economic Council;

- (ii) a Notification dated 11 July 2008, Gazetted under the heading of Statutory Notifications (SRO) in the Extraordinary Section of Part II of the Gazette of Pakistan dated 1 August 2008 under Section 27 of the Public Procurement Regulatory Authority Ordinance, 2002, entitled the Public Procurement Regulations 2008 whereby in Regulation 3 it was made mandatory on a procuring agency to follow the “Standard Form Bidding Documents” that had been prepared by the PEC.

(i) **Bid Security**

5. In the “Standard Form Bidding Documents” that have been prepared by the PEC, a document entitled Instructions to Bidder (which are abbreviated to “IB” in that document) contain the following clauses which have also been referred to by the Respondent No. 1 in the LOA:

“ ... **IB-15 Bid Security**

15.1 Each bidder shall furnish, as part of his bid, a Bid Security in the amount stipulated in the Bidding Data in Pak Rupees or an equivalent amount in a freely convertible currency.

15.2 The Bid Security shall be, at the option of the bidder, in the form of Deposit at Call or a Bank Guarantee issued by a Scheduled Bank in Pakistan or from a foreign bank duly counter guaranteed by a Scheduled Bank in Pakistan or an insurance company having atleast AA rating from PACRA/JCR in favour of the Employer valid for a period 28 days beyond the Bid Validity date.”

As such at the time of **making a bid** the Petitioners were, at their option liable, to submit a “bid security” either in the form of “Deposit at Call” or a “Bank Guarantee” issued by a scheduled Bank in Pakistan or from a foreign Bank and which foreign Bank Guarantee was liable to be counter

guaranteed by a scheduled Bank in Pakistan or from an Insurance Company having an AA rating.

(ii) **Performance Security**

6. The guarantee given as “**Bid Security**” is not to be confused with a performance guarantee that are to be given by a successful bidder as “**Performance Security**” and which is to be given by the successful bidder, post the Letter of Acceptance being issued, to secure his performance of the contract. The requirement to provide such “**Performance Security**” are broadly outlined in IB- 32 and IB-33 which are reproduced hereinunder

“ ... **IB.32 Performance Security**

32.1 The successful bidder shall furnish to the Employer a Performance Security **in the form and the amount stipulated in the Bidding Data and the Conditions of Contract** within a period of 28 days after the receipt of Letter of Acceptance.

32.2 Failure of the successful bidder to comply with the requirements of Sub- Clause IB.32.1 or Clauses IB.33 or IB.35 shall constitute sufficient grounds for the annulment of the award and forfeiture of the Bid Security.

**IB.33 Signing of Contract Agreement**

33.1 Within 14 days from the date of furnishing of acceptable Performance Security under the Conditions of Contract, the Employer will send the successful bidder the Contract Agreement in the form provided in the Bidding Documents, incorporating all agreements between the parties.

33.2 The formal Agreement between the Employer and the successful bidder shall be executed within 14 days of the receipt of the Contract Agreement by the successful bidder from the Employer.”

7. As is apparent, once the Contract is awarded to a bidder, the successful bidder is obligated to provide a “Performance Security in the form and the amount stipulated in the “Bidding Data” and the “Conditions of Contract”. Thereafter within 14 days from the date of the successful bidder furnishing an “acceptable Performance Security under the Conditions of Contract”, the Contract Agreement would be forwarded to the successful bidder and the Contract would be executed within 14 days of the Contract Agreement being forwarded.

8. It is also apparent that while a reference is made to a “Performance Security” having to be provided by the successful bidder, the form of the Performance Security that has to be provided has not been mentioned in IB 32.1. The form of such a Performance Security is identified in IB-32.1 as to be detailed in the Bidding Documents” and the “Conditions of Contract” which are comprised within the “Standard Form Bidding Documents” that have been prepared by the PEC. In this regard, the Preface of the document entitled “Bidding Data” clarifies that:

“ ... This section should be ***filled in by the Employer*** before issuance of the Bidding Documents.) The following specific data for the Works to be bid shall ***complement, amend, or supplement the provisions in the Instructions to Bidders***. Wherever there is a conflict, the provisions herein shall prevail over those in the Instructions to Bidders.

*[Instructions are provided, as needed, in italics.]*

Instructions to Bidders Clause Reference”

(Emphasis is added)

The clauses indicated in the document entitled “Bidding Data” are therefore to “complement, amend or supplement” the Instructions to the Bidders and as per the instructions are ***to be filled in the by the Employer i.e. the Respondent No. 1***. Clause 32.1 of the document entitled “Bidding Data” which is therefore to be interpreted to “supplement” the ambiguity of IB 32.1 provides that:

“ ... 32.1 Standard form and amount of Performance Security ***acceptable to the Employer***:

***[Select the kind of Performance Security (bank guarantee and/ or bond), and indicate the amount.***

*A bank guarantee can be conditional or unconditional on demand (Standard Form at PS-1 & 2). An amount equal to 10 percent of the Contract Price is commonly specified for bank guarantees, which %age should match with that stipulated in Appendix-A to Bid.*

*A performance bond is an undertaking by an insurance company to complete the construction in the event of default by the Contractor, or to pay the amount of bond to the Employer.]*

(Emphasis is added)

As per the instructions that are given in the document entitled the "Bidding Data", prima facie, the Respondent No. 1 is given a **discretion** to choose the form of the Performance Security that can be demanded i.e. a Bank Guarantee or a Performance Bond from an Insurance Company. In respect of each of the Contracts awarded to each of the Petitioners, the Respondent No. 1 had exercised its discretion and in the "Bidding Data" stated that:

" ... 32.1 (i) The successful bidder shall furnish the Employer a Performance Security in the form and the amount stated in clause 10.1 of the Conditions of Contract Part II & Appendix A in Bid within a period of 28 days after the receipt of Letter of Acceptance:

(ii) However, if the quoted bid price is beyond 10% below the Engineer Estimate, the successful bidder shall have to provide additional performance security in the shape of Bank Guarantee only as stipulated in Appendix A to Bid."

The Special Stipulations as contained in clause 10.1 of the Conditions of Contract Part II & Appendix A to the Bid as admitted by the Petitioners and the Respondent No. 1 read as under:

" .... Performance Security shall be, at the option of the bidder, be in the form of either (a) bank guarantee from any scheduled bank in Pakistan or (b) bank guarantee from a bank located outside Pakistan duly countersigned by a Scheduled Bank in Pakistan only if the quoted /evaluated bid price is upto 10% of the Engineer Estimate (EE). For such bid, the Performance Security of an amount equal to 10% of the Contract Price stated in the Letter of Acceptance in the form of Bank Guarantee shall be acceptable **No insurance guarantee will be acceptable.**

However, if the quoted bid price is further 10% below the EE, the bidder shall have to provide additional Performance Security in the shape of Bank Guarantee only for the balance lower percentage.

For instance, if a bid price appears 15% below the EE, the bidder shall have to provide Performance Security in two parts as follows:

(i) Performance Security (First Part) of an amount equal to 10% of the Contract price stated in Letter of Acceptance in the form of an option of the bidder, be in the form of either (a) bank guarantee from any scheduled bank in Pakistan or (b) Bank guarantee from a bank located outside of Pakistan duly counter guaranteed by a scheduled Bank in Pakistan."

(ii) Performance Security (Second Part) of an amount equal to 5% of the Contract Price stated in the Letter of Acceptance in the form of either (a) bank guarantee or (b) bank guarantee from

a bank located outside Pakistan duly counter guaranteed by a scheduled Bank in Pakistan”

(Emphasis is added)

It would seem that the Respondent No. 1 asserting its discretion under Clause 32.1 of the document entitled “Bidding Data” has demanded a Bank Guarantee from each of the Petitioners as Performance Security and have again exerted its discretion under Clause 32.1 of the document entitled “Bidding Data” specifically prohibiting the Petitioners from providing “Insurance Guarantees”. The Respondent No. 1 has communicated this requirement to each of the Petitioners by letters each dated 29 May 2023 and which the Petitioners impugn in these Petitions.

**C. The Bidders Contentions as to the Discretion Exercised by the National Highway Authority in Demanding Bank Guarantees and Prohibiting the Provision of Insurance Guarantees**

9. The Petitioners are each aggrieved by the discretion that has been exercised by the Respondent No. 1 in demanding Bank Guarantees as Performance Security from each of the Petitioners and prohibiting each of the Petitioners from providing Insurance Guarantees as Performance Security.

10. Mr. Muhammad Masood Khan, who appeared on behalf of the Petitioners has contended that:

- (i) each of the Petitioners has requested the Respondent No. 1 to accept an Insurance Guarantee as opposed to a Bank Guarantee as Performance Security;
- (ii) the plea was made by the Petitioners on the basis of:



- (a) a Notification dated 11 June 2007 issued by the Executive Committee of the National Economic Council (which was ratified by the Government of Pakistan by its notification dated 12 February 2008 and was also ratified in Regulation 3 of the Public Procurement Regulations 2008) which the Petitioners contends purportedly gives the discretion to the **Petitioners** to either provide a Bank Guarantee or an Insurance Guarantee as Performance Security;
- (b) unreported decisions of the High Court of Baluchistan each of which had directed the Respondent No. 1 to accept either Bank Guarantee or an Insurance Guarantee as Performance Security from a Bidder.
- (iii) the Respondent No. 1, in its letter dated 29 May 2023, asserting **its discretion** under Clause 32.1 of the document entitled "Bidding Data" having demanded Bank Guarantees from each of the Petitioners as Performance Security and again by exerting the discretion under Clause 32.1 of the document entitled "Bidding Data", prohibiting the Petitioners from providing Insurance Guarantees has exercised such discretion "arbitrarily" and has discriminated as against the Petitioners as:
- (a) it must exercise such discretion in conformity with the Notification dated 11 June 2007 issued by the Executive Committee of the National Economic Council (which was ratified by the Government of Pakistan by its notification dated 12 February 2008 and in Regulation 3 of the Public Procurement Regulations

2008) and by failing to do so has exercised its discretion arbitrarily; and

- (b) in the past the Respondent No. 1 has accepted Insurance Guarantees from other bidders in other contracts and to not give the Petitioners same opportunity would be discriminatory.
- (c) in fact, the Respondent No. 1 has on 6 June 2022 issued a list of Insurance Companies whose Insurance Guarantees it will accept and once having issued such a notification it cannot prevent the Petitioners from providing an Insurance Guarantee from one of the Insurance Companies mentioned in that list.

11. Mr. Muhammad Masood Khan relied on the decision of the Supreme Court of Pakistan reported as **Habibullah Energy and another vs. WAPDA**<sup>1</sup> and a decision of this Court reported as **Adam Sugar Mills Limited vs. Federation of Pakistan**<sup>2</sup> to advance the proposition that this Court in its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 can set aside decisions of public bodies that has made in an arbitrary manner. He also stated that while generally contractual obligations cannot be examined in the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 the Supreme Court of Pakistan in the decision reported as **Messrs Airport Support Services vs. The Airport Manager, Quaid e Azam International Airport, Karachi**<sup>3</sup> has held that where the contract does not involve a detailed inquiry into or an examination of minute or controversial

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<sup>1</sup> PLD 2014 SC 47

<sup>2</sup> 2012 CLD 1734

<sup>3</sup> 1998 SCMR 2268

questions of fact, contractual obligations owed by a public body could be made subject to judicial review *inter alia* as being arbitrary or in discriminatory. In respect of what is to be examined to see whether an action would tantamount to being discriminatory he contended that it had been held by a Division Bench of this Court in a decision reported as **M.Q.M and others vs. Province of Sindh**<sup>4</sup> and a decision of the High Court of Lahore reported as **Burewalla Textile Mills Limited vs. Enquiry Officer, War Risks Insurance, Punjab, N.W.F.P. and Federal Territory**<sup>5</sup> that where no standards were provided by the public body in the exercise of discretion, the act on the part of the government body would amount to discrimination and be in violation of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973. He finally relied on various unreported decisions of the High Court of Baluchistan which decided as under:

- (i) Constitution Petition No. 757 of 2021 entitled **Constructors Association of Pakistan vs. Government of Baluchistan** held that Rule 29.1 of the Baluchistan Public Procurement Regulations, 2014 which had not included the right of a bidder to submit an “insurance guarantee” in the form of **Pre-Bid Security** as opposed to **Performance Security** should be amended to bring the same into conformity with the Standard Form of Bidding Documents (Civil Works) issued by the PEC;
- (ii) Constitution Petition No. 571 of 2023 entitled **M.N. Construction Company vs. Government of Baluchistan and others** which while relying on Constitution Petition No. 757 of 2021 entitled **Constructors Association of Pakistan vs. Government of Baluchistan** allowed the Petitioners to submit an “insurance guarantee” as **Pre-Bid Security** under

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<sup>4</sup> 2014 CLC 335

<sup>5</sup> 2002 CLD 1130

the terms of the Standard Form of Bidding Documents (Civil Works) issued by the PEC;

- (iii) Constitution Petition No. 512 of 2023 entitled **Latif & Brothers JV with MS. Costal Constructions Company vs. National Highway Authority and others** and Constitution Petition No. 107 of 2023 entitled **Baluchistan Government Contractors Association Baluchistan vs. National Highway Authority and others** both of which are **short orders** and whereby the Respondents were directed to accept a 10% **Performance Security** in the form of an Insurance Guarantee/Bond for both “Bid Security” as well as for a “Performance Security”.

**D. The National Highway Authorities Contentions as to the Discretion Exercised by it in Demanding Bank Guarantees and Prohibiting Insurance Guarantees**

12. Mr. Touqeer Seehar, assisted by Mr. Hafeezullah argued that the discretion that was exercised by the Respondent No. 1 was not arbitrary nor discriminatory. He contended that while they accepted that the “Standard Form Bidding Documents” that were prepared by the PEC and which were pursuant to a directive of the Executive Committee of the National Economic Council dated 12 November 2007 to be made applicable to the “procurement of engineering goods, works and services” and which he also accepts have been ratified through a Notification dated 12 February 2008 issued by the “Government of Pakistan, Planning & Development Division, Planning Commission” and by Regulation 3 of the Public Procurement Regulations, 2008 were applicable to the contracts being considered in these Petitions. He further contended that the Respondent No. 1 has not only followed the terms of the “Standard Form Bidding Documents” that were prepared by the PEC but have fully implemented them and it is in fact the Petitioners who are misinterpreting these documents. He contended

that while **discretion did vest with the Petitioner**, under clause IB 15.1 of the “Standard Form Bidding Documents” that were prepared by the PEC, to choose the form of a **Pre-Bid Security**, by contrast when it came to the provision of a **Performance Security** under IB-32.1 read with clause 10.1 of the Conditions of Contract Part II & Appendix A to the Bid, the discretion vested solely with the Respondent No. 1 and not with the Petitioners. He contended that the discretion exercised by the Respondent No. 1 in demanding a Bank Guarantee was neither arbitrary nor discriminatory as the practice of accepting Insurance Guarantees as Performance Security had resulted in litigation being instituted whenever the performance of the contract came into issue and whereby the security was injunctioned, resulting in losses having to be sustained by the Respondent No. 1. This he contended was in contrast to the enforcement of Bank Guarantees where little or no litigation had occurred when the Respondent No. 1 attempted to enforce such security. This had led to a policy decision being made by the Respondent No. 1 whereby it had stopped accepting Insurance Guarantees and is only accepting Bank Guarantees as Performance Security. He concluded by stating that the decisions of the High Court of Baluchistan have been appealed by the Respondent No. 1 before the Supreme Court of Pakistan and need not be followed as they are not binding on this Court. The Assistant Attorney General adopted the arguments of Mr. Touqeer Seehar and each of the prayed that the Petitions may be dismissed. Neither Mr. Touqeer Seehar nor the Assistant Attorney General relied on any case law in support of their contentions.

**E. The Order of the Court on the Petitions**

**(i) Maintainability**

13. The jurisdiction of this Court to review contractual obligations, such as of the nature involved in these Petitions, is well settled. While, the jurisdiction of this Court under Article 199 of the Constitution of Islamic

Republic of Pakistan, 1973 is a summary jurisdiction which does not generally allow for an order in the nature of a writ of mandamus to be issued to allow us to enforce contractual rights,<sup>6</sup> exceptions do exist to this general rule. These exceptions are limited to the situation where contractual obligations as between the petitioner and a government body are admitted and the jurisdiction of this court is invoked so as to enforce such an admitted obligation. Reliance in this regard can be placed on the decision of the Supreme Court of Pakistan in **The State of Pakistan vs. Mehrajuddin**<sup>7</sup> wherein it was held that:<sup>8</sup>

“ ... A right founded purely on private contract, however clear it might be, is not enforceable by mandamus. These statements regarding the nature of the writ of mandamus have been borrowed from a valuable monograph on the subject, entitled "Extraordinary Legal Remedies" by Ferris. (Thomas Law Book Company, U. S.) In Halsbury's Laws of England (Volume 11, Third Edition), the following statements of the relevant law are found. If public officials or a public body fail to perform any public duty with which they have been charged, an order of mandamus will lie to compel them to carry it out. In accordance with this principle a mandamus will issue to Government officials in their capacity as public officers exercising public duties which affect the rights of private persons. Such a mandamus might even issue to the Lords of the Treasury in their capacity as public officers invested by statute with public duties affecting the rights of private persons. An applicant for a mandamus must show that he has a legal right to the performance of a legal duty by the party against whom a mandamus is sought. The petitioner must be clothed with a clear legal and equitable right to something which is properly the subject of a writ, as a legal right by virtue of an Act of Parliament. The order is only granted to compel the performance of a duty of a public nature.”

Similarly in **The Chandpur Mills Limited vs. The District Magistrate Tippera and another**<sup>9</sup> it was held that:<sup>10</sup>

“ ... We cannot conceive that a writ of mandamus to carry out the requirement of such an enactment as section 7-B of the Act in question can possibly be issued on the basis of an interpretation of several documents such as that which Mr. Fazal-ur-Rehman has attempted to place before us. A contract may sometimes be construed out of a number of documents in the manner suggested, but a writ of mandamus does not issue for the enforcement of contracts. What should be established on the

<sup>6</sup> See **Messrs Momin Motor Company vs The Regional Transport Authority, Dacca** PLD 1962 SC 108; **Nizamuddin vs. Civil Aviation Authority** 1999 SCMR 467; **Lahore Cantonment Cooperative Housing Society Limited, Lahore Cantt vs. Dr. Nusrat ullah Chaudhry** PLD 2002 SC 1068; **Pakcom Limited vs. Federation of Pakistan** PLD 2011 SC 44; **Vice-Chancellor, Bacha Khan University Charsadda, Khyber Pakhtunkhwa** 2021 SCMR 1995,

<sup>7</sup> PLD 1959 SC (Pak.) 147

<sup>8</sup> *Ibid* at pg. 159

<sup>9</sup> PLD 1958 SC (Pak.)267

<sup>10</sup> *Ibid* at pg.274

record in order to obtain a writ in this case is a clear agreement to which the Provincial Government should be a party on the Government side as against the private claimant, as to what the compensation for the requisition should be, stating a specified sum.”

Indeed, the decision of the Supreme Court of Pakistan as relied on by Muhammad Masood Khan reported as **Habibullah Energy and another vs. WAPDA**<sup>11</sup> was correctly relied on and in which it was held that:<sup>12</sup>

“ ... The nature and scope and extent of the power of judicial review by the superior Courts of administrative actions and the grounds on the basis whereof such actions can be set aside has evolved with the passage of time and its contours stand clearly defined especially in the context of the award of the contract by the state or its instrumentalities. In the case of Quaid e Azam International Airport, Karachi and others (19989 SCMR 2268), the following was held:-

“ Further a contract carrying elements of public interested, concluded by the functionaries of the State, Has to be just, fair, transparent, reasonable and free from any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premises that public functionaries, deriving authority from or under law are obligated to act justly, fairly, equitably, reasonably without any element of discrimination and squarely within the parameters of the law as applicable in a given situation. Deviations, if of substance can be corrected through appropriate orders under Article 199 of the Constitution. In such behalf even where a contract, pure and simple, is involved, provided always that public element presents itself and the dispute does not entail evidentiary facts of a disputed nature may be provided...”

14. The Petitioners, in each of these Petitions, are impugning the discretion that has been exercised by the Respondent No. 1 in refusing them the opportunity to provide an insurance guarantee as Performance Security. The Petitioners and the Respondent No. 1 have correctly contended that the issue that has to be considered in these Petitions involves the interpretation of various clauses of the “Standard Form Bidding Documents” that have been issued by the Respondent No. 4, in particular IB-32.1 read with Clause 32.1 of the “Bidding Data” and Clause 10.1 of the Conditions of Contract Part II & Appendix A to the Bid so as to examine:

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<sup>11</sup> PLD 2014 SC 47

<sup>12</sup> *Ibid* at pg. 62-63

- (i) as to whether the Respondent No. 1 has the discretion to choose as between a Bank Guarantee and an Insurance Guarantee as the Performance Security that is to be provided by the Petitioners under a contract, and
- (ii) If the Respondent No. 1 has the discretion to choose as between a Bank Guarantee and an Insurance Guarantee as the Performance Security to be provided by the Petitioners under a contract whether the discretion has been exercised arbitrarily or discriminatorily in the circumstances indicated in the Petition.

15. We are of the opinion that the discretion of the Respondent No. 1 which has been exercised in the letter dated 29 May 2023 and which is impugned in each of Petitions, neither involves us going into any detailed inquiry into the facts or for that matter involves any dispute as to the facts involved therein. The discretion of the Respondent No. 1 which has been exercised in the letter dated 29 May 2023 is amenable to our jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 so as to examine the two issues that we have framed hereinabove and we therefore have no hesitation in holding that these Petition are to this extent maintainable.

(ii) **Whether the Respondent No. 1 has the discretion to choose as between a Bank Guarantee and an Insurance Guarantee as the Performance Security to be provided by the Petitioners under the Contracts**

16. As is regular in contracts of this nature, two separate forms of security are required by the Respondent No. 1 to regulate the obligations as between the Respondent No. 1 and the Petitioners. The first is a security which has to be issued by a bidder when he makes a bid. These are obtained so as to dissuade, adventurism in the bidding process, making it



incumbent on every bidder taking part in a bid to provide a security so as to provide some comfort towards the bidders financial security. To this extent clause IB-15.1 of the “Standard Form Bidding Documents” provides for the submission of “**bid security**” as under:

“ .. 15.1 Each bidder shall furnish, as part of his bid, a **Bid Security** in the amount stipulated in the Bidding Data in Pak Rupees or an equivalent amount in a freely convertible currency.

15.2 The **Bid Security** shall be, **at the option of the bidder**, in the form of Deposit at Call or a Bank Guarantee issued by a Scheduled Bank in Pakistan or from a foreign bank duly counter guaranteed by a Scheduled Bank in Pakistan or an insurance company having at least AA rating from PACRA/JCR in favour of the Employer valid for a period 28 days beyond the Bid Validity date.”

As such at the time of **making a bid** the Petitioners had an option to either submit a “bid security” either in the form of Deposit at Call or a Bank Guarantee issued by the scheduled Bank in Pakistan or from a foreign Bank and which in the case of a foreign bank guarantee was liable to be counter guaranteed by a scheduled Bank in Pakistan or from an insurance Company having an AA rating.

17. By contrast the bidder who has been declared as successful and to whom a Letter of Acceptance has been issued, such as the Petitioners, would under clause IB-32.1 be required to issue a “**Performance Security**” the obligation being clarified as follows:

“ ... 32.1 The successful bidder shall furnish to the Employer a **Performance Security** in the form and the amount stipulated in the Bidding Data and the Conditions of Contract within a period of 28 days after the receipt of Letter of Acceptance.

We are clear that these are two separate obligations that are being considered i.e. the obligation to provide a “**Bid Security**” under clause 1B-15.1 as opposed to the obligation to provide a “**Performance Security**”. While the discretion clearly vests with **the Petitioners** to choose the form of the “**Bid Security**” that they wish to provide, it is to be seen as to whether

they or the Respondent No. 1 have the right to choose as to the form of the **“Performance Security”** that is to be provided. Clarity is given in a document that is part of the “Standard Form Bidding Documents” entitled “Bidding Data”, the preface of which clarifies that:

“ ... *This section should be **filled in by the Employer** before issuance of the Bidding Documents.) The following specific data for the Works to be bid shall **complement, amend, or supplement the provisions in the Instructions to Bidders**. Wherever there is a conflict, the provisions herein shall prevail over those in the Instructions to Bidders.*

*[Instructions are provided, as needed, in italics.]*

*Instructions to Bidders Clause Reference”*

(Emphasis is added)

It is apparent that the clauses indicated in the document entitled “Bidding Data” are therefore to “complement, amend or supplement” the “Instructions to the Bidders” and as per the instructions are **to be filled in the by the Employer i.e. the Respondent No. 1**. Clause 32.1 of the document entitled “Bidding Data” which is therefore to be interpreted to “supplement” the ambiguity of IB 32 identified hereinabove and which provides that:

“ ... 32.1 Standard form and amount of Performance Security **acceptable to the Employer**:

**[Select the kind of Performance Security (bank guarantee and/ or bond), and indicate the amount.**

*A bank guarantee can be conditional or unconditional on demand (Standard Form at PS-1 & 2). An amount equal to 10 percent of the Contract Price is commonly specified for bank guarantees, which %age should match with that stipulated in Appendix-A to Bid.*

*A performance bond is an undertaking by an insurance company to complete the construction in the event of default by the Contractor, or to pay the amount of bond to the Employer.]*

(Emphasis is added)

On a literal interpretation it is therefore apparent that, as per the instructions that are given in the document entitled the “Bidding Documents” the Employer i.e. the **Respondent No. 1** is given the option to “select the kind of Performance Security” at its **discretion** that can be demanded i.e. a Bank Guarantee or a Performance Bond from an Insurance Company. In

respect of each of the Contracts awarded to each of the Petitioners the Respondent No. 1 had exercised its discretion and in the “Bidding Data” stated that:

“ ... 32.1 (i) The successful bidder shall furnish the Employer a Performance Security in the form and the amount stated in clause 10.1 of the Conditions of Contract Part II & Appendix A in Bid within a period of 28 days after the receipt of Letter of Acceptance:

(ii) However, if the quoted bid price is beyond 10% below the Engineer Estimate, the successful bidder shall have to provide additional performance security in the shape of Bank Guarantee only as stipulated in Appendix A to Bid.”

The Special Stipulations as contained in clause 10.1 of the Conditions of Contract Part II & Appendix A to the Bid as admitted by the Petitioners and the Respondent No. 1 and which have already been reproduced hereinabove<sup>13</sup> state that the Petitioners would provide a Bank Guarantee and not an Insurance Guarantee. **We are therefore of the opinion that, in contrast to the discretion to chose the form of the Bid Security to be provided which could be determined by the Petitioners, the discretion to choose the form of the Performance Security to be provided by the Petitioners vested in the Respondent No. 1 and not in the Petitioners.** We have carefully considered the unreported decisions of the High Court of Baluchistan Constitution Petition No. 757 of 2021 entitled **Constructors Association of Pakistan vs. Government of Baluchistan**; Constitution Petition No. 571 of 2023 entitled **M.N. Construction Company vs. Government of Baluchistan and others**; Constitution Petition No. 512 of 2023 entitled **Latif & Brothers JV with MS. Costal Constructions Company vs. National Highway Authority and others** and Constitution Petition No. 107 of 2023 entitled **Baluchistan Government Contractors Association Baluchistan vs. National Highway Authority and others** and are respectfully not persuaded to follow those Judgements. Two of the judgments relied on are short orders

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<sup>13</sup> See Paragraph 8

and until the full reasons are provided are not speaking orders, while the other two judgements relate to the provision of a “Bid Security” as opposed to a “Performance Security ” which are not in issue in this Petition.

(iii) **If the Respondent No. 1 has the discretion to choose as between a Bank Guarantee and an Insurance Guarantee as the Performance Security to be provided by the Petitioners under a contract whether discretion been exercised arbitrarily or discriminatorily in the circumstances indicated in the Petition**

18. No public body etc. has the right to make an arbitrary decision. Each decision of any such person or body has to be a decision which has to be structured. It has been held in the decision of the Supreme Court reported as **Amanullah Khan vs. The Federal Government of Pakistan**<sup>14</sup> that:<sup>15</sup>

“ ... Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularising it, organizing it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are *open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure*. Somehow, in our context, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalise it and regulate it by Rules, or Policy statements or precedents, the Courts have to intervene more often, than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times.

(Emphasis is added)

The discretion exercised by the Respondent No. 1 therefore has to be examined to see whether it was made in conformity with the seven factors identified by the Supreme Court of Pakistan in **Amanullah Khan vs. The Federal Government of Pakistan**<sup>16</sup>. After examining the actions of the Respondent No. 1 we are unable to see how the discretion vested by the Respondent No. 1 has not been exercised on such a basis. By

<sup>14</sup> PLD 1990 SC 1092; Followed in **Government of N.W.F.P vs. Mejee Flour and General Mills (Private) Limited, Mardan** 1997 SCMR 1804; **Abid Hassan vs P.I.A.C** 2005 SCMR 25

<sup>15</sup>

<sup>16</sup> PLD 1990 SC 1092;

implementing the decision of Executive Committee of the National Economic Council dated 12 November 2007, the Notification dated 12 February 2008 issued by the “Government of Pakistan, Planning & Development Division, Planning Commission” and acting in conformity with Regulation 3 of the Public Procurement Regulations, 2008 and having implemented the entire bidding process and the awarding of the contract in accordance with the provisions of the “Standard Form Bidding Documents” that have been prepared by the PEC i.e. the PEC, it has clearly exercised its jurisdiction as per **open plans, open policy statements, open rules, open findings and has implemented the process through what is transparently a fair informal procedure.** The option exercised by the Respondent No. 1, under the “Standard Form Bidding Documents” which as per Clause 32-1 of the Bidding Data gives the discretion to the Respondent No. 1 to choose the form of the Performance Security that it wishes to be provided and the Respondent No. 1 having specifically chosen to opt for a Bank Guarantee within the perimeters set by clause 10.1 of the Conditions of Contract Part II & Appendix A to the Bid we cannot fault the Respondent No. 1 for exercising its jurisdiction which it has been conferred with under the “Standard Form Bidding Documents” issued by the PEC.

19. It remains to be seen whether the discretion exercised has also been exercised as opined by the Supreme Court of Pakistan in **Amanullah Khan vs. The Federal Government of Pakistan**<sup>17</sup> by giving **open reasons and open precedents** or as is being alleged by the Petitioners whether such discretion is being exercised discriminatorily by the Respondent No. 1. It is apparent that in the past the Respondent No. 1 was accepting Insurance Guarantees as Performance Security, but on account of the fact that they are not being considered as viable security as such Insurance Guarantees are inevitably involved in litigation and the performance of which is

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<sup>17</sup> PLD 1990 SC 1092; Followed in **Government of N.W.F.P vs. Mejee Flour and General Mills (Private) Limited, Mardan** 1997 SCMR 1804; **Abid Hassan vs P.I.A.C** 2005 SCMR 25

injunctioned, the Respondent No. 1 has made changed its policy to not accept Insurance Guarantees and opt only to accept Bank Guarantees. We are left to consider as to whether a change in policy would amount to an act which would be discriminatory as against the Petitioners. In **I.A Sharwani vs. Government of Pakistan**<sup>18</sup> the standard for determining discrimination was considered by the Supreme Court of Pakistan and wherein it was held that:

- “ ... 26. From the above cited cases the following principles of law are deducible:-
- (i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;
  - (ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;
  - (iii) that different laws can validly be enacted for different sexes, persons in different age groups, person having different financial standings, and persons accused of heinous crimes;
  - (iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;
  - (v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25:-
  - (vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;
  - (vii) that in order to make a classification reasonable, it should be based--
    - (a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;
    - (b) that the differentia must have rational nexus to the object sought to be achieved by such classification.”

While applying the principles enunciated by the Supreme Court of Pakistan, we note that it is not the case of the Petitioners that they are being discriminated against as compared to bidders i.e. that the Respondent No. 1 is permitting certain bidders to furnish Insurance Guarantees and

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<sup>18</sup> 1991 SCMR 1041

demanding others to furnish Bank Guarantees as Performance Security or for that matter that a specific class of bidder has been permitted to provide Insurance Guarantees as Performance Security. Indeed no such document has been produced before this Court to show that after the change in the policy, a bidder has submitted an Insurance Guarantee and which has been accepted by the Respondent No. 1; rather it is the Petitioners case that prior to the policy change that has been made by the Respondent No. 1, bidders were permitted to furnish Insurance Guarantees and they should continue to be permitted to so as prohibiting such a right that was conferred previous bidders prior to the change in policy, would amount to discrimination on the part of the Respondent No. 1. This clearly cannot be correct. To allow such an argument would amount to stating that the Respondent No. 1 would in effect be prohibited to make a policy change and must continue to follow its old policy in accepting either Bank Guarantees or Insurance Guarantees to its detriment. To our mind, as long as the Respondent No. 1 identifies a date from which it has made the policy change and thereafter does not discriminate amongst any of the bidders by only accepting Bank Guarantees, such an action on the part of the Respondent No. 1 would not be discriminatory or in violation of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973. To hold otherwise would actually amount to depriving the Respondent No. 1 the right to rectify errors in their policy and labouring it with having to continue with a historic mistake. In addition, we see no reason why the Respondent No. 1 during commercial negotiations should not have every right, like any other party to a contract, to settle terms advantageous to it. If the Respondent No. 1 has come to the conclusion that a Bank Guarantee is more advantageous to it than an Insurance Guarantee then it has every right to fetter its discretion to its financial benefit as long as such a decision cannot be found to have not been made in violation of the provisions of the Standard Form Bidding Documents". Similarly, if the Petitioners find the terms as stipulated within the permitters of the "Standard Form Bidding

Documents” to being financially detrimental to them, then they can withdraw from the process subject to whatever penalties that the law imposes on them. We are therefore inclined to hold that the change in policy that has been made by the Respondent No. 1 to not accept Insurance Guarantees, is neither discriminatory nor in violation of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973.

20. Although the point was not specifically raised by Mr. Muhammad Masood Khan, we are aware of the application of the doctrine of Legitimate Expectation on the change of a policy decision made by a public body and have considered the same. The argument, as we understand it would be, that the change in policy would violate a legitimate expectation in the Petitioners to provide Insurance Guarantees as Performance Security.

21. The doctrine of legitimate expectation has been accepted by the Superior Courts of Pakistan,<sup>19</sup> having found its way into our jurisprudence on the basis of various decisions of the courts in the United Kingdom.<sup>20</sup> The law was restated in the decision reported as **R v North and East Devon Health Authority, ex parte Coughlan**<sup>21</sup> wherein representations had been made to a severely disabled lady, Miss Coughlan, who was receiving nursing care in a government maintained retirement home and to whom several representations had been made that she would be able to live out

<sup>19</sup> See **President National Bank Of Pakistan vs. Waqas Ahmed Khan** 2023 SCMR 766, **District Education Officer (Female), Charsadda Versus Sonia Begum** 2023 SCMR 217, **Federation Of Pakistan Through Secretary, Ministry Of National Health Services vs. Jahanzeb** 2023 PLC(CS) 336, **Uzma Manzoor Versus Vice-Chancellor Khushal Khan Khattak University, Karak** 2022 SCMR 694, **Pakistan Telecommunication Employees Trust (Ptet) Through M.D., Islamabad Versus Muhammad Arif** 2015 SCMR 1472, **Secretary, Government Of Punjab, Finance Department vs. M. Ismail Tayer** 2014 SCMR 1336, **Syed Mubashir Raza Jaffri Versus Employees Old-Age Benefits Institutions (EOBI)** 2014 Plc 428, **Nadeem Ahmed vs. Federation Of Pakistan** 2013 SCMR 1062, **Application By Abdul Rehman Farooq Pirzada Versus Begum Nusrat Ali Gonda vs. Federation Of Pakistan** 2013 PLD 2013 SC 829, **Reference No.01 Of 2012** PLD 2013 SC 279 , **Government Of Sindh vs. Abdul Jabbar** 2004 SCMR 639

<sup>20</sup> See **R. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association** [1972] 2 Q.B. 299; **R. v. Board of Visitors of Hull Prison, Ex parte St. Germain** [1979] Q.B. 425, **O'Reilly v. Mackman** [1983] 2 AC 237, **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935

<sup>21</sup> [2000] 3 All ER 850



her final years at that institution. Unilaterally, the Health Authority decided to shut the facility down as the cost of operating it was becoming excessive and Miss Coughlan sought judicial review of the Authority's decision, claiming that its representations had induced in her a legitimate expectation that Mardon House would be her home for life. Lord Woolf M.R. describing the role of the Court while looking at an issue pertaining to legitimate expectation had held that:<sup>22</sup>

“ ... **Legitimate Expectation – The Court's Role**

55. *In considering the correctness of this part of the judge's decision it is necessary to begin by examining the court's role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function. In the past it would have been argued that the promise was to be ignored since it could not have any effect on how the public body exercised its judgment in what it thought was the public interest. Today such an argument would have no prospect of success, as Mr Goudie and Mr Gordon accept.*

56. *What is still the subject of some controversy is the court's role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in *Findlay v Secretary of State for the Home Department* [1985] 1 AC 318, [1984] 3 All ER 801 at page 338 of the former report, "But what was their legitimate expectation?" Where there is a dispute as to this, the dispute has to be determined by the court, as happened in *Findlay*. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.*

57. *There are at least three possible outcomes.*

(a) *The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds. This has been held to be the effect of changes of policy in cases involving the early release of prisoners (see *Re Findlay* [1985] AC 318; *R v Secretary of State for the Home Dept, ex parte Hargreaves* [1997] 1 All ER 397, [1997] 1 WLR 906.)*

(b) *On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentional that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see *Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.*

(c) *Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair*

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<sup>22</sup> *Ibid* at pgs. 871-872

*that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.*

*58. The court having decided which of the categories is appropriate, the court's role in the case of the second and third categories is different from that in the first. In the case of the first, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. In the case of the second category the court's task is the conventional one of determining whether the decision was procedurally fair. In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.*

*59. In many cases the difficult task will be to decide into which category the decision should be allotted. In what is still a developing field of law, attention will have to be given to what it is in the first category of case which limits the applicant's legitimate expectation (in Lord Scarman's words in *Re Findlay*) to an expectation that whatever policy is in force at the time will be applied to him. As to the second and third categories, the difficulty of segregating the procedural from the substantive is illustrated by the line of cases arising out of decisions of justices not to commit a defendant to the Crown Court for sentence, or assurances given to a defendant by the court: here to resile from such a decision or assurance may involve the breach of legitimate expectation. (See *R v Reilly* (1985) 1 Cr App R(S) 273, 276; *R v Dover Magistrates' Court, ex parte Pamment* (1994) 15 Cr App R(S) 778, 158 JP 665, page 781-2 of the former report). No attempt is made in those cases, rightly in our view, to draw the distinction. Nevertheless, most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract. We recognise that the courts' role in relation to the third category is still controversial; but, as we hope to show, it is now clarified by authority."*

22. While keeping in mind that no representation per se has been made by the Respondent No. 1 to the Petitioners that they would accept Insurance Guarantees, however the Respondent No. 1's conduct in the past of accepting Insurance Guarantees could be considered as conduct which would have created a legitimate expectation in the Petitioners to be treated in a like manner to that of bidders prior to the change of the policy and the provisions of Clause IB 32.1 confer a discretion to choose as between an Insurance Guarantee and a Bank Guarantee as Performance Security thereby giving the Petitioners the Legitimate Expectation to provide an Insurance Guarantee as Performance Security. Even if so, we would think that as no substantive right had been conferred on the Petitioners by such conduct or by the "Standard Form Bidding Documents", the change in policy should be considered in the first category and whereby the decision of the

Respondent No. 1 should be judged on the basic threshold of the conventional grounds of judicial review. The rationale that has been given by the Respondent No. 1 as to the change in its policy is based on their experience that accepting an Insurance Guarantee has been futile to secure performance of a contract, as in the vast number of cases where an Insurance Guarantee has been accepted as a Performance Guarantee, the performance of that guarantee has been enjoined by a Court, resulting in a financial loss having to be borne by the Respondent No. 1. To our mind, this is not only a reasonable change in policy, the same would actually be a decision that we would expect a public body to make so as to mitigate the losses that it was suffering. We found no irrationality, illegality or arbitrariness in the make of such a change in policy and therefore do not consider that the change in policy has resulted in a violation of any legitimate expectation that the Petitioners may have in the earlier policy of the Respondent No. 1.

23. The additional plea raised by the Petitioners that as the Respondent No. 1 had issued a notification dated 6 June 2022 approving a list of Insurance Companies whose Insurance Guarantees it was willing to accept as security would ipso facto created a Legitimate Expectation in the Petitioners that an Insurance Guarantee would be security that the Respondent No. 1 would consider as a Performance Security to our mind is also not on sound footing. It is to be remembered that that the Respondent No. 1 continues to be willing, at the choice of the Petitioners, to accept Insurance Guarantees as Bid Security and to that extent the existence of the notification dated 6 June 2022 would be justified to list Insurance Companies from whom such Bid Security would be accepted. We do not think it to be logical that the existence of the notification automatically means that it must be accepted as a Performance Security nor can it be said that the existence of the same would be conduct giving rise to an

expectation in the Petitioners to demand such a right from the Respondent No. 1

24. For the foregoing reasons we are of the opinion that the Respondent No. 1 has committed no illegality or irregularity nor has acted discriminatorily in changing its policy to only accept Performance Guarantees as Performance Security and which decision is not in conflict with any of the provisions of the "Standard Form Bidding Documents" that have been prepared by the PEC. These Petitions must therefore fail and are accordingly dismissed, along with all listed applications, with no order as to costs.

JUDGE

JUDGE