

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No: 96/2024.

Date of Institution: 12.01.2024.

Date of decision: 02.04.2024.

M/S Kashmir Royals Associates through its Managing Director Saqib Mahmood, office situated at Ghari Dupatta, Khun Bandway Muzaffarabad, Azad Jammu and Kashmir.

(Petitioner)

Versus

1. Secretary Works Department Azad Govt. of the State of Jammu and Kashmir, office situated at New Secretariat Muzaffarabad.
2. Chief Engineer Public Works Department, (North) Highways Division Muzaffarabad, Azad Jammu and Kashmir.
3. Chairman Bid Evaluation Committee, Superintending Engineer Highways Circle Muzaffarabad (Chairman Committee).
4. Superintending Engineer Highways Division Circle Muzaffarabad, having his office at New District Complex, Muzaffarabad.
5. Executive Engineer Public Works Department, Highways Division Muzaffarabad, Azad Jammu and Kashmir.
6. Rizwan ur Rashid Mughal R/o Aarro Khaitar Anwar Sharif Tehsil and District Muzaffarabad.

...Respondents

WRIT PETITION

Before: **Justice Syed Shahid Bahar, J.**

PRESENT:

Kashif Azad Raja, Advocate for the petitioner.

Asad Khan, Legal Advisor P.W.D.

Raja Zulqarnain Khan, Advocate for respondent No.6.

Judgment:

Through the constitutional petition in hand filed under Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974, the petitioner is seeking infra relief:-

“It is, therefore, humbly prayed that respondents may kindly be directed to cancel the bid form of the private respondent being not in accordance with condition No.5 of advertisement dated 16.12.2023 and notification dated 10.12.2004 and work order of the project i.e. Link Road Poorian (Tambi) to Bhanna length 0.50km LA-31 District Muzaffarabad may kindly be directed to forward the case of the petitioner before GRC with further direction to expeditious disposal of the same.”

2. The long and the short of the instant lis as per petitioner is that the petitioner is a construction company with Pakistan Engineering Council and public Works Department in a category C-16, who has completed number of projects in Azad Jammu and Kashmir. The petitioner vehemently contended that vide tender notice dated 16.12.2023, the respondent No.5 invited single stage envelop bid through E-bidding system for the construction of link roads, patchwork of the link roads etc. Petitioner submitted bid for construction, improvement and reconditioning of link road Poorian (Timbi) to Bhanna length 0.50 km LA-31 District Muzaffarabad. The petitioner averred that he and private respondent submitted their respective rates/estimated cost for construction of said link road. The petitioner quoted its rates as 9.99 whereas the private respondent quoted its rate at 10% of engineering estimate and bid price. The petitioner further averred that the private respondent quoted their rates below 10% and he was duty bound to submit additional bid security but he failed to do so. The official respondents despite having imposition of above

condition are bent upon to issue work order to the private respondent against the spirit of condition No.5 purely on political basis. The petitioner claimed that the advertisement dated 16.12.2023 has certain terms and conditions. Condition No.5 demands additional bid security equal to difference between engineering estimate and bid price, in case when the quoting rates are below 10%. Such condition has no legal backing from the PPRA but same was imposed via notification dated 10.12.2004 wherein it has been mentioned that if the quoted rates are 10% or below 10% than the bidder is bound to furnish additional CDR within the period of 5 days, failure of which, amounts to cancellation of bid form and allotment of work to the second lowest bidder, while, the private respondent quoted his rate 10% below, hence, he was duty bound to furnish additional bid security but he failed, hence, he was not eligible but official respondents are bent upon to declare the private respondent as successful bidder.

3. Comments have been filed on behalf of the respondents wherein the claim of the petitioner has been negated in detail and contended that the claim of the petitioner to the extent of participation in tendering process is correct, however, the other stance of the petitioner is not as per facts and law, hence, liable to be set at naught.

4. *I have heard the learned counsel for the parties and gone through the record of the case with due care.*

5. The record appended with the petition shows that the petitioner herein alongwith other participants/Firms participated in the tendering process which was issued vide proclamation dated 16.12.2023 by the respondents regarding “construction, improvement and reconditioning of link road Poorian (Timbi) to Bhanna length 0.50 km LA.31, Muzaffarabad”. The main stance of the petitioner is that the respondents may be directed to cancel the bid form of the private respondent being not in accordance with condition No.5 of advertisement dated 16.12.2023 and notification dated 10.12.2004 and work order of the project i.e. Link Road Poorian (Timbi) to Bhanna length 0.50 km LA-31 District Muzaffarabad may kindly be issued in favour of the petitioner being 2nd lowest bidder. Furthermore, the petitioner prayed that the respondent No.2 may be directed to send the case of the petitioner before GRC with further direction to expeditious disposal of the same.

6. As per stance of the rival side the petitioner is not a lowest bidder and according to condition 5 of the advertisement no additional security was obtained in the department of Highways, the tendering process was made in light of E-bidding and in E-bidding system the Bid Document were also available and within 48 hours it is incumbent upon to the Contractor that after downloading the bid documents, hard copy be submitted in the Department, Thus, the claim of the petitioner that the department has not provided him a copy of bid documents is not considerable.

7. Moreover, as per stance of the official respondents the answering respondent submitted rates below 10% of engineering estimates, the petitioner made wrong definition of the said condition i.e condition No.5, which is against the law and rules; moreover, the petitioner participated in whole process of bidding and when he failed to achieve the desired result, filed this petition, thus, the petition is liable to be dismissed. Furthermore, the project is purely in the interest of public at large which cannot be stopped in any way.

8. Be that as it may in the codal scheme 2 type of remedies are available to the aggrieved one to project his grievance, i.e. under Rule 48 of AJ&K Public Procurement Rules, 2017, prior to entry into force of the procurement contract through filing complaint before the Grievance Redressal Committee (GRC) while in juxtaposition after coming into force of the procurement contract, disputes can be settled through arbitration under Rule 49 of the above said rules.

9. Bidding process all its technical modalities procurement of Contract and its aftermath is prescribed in the procurement Rules, 2017 (supra) and a dispute or a grievance of a party arising out of it therefore inevitably has to be addressed in the said rules for maintaining context and convenience. Reliance upon Notification is holding the field prior to promulgation of PPRA Code bears no wait and lost its significance as it cannot stand in juxtaposition with the Act & Rules. It is trite that no act can exist

which militates against the scheme of Constitution vis a vis no rules can be made in opposition with the act and similarly no policy notification can hold the field which is in conflict with the rules.

(Underlining is mine)

10. The learned counsel for the petitioner to bring home nub of his case relied upon the notification of 2004, while subsequently under public procurement Code overriding effect has been given to the procurement rules of 2017 notwithstanding anything contrary contained in any other rules concerning public procurements, thus, notification of 2004 providing different or contrary mode cannot be read against the scheme of procurement rules, 2017.

11. The bid is accepted only when in addition to being the lower most financially, it is not in conflict with any other law, rules, regulations of policy so chalked out.

12. Petitioners bid did not stand accepted at any time after its qualification in technical evaluation process but the petitioners succeeded only to cross one barrier of an ongoing process concerning tender inquiry and got the status of being technically qualified.

13. Terminology of lower most bidder has only procedural implications and it does not confer any right to it of being declared as successful bidder entitled to the Contract.

14. Even the lowest bid would not confer any absolute title for award of a Contract in such like mega projects host of other considerations become relevant to avoid any unnecessary risk.¹

15. **Present fora is not meant for adjudication of disputed question of facts requiring detailed probe. Civil Court under Section 9 of the CPC is proper fora to address, redress and adjudicate the disputes requiring evidence and deeper probe. The petitioner is simultaneously equipped with statutory remedy to ask for arbitration as well case projected is bereft of merit.**

(Underlining is mine)

16. Nub of above discussion is that finding no substance in the instant petition, therefore, the writ petition stands dismissed in limine.

File shall be kept in archive, after due completion.

Muzaffarabad,
02.04.2024.

JUDGE

Approved for reporting

JUDGE

¹. Petrosin Corporation (Pvt) Ltd. vs. Oil and Gas Company 2010 SCMR 306.
Messers Pakistan Gas Port vs. Messer Sui Southern Gas PLD 2016 Sind 207.