ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
C. P. No.D-185 of 2014
C. P. No.D-281 of 2014
C. P. No.D-1086 of 2014

Date of Hearing	ORDER WITH SIGNATURE OF JUDGE

28.9.2017.

Messrs Inayatullah G. Morio, Sarfraz Khan Jatoi and Ashfaque Hussain Abro, advocates for the petitioners.

Mr. Abid Hussain Qadri, State Counsel.

Learned Counsel for the petitioners submit that these petitions have partly become infructuous, therefore, the same may be disposed of accordingly, however, with directions to the respondents to act strictly in accordance with SPPRA Rules, especially Rule 17 *ibid*, in advertising and awarding tenders in respect of public projects.

We have noticed that time and again petitions are being filed in this Court, wherein, the main grievance of the petitioners is to the effect that either, the procuring agency is not issuing blank tender forms, or, the Notice Inviting Tender (NIT) is not properly published and advertised in at least 3 widely circulated Newspapers. The Sindh Public Procurement Act, 2009 and Sindh Public Procurement Rules, 2010 cater to all these issues. Rule 2(g) provides that "**Bidding Documents**" *means all documents provided to the interested bidders to facilitate them in preparation of their bids in uniform manner*, Rule 2(aa) provides that **"Open Competitive Bidding"** *means a fair and transparent specified procedure defined under these rules, advertised in the*

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prescribed manner leading to the award of a contract whereby all interested persons, firms, companies or organization may bid for the contract and includes both National and International Competitive Biddings; whereas Rule 17 stipulates the **"Methods of Notification and Advertisement"**. However, our experience reflects that every now and then these Rules are openly flouted by various procuring agencies; resultantly there is an influx of unnecessary litigation before this Court. The purpose of open bidding and tender is to fetch the best and lowest bid and for this it is always beneficial to have more and more bidders. However, refusal of blank tender forms negates this very purpose. We have also noticed that as and when a person who is refused issuance of blank tender form approaches this Court, the response generally from the procuring agency is that they are ready to issue such tender form if so directed. This is not understandable and creates serious doubts about the fairness of the procurement process and smacks a non-transparent and callous attitude on the part of the procuring agency as well as Government. The discretion of State in procuring things for public purpose is not unlimited and the State cannot give largess in its arbitrary discretion or at its sweet will or in such terms as it chooses in its absolute discretion.

In the case of ***Kasturi Lal Lakshmi Reddy v The State of Jammu & Kashmir and another*** (**AIR 1980 SC 1992**), the Indian Supreme Court has been pleased to hold as under;

> 11. So far as the first limitation is concerned, it flows directly from the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largess. Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act

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contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free to act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in and unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either best, it would be unconstitutional and invalid.

14. Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost, of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so....."

The activities of the State and or the Government always have a public element or its interest in it, and therefore, it ought to have fairness and equality in its conduct, specially while awarding contracts or lease hold rights in respect of royalty collection. When it enters into a contract it must do so with fairness and without discrimination and the procedure followed in awarding such contract must also be fair. The Indian Supreme Court in the case of ***Ramana Dayaram Shetty v. The International Airport Authority of India and others*** (**AIR 1979 SC 1628**) has been pleased to observe as under;

11. .... "Licences are required before one can engage in many kinds of business or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals

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and many more businesses enjoy largess in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilization by private corporations and individuals by way of lease or licence. All these mean growth in the Government largess and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so. The law has not been slow to recognize the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognized as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorized." "The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same position as a private individual.

12. ..... "It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

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This judgment of the Indian Supreme Court has been cited with approval by our Supreme Court in the case of ***Javaid Iqbal Abbasi & Company v. Province of Punjab and 6 others*** (**1996 SCMR 1433**)

In view of hereinabove discussion these petitions are disposed of by directing the respondents to ensure that as and when any public project is announced and tender is called, the Sindh Public Procurement Rules 2010, shall be followed in letter and spirit, including issuance of tender forms to the interested bidders without hassle and the condition of publication of the tender notice in widely circulated newspapers as provided in Rule 17 ibid must be adhered to. Let copy of this order be sent to all the respondents including Addl. A.G, for compliance.

Petitions stand disposed of with above directions.

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