

JUDGMENT SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui, CJ

Mr. Justice Jawad Akbar Sarwana.

**C.P No.D-3760 of 2024**

Petitioners: Cosmos Enterprises and Three (3)  
Others through M/s Haider Waheed  
and Romain Qamar, Advocates

**C.P No.D-3868 of 2024**

Petitioner: M/s Kamran Ahmed Bhutto  
through Syed Shahzad Ali Shah,  
Advocate

**C.P No.D-3996 of 2024**

Petitioners: M/s Abdullah & Brothers and Another  
through Mr. Obaid-ur-Rehman Khan,  
Advocate

**C.P No.D-4821 of 2024**

Petitioner: Cosmos Enterprises  
through M/s Haider Waheed and  
Romain Qamar, Advocates

**C.P No.D-5060 of 2024**

Petitioners: M/s Abdullah & Brothers and Another  
through Mr. Obaid-ur-Rehman Khan,  
Advocate

*Versus*

Respondents: Province of Sindh and others  
through Mr. Saifullah, Addl. A.G Sindh  
Mr. Qamar Zaman Shah, Assistant  
Director (Legal) SPPRA.

Mr. Haq Nawaz Soomro, ASP on  
behalf of DIG Prisons, Karachi.

Mr. Imtiaz Ali Soomro, AIG Sindh  
Prisons on behalf of I.G Sindh Prisons,  
Karachi.

Date of hearing: 12.11.2024

Date of Decision: 20.11.2024

## COMMON JUDGMENT

**JAWAD AKBAR SARWANA, J:** These five (5) constitution petitions filed by seven (7) petitioners challenge the procurement for supplying dietary articles / cooked food to six (6) out of 22 prison facilities in Sindh.<sup>1</sup> The procurement involves two tenders: (i) the first tender invitation published on 19.05.2024 (s. nos.17-22), which tender eventually got cancelled on 29.07.2024; and (ii) another (second) re-tender (s. nos.1-6) published on 02.08.2024, which re-tender seeks bids for the same product lines and prison facilities as the first tender. Hence, this Common Judgment. The concerned six (6) prison facilities in the Interior of Sindh are as follows:

S. No.	Prison Facilities	S. No. in First Tender (May 2024)	S. No. in Re-Tender (Aug 2024)
1.	Central Prison & Correction Facility at <b>Hyderabad</b>	#17	#1
2.	Special Prison & Correction Facility <b>Nara Hyderabad</b>	#18	#4
3.	Special Prison & Correction Facility <b>Sukkur</b>	#19	#3
4.	Central Prison & Correction Facility <b>Khairpur</b>	#20	#4

<sup>1</sup> The following six (6) petitioners are agitating their claims across the five (5) petitions:

<b>First Tender 19.05.2024 (Cancelled 29.07.2024)</b>	<b>Re-Tender dated 02.08.2024</b>

S#	Petitioners in CP D-3760/2024	S#	Petitioner in CP D-4821/2024
1.	Cosmos Enterprises	1.	Cosmos Enterprises
2.	Asif Enterprises		
3.	Naeemuddin & Brothers		
4.	Ziauddin Contractors		

S#	Petitioner in CP D-3868/2024
1.	Kamran Ahmed Bhutto

S#	Petitioners in CP D-3996/2024	S#	Petitioners in CP D-5060/2024
1.	Abdullah & Brothers	1.	Abdullah & Brothers
2.	Bilal Contractor	2.	Bilal Contractors

5.	District Prison & Correction Facility <b>Shikarpur</b>	#21	#5
6.	District Prison & Correction Facility <b>Jacobabad</b>	#22	#6

2. At the outset, it is pertinent to mention that the Superior Courts of Pakistan have held/observed that the cost of three meals for each prisoner alone is an inadequate criterion to provide a sufficiently nutritious diet to fulfil the prisoner's dietary requirements. Further, if the contractor selected to provide meals at the prison or correction facility deviates from the dietary schedule or provides substandard quality food, his contract may be cancelled immediately. Finally, a failure to provide a minimum degree of nutrition in every meal given to prisons is against the injunctions of Islam.<sup>2</sup> The respondent no.2, the Sindh Prisons and Corrections Services ("SPCS") and respondent no.3, the Procurement Committee-IV (Dietary Supply & Cooked Food)("Procurement Committee"), are duty-bound at all times to ensure compliance with the Sindh Public Procurement Act, 2009 read with the Sindh Public Procurement Rules ("SRPR"), 2010, the terms and conditions of the tender and to ensure that the observations of the Superior Courts are also followed in letter and spirit.

3. A brief chronology of events concerning the two tenders is as follows:

19.05.2024 The Sindh Prisons & Corrections Services (SPCS),<sup>3</sup> published tender notices in major newspapers for dietary articles/cooked food to the prison inmates of Sindh Province for the year 2024-2025 by way of a Single Stage Two Envelope Procedure.

<sup>2</sup> Federal Shariat Court Judgment dated 28.08.2009 (11<sup>th</sup> Segment) passed in Shariat Petition No.61/1992 and Order dated 30.09.2010 passed in CP No.D-222/20210 and MIT (Inquiry) Report

<sup>3</sup> Available on page 57 of CP No.D-3760/2024

- 06.06.2024 All petitioners submitted their bid documents by 06.06.2024, when the Procurement Committee accessed/opened their technical bids.<sup>4</sup>
- 03.07.2024 After scrutinizing the technical bids, the Procurement Committee also opened the petitioners' financial bids/proposals and found certain shortcomings in the financial bids for the six prisons mentioned in serial nos.17-22. In summary, they noted that the petitioner in CP No.3868/2024, bidder, Kamran Ahmed Bhutto, had offered abnormally low/unrealistic rates, that these were the same offered rates which were awarded during the year 2022-2023 and on comparison of their rates with other successful 1<sup>st</sup> lowest bidders, the average realistic rates were between Rs.321/- to Rs.360, etc.<sup>5</sup> Therefore, all bids offered by petitioner Kamran Ahmed Bhutto in CP No.D-3868/2024 were rejected.

It may be mentioned here that the bids of the six (6) petitioners in CP Nos.D-3760/2024 and D-3996/2024 were found to be next in line, i.e. the 2<sup>nd</sup> lowest bids for the six (6) prisons, after Kamran Ahmed Bhutto. The 2<sup>nd</sup> lowest bids after Kamran Ahmed Bhutto were as follows:

**CP-D-3760/2024**

17. **Hyderabad** – Cosmos Enterprises (Petitioner #1)
18. **Nara Hyderabad** – Naeemuddin & Brothers  
(Petitioner #3)
20. **Khairpur** - Ziauddin Contractors (Petitioner #4)
21. **Shikarpur** – Asif Enterprises (Petitioner #2)

**CP-D-3996/2024**

<sup>4</sup> Available on page 303 of CP No.D-3760/2024

<sup>5</sup> Available on pages 313, 325 and 365 of CP No.D-3760/2024

19. **Sukkur** – Abdullah & Brothers (Petitioner #1)

22. **Jacobabad** – Bilal Contractor (Petitioner #2)

The Procurement Committee recommended that, based on its financial evaluation, the above-mentioned tenders from s. nos.17 to 22 may be cancelled and re-invited to ensure realistic rates in view of the market condition.

25.07.2024 The petitioner bidders aggrieved by the recommendations of the Procurement Committee dated 03.07.2024, filed complaints on various dates before the Complaint Redressal Committee (“CRC”),<sup>6</sup> whereafter, CRC, after hearing the parties, passed its decision dated 25.07.2024, deciding as follows with respect to the above-mentioned six (6) prisons in the interior of Sindh:

*“[Kamran Ahmed Bhutto]. . .in view of the Hon’ble High Court of Sindh at Karachi Order passed in CP No.D-2222/2010 the quality of foods is to be improved. However, the said bidder [Kamran Ahmed Bhutto] did not satisfy the Committee how to improve it on offering running rate of Rs.282/- to maintain the quantity and quality of food of daily three times cooked food per prisoner per day. Moreover the said bidder himself had already submitted the rate of Rs.325/ in the previous tender of Central Prison Hyderabad during the year 2022-2023 and on the other hand the Committee also observed that the cost of food commodities has continuously increased since last two years. Hence, Committee hereby suggests the Procurement Committee that the offers of the 2<sup>nd</sup> lowest bidders, mentioned at serial no.ii to vii. . .[at the six listed prisons at serial nos.17-22] may be considered, if deemed appropriate according to SPPRA Rules.”*

29.07.2024 Following CRC’s decision dated 25.07.2024, the Procurement Committee noted in its meeting dated 29.07.2024, that there was no provision to award the contract to the 2<sup>nd</sup> lowest bidder when the Procurement

<sup>6</sup> From CP No.D-3760/2024, Cosmos Enterprises (Petitioner No.1) filed Complaint on 18.07.2024 (pages 409-411), Asif Enterprises (Petitioner No.2) filed Complaint on 22.07.2024 (pages 421-423), Naeem-ud-din & Brothers (Petitioner No.3) filed Complaint on 19.07.2024 (pages 417-419), Ziauddin Contractor (Petitioner No.4) filed Complaint on 19.07.2024 (pages 413-415). From CP No.D-3996/2024, Abdullah & Brothers (Petitioner No.1) filed Complaint on 22.07.2024 (page 399) and Bilal Contractor (Petitioner No.2) filed Complaint on 22.07.2024 (page 401).

Committee had already recommended in its previous meeting dated 03.07.2024 that the tender process at the six (6) prisons may be cancelled and tenders may be re-invited as per Rule 25 of the SPPR, 2010. Accordingly, the Procurement Committee decided to re-tender.<sup>7</sup>

4. According to the documents available on record, the bidder, Kamran Ahmed Bhutto (the petitioner in CP No.3868/2024), filed his Complaint against the recommendation of the Procurement Committee dated 03.07.2024, with the CRC on 15.07.2024.<sup>8</sup> It is pertinent to mention that Kamran Ahmed Bhutto vide the Procurement Committee's recommendation dated 03.07.2024, was also technically disqualified concerning his bid for Central Prison Karachi and District Prison Malir, Karachi and challenged such disqualification in the same Complaint.<sup>9</sup> When his Complaint was dismissed by CRC on 25.07.2024, it also included CRC's reasons for the disqualification of his technical bid for Karachi and Malir.<sup>10</sup> Aggrieved by CRC's decision, Kamran Ahmed Bhutto filed a Review Appeal before the Review Committee of the Government of Sindh, Sindh Public Procurement Regulatory Authority ("SPPRA") under Rule 32 of the SPPR, 2010.<sup>11</sup> The Review Committee of SPPRA, after hearing him on 07.08.2024,<sup>12</sup> rejected the appeal vide its decision dated 07.09.2024 on the ground that the appellant submitted his complaint to the CRC after the lapse of the time period provided under Rule 31(1) of the SPPR, 2010, i.e. the Procurement Agency had already awarded the contract for Karachi and Malir on 12.07.2024 whereas Kamran Ahmed Bhutto filed his Complaint with

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<sup>7</sup> Minutes of Minutes of the Procurement Committee dated 29.07.2024 is available on pages 395-399 in CP No.D-4821/2024.

<sup>8</sup> Copy of Kamran Ahmed Bhutto's Complaint dated 13.07.2024 is available on pages 107-111 of CP No.D-3868/2024

<sup>9</sup> Copy of the Complaint of Kamran Ahmed Bhutto filed with CRC is available on pages 107-111, and the Statement dated 15.08.2024 filed by Kamran Bhutto is available in Part II of CP No.D-3868/2024 on pages 187.

<sup>10</sup> Copy of CRC Decision dated 25.07.2024 is available in CP No.D-3868/2024.

<sup>11</sup> Copy of Review Application of Kamran Ahmed Bhutto is available in CP No.D-3868/2024 on pages 119-129.

<sup>12</sup> Notice of hearing provided to Kamran Ahmed Bhutto by the Review Committee of SPPRA is available on page 133 of CP No.D-3868/2024.

CRC on 15.07.2024, i.e. after the award of the Contract.<sup>13</sup> On 12.08.2024, Kamran Ahmed Bhutto filed CP No.D-3868/2024 invoking the writ jurisdiction of this Court seeking (a) declaration that the tender in respect of the supply of cooked foods to inmates of Central Prison Karachi and District Jail Malir issued in favor of Cosmos Enterprises (respondent no.6) and Choudhry Ali Muhammad & Co. (respondent no.7) should be declared null, void abinitio, unlawful and may be cancelled and direct the SPSC to issue fresh tenders; (b) direct the SPSC to recall its decisions regarding rejection of bid offer of Kamran Ahmed Bhutto, etc.

5. On 01.08.2024, SPCS published the re-tender for the supply of dietary articles/cooked foods in various newspapers for the above-mentioned six (6) prisons and correction facilities in Interior Sindh.<sup>14</sup>

6. On 06.08.2024, the four (4) petitioners in CP No.D-3760/2024, and on 21.08.2024, the two (2) petitioners in CP No.D-3996/2024, invoked the writ jurisdiction of this Court seeking a declaration to set-aside the Procurement Committee's decision dated 29.07.2024 to cancel the first tender.

7. On 30.08.2024, based on the evaluation of the technical bids, the technical bids of five (5) out of the seven (7) petitioners in CP Nos. D-3760/2024, 3996/2024 and 3868/2024 were approved, i.e. Cosmos Enterprises, Asif Enterprises, Abdullah & Brothers, Bilal Contractors and Kamran Ahmed Bhutto.<sup>15</sup> The technical bids of Naeem-ud-din Brothers and Ziauddin Contractors were not approved.

8. On the same date, i.e. 30.08.2024, the Procurement Committee proceeded to the financial evaluation of the bidders and after analysing (i) the rates offered in the last awarded contracts for

<sup>13</sup> Copy of the Decision of the Review Committee of SPPRA dated 07.09.2024 is available in Part-II of CP No.D-3868/2024 on pages 179-183.

<sup>14</sup> Available on pages 69-73 of CP No.D-4821/2024.

<sup>15</sup> Procurement Committee's Recommendation dated 30.08.2024 is available on pages 527-541 of CP No.D-4821/2024.

the 16 different prisons during the financial year 2024-25 (paragraph 8), (ii) the bids offered by the bidders which resulted in cancellation and re-invitation of the last (first) tender for the same product line for the year 2024-25 (paragraph 9), and (iii) finally the above conditions and issues recommended as follows:<sup>16</sup>

<b>Re-tender s. no.</b>	<b>Cancelled tender s.no.</b>	<b>Name of Prison</b>	<b>Recommendations</b>
1.	#17	Hyderabad	Abdullah & Brothers
2.	#20	Khairpur	For reasons stated therein tender may be cancelled and reinvited afresh.
3.	#19	Sukkur	Abdullah & Brother
4.	#18	Nara Hyderabad	Bilal Contractor
5.	#21	Shikarpur	Abdullah & Brother
6.	#22	Jacobabad	Bilal Contractor

9. Aggrieved by the above-referred recommendations of the Procurement Committee dated 30.08.2024, Cosmos Enterprises filed a complaint dated 13.09.2024 with CRC. On 16.09.2024, after hearing the aggrieved bidder, the CRC concluded that:

“ . . .the rates Rs.320/- offered by M/s Cosmos Enterprises at six prisons are according to the market survey and not abnormally low in comparison to the last awarded contracts at different 16 prisons during the current fiscal year 2024-2025. Further, the offered rates are realistic as well as most advantageous among the qualified bids according to the terms and conditions of the bid documents. . . .”<sup>17</sup>

10. On 30.09.2024, Cosmos Enterprises filed CP No.D-4821/2024 invoking the writ jurisdiction of this Court and seeking directions that

<sup>16</sup> Page 539-541 of CP No.D-4821/2024

<sup>17</sup> Copy of CRC Decision dated 16.09.2024 in Complaint filed by Cosmos Enterprises is available on pages 29-31 of CP No.D-4821/2024



in view of the Minutes of Meeting dated 16.09.2024, SPCS may be directed to award the contract for all six (6) prisons to the petitioner. Meanwhile, on 10.10.2024, Abdullah & Brothers and Bilal Contractor, petitioner nos.1 and 2, respectively, filed CP No.D-5060/2024, seeking a declaration that the SPCS Minutes of Meeting of 30.09.2024 be declared illegal, unlawful, void ab initio, ultra vires of the terms and condition of the tender and on principles of natural justice.

11. Counsel for petitioner, Cosmos Enterprises has contended that Abdullah & Brothers and Bilal Contractor CP No.D-3996/2024 concerning the first tender has become infructuous as the said petitioners have withdrawn their bid security and fully participated in the retender process. Counsel for Cosmos Enterprises further contended that the petitioners of CP No.D-3996/2024, having accepted the outcome of the cancellation of the first tender by their participation in the re-tender, cannot agitate any claim under the said first tender. Counsel argued that Cosmos Enterprises had still not withdrawn its bid security from the first tender; hence, its submissions as set up in Cosmos Enterprises and three (3) Others CP No.D-3760/2024 was on better footing compared to CP No.D-3996/2024. He argued that Rule 31 of the SPPR, 2010 excluded any other participating bidders from any right to be notified or involved in the adjudication proceedings of the CRC on any bidder's complaint. He further contended that Abdullah & Brothers and Bilal Contractors had no statutory or constitutional right to be notified of or involved in the CRC hearing on any bidder's complaint. This he submitted was based on the premise that in procurement proceedings, no bidders or participants have any vested rights in the outcome of the procurement proceedings, nor otherwise, until and unless they have been awarded a contract from which such rights can stem. Finally, on merits, he argued that the Procurement Committee had erred in its calculation concerning Cosmos Enterprises and that once it corrected the calculation, Cosmos Enterprises had emerged as the successful bidder. He argued that

the error by the Procurement Committee was limited to Cosmos Enterprises alone. It would not change the position of the other bidders on the ladder, and their position would remain the same. Therefore, he submitted that CP No.D-4821/2024 should be allowed, and Cosmos Enterprises should be awarded the contract for all six (6) prisons in the Interior of Sindh.

12. Counsel for Abdullah & Brothers and Bilal Contractors vehemently opposed the submissions of the Counsel for Cosmos Enterprises. He contended that he was the successful bidder in the first tender based on the second-highest bid established by the Procurement Committee for Central Prison Sukkur and District Prison Jacobabad. He further contended that in the re-tender, his two clients had emerged as the successful bidder in five (5) out of the six (6) prison locations as per the Procurement Committee decision dated 30.08.2024. The tender for one location, i.e. Khairpur, was to be re-tendered. As such, as petitioners of CP No.D-5060/2024 were successful bidders at the five (5) prison locations. As such, the petitioners were not aggrieved by the Procurement Committee's decision dated 30.08.2024 and did not lodge any complaint with the CRC. He argued that the proceedings of the CRC dated 16.09.2024 were contrary to law and the principle of natural justice, as the successful bidders were not given an opportunity for a hearing. Therefore, he argued that the CRC decision dated 16.09.2024 was liable to be set aside.

13. Counsel for Kamran Ahmed Bhutto argued that he had challenged the first tender proceedings, including the decisions of the CRC dated 25.07.2024, the Review Committee dated 07.09.2024 and the cancellation of the first tender by the Procurement Committee's decision dated 29.07.2024. He argued that the Procurement Committee had wrongly concluded that the rates were abnormal and low when, in fact, these were to the economic advantage of SPCS. Therefore, CP No.D-3868/2024 filed by him should be allowed.

14. We have heard Counsels, the learned DAG, and the Additional Advocate-General and perused the record. It is apparent on the face of the record that the first tender in respect of the six prisons in the Interior of Sindh mentioned at serial nos.17 to 22 was cancelled by the Procurement Committee decision dated 03.07.2024. When the decision dated 03.07.2024 was challenged by all seven (7) petitioners before the CRC, CRC by its' decision dated 25.07.2024, recommended that the 2<sup>nd</sup> lowest bidders should be awarded the tender. Only Kamran Ahmed Bhutto challenged the decision of the CRC by filing a review/appeal before the Review Committee. None of the others, i.e. the six remaining petitioners, challenged either the decision of the CRC or of the Review Committee. After that, when the Procurement Committee, by its decision dated 29.07.2024, cancelled the first tender and decided to re-tender, none opposed the decision within the framework of the SPPA, 2009, and the rules framed thereunder. Instead, six (6) of the bidders filed CP Nos.D-3760/2024 and D-3996/2024 challenging the Procurement Committee's decision dated 29.07.2024 in writ jurisdiction under Article 199 of the Constitution of Pakistan, while Kamran Ahmed Bhutto filed CP No.D-3868/2024 challenging the Procurement Committee's decision dated 29.07.2024 and CRC's decision dated 25.07.2024. During the hearing of Kamran Ahmed Bhutto's petition, the Review Committee also announced its decision dated 07.09.2024, rejecting his review application.

15. Till date, all seven (7) petitioners from CP No.D-3760/2024, D-3996/2024 and D-3868/2024 have fully participated in the (second) re-tender. They arranged and submitted fresh guarantees/securities and fresh bid offers in this (second) re-tender round albeit they all did so under the cover of certain ad-interim orders passed by this Bench in the three petitions. On 06.08.2024, in CP No.D-3760/2024, this bench passed ad-interim order that:

"Without prejudice the right rights of the [four] petitioner[s] (i.e. Cosmos Enterprises, Asif Enterprises, Naeem-ud-din & Brothers and Ziauddin Contractors] as agitated by them in this petition, they may participate in

the tender process [of the (second) re-tender], however, it may not be finalized till further orders in this petition.”

On 21.08.2024, in CP No.D-3996/2024, this Bench passed ad-interim order that:

“Since the procurement process [of the (second) re-tender] has been advertised, without prejudice to the rights agitated by them [Abdullah & Brothers and Bilal Contractors], they may participate in the [(second) re-tender] tender process; however it may not be finalized till further orders in this petition.”

Finally, on 10.09.2024 in CP No.D-3868/2024, this Bench passed orders that the ad-interim orders passed in the above-mentioned two constitution petitions would continue in this petition filed by Kamran Ahmed Bhutto.

16. Out of the seven (7) petitioners of CP No.D-3760/2024, D-3996/2024 and D-3868/2024 from the first round of the tender process (i.e. the (cancelled) first tender), four (4) petitioners, namely, Asif Enterprises, Naeem-ud-din & Brothers, Ziauddin Contractor, and Kamran Ahmed Bhutto were knocked out from the (second) re-tender. They did not challenge the technical bid / financial evaluation decisions of the Procurement Committee, ousting them from the (second) re-tender. Further, they neither initiated any litigation concerning the second (re-tender) nor did their Counsel mention any such litigation made by them, nor at least none is before us. The ad-interim orders passed in the three petitions concerned only the first (cancelled) tender. Thus, the challenge to the procurement and the judgment for CP Nos.D-3760, D-3996/2024 and D-3868/2024 is limited to the first tender only. They seek relief from this Court limited to the first tender only. They are not before us regarding any grievance concerning the (second) re-tender. This is opposed to the three (3) petitioners, namely, Cosmos Enterprises in CP No.D-4821/2024 and Abdullah & Brothers and Bilal Contractor in CP No.D-5060/2024, who have raised certain challenges to the (second) re-tender as well. As such,

these three petitioners seek certain reliefs under both the first (cancelled) tender and the (second) re-tender.

17. We now proceed to decide CP Nos.D-3760/2024, D-3996/2024 and D-3868/2024 concerning the first (cancelled) tender, from the point of view of (a) maintainability of a challenge to a procurement in writ jurisdiction by the seven (7) bidders in CP Nos.D-3760/2024, D-3996/2024, and D-3868/2024, (b) the entitlement of relief, if any, in the context of the ad-interim orders passed from time to time in the above three petitions, (c) the impact on the first (cancelled) tender given the continuing participation of the seven (7) bidders in the (second) re-tender, and (d) the implications on CP Nos.D-3760/2024 and D-3996/2024 of the actions of the three bidders who opted to simultaneously maintain challenge to both the first (cancelled) tender and the (second) re-tender, namely Cosmos Enterprises filing CP No.D-4821/2024, and Abdullah & Brothers and Bilal Contractors filing CP No.D-5060/2024 and what impact this has on the fate of deciding the petition concerning the first (cancelled) tender, i.e. CP Nos.D-3760/2024 and D-3996/2024 to the extent of the three petitioners. Last but not least, we will decide the fate of these three petitioners based on the two leftover petitions, CP Nos.D-4821/2024 and D-5060/2024, concerning the (second) re-tender.

(a) Challenge to the first (cancelled) tender raised by the seven (7) bidders in writ jurisdiction

18. We have perused the bundle of documents exchanged between the parties in the first (cancelled) tender exhibited in CP Nos.D-3760/2024, D-3996/2024 and D-3868/2024. Undoubtedly, the first (cancelled) tender had undergone a thorough and complete challenge to the extent that the seven (7) petitioners challenged the decision of the procurement committee before the CRC, and Kamran Ahmed Bhutto challenged the decision of the CRC before the Review Board. In Badar Expo Solutions v. Federation of

*Pakistan & Others*, 2002 PLD 336,<sup>18</sup> a Division Bench of this Court, after a detailed discussion on the role of the Constitutional Courts in so far as judicial review of administrative/executive actions, in procurements proceedings is concerned, reproduced certain questions, based on case law from the Indian Subcontinent,<sup>19</sup> that a Constitutional Court should pose to itself before interfering in tender or contractual matters in exercising its power of judicial review in procurements. This bench is inclined to reframe those questions and pose certain additional questions for a Constitutional Court having power under Article 199 to issue writs to any person or entity or authority, including the Government, in procurement matters. The questions to be raised are as follows:

**Qs.1. Is the authority's process adopted, or its decision, malafide or intended to favour someone?**

**Qs.2. Is the process adopted or decision made so arbitrary and irrational that the court can say that "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"?**

**Qs.3. Is there any violation of any fundamental rights under the Articles of the Constitution of the Islamic Republic of Pakistan?**

**Qs.4. Whether public interest is affected?**

If the answers to the questions are negative, then the Constitution Court should not interfere.

Suffice it to say that the above questions are not exhaustive. Whether the statutory grievance redressal forum was exhausted or adequate, and if so, provided appropriate remedies under Article 199 of the Constitution of Pakistan, could be additional questions.

19. In the facts and circumstances of the case, the seven (7) petitioners all fully participated in the tender process. They also

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<sup>18</sup> *Badar Expo Solutions v. The Federation of Pakistan and Others*, PLD 2022 Karachi 336 at paragraphs 26, 27, 28

engaged in the complaint procedure. All seven (7) exhausted their remedies in challenging the procurement process within the framework of the SPPA, 2010, and the SPPR framed thereunder. We can neither conduct any fact-finding investigation nor determine the soundness of the merits of the decisions of the Procurement Committee and the Review Board outside the scope of the four (4) questions raised above. In our analysis, the answer to the four (4) questions we posed as applicable to the first (cancelled) tender is negative, and we are not inclined to exercise writ jurisdiction in the matter of the first (cancelled) tender except that for the reasons recorded in paragraphs 23 to 25 we have set aside the decision of the Review Board dated 07.09.2024 on Kamran Ahmed Bhutto's Review Application. Be that as it may, this does not make any difference to the finding that the first (cancelled) tender does not require any interference.

(b) Availability of relief, if any, to the seven (7) petitioners in CP Nos.D-3760/2024, D-3996/2024, and D-3868/2024 on account of ad-interim orders passed in the three (3) petitions?

20. The ad-interim orders passed by this bench from time to time in the above-mentioned three (3) petitions do not come into play as we have already determined that the first (cancelled) tender, as in (a) above did not call for any interference of our power of judicial review under Article 199.

(c) the impact on the first (cancelled) tender given the continuing participation of the seven (7) bidders in the (second) re-tender?

21. It is common ground that all the parties arrayed in CP Nos.D-3760/2024, D-3996/2024 and D-3868/2024 elected to participate in the (second) re-tender. The first tender, in the background of the (second) re-tender, and our finding that the first (cancelled) tender

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<sup>19</sup> Maa Binda Express Carrier v. North East Frontier Railway AIR 2014 SC 390 = (2014) 3 SCC 760

did not call for any interference, the first (cancelled) tender is now a past and closed transaction.

- (d) the implications on CP Nos.D-3760/2024 and D-3996/2024 of the actions of the three bidders Cosmos Enterprises, Abdullah & Brothers and Bilal Contractor who sought judicial review of both the first (cancelled) tender and the (second) re-tender?

22. Apart from finding that the earlier in-time filed three constitution petitions<sup>20</sup> do not call for judicial interference in writ jurisdiction as held by us in (a) above, the three petitioners, Cosmo Enterprises, Abdullah & Brothers and Bilal Contractor, were seeking relief in writ jurisdiction for both the first (cancelled) tender and the (second) re-tender. For instance, Cosmos Enterprises claimed in the first petition that the first tender was wrongly cancelled and that as per the recommendation of the CRC, the 2<sup>nd</sup> lowest bidder should be awarded the contract for the prisons, therefore as he is the 2<sup>nd</sup> lowest bidder in four (4) out of six (6) of the prisons as decided by the Procurement Committee, hence Cosmos Enterprises should have been awarded the contract for the four (4) prisons wherein he is the 2<sup>nd</sup> lowest bidder. Simultaneously, concerning the (second) re-tender, Cosmos Enterprises prayed in the second petition that contracts should be awarded to it for all six prisons as decided by the CRC for the (second) re-tender. Meanwhile, Abdullah & Brothers and Bilal Contractors simultaneously claimed the award for contracts of two prisons at Sukkur and Jacobabad, respectively, in the first tender in CP No.D-3996/2024 (as each was found to be the 2<sup>nd</sup> lowest bidder by the Procurement Committee and the CRC had recommended that the 2<sup>nd</sup> lowest bidder should be awarded the contract given that Kamran Ahmed Bhutto's lowest bid was not acceptable). At the same time, these two petitioners in CP No.D-5060/2024 under the (second) re-tender also prayed for the contract for five (5) of the six (6) prisons to be awarded to them because the Procurement Committee under the (second) re-tender had recommended that

<sup>20</sup> The earlier filed three CPs are: CP No.D-3760/2024, CP No.D-3996/2024 and CP No.D-3868/2024.



Abdullah & Brothers was the successful bidder for the three prisons at Hyderabad, Sukkur and Shikarpur, and Bilal Contractor was recommended as the successful bidder for the two prisons at Nara Hyderabad and Jacobabad.<sup>21</sup> At no point did the three petitioners wish to give up on one or the other bid, i.e. neither on the decision of the Procurement Committee in the first (cancelled) tender to award the contract to the 2nd lowest bidders of the six (6) prisons in question nor letting go of their bid for the six (6) prisons based on the decisions of either the Procurement Committee (which was five (5) prisons in favor of Abdullah & Brothers and Bilal Contractor) or the CRC (which was all six (6) prisons in favor of Cosmos Enterprises), as the case may be. Yet the petitioners attempted to maintain both petitions without expressing whether they intended to push for the first or second tender. In fact this bench could not have granted them reliefs of both first and second tender. This amounted to an abuse of due process and is contrary to advancing the statutory principles of procurement, i.e. ensuring that procurements are conducted in a fair and transparent manner and the object of procurement brings value for money to the agency and the procurement process is efficient and economical.<sup>22</sup>

23. Thus, for all of the above reasons, we have dismissed all three Petitions, namely, CP Nos. D-3760/2024, D-3996/2024, and D-3868/2024, concerning the challenge to the first (cancelled) tender. However, before we turn to examine the (second) re-tender and exercise of judicial review of the decisions of the Procurement Committee and the CRC as per the challenge raised by Cosmo Enterprises, Abdullah & Brother, and Bilal Contractors in CP No.D-4821/2024 and CP No.D-5060/2024, we take up Kamran Ahmed Bhutto's CP No.D-3868/2024, wherein he has challenged the decision of the Procurement Committee dated 03.07.2024 and the CRC's decision dated 25.07.2024 before the Review Committee. He lost both rounds of his challenge before the CRC and the Review Committee (decision dated 07.09.2024). During

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<sup>21</sup> Available on Pages 539-541 of CP No.D-4821/2024

arguments, the learned AAG argued that the Review Committee rejected the appeal because Kamran Ahmed Bhutto filed his Complaint with the CRC after the award of the Contract, contrary to Rule 31(1) of SPPR, 2010. Hence his appeal was time-barred. We disagree with the submissions of the learned AAG.

24. While Kamran Ahmed Bhutto filed his Complaint before the CRC on 15.07.2024, we have perused his Complaint and his Review Application, raised a challenge to the tenders in connection with the Central Prison Karachi, the District Prison Malir and the six (6) prison locations in the Interior of Sindh at serial nos.17 to 22. To this end, the Complaint filed by Kamran Ahmed Bhutto to the extent of the tenders concerning the Central Prison Karachi and the District Prison Malir may have become time-barred as the award for the tenders of these two locations had already been awarded when he lodged his Complaint with the CRC, yet, by no stretch of the imagination could it have been argued that the Complaint was barred by time for the six (6) prisons in the Interior of Sindh. The petitioners in CP No.D-3760/2024 and CP No.D-3996/2024 had also filed Complaints post 15.07.2024 concerning the six (6) prison locations in the Interior of Sindh at s. nos.17 to 22. The CRC also entertained these as well as heard Kamran Ahmed Bhutto. Therefore, Kamran Ahmed Bhutto's Complaint for the same matter was not time-barred, and the Review Committee could not have dismissed his review/appeal as being time-barred for the six (6) prison locations at s. no.17-22 in the Interior of Sindh. The Review Committee was obliged to pass a speaking order which dealt with the matter and gave reasons for its conclusion for dismissal. In the present case, the Review Committee has neither considered nor applied its mind to the matter. Instead, it attempted to knock out the Appellant/Applicant on technical grounds of limitation, but as discussed above, the complaint was within time for the six (6) prisons as no award was made in connection therewith.

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<sup>22</sup> Rule 4 of the SPPR, 2010.

25. For the above reasons, we hereby set aside the decision of the Review Committee dated 07.09.2024. However, in the facts and circumstances, the position of Kamran Ahmed Bhutto remains unchanged. We have already found that no ground has been made out for judicial review of the first (cancelled) tender. Kamran Ahmed Bhutto's predicament can be no better than that of the other petitioners. Further, he has fully participated in the (second) re-tender. Therefore, we find that CP No.D-3868/2024, in relation to the first (cancelled) tender, meets the same fate as CP No.D-3760/2024 and D-3996/2024, which challenged the first (cancelled) tender, and which petitions, we have already dismissed. Accordingly, CP No.D-3868/2024 is also dismissed.

26. We now turn to the judicial review of the (second) re-tender for the supply of dietary articles/cooked food for the six (6) prison locations in the Interior of Sindh as raised by Cosmos Enterprises in CP Nos.D-4821/2024 and Abdullah & Brothers and Bilal Contractors in CP No. D-5060/2024. In the first (cancelled) tender, Cosmo Enterprises was found by the Procurement Committee to be the 2<sup>nd</sup> lowest bidder for the Central Prison Hyderabad and Abdullah & Brothers and Bilal Contractors to have the 2<sup>nd</sup> lowest bid for Central Prison Sukkur and District Prison, Jacobabad, respectively.<sup>23</sup> When the first tender was cancelled, in the (second) re-tender, the Procurement Committee did not find the bid in favor of Cosmos Enterprises for any of the six (6) prison locations in play in the Interior of Sindh. Instead, Abdullah & Brothers was found by the Procurement Committee to be the most advantageous bid for Hyderabad, Sukkur and Shikarpur, and Bilal Contractor was the most advantageous for Nara Hyderabad and Jacobabad. The Procurement Committee found that none of the bids for the Central Prison Khairpur were most advantageous and recommended that tenders for Khairpur be cancelled and reinvited to get a fresh bid. Cosmos Enterprises immediately filed a complaint before the CRC.

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<sup>23</sup> The Procurement Committee found that Naeem-ud-din & Brothers for Nara Hyderabad, Ziauddin Contractor for Khairpur, and Asif Enterprises for Shikarpur were the 2<sup>nd</sup> lowest bidders for the first (cancelled) tender.

After hearing Cosmos Enterprises alone, CRC found that the rates offered by Cosmos Enterprises at the six (6) prisons were, according to the market survey, and not abnormally low in comparison to the last awarded contracts at 16 different prisons during the current fiscal year 2024-25. Further, the offered rates were realistic as well as the most advantageous among the qualified bids according to the terms and conditions of the bid document. It is pertinent to mention that neither Abdullah & Brothers nor Bilal Contractors were given a hearing before the CRC.

27. We cannot imagine that the statute and the constitution extend a carte blanche protection to public procurement and that there can never be a situation requiring the involvement of another participating bidder in an adjudication proceeding of the CRC on a bidder's complaint before it. Indeed, a challenge to any stage of public procurement is not barred from writ jurisdiction for all time - confined to merely a case of damages in a civil court. As enunciated earlier, it is not a categorical imperative that procurement proceedings are beyond the scope of judicial review. Public procurements are not meant to be hidden behind a Cloak of Invisibility. This would be contrary to the statutory principle of procurement, too. As we have discussed in paragraph 18 above, a Constitutional Court, in the exercise of its power of judicial review, before interfering in a tender or contractual matter, should pose certain questions (be it 4 or 5 questions) to itself, the answer to which would determine the Court's decision regarding whether to interfere or not to interfere.<sup>24</sup> Presently, we take up the four questions mentioned in paragraph 18 above.

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<sup>24</sup> A court, before interfering in tender or contractual matters in the exercise of its power of judicial review, should pose to itself the following four (4) questions:

Qs.1. Is the authority's process adopted, or its decision, malafide or intended to favour someone?

Qs.2. Is the process adopted or decision made so arbitrary and irrational that the court can say that "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"?

Qs.3. Is there any violation of any fundamental rights under the Articles of the Constitution of the Islamic Republic of Pakistan?

28. We now turn to these four (4) questions providing a framework for judicial review in procurement matters. In this regard, we are satisfied that in the instant case, the answer to question no. 1 is negative, and to this end, we are not inclined to interfere in the procurement process because of it. However, the deciding factors are questions 4, 3 and 2, i.e. whether the public interest is affected, whether there is any violation of fundamental rights as enunciated under the articles of the Constitution of the Islamic Republic of Pakistan, and whether the process adopted or decision made so arbitrary and irrational that the court can say that “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”. We examine questions nos.2, 3 and 4 in reverse chronological order, taking up question no.4, followed by addressing question nos.3 and 2.

29. At the outset, we have already discussed how the Superior Courts of Pakistan have pointed out that merely calculating the cost of three meals per prisoner falls short of ensuring a nutritious diet that adequately meets inmates' dietary needs. These individuals, already facing immense challenges, deserve better. Moreover, if a contractor strays from the dietary plan or serves substandard food, their contract can be justly cancelled. Additionally, failing to provide sufficient nutrition in every meal not only impacts the health of the prisoners but also goes against the compassionate principles of Islam, which emphasize the importance of caring for the well-being of all individuals. There is no doubt that the bids concerning the supply of cooked food to the inmates at the six (6) prison locations in the Interior of Sindh involve a “public interest”. Consequently, we find that the answer to question 4, in the case at hand, is in the affirmative. We now turn to question no.3.

30. As a rule of thumb, evaluating tenders or award of contracts are essentially commercial functions. Ordinarily, principles of equity

and natural justice stay at a distance in matters of procurement and contracts; however, after the insertion of Article 10-A under the 18<sup>th</sup> Amendment to the Constitution of Pakistan, it is now a fundamental right of every citizen of Pakistan for the determination of her/his civil rights and obligations, that s/he shall be entitled to a fair trial and due process. A violation of Article 10-A will constitute a violation of a person's fundamental right under the Constitution. Thus, if there is any violation of a fundamental right covered under Article 10-A by the State and its instrumentalities at any stage of the public procurement, then an aggrieved person may have a cause to invoke the writ jurisdiction of the Constitution Court to seek judicial review of that specific event in the procurement process.

31. In the facts and circumstances of the case at hand, the particular event which has caused us to consider intervention is the absence of Abdullah & Brothers and Bilal Contractor before the CRC. The issue for determination before the CRC in September 2024 was the second-time challenge to the decisions of the Procurement Committee regarding the supply of cooked food to the six (6) prisons in the Interior of Sindh. From May 2024 to September 2024, the Procurement Committee and the CRC examined essentially the same data set arriving at the most efficient cost of providing cooked meals three times a day per prisoner for six (6) prison locations across the Interior of Sindh. Each round of the contest in the first (cancelled) tender and the (second) re-tender involved almost the same bidders. The technical credentials required from tenderers also almost remained the same except for the tax year, as the first (cancelled) tender and the (second) re-tender were split between two years. The wholesale market price for the five (months) probably did not experience any hyperincrease in prices either. Thus, given this situation, when Cosmos Enterprises filed a complaint with the CRC, it would have been reasonable for the CRC to provide an opportunity of hearing to the two bidders who had been recommended as having the most

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advantageous bid within the meaning of Rule 2(1)(x) of SPPR, 2010, i.e. Abdullah & Brothers and Bilal Contractor. At this stage, the complainant, Cosmos Enterprises, seeking relief from the CRC against the decision of the Procurement Committee, had been completely knocked out as a bidder for all of the six (6) prison locations in the Interior of Sindh. On the other hand, the Procurement Committee suggested that Abdullah & Brothers and Bilal Contractor have the most advantageous bid for five (5) out of six (6) prison locations. The CRC was in the process of hearing a complaint filed by one elephant, and the two other elephants were missing from the room because they had no grievance, having been recommended as the most advantageous bidder by the Procurement Committee. All stakeholders were well aware of the highly competitive nature of the bidders. The situation called for Abdullah & Brothers and Bilal Contractor to be given a hearing by the CRC. In the absence of such a hearing, given the peculiar facts and circumstances of this tender, the inaction of CRC to call the other two participating bidders for a hearing constituted a violation of Article 10-A of the Constitution. The process adopted or decision made by the CRC was irrational given the cut-throat nature of competition between the three contesting bidders and the tight timelines and reliance on the same data-set, that we are inclined to question indeed that the decision of the CRC is such that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision. We find the answer to questions nos.3 and 4 posed by us to be affirmative. Accordingly, the decision of the CRC dated 16.09.2024 is set aside. We direct the CRC to issue notice to the two bidders, i.e. Abdullah & Brothers and Bilal Contractor, along with a copy of the complaint filed by Cosmos Enterprises, and to direct them to submit to CRC within seven (7) days of such notice their written comments, if any, with proof of having provided an advance copy to Cosmos Enterprises. After giving the parties an opportunity for a hearing, CRC shall pass a speaking order. CRC shall complete this exercise within 21 days from this judgment's announcement date.

32. Before parting with this matter, we note that the Procurement Committee has once again cancelled the tender for the Central Prison Khairpur. The tender for Khairpur is being cancelled for the second time. Given all the moving parts of this transaction and the ad-interim orders of this bench from time to time, in the facts and circumstances of the case, and to bring the several open threads to a close we will leave the matter of frequent cancellation in tenders to benefit the blue-eyed boys of the Authority to be decided in some other case. At this point, suffice to say, should CRC in its pending decision decide to accept/reject any bidder for the prison at Khairpur, we expect CRC will also provide an explain for the same given that the Procurement Committee by its decision dated 30.08.2024 cancelled the tender for Central Prison Khairpur.

33. CP No.D-3760/2024, CP No.D-3996/2024 and CP No.3868/2024 are dismissed, and CP No.D-4821/2024 and CP No.5060/2024 are disposed of in the above terms.

34. The observations made herein are to decide/dispose of this lis, as the case may be, and should not be relied upon by the parties arrayed as either Petitioner(s) or Respondents in these five (5) constitution petitions.

JUDGE

CHIEF JUSTICE