

HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ Petition No.2547-A/2022.

Date of Institution 24.06.2022.

Date of decision 27.06.2022.

1. M/S Asif Awan & Co. through its Managing Director Asif Awan Government Contractor Muzaffarabad, Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
2. Ms. Raja Amir Zafar & Co through its Managing Director Raja Amir Zaffar, Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
3. MS. Raja Mohsin Majeed & Co. through its Managing Director Ms. Raja Mohsin Majeed, Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
4. MS. Muhammad Munir Qureshi & Co through its Managing Director MS. Muhammad Munir Qureshi, Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
5. Ms. Rowani Construction Company & Co through its Managing Director Syed Subtain Gillani Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
6. Sheraz Maqbool Arshad & Co through its Managing Director Sheraz Maqbool Arshadi, Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
7. Tabasum Nisar & Co through its Managing Director Tabasum Nisar Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
8. Raja Mir Zaman Khan & Co through its Managing Director Raja Mir Zaman, Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
9. Arif Naqvi & Co through its Managing Director Arif Naqvi Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
10. Bricks and Bridge Associate through its Managing Director Sardar Muhammad Mudassar Nawaz, Government Contractor Muzaffarabad, Azad Jammu & Kashmir.
11. MS. Mir Faheem & Co through its Managing Director Mir Faheem, Government Contractor Muzaffarabad, Azad Jammu & Kashmir.

(Petitioners)

Versus

1. Azad Govt. of State of Jammu and Kashmir, Secretary Planning and Development Department, having his office at New Secretariat Muzaffarabad, Azad Jammu & Kashmir.
2. Secretary Planning and Development, Azad Government of the State of Jammu and Kashmir, having his office at New Secretariat Muzaffarabad, Azad Jammu & Kashmir.
3. Secretary Public Works Department Highways, Azad Government of State of Jammu and Kashmir, having his office at New Secretariat Muzaffarabad, Azad Jammu & Kashmir.
4. Secretary Physical Planning and Housing, Azad Government of the State of Jammu and Kashmir, having his office at New Secretariat Muzaffarabad, Azad Jammu & Kashmir.
5. Chief Engineer Public Works Department Highways (North), Azad Government of the State of Jammu and Kashmir, new district Complex, Muzaffarabad, Azad Jammu & Kashmir.
6. Chief Engineer Public Works Department Highways (South), Azad Government of the State of Jammu and Kashmir, new District Complex, Muzaffarabad, Azad Kashmir.
7. Executive Engineer, Public Works Department (PWD), Highways Division Muzaffarabad Azad Jammu & Kashmir.
8. Executive Engineer, Public Works Department (PWD), Highways Division Neelum, Azad Jammu & Kashmir.
9. Executive Engineer, Public Works Department (PWD), Highways Division Mirpur, Azad Jammu & Kashmir.
10. Executive Engineer, Public Works Department (PWD), Highways Division Bhimber, Azad Jammu & Kashmir.
11. Executive Engineer, Public Works Department (PWD), Highways Division Jhelum Valley, Azad Jammu & Kashmir.
12. Executive Engineer, Public Works Department (PWD), Highways Division Kahuta Haveli, Azad Jammu & Kashmir.
13. Executive Engineer, Public Works Department (PWD), Highways Division Bagh, Azad Jammu & Kashmir.

14. Executive Engineer, Public Works Department (PWD),
Highways Division Kotli, Azad Jammu & Kashmir.
15. Executive Engineer, Public Works Department (PWD),
Highways Division Sudhnoti/Pallandari Azad Jammu &
Kashmir.
16. Executive Engineer, Public Works Department (PWD),
Highways Division Rawalakot, Azad Jammu &
Kashmir.

(Respondents)

WRIT PETITION

Before:- ***Justice Sadaqat Hussain Raja, CJ.***
Justice Syed Shahid Bahar, J.

PRESENT:

Jamal Zafar Khan, Advocate for the petitioners.

Judgment:

(Justice Syed Shahid Bahar, J.) Through this writ petition filed under Article 44 of Azad Jammu & Kashmir Interim Constitution, 1974, infra relief has been beseeched as under:-

“It is, therefore, prayed on behalf of petitioner that an appropriate writ is liable to be issued in favour of petitioner against the respondents on following manners:-

- i. Directing the respondents to fix the items wise rates of construction work in the impugned proclamation (Annexure “PA” to “PA/18”), keeping in view the current/revise market rates, prices of construction material, labour charges and other prices ancillary thereto,
- ii. The fixation of the rates on the basis of Azad Jammu & Kashmir CSR which was valid upto June 2022 may kindly be declared as illegal, unlawful and set-aside the same.
- iii. Directing the respondents to recall the tenders and the tenders may also be

- issued, keeping in view the current item prices, rate of inflation, labour charges and other construction items.
- iv. Declaring the notification dated 20.10.2021 as illegal and against the present rate of market.
 - v. Any other relief which is just and proper in the estimation of this Court may also be granted to petitioner in the interest of justice.”

Precise facts of the case as per petitioners are that the respondents invited the Contractor to participate in the bidding process for the construction of different Projects (roads etc.) through tenders notices, however, the government fixed the rate of construction work on the basis of Azad Jammu & Kashmir Composite Schedule of Rate CSR 2021-22 which was issued only for a period till June 2022, whereas, now due to the inflation and increase the rates of different products and commodities, the items wise rates shall be fixed keeping in view the inflation rate increase in the prices of the different items, i.e. Cement, Steel, Petrol, Diesel, so the fixation of the rates as per Azad Jammu & Kashmir CSR is illegal and unlawful. It is claimed that the prices/items wise rates are liable to be fixed, keeping in view the latest prices. It is averred that the present schedule of Azad Jammu & Kashmir CSR was released on 01.01.2022 and after its implementation, the price of material has increased. It is alleged that after issuance of CSR 2022, the price of construction material i.e.

steel, diesel, Petrol, aluminum and cement have gone high and prices of other construction material have also increased, so, the existing construction equipment prices need to be corrected and the schedule issued from July 01, 2022 needs to be increased accordingly. It is contended that the petitioners submitted an application before Chief Engineer Public Works Department Highways (North) for the revise CSR and increasing of rates, but the concerned respondent has not acted upon, hence, the impugned proclamations are illegal, unlawful, against the AJ&K PPRA Rules, 2017 as well as against the enforced law, thus, the same is liable to be struck down by issuing of appropriate writ in favour of petitioners.

The learned counsel for the petitioner reiterated the facts and grounds narrated in the petition and argued that petitioners are registered Contractors with registration of GST, CBR & FBR and having good reputation in the construction work/industry. The learned counsel contended that respondents issued a notification dated 02.02.2022 and revised the rates of some items which are against the present rates of market. He further contended that the scheme of establishment of CSR clearly manifest that the rates of different items are liable to be fixed, keeping in view the overall circumstances of the inflation rate and the prices of different items such as Cement, Petrol, diesel, etc.,

however, the proclamation impugned herein has been issued on the basis of the CSR which was effective till June 2022, thus, the items wise rates are liable to be fixed in light of overall increases of items prices, which have increased more than 40%. He alleged that the respondents have not fixed the item wise rates in light of law and rules on the subject, which shows malafide on the part of respondents. The learned counsel vehemently contended that it is the prime duty of the respondents while fixation the rates of different items of construction work the same shall be based on current market prices, which has been ignored by the respondents while inviting current/recent bids. The learned counsel prayed that by accepting the instant writ petition, the notification dated 20.10.2021 as well as invitation of bids/tenders may be set at naught and direction may be issued to respondents to issue tenders keeping in view the current item prices, element of inflation, labour charges and other construction items.

We have heard preliminary arguments as well as perused the record attached with the writ petition and gone through the law on the subject, with due care.

The claim of the petitioners is that the impugned notification dated 20.10.2021 may be set-aside and direction may be issued to the respondents to recall the impugned tenders/bids and they may also be directed to fix the items

wise rates of construction work in the impugned proclamations (Annex. PA” to “PA/18”) in view of current/revise market rates, prices of construction material and labour charges etc.

At the very outset it is pertinent to mention here that basic law governing and regulating the matter in hand is Azad Jammu & Kashmir Public Procurement Regulatory Authority Act, 2017 and rules made thereunder provides complete mechanism and roadmap quo initial procurement and procedure in order to streamline public procurement work.

Main plank of the arguments of the learned counsel for the petitioners is basically rotating around the notification dated 26.05.2015 on the strength of which petitioners have challenged different proclamations for invitation of bids listed herewith writ petition as “Annexures PA to PA/18” through which official respondents invited Contractors to participate in bidding process for the construction of different development projects under the fixed rates of construction work on the basis of Case has been called repeatedly since morning but nobody appeared on behalf of the parties which shows lack of interest on their part, therefore, the instant writ petition stands dismissed for want of prosecution. CSR 2021-22, thus, the petitioners are reluctant upon fixation of the rates of construction work.

As per estimation of the learned counsel for the petitioners that due to inflation and increase of rates of different projects and commodities, items rates are liable to be increased keeping in view the inflation rates increased in the price of different items.

In light of the above matrix facts and entire gamut of the lis it is worthwhile to come back, particularly to the notification dated 26.05.2015, reproduced as under:-

**Azad Govt. of the State of Jammu & Kashmir
Planning and Development Department**

.....
"Muzaffarabad"
Dated: May 26, 2015.

Notification:

No.P&Case has been called repeatedly since morning but nobody appeared on behalf of the parties which shows lack of interest on their part, therefore, the instant writ petition stands dismissed for want of prosecution./Admin/8127-76/2015, the President of Azad Jammu and Kashmir has been pleased to accord approval of following mechanism for Case has been called repeatedly since morning but nobody appeared on behalf of the parties which shows lack of interest on their part, therefore, the instant writ petition stands dismissed for want of prosecution.-CSR updation:-

- a. Case has been called repeatedly since morning but nobody appeared on behalf of the parties which shows lack of interest on their part, therefore, the instant writ petition stands dismissed for want of prosecution.-CSR shall be regularly updated on semiannual basis (period of six month) for each district by the Rate Analysis Section.
- b. The input rates as well as item rates will be revised semiannually unless the rates of any particular item(s) exceeded/decreases by more than 15%. The engineering Department would approach P&Case has been called repeatedly since morning but nobody appeared on behalf of the parties which shows lack of interest on their part, therefore, the instant writ petition stands dismissed for want of prosecution. Department as and when they deem it

necessary to get the rates revised during the currency of notified Case has been called repeatedly since morning but nobody appeared on behalf of the parties which shows lack of interest on their part, therefore, the instant writ petition stands dismissed for want of prosecution.-CSR rates.

- c. Planning and Development Department on the basis of finalized input rates shall fix the rates of each item of work in Case has been called repeatedly since morning but nobody appeared on behalf of the parties which shows lack of interest on their part, therefore, the instant writ petition stands dismissed for want of prosecution.-CSR for each district and place the same on official web site pontifical of P&Case has been called repeatedly since morning but nobody appeared on behalf of the parties which shows lack of interest on their part, therefore, the instant writ petition stands dismissed for want of prosecution. Department semiannual basis, which may be used for price adjustment/escalation payment.
- d. The tendering trends lend to determine the accuracy of the rates notified. All executing agencies will place a copy of acceptance letters/letters of award on their respective website, so that the accuracy of notified rates can be monitored.
- e. Grass contractor profit=22%
 - i) Net contractor profit=10%
 - ii) Contractor's site/Head office charges=4%
 - iii) Income Tax and other miscellaneous taxes/duties etc. 8%

....Sd.....

(Amjad Khaqan)

Section Officer P&DD

Copy to:

1. The Secretary to the President, Azad Jammu & Kashmir, Muzaffarabad.
2. The Secretary to the Prime Minister, GoAJ&K, Muzaffarabad.
3. PS to the Chief Secretary, GoAJ&K, Muzaffarabad.
4. PS to the Additional Chief Secretary (Dev.) GoAJ&K Muzaffarabad.
5. PS to the Secretary Finance, GoAJ&K, Muzaffarabad.
6. PS to the Secretary Planning & Development Department, GoAJ&K, Muzaffarabad.
7. All Secretaries, GoAJ&K, Muzaffarabad.
8. PA to the Accountant General, AJ&K, Muzaffarabad.
9. All Heads of the Departments.
10. The Chief Economist. P&DD GoAJ&K, Muzaffarabad.
11. All Chiefs P&DD.
12. The Controller Printing Press GoAJ&K, Muzaffarabad.
13. Master File.

.....Sd.....

Section Officer P&DD

The petitioners are putting reliance and claiming enforcement of clause (b) of the supra mentioned notification (which more or less is policy notification) language implied in para (b) unequivocally reveals that it is directory in nature and no penal consequences for non-

compliance of para (b) of supra notification has been given. It has been laid down in **2001 SCMR 1001** that where legislature have provided penalty for the non-compliance of the provision such provision is mandatory in nature, however, where such consequences is not provided the provision is termed as directory, thus, it is very much clear that any provision of law for that matter policy couched with penal consequences would be considered as mandatory and where no penal consequences is entail to non-compliance of the provision of law then such provision of law would be taken as directory. In this regard reliance has been placed on **2002 CLC 557** as well **2002 CLC 1431 and 1018**.

It is celebrated principle of law that individual interest/rights are to yield before the interest of public at large. No doubt invitation of bids through impugned proclamation are regarding different type of public works/development works which definitely carries public interest of the public at large. Even otherwise, it is astonishing state of affairs that item rates are to be revised semi-annually while on the other hand, petitioners at initial stage are claiming revised rate prior to expiry of 6 months and prior to participating in the process and before practically entering into contract, thus, the writ petition in this count is also premature. At this juncture, it is worth mentioning here that at initial stage of matter pertaining to public procurement

work obstacle and hurdles ex-facie amounts to jeopardize the projects carrying public interest and in such like matter the Court ordinarily should exercise judicial restraint. In this regard reliance has been placed upon **AIR 2007 SC 437**, wherein the new principle of judicial review in contractual matter has been portrayed as under:-

- (i) If there are essential conditions, the same must be adhered to:
- (ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully:
- (iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
- (iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
- (v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
- (vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest

- tenderer, public interest, would be given priority;
- (vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.”

Parameters of the issuance of writ and judicial review are coached in Article 44 of Azad Jammu & Kashmir Interim Constitution, 1974, such powers are intended to prevent arbitrariness, illegalities and enforcement of fundamental rights. Such powers are designed to effectuate the law, to enforcement of right and law and to ensure all the authorities and organs of the State to act in accordance with law.

The petitioners have not pointed out any illegalities or violations of any statutory provisions or for that matter any infringement of constitutionally fundamental guaranteed rights. Even the policy notification referred by the learned counsel for the petitioner is directory in nature (having no penal consequences) thus, by any stretch of imagination the aforesaid policy notification seems not to be violated in any angle. As how the petitioners prior to entering into the agreement or participating in tendering process can claim inflation of rates for the public works which is even otherwise liable to be assessed on the running/previous 6 months as per language of the notification of 2015 referred above. Courts are not supposed to interfere and control the policy decision of the government functionaries. In this

regard hon'ble Supreme Court of Azad Jammu & Kashmir has chalked out guidelines in the case titled "Muhammad Akhtar and 183 others Vs. Azad Govt. and 7 others' reported as 2016 SCR 853.

Facts agitated in the writ petition are disputed questions of facts which cannot be resolved in exercise of extraordinary jurisdiction of this Court. Furthermore, public procurement authority & Board are necessary party in this lis, and in absence of necessary party, writ petition in hand is not properly constituted as well. Moreover, grievance redressal committee is a proper fora for resolution of such like matters as well which is an alternate remedy provided by AJ&K PPRA Code.

Publication/advertisement is only an invitation to offer/making of bid. Simply a bid itself constitute offer, no legal right would be acquired on the strength of any publication only or some decisive steps converts into contract.

Public procurement is given/allotted to a lowest bidder itself constitutes an estoppel to his extent quo claiming any inflation of rates afterwards, as he himself opted to bring back himself from standard rates.

The petitioners instead of tendering process in response of the impugned publication come forward in a hasty manner by asking for inflation and escalation of the

fixed rates. Publication is a proposal/offer in view of section 3 of The Contract Act, 1872 as adopted in Azad Jammu and Kashmir.

The current fiscal year is likely to be ended on 30th June, 2022. Interest of public at large is liable to be preferred over individual interest. Even otherwise party cannot be enforced to enter into agreement by imposing one sided conditions, particularly, when contract is not came into being.

It is important to mention here that petitioners have neither pointed out any violation of law nor drawn the attention of this Court towards infringement of any constitutionally fundamental guaranteed rights as it transpires from the grounds of attack i.e. No.“A to H”. Writ Jurisdiction is not akin to proceedings of civil suit. Factual inquiry of the fact is purely job of civil Court.

Now coming back to the prayer (iv) of the petition wherein the petitioners have sought annulment of notification dated 20.10.2021 but after perusal of the record appended with the writ petition no such like notification existed or found with the writ petition, thus, in absence of any such like notification no direction in vacuum is possible.

Before parting with the decision it is worth mentioning that in order to bring transparency and fairness in the bidding process, E-Bidding should be introduced for

the purpose. We have observed that due to unnecessary litigation, public procurement work and projects become prey of delay and postponement of said projects ultimately jeopardized the interest of public at large. It is worthwhile to mention here that a complete mechanism has been provided in Public Procurement Code quo dealing with the such like matters.

Codal arrangement in this regard holding the field is articulated as under:-

- (1). AJ&K Public Procurement Regulatory Authority Act, 2017.
- (2) AJ&K Public Procurement Regulatory Authority Rules, 2017. (Amended in January 2021)
- (3) AJ&K Public Procurement of Consultancy Services Regulations 2018.

Under section 3 of the supra Act, concept of regulatory authority has been introduced while in section 5 of the aforesaid Act, functions and powers of the Authority have been given; verbatim of section 5 reads as under:-

5. Functions and powers of the Authority:-

- (1) The Authority may take measures and exercise powers as may be necessary for improving governance, management, transparency, accountability and quality of public procurement.
- (2) Subject to sub-section (1), the Authority may,-
 - a. Monitor application of the laws, rules, regulations, policies and procedures in respect of, or relating to the public procurement;
 - b. Monitor the implementation of and evaluate laws, rules, regulations, policies and procedures in respect of, or relating to, inspection or quality of goods, services and works and recommend reformulation thereof or revisions therein as it deems necessary;

- c. Recommend to the Government revisions in or formulation of new laws, rules and policies in respect of or related to public procurement;
- d. Make regulations and lay down codes of ethics and procedures for public procurement, inspection or quality of goods, services and works;
- e. Establish performance indicators for procurement performance of the Procuring Agencies and monitor compliance with these indicators through independent third-party evaluation and make recommendations for improvement of procurement performance of the procuring agencies;
- f. Issue guidance and instructions regarding the interpretation and implementation of this Act;
- g. Provide assistance and coordinate with the Procuring Agencies for developing and improving their institutional framework and public procurement activities;
- h. Prepare standard documents to be used in connection with public procurement;
- i. Present an annual report to the Government regarding the overall functioning of the public procurement system, including recommendations on measures to be taken by the Government to enhance the quality of procurement work;
- j. Call a functionary of Procuring Agency to provide assistance in its functions and call for information from a Procuring Agency pursuant to its objectives and functions;
- k. Develop, promote and support training and professional development policy of officials and other persons engaged in public procurement; and
- l. perform other function as may be assigned to it by the Government.

Management and administration of the authority is to be handled by a board headed by Chief Secretary as Chairman.

Supra authority has full flag powers to deal with the public procurement affair in view of Section 5 subsection

“e” of the Act, 2017 as well the said authority is recommendatory authority in this regard.

Vis a vis under Rule 48 of AJK PPRA Rules, 2017 a fora for settlement of such like disputes & redressal of grievance has been provided, abovementioned rule 48 is reproduced as infra:-

48. Redressal of Grievances by the Procuring Agency.-

(1) The procuring agency shall constitute a committee comprising of odd number of persons, with necessary powers and authorizations, to address the complaints of bidders that may occur prior to the entry into force of the procurement contract.

(2) Any party may file its written complaint against the eligibility parameters, evaluation criteria or any other terms and conditions prescribed in the bidding documents if found contrary to the provisions of the procurement regulatory framework, and the same shall be addressed by the grievance redressal committee (GRC) well before the proposal submission deadline.

(3) Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written complaint concerning his grievances within seven days of announcement of the technical evaluation report and five days after issuance of final evaluation report.

(4) In case, the complaint is filed against the technical evaluation report, the GRC shall suspend the procurement proceedings.

(5) In case, the complaint is filed after the issuance of the final evaluation report, the complainant cannot raise any objection on technical evaluation of the report:

Provided that the complainant may raise the objection on any part of the final evaluation report in case where single stage

single envelope bidding procedure is adopted.

(6) The GRC shall investigate and decide upon the complaint within ten days of its receipt.

(7) Any bidder or party not satisfied with the decision of the GRC, may file an appeal before the Authority within thirty days of communication of the decision subject to depositing the prescribed fee and in accordance with the procedure issued by the Authority. The decision of the Authority shall be considered as final.”

Thus, the respondents are directed to implement the Public Procurement Code supra in its pros and cons and ensure functioning of the relevant provisions as envisaged in above Code as well as ensure dispensation of administration of justice.

ANALYSIS

Analysis of supra facts reveals that no vested legal right of the petitioners have been infringed, even otherwise the petitioners have made pre-mature attempt, alternate remedy before Grievance Redressal Committee (GRC) is available, necessary parties have not been arrayed in the line of respondents. Public Procurement work stands for public interests where the public interest conflicts with private interest the latter must yield to the former, inquiry of disputed question of facts is not warranted in writ jurisdiction. Consequently conscious of this Court is not attracted quo exercise of extra-ordinary jurisdiction.

With the above multiple reasons, instant writ petition is devoid of merit, same is hereby dismissed in limine alongwith other miscellaneous applications.

Muzaffarabad,
27.06.2022.

-Sd-
CHIEF JUSTICE

-Sd-
JUDGE