

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**

(Judicial Department)

WP No. 4065-P/2018.

M/s Wahid Builders & others

Vs

Government of KPK etc.

JUDGMENT

Date of hearing. 28.08.2018
Petitioner(s) by: Mr. Shakirullah Afridi Advocate.
**Respondent(s) by: Syed Sikandar Hayat Shah AAG
alongwith Inayatullah XEN Highway
Bajawar, Ziaul Islam XEN Highway
Kurram and Muhammad Ali, Project
Director PMU, FATA Secretariat.**

MUHAMMAD NASIR MAHFOOZ, J:- Petitioners

have invoked the jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan 1973 (**Constitution**), for the relief couched in the following words:-

“that by accepting this writ petition, the respondents may be directed to allow the petitioners in the bidding process for the above mentioned projects.”

2. Petitioners are private limited companies engaged in construction works of different nature and

through resolutions of their respective Board filed the instant writ petition challenging their refusal by respondents to participate in the bidding process for different construction works in the District Bajaur & District Kurram (the then agencies). That they hold a valid license from the Pakistan Engineering Council and assert that they meet the required standard for undergoing such like projects. Respondents initiated the process for construction of five different projects with the connotation as under:-

(Bajaur)

Contract #	Name of work	Estimated cost (Rs)
CP-1	Rehabilitation & improvement of Loesam to Nawapass (Bajaur Agency) under restoration of damaged infrastructure in Conflict Affected Area of FATA (10 km)	160.00 M
CP-2	Rehabilitation & Improvement of Loesam to Nawapass (Bajaur Agency) under restoration of damaged infrastructure in Conflict Affected Area of FATA (10 km)	248.00 M
CP-3	Rehabilitation & Improvement of Loesam to Nawapass (Bajaur Agency) under restoration of damaged infrastructure in Conflict Affected Area of FATA (10.750- km) (Package-III)	176.00 M

S.No	Name of work	Estimated cost (Rs)
1	Reconstruction & Black topping of Asil Targhaw Road, Tehsil Barang Bajaur Agency (10.3 Km)" (RD 0+000 to RD 10+300) (BRP-1)	280.0 M
2	Reconstruction & Black topping of Asil Targhaw Road, Tehsil Barang Bajaur Agency (10.275 Km)" (RD 10+300 to RD 20+575) (BRP-II)	280.0 M

(Kurram Agency)

Sl.No	Name of work	Estimated cost (Rs)
1	Widening & Improvement of road Morghan to Nika Ziarat via Murghan Kandao in Central Kurram (Kurram Agency) (12-Km) (RD 0+000 to RD 12+000) (Package-I)	225.0 M
2	Widening & Improvement of road Morghan to Nika Ziarat via Murghan Kandao in Central Kurram (Kurram Agency) (12-Km) (RD 13+000 to RD 24+000) (Package-II)	225.0 M

3. Invitation for pre-qualification of contractors was made through publication in different newspapers with technical proposals prepared in accordance with the instructions and criteria provided therein to be submitted on or before 5th December, 2017, 27.12.2017 & 20.2.2018.

4. The petitioners submitted their proposals, who failed to prequalify for the projects in question. Lateron different other companies were pre-qualified and allowed to participate in the bidding process to be held on 28.8.2018, 29.8.2018 and 31.8.2018. This notice inviting for bids was also published in different newspapers and 16.8.2018, 17.8.2018 were fixed dates for pre-bid meeting to be held in the office of respondent No.6. On 11.8.2018, petitioners instituted the instant writ petition alleging therein that they meet all the required standards to fulfill the projects in question.

5. The comments were called from the respondents No.4 to 7 on 24.8.2018 but on the interim relief hard pressed by petitioners, the case was taken up today.

6. We have heard learned counsel for the petitioners, learned AAG for respondents with the assistance of representative of respondents present in Court.

7. Before discussing the merits of this case, it seems essential to refer to certain legal aspects, which emerged after 31st Constitutional amendment, whereby amendment were made and Article 247 of the Constitution was omitted besides other relevant amendments. According to the latest dispensation, all the Tribal Areas have been merged into the Province of Khyber Pakhtunkhwa for administration of justice, maintenance of peace and good governance vide regulation known as *FATA Interim Governance Regulation, 2018*, which was passed by the President of Pakistan on 25.5.2018. The Frontier Crimes Regulation, 1901 was repealed and all the agencies/ areas in FATA are now termed/ declared as Tribal Districts while the existing Tehsils are termed as

Sub-divisions. Instead of Political Agent, Additional Political Agent and Assistant Political agent, the Deputy Commissioner, Additional Commissioner and Assistant Commissioner respectively are re-designated.

8. It is also pertinent to mention that for the efficient performance and transparent execution of works in the province, the Provincial Legislature has passed an act known as *Khyber Pakhtunkhwa Public Procurement Regulatory Authority Act, 2012*. Under Section 14-A of the Act *ibid*, all procurement shall be conducted in a manner which promotes transparency, accountability and fairness. Similarly open competition in such a manner to achieve value for money is also essential pre-requisite of the *ibid* Act. Section 23 of this Act provides that procuring entity is required to solicit bids based on performance or functional specifications, which shall invariably include an unambiguous statement giving accurate and complete description of the procurement objects to pursue the principles of public procurement enunciated in Section 3 of this Act. It has also provided minimum qualification of bidders, enlistments, pre-registration, best practices and

industry standards defined as appropriate for international bidding.

9. The grievance redressal mechanism is provided under Section 35 of the Act for any bidder aggrieved by any act of the Procurement entity by filing a complaint in writing to the head of procuring entity and in case of rejection/ refusal of the same, may file an appeal to the Authority within 15 days in accordance with the prescribed procedure. Under Section 35-A the authority is empowered to make regulations not inconsistent to this Act or rules for carrying out the purpose of this Act.

10. Under Section 36-A of this Act, the Provincial Government has framed rules known as *Khyber Pakhtunkhwa Public Procurement of Goods, Works & Services Rules, 2014*. Rule 7 of the *ibid* Rules, provides for enlistment of suppliers whereas Rule 8 for pre-qualification of suppliers and under sub-rule 3 of the same, pre-qualification of bidders is concomitant to be based entirely upon the capability, competence, resources of the bidders relevant to performance in the particular assignment, taking into account their legal status, proof of registration, being a tax payer, having organizational

profile, past performance alongwith list of clients and references, capability with respect to human resources, personnel, computing and engineering equipment, machinery and plant etc. Besides proof of possessing appropriate managerial capability alongwith last three years bank statement and audited reports by an External Auditor are also provided for pre-qualification of suppliers.

11. Under Rule 26 a criteria for short-listing of consultants is provided and approval of the contract award inter-alia.

12. As per relevant provisions, the petitioners were legally bound to provide documentary proof, depicting their past performance, performance of companies pre-qualified by respondents as well as currently participating in the bidding process. Viewed in the above perspective, the requisite documents annexed with the instant writ petition, falls short to meet the requisite standard. Though we are not constrained to delve deeper into the eligibility or ineligibility of the petitioners for pre-qualification because they have not challenged the action of respondents whereby they have

been refused pre-qualification rather they have prayed for issuance of directions to the respondents to allow them for participating in the bidding process. In the absence of requisite standard, if the petitioners are allowed to participate in the bidding process, which is commenced from today, it would amount to putting the cart before the horse. The process initiated for awarding the contract in question as per documents annexed with the petition, reveals that till date relevant provisions have been followed and no violation of any such provisions is apparent on the face of record including invitation for pre-qualification of contracts, till a specified date alongwith the detailed construction works and the amount involved therein.

13. Apart from above, for the purpose of grant of interim relief, the essential pre-requisites are to show a prima facie case and balance of inconvenience so while applying the same test to the instant case, the subject matter being question of public interest at large, relating to construction of roads therefore, the grant of injunction in such like matter would be more inconvenient for the public at large and less inconvenient for the petitioners,

who not only failed to pre-qualify but also have not challenged such failure/ action of respondents.

14. We are therefore, constrained to hold that in the absence of grant of interim injunction and prayer made herein, this Writ petition would itself become infructuous, which could not be allowed to proceed further, hence the same is dismissed in limine. However, the respondents shall ensure that the contract is awarded by following the principles of transparency, fairness with a sense of accountability and meeting the required international standards.

Announced:
28.08.2018.

J U D G E

J U D G E

“A.Qayum PA” (DB)

***Hon’be Mr. Justice Qaiser Rashid Khan
& Hon’ble Mr. Justice Muhammad Nasir Mahfooz.***