

JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT, PESHAWAR  
[JUDICIAL DEPARTMENT]

**Writ Petition No.4887-P/2020**

*M/s Cemtech-Jiangsu JV, Islamabad through its Authorized  
Representative/Signatory, Mr. Imran Rehman*

*versus*

*Government of Khyber Pakhtunkhwa through its Chief Secretary,  
Peshawar & others*

Date of hearing: **27.10.2022**

***Mr. Isaac Ali Qazi, Advocate for the petitioner.***

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**JUDGMENT**

**SHAKEEL AHMAD, I.** The petitioner came up before this Court through this petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973, for issuance of a writ of mandamus, basically with the following six prayers: -

- i. Declare that in view of all the provisions of all applicable laws, Respondent-2 being a regulatory authority cannot itself carry out the operation and maintenance services of the Hydro Power Projects.*
- ii. Declare that the impugned Order dated 13.01.2020 of Respondents of cancellation of bidding process is without lawful cause and authority, thus, of no legal effect.*
- iii. Declare that subsequent appellate orders and non-order of the Respondents endorsing the impugned order dated 13.01.2020 may please be vacated/set aside.*
- iv. Declare that Petitioner being duly qualified and lowest bidder is entitled to the contract of O&M Services of the Project.*
- v. Direct the Respondents to Award the Contract of O&M Services of the Project to the Petitioner was envisaged by the tender process.*
- vi. Or under the circumstances any other relief deemed appropriate may please be granted to the Petitioner.*


02. The portrayal of the facts are short and simple. The fourth respondent, the Chief Engineer O&C/Director O&C Pakhtunkhwa Energy Development Organization (PEDO) invited applications from local and international firms or Joint Ventures (JV) for pre-qualification, on the prescribed format, for providing operation and maintenance Services for 36.6 MW Daral Khwar Hydro Power plant located at District Swat, Khyber Pakhtunkhwa, on the terms & conditions mentioned therein. It is stated in the Petition that this public notice was published in the Daily "Aaj" dated 4<sup>th</sup> June 2018, and accordingly, the petitioner submitted his application. The petitioner gave the lowest bid on 17<sup>th</sup> December, 2018. After proper evaluation "*The Technical Proposal*", the JV was declared as "*technically responsive*". He secured higher marks in the open competition as is reflected from the letter dated 28<sup>th</sup> May 2019. It was pleaded in the petition that petitioner was under legitimate expectation of awarding contract, therefore, petitioner hired services of staff for the subject project, however despite lapse of considerable time, nothing was communicated to the petitioner, therefore, vide letter dated 07.12.2019, the petitioner approached the respondents to issue letter of acceptance of bid in terms of Clause IB 33.1 of the bidding documents so as to meet the pre-requisites of Clause IB 13.5 *ibid*. Ultimately, vide impugned letter dated 13<sup>th</sup> January 2020, it was intimated to the petitioner that process of hiring for operation and maintenance contractor for 33.6 MW Daral Khawar Hydropower Complex has been

cancelled on the direction of Competent Authority, purportedly for opting to the alternate i.e. the O&M services to be undertaken by the PEDO itself. Being aggrieved of the same, the petitioner filed grievance petition/complaint before respondent No. 5. During pendency of appeal, respondent No.4 served a letter dated 22.01.2020 upon the petitioner disclosing therein that with reference to Pakistan Engineering Council (PEC) letter dated 25.06.2019, another ground of rejection of the bid was that "pre-qualification is a part of the bidding process and prior registration with PEC of the foreign company of JV is mandatory to participate at pre-qualification stage". In response, the petitioner pleaded that requirement of registration of foreign JV partner with PEC, is only after awarding of the contract and not before awarding of the contract. After providing opportunity of hearing, the grievance petition/complainant filed by the petitioner was turned down vide order dated 05.03.2020. Not contented with the same, the petitioner filed appeal before respondent No.3 in terms of Clause 35(1)(a) *ibid*, however, due to Covid-19 Pandemic, The Government of Khyber Pakhtunkhwa announced complete lockdown due to which all official and unofficial activities came to standstill. After normalization of situation, the petitioner made hectic efforts for fixation of his case and decision on merits, but all his efforts in this respect proved to be a wild goose chase. Petitioner presumed that it has evasively denied, consequently, he filed an Appeal bearing No. KPPRA/GRR/Appeal/49 of 2020, before respondent No.6,

which was declined on 20<sup>th</sup> October, 2020, which necessitated to file the present constitutional petition.

03. Pursuant to the order of this Court dated 03.08.2021, respondents No.1, 2 & 6 filed their para-wise comments, raising therein many legal and factual objections qua maintainability of the writ petition.

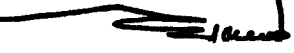
04. We heard the petitioner's counsel. He elaborately argued the case. According to the petitioner's counsel, rejection of his bid was illegal and that the authorities should have accepted the same. He next argued that being a successful bidder, the petitioner deposited security of Rs. 10 Million & possesses all requisite qualifications and bidding requirements as pre-qualification & bidding documents. He further argued that PEDO has no mandate under the Khyber Pakhtunkhwa Energy Development Organization Act, 1993 to undertake operational & maintenance works itself. He added that requirement of registration of JV Partner with PEC at pre-qualification stage was not a legal requirement and prayed for acceptance of the writ petition.



05. Having considered the arguments of learned counsel for the petitioner, we are of the view that the questions are to be considered are (i) whether the respondent was bound to accept the bid offered by the petitioner under the above circumstances, (ii) whether the petitioner has got locus-standi to file the writ petition, (iii) whether the operation and maintenance services for 36.6 MW Daral Khwar Hydropower plant can be undertaken by the PEDO itself or not & (iv)

whether JV was required to be registered with PEC prior to acceptance of bid at pre-qualification stage or not.

06. It is reflected from the record that in pursuance of the advertisement dated 4th June 2018, for providing operation and maintenance Services for 36.06 MW Daral Khwar Hydropower plant located at District Swat, Khyber Pakhtunkhwa, the petitioner submitted his application for pre-qualification. He was lowest bidder, yet it was not accepted by the respondent *firstly*, on the grounds that the PEDO Board/PEDO Board Technical Committee in its meeting held on 2<sup>nd</sup> January 2020, recommended that operation and maintenance of Daral Khwar Hydropower Complex will be undertaken by the PEDO own staff and there is no need to hire O&M Contractor for the said purpose and *secondly*, that registration of foreign firm Joint Ventures (JV) is mandatory with PEC at pre-qualification stage and *thirdly*, that under rule-7 of the Khyber Pakhtunkhwa Public Procurement of Goods, Works and Services Rules, 2014 the procuring entity is competent to reject all bids based on cogent reasons.

 07. Adverting to the *first* ground, we are of the view that rejection of the bid of the petitioner is merely communication of the decision stated to have been taken by the BoD of PEDO. So far as the *second* ground is concerned, it was taken in terms of the provisions of PEC bylaws, making it obligatory upon a foreign firm in the Joint Ventures to get itself registered with PEC for participation in the bidding process. We deem it appropriate to reproduce, the relevant criteria

incorporated in the bidding documents, which reads as under:

*"Pre-qualification is open to O&M Contractors/Joint Ventures of contractors who are registered with PEC in category 02 and above. Foreign/Joint Venture applicants who are not registered with PEC shall have to submit an undertaking to get them registered with PEC before awarding of the Contract"*

08. Admittedly, the petitioner M/s Cemtech Engineering Services Pvt Ltd alongwith Chinese Company namely **M/S JIANGSU HUANENG CONSTRUCTION ENGINEERING GROUP CO. LTD** as Joint Venture (JV) submitted its pre-qualification on 12.07.2008. However, the Chinese Company/foreign firm JV Partner of the petitioner was not registered with PEC at the pre-qualification stage, which is obligatory as per by laws of Pakistan Engineering Council(PEC).

09. Moreso, section 30 of the KPPRA Act, 2012 & rule 47 of the Khyber Pakhtunkhwa Public Procurement of Goods, Works and Services Rules, 2014 empowers the Procurement Authority to reject all bids for cogent reasons. It will be advantageous to reproduce the same as under: -

**Section 30. Rejection of bids.** *A Procuring Entity may reject any or all bids communicating the reasons for rejection in writing to the Authority at any time prior to the award of a contract.*

**Rules 47. Rejection of bids.**

*(1) The procuring entity may reject all bids or proposals at any time prior to the acceptance of a bid or proposal. The procuring entity shall upon request communicate to any contractor or consultant who submitted a bid or proposal, the grounds for rejection of all bids or proposals.*

*(2) The procuring entity shall incur no liability, solely by virtue of its invoking sub-rule (1) towards contractors or consultants who have submitted bids or proposals.*

*(3) Notice of the rejection of all bids or proposals shall be given promptly to all contractors or consultants that submitted bids or proposals.*

10. We also deem it appropriate to reproduce IB.30 of bidding Documents for Procurement of Works (Civil Works) (For Large Contracts) over Rs. 45 Million and para 4.5 of Bidding Documents/Pre-qualification Documents, as follows:-


*IB.30 of Standard Form of Bidding Documents for Procurement of Works (Civil Works) (For Large Contracts) Over Rs.45 Million:*

*Procuring Entity's Right to Accept any Bid and to Reject any or all Bids 30.1: Notwithstanding Clause IB.29, the Procuring Entity reserves the right to accept or reject any Bid, and to annul the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected bidders or any obligation except that the grounds for rejection of all bids shall upon request be communicated to any bidder who submitted a bid, without justification of grounds. Rejection of all bids shall be notified to all bidders promptly.*

*Para 4.5 of Bidding Documents/Pre-qualification Documents: Notwithstanding anything contained in this Pre-qualification document, PEDO reserves the right to accept or reject any Pre-qualification application and to annul the pre-qualification process and to reject all Pre-qualification applications / proposals, at any time even after pre-qualification without any liability or any obligation for such acceptance, rejection or annulment as per Rule No. 47 of KPPRA Rules, 2014.*

11. A plain reading of the legal provisions quoted hereinabove makes it crystal clear that the procurement entity is competent to reject any or all bids and annul the procurement process for reasons to be recorded in writing prior to the award of Contract. A perusal of the different provisions of the Contract Act discloses that a tender notice is merely an invitation for making an offer and not by itself an offer or proposal. The advertisement does not constitute a proposal, which would bind the authority to award the contract to the petitioner, who made the lowest bid. It is

merely an attempt to ascertain whether an offer can be obtained within such margin as the procuring entity is willing to adopt. The advertisement inviting applications for pre-qualification for providing Operation & Maintenance Services, therefore, is not a proposal within the meaning of the Contract Act, but it invites a proposal. The acceptance of the application may be qualified by several conditions. The submission of application for pre-qualification being in the nature of a proposal or offer unless the application is accepted by the Competent Authority/Procurement Entity and the said acceptance is communicated to the applicant, the contract cannot be said to be concluded between the parties and no legal right accrued to such bidder. An advertisement for providing Operation & Maintenance Services is a mere declaration and does not amount to a contract with anyone who may act upon it.

 12. Therefore, in our view when offer/application of the petitioner was not accepted by the relevant authority, no legal or vested or accrued right of the petitioner was violated to invoke the constitutional jurisdiction of this Court. The real and true test for deciding whether a valid contract has been made or created between the parties or not is to ascertain if the parties were of one mind on all the material terms at the time it is said to have been finalized & whether they intended that the matter was closed and concluded between the parties. For this purpose, the correspondence exchanged between the parties is also be looked into.



13. In the instant case the procurement entity never agreed to award contract for Operation & Maintenance Services to the petitioner. The Government, its agency or procurement entity possesses the power to reject the offer of lowest bidder and the procurement entity even can change its policy, but, before confirmation, as was done in the instant case.

14. It was vehemently argued by the learned counsel for the parties that the petitioner had deposited fee of Rs. 1000/- in the shape of pay order/bank draft etc in accordance with the conditions laid down in the advertisement and he was declared as pre-qualified by the Competent Authority, therefore, for all practical purposes it become a lawful contract between the parties. It is a matter of record that vide letter dated 13.01.2020 and letter dated 22.01.2020 respectively, the petitioner was informed of rejection/cancellation of his bidding process. We are of the considered view that mere deposit of Rs. 1000/- in shape of bank draft/pay order or submission of financial bids alongwith Rs. 10 million as a bid security, if any would not by itself amount to acceptance as part of price. As observed in the preceding para that, the true test for deciding the question, in a particular circumstance a contract is made or not is to ascertain whether the parties were of one mind on all material terms & conditions or not. The elaborate discussion made hereinabove, leads us to the conclusion that the relevant authority never agreed to accept the bid offered by the

petitioner. In this behalf, reference may be made to the case repeated as "Nilgine Contractors Society vs The State of Orissa" (AIR 1975 Orissa-33), wherein it was held that no approval having been given by the Competent Authority and no formal agreement having been executed, no rights had been accrued in favour of the petitioner on the basis of the highest bid given by him, which can be said to be merely provisionally accepted by the Divisional Forest Officer. The highest bid at the auction had not culminated into a binding Contract between the parties and therefore, the bidder has no enforceable right. In this context, reliance can also be placed on the judgment reported as "M/s Star Enterprises Vs. City and Industrial Development Corporation of Maharashtra Ltd., 1990 (3) SCC 280". In this case, the appellants submitted tenders for the purchase of plots offered by the respondents for sale. The appellant's offer was the highest yet it was not accepted by the respondents. Appellants challenged this decision before the Court. The Supreme Court held that:

*"The State is certainly entitled to look for the best deal with regard to its properties. In absence of any allegation of mala-fides, it may be presumed that respondent 1 acted bona fide and in refusing to accept the highest offers of the appellants with regard to specific plots had been actuated by the consideration of looking for better offers for specific plots in the economic interest of respondent 1."*


15. The learned counsel for the petitioner further contended that the petitioner had legitimate expectations that his bid should be accepted by the relevant authority as he was the lowest bidder. We are not able to find out any violation of principle of legitimate expectation in the present case. The

scope and ambit of this principle is explained in detail in the most celebrated judgment of the House of lords reported in ***"CCSU v Minister for the Civil Service"*** (1984 ER 954). Lord Boakill elaborately explained the principle of legitimate expectancy as under:-

*"The principle may now said to be firmly entrenched in this branch of the law. As the cases show the principle is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations; especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure."*

In the very same decision, it was further explained that;

*"the principles of legitimate expectation could be invoked only in a case where the aggrieved person was deprived of some benefit or advantage which in the past had been permitted to be enjoyed until he was given reasons for its withdrawal and opportunity to comment on these reasons because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representation against the withdrawal. The appellant's legitimate expectation arising from the existence of a regular practice of consultation which the appellants could reasonably expect to continue gave rise to an implied limitation on the Minister's exercise of the power."*

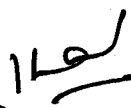
 16. We do not think that the above principle can in any way be applied to the facts of the case. The principle of legitimate expectation would arise in a case where the petitioner is denied an opportunity of being heard in a case where he has got a right of hearing or the practice had been that before a decision is taken the affected parties would generally be heard. In the instant case, the petitioner's bid was cancelled/rejected and he was informed of that. There was no

procedural illegality. The fact that being the lowest bidder, there was no valid ground for rejecting the bid offered by him, this argument of the learned counsel for the petitioner equally has no force. The petitioner has got no right to say that his bid should be accepted.

17. Advertising to the last contention of the petitioner that PEDO has got no right to undertake Operational & Maintenance Services for 36.6 MW Daral Hydropower Plant located at District Swat, as said in the letter dated 13.01.2020. PEDO is a Government Organization under the Energy & Power Department and is governed by the PEDO Act, 1993. The circular of NEPRA issued on 6<sup>th</sup> September 2018, is for adjustment in the O&M cost over and above the ceiling. This has not created an embargo on the power producer through its own O&M. However, we leave it to NEPRA to see as to whether act of the respondents/PEDO is violative of the said O&M or not, but, in our opinion, the petitioner has got no locus standi to question the same through constitutional petition.

18. In the net result, there is no merit in this writ petition, which is accordingly **dismissed** with no order as to costs.

**Announced:**  
27.10.2022

  
JUDGE

  
JUDGE

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*Hon'ble Mr. Justice Mohammad Ibrahim Khan*  
*Hon'ble Mr. Justice Shakeel Ahmad*

*Himayat, CS.*