

IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. 1951 of 2018

Plaintiff: M/s. Al-Noor through Dr. Shah Nawaz Memon, Advocate.

Defendant No. 1: Province of Sindh through Mr. Suneel Kumar Talreja, AAG.

Defendant No.2 & 3: The Director General and The Executive Engineer, KDA, Through Ms. Naheed A. Shahid, Advocate.

Defendant No.5: M/s. Allied Business through Syed Fazal-ur-Rehman, Advocate.

Defendant No.8: M/s. Allied Business through Syed Sultan Ahmed Advocate.
Mr. Qamar Zaman Shah, Assistant Director, SPPRA.

For hearing of CMA No. 14533/2018.

Dates of Hearing: 22.11.2018, 26.11.2018, 03.12.2018, 10.12.2018, 19.12.2018 & 21.12.2018.

Date of Order: 21.12.2018

ORDER

Muhammad Junaid Ghaffar J. This is a Suit for Declaration, Injunction and Cancellation and through listed application, the Plaintiff seeks a restraining order against Defendants No.1 to 4 regarding award of Contract to Defendants No.5 to 9 during pendency of this Suit.

2. The precise facts, as stated, are that Plaintiff who is engaged in the business of Government Contracts, pursuant to a Notice Inviting Tenders dated 16.8.2018, participated in the said Tenders, which are (7) seven in number, and offered bids alongwith requisite Pay Orders of earnest money. It is the case of the Plaintiff that despite such participation and presence at the time of opening of bids, while preparing the Evaluation Report and when the Contract was being awarded, the bids of the Plaintiff have not been considered, as if no bids

were ever submitted, and being aggrieved, Plaintiff has filed instant Suit.

3. Learned Counsel for the Plaintiff has contended that Plaintiff participated in all (7) seven Tenders and furnished its bids alongwith requisite Pay Orders; whereas, according to the Attendance Sheet, the Plaintiff has been shown as present through authorized representative; but the bids of the Plaintiffs have been ignored; that through record placed by the Plaintiff as well as the Official Defendants, it is not denied that Plaintiff was present at the time of submission of bids, and therefore, it is not conceivable that being present and after preparation of Pay Orders of the earnest money of each tender separately, no bids were submitted; that the Website of official Defendants as well as Defendant No.4 kept on showing that the Tenders in question have been cancelled on 04.10.2018; whereas, suddenly 11.10.2018 was being shown on the Website of the Procurement Agency as the last date of Tender; whereas, in the Evaluation Report, purportedly prepared on 03.10.2018, the bids of the Plaintiff are missing; that even otherwise, the bids have been awarded fraudulently and with ill intentions to benefit certain contractors and the purported amendment in the Regulations through Clause 11.3.4 has been mis-interpreted; that the bids of Plaintiff as well as other Contractors were all equal to or less than 30% from the Engineer's Estimate, and could not have been discarded, but to benefit favorites and others, the quotations in paisas have been accepted by classifying such bids as less than 30%, though they were in effect equal to or more than 30% less than the Engineer's Estimate and also ought to have been discarded or disqualified; that the Engineer's Estimate is in Millions and Thousands of Rupees; whereas, the bids have been accepted in Paisas, which is not the minimum currency of the Country; that in such situation all bids of 30% less than the Engineer's Estate ought to have been rejected by calling fresh Tenders; but to grant favour to someone, a new phenomenon of 29.9999996% has been developed, which in fact is nothing but equal to 30%; that after passing of the interim order on 15.10.2018, to frustrate the proceedings of this Suit, on 16.10.2018, Letter of Acceptance has been issued to all purported successful bidders and the record placed before the Court reflects that such exercise has been carried in haste and without following the procedure as on the same date the

Acceptance has been given by each contractor, and the contents of such Letters are verbatim same with common mistakes of grammar and punctuation, which leads to the presumption that such exercise has been maneuvered in connivance; that the award of Tenders is in violation of the provisions of **Sindh Public Procurement Act, 2009 (SPPRA Act)** and the Sindh Public Procurement Rules 2010 (**SPPRA Rules**) including but not limited, to Rule 2(d) & (f), Rule 41 and so on and so forth; that as per mathematical calculations anything after three digits of a decimal is to be rounded up or rounded down, and in this matter the percentage has been calculated up to 8 Digits after decimal, which is nothing but equal to 30%; hence disqualification of the bidders with offer of equal to 30% of the Engineers Estimate, is unlawful and they are to be treated at par with the Successful Bidders; that it has come on record through photographs placed on behalf of the Procurement Agency, that the Tender Boxes in respect of various Works were not sealed and were kept opened, which creates a possibility and situation to misplace the bids of the Plaintiff and others, and in that situation, the Procurement Agency was required to issue proper acknowledgment, hence entire exercise is an eyewash. In support he has relied upon the cases reported as ***Messrs Facto Belarus Tractors Limited Karachi and another Vs. Federation of Pakistan through Secretary, Ministry of Industries, Production and Special Initiatives Islamabad and others (PLD 2006 Sindh 479)***, ***Pakistan through Secretary Finance, Islamabad and 5 others Vs. Aryan Petro Chemical Industries (Pvt.) Ltd., Peshawar and others (2003 SCMR 370)***, ***Province of the Punjab through Collector District Khushab, Jauharabad and others Vs. Haji Yaqoob Khan and others (2007 SCMR 554)***, ***University of the Punjab Vs. Miss Wajiha Urooj (2008 SCMR 1577)***, ***(Raja Mujahid Muzaffar and others Vs. Federation of Pakistan and others) 2012 SCMR 1651***, ***In re; Suo Motu Case No.5 of 2010 (PLD 2010 SC 731)*** and ***Alleged Corruption in Rental Power Plants etc. in the matter of Human Rights Cases (2012 SCMR 773)***.

4. Learned Counsel for the Defendants No.2 & 3 / KDA has contended that as per Rule 17 of SPPRA Rules read with Tender Advertisement in Newspapers, the Tenders were required to be dropped and are never received, therefore, this objection is misconceived; that

notwithstanding this, the admitted position is that Plaintiff was though represented at the time of submission of bids; but this would not impliedly mean that bids were also offered by the Plaintiff; that Pay Orders have though been detailed in the Plaint, but nothing has been placed on record, that whether such Pay orders have been cancelled or not, or were even issued on behalf of the Plaintiffs; that mere presence at the time of submission of bids does not mean that all participants are bidders as well; that there were more participants at the time of opening of bids as against total number of bidders, and therefore, the presumption is that the Plaintiff was one of those who did not gave bids; that the Bank from whom purportedly the Pay Orders were prepared, has not been arrayed as a Defendant; that KDA never received any earnest money; that present Suit is otherwise barred in terms of Rule 31 and 32 of the SPPRA Rules as Plaintiff is required to approach the Grievance Redressal Committee first; that Tenders were opened on 17.09.2018 and till 15.10.2018 no grievance had accrued; whereas, the Evaluation was made in public on 03.10.2018, therefore, the Suit has been filed belatedly; that in various Tender documents filed along with the Plaint, either the signatures are not matching; or documents of other Companies have been filed and a claim has been made that such Tenders were filed by the Plaintiff; that insofar as the cancellation of Tenders on the SPPRA's Website is concerned, this happened due to a typing mistake; whereas, it was immediately uploaded on the Website of KDA, therefore, no case is made out to this effect; that all Tenders have been awarded to the lowest bidders after considering the implication of Clause 11.3.4 of the Regulations issued under the SPPRA Act, which provides that any bid which is more than 30% below than the Engineer's Estimate can be rejected; whereas, the bids of successful bidders were to the extent of 29.9999996% (more or less) in all such cases; hence no irregularity has been committed; that paisas cannot be ignored as it is competitive bidding, therefore, KDA was justified in accepting such bids; that no ingredients for grant of an injunctive relief are present in this case; whereas, the entire Suit is otherwise incompetent and liable to be dismissed. She has relied upon the cases reported as ***Sinotec Co. Limited through Authorized Person Vs. Province of Sindh through Secretary Sindh and 5 others*** (PLD 2018 Sindh 303), ***M/s. Iqbal & Sons Vs. City District Government & others*** (SBLR 2011 Sindh 1249), ***Saeed Ismail Burero Vs. Province***

of Sindh through Secretary Education, Government of Sindh and another (2014 YLR 825), Messrs Euroconsult Pakistan (Pvt.) Ltd. through Accounts Manager Vs. Province of Sindh through Secretary and 8 others (PLD 2011 Karachi 275) and Atta Muhammad Chaniho Vs. Province of Sindh, through Chief Secretary and 4 others (2014 MLD 221).

5. Learned Counsel for Defendant No.8, who is one of the Successful Bidders in Work No.5, in addition to adopting the arguments of learned Counsel for KDA, has contended that bids were required to be dropped and not received, whereas, Plaintiff has not filed any bids, therefore, no grievance can be raised; that the bids in Paisas can be accepted in a competitive bidding; whereas; the conditions of Clause-11.3.4 of the Regulations *ibid*, is to be kept in consideration for the benefit of the Procurement Agency; that the Plaintiff was never the lowest bidder; hence, cannot agitate cause of others; that Plaintiff also quoted bids in some of the Works in Paisas; that the Minutes of Meeting for Evaluation are clear and none has objected; that Plaintiff failed to approach the appropriate authorities with a proper complaint; that Plaintiff ought to have agitated the issue before the appropriate forums regarding alleged misplacement of its bids; that Public should not be made to suffer due to interim injunction as public interest must override private interest; that all three ingredients for grant of injunction under Order 39 Rule 1 & 2 CPC should be present together, which are lacking in this case; therefore, no case is otherwise made out on behalf of the Plaintiff. In support of his contention he has relied upon the case law reported as ***Puri Terminal Ltd. Vs. Government of Pakistan through Secretary, Ministry of Communications and Railways, Islamabad and 2 others (2004 SCMR 1092), Messrs Al-Meezan Investment Management Company Vs. Pakistan Water and Power Development Authority and 2 others (2016 CLC 1501), Data Steel Pipe Industries (Pvt.) Ltd. Vs. Sui Southern Gas Co. Ltd. and others (2012 CLD 832), Messrs Gul Construction through Authorized Attorney Vs. Province of Sindh through Chief Secretary and 3 others (2017 YLR 501) and Sinotec Co. Limited through Authorized Person Vs. Province of Sindh through Sindh and 5 others (PLD 2018 Sindh 303).***

6. Learned Counsel appearing on behalf of Defendant No.5, who claims to be the successful bidder for Work Nos.1 & 4 has also adopted the arguments of learned Counsel for KDA and has further contended that his client is a reputed contractor and has completed various Government Projects successfully and has been awarded works being the lowest bidder; hence, vested right has accrued in its favor; that Plaintiff never participated in the Works awarded to his clients; that the listed application has become infructuous as for the time being Award has already been made in favor of his client; that Plaintiff is not a whistle blower for public interest; but has come before this Court to protect its personal interest; hence no case is made out. In support of his contention he has relied upon the case law reported as ***Dr. Akhtar Hassan Khan and others Vs. Federation of Pakistan and others (2012 SCMR 455)***.

7. Departmental Representative on behalf of SPPRA / Defendant No.4 has contended that in view of the difficulties being faced by various Procurement Agencies, Regulations were amended by insertion of Regulation No.11.3.4 for rejection of bids, which are more than 30% below than the Engineer's Estimate as in various cases, the lowest bidder had failed to completely perform the works procured through such lowest bids; that the Amendment dated 05.07.2017 is in respect of Regulation and is not required to be Gazetted; that Plaintiff out to have availed alternate remedy in terms of Rules 31 and 32 of SPPRA Rules before the Grievance Redressal Committee, and thereafter, the Committee formed by SPPRA; hence injunction application be dismissed.

8. Learned Additional Advocate General has also adopted the arguments made on behalf of Defendants and has further submitted that since alternate remedy has been provided in law; therefore, Plaintiff ought to have approached the appropriate forum, whereas, instant Suit is not maintainable before this Court.

9. While exercising his right of Rebuttal, learned Counsel for the Plaintiff has contended that in the entire SPPRA Act as well as the Rules the word "Dropping of Tenders" has not been provided and it is only Submission of Tenders, and therefore; the advertisement and the procedures for dropping the Tenders was not appropriate; rather

Tenders are to be submitted with proper acknowledgment; that in terms of relevant Rules, no outsider could be present at the time of submission of Tenders; therefore, the stance and material placed on record by KDA to this effect is false and misleading; that participation of the Plaintiff has been admitted and subsequently Pay Orders have also been verified from the concerned Bank by KDA itself after filing of this Suit; that availing of alternate remedy is not mandatory and this Court has jurisdiction to scrutinize the malafide Acts of the Procurement Agency; that by saying that the cancellation on the website was due to typing mistake is not a satisfactory response; rather such conduct has misled the Plaintiff and others; whereas, discreetly, the bids have been opened without taking all participants in confidence; that transparency ought to have been reflected in the bidding process and there cannot be any exception to it; that the Plaintiff was filed in a hurry and certain documents of one Tender Work have been wrongly placed with the Plaintiff but all such documents relied upon by the Plaintiff are a matter of record; however, this does not in any manner can be a ground to prejudice the case of the Plaintiff; that the objections regarding differences in signatures is incorrect; that without prejudice the amendment in Regulations through Clause 11.3.4 in fact is ultra-vires as it defeats the very concept of Competition, which in turn will cause losses to the Procurement Agencies / public exchequer; that in response to the claim that such amendment is not required to be gazetted, reliance can be placed on the law reported as ***Government of Sindh through Secretary Agriculture and Livestock Department and others Vs. Messrs Khan Ginnars (Private) Limited and 57 others (PLD 2011 SC 347)***, ***Chief Administrator Auqaf Vs. Mst. Aman Bibi (2008 SCMR 1717)***, ***Muhammad Suleman etc. Vs. Abdul Ghani (PLD 1978 SC 190)***, ***Sohail Ahmed and 7 others Vs. Province of Sindh through Secretary and 2 others (2017 PLC (C.S) 510)***; that this Court can always mould the relief and even cancel the Tender as held in the case of ***Messrs Facto Belarus Tractors Limited Karachi (supra)***.

10. I have heard all the learned Counsel and perused the record. Precisely, the facts as stated and which are not in dispute is that KDA published a Notice Inviting Tenders on 16.8.2018 in respect of (7) seven different works which were supposed to be opened on 17.09.2018. It is

the case of the Plaintiff that proper bids were submitted on its behalf in respect of all (7) seven works, whereas, the case of KDA as well as other defendants is that though the Plaintiff's representative was in attendance; but no tenders were dropped on its behalf. In support the Plaintiff has placed on record copies of all such tenders / bids which were purportedly filed / submitted, and so also the Pay Orders prepared in respect of earnest money of each tender. It is a matter of record which has been placed before this Court on behalf of KDA in the form of attendance sheet, that Plaintiff's representative was in attendance and not only that, at the beginning of the proceedings he even recited verses from the Holy Quran to start the proceedings. Counsel for KDA was confronted as to how a person who is not depositing or dropping any tender or had no concern with the opening of bids, could have attended the proceedings, to which her reply was, "*anybody can come and attend such proceeding*". However, this Court is not inclined to accept such plea; firstly, on the ground that why any person could be permitted to enter and attend the proceedings of opening of tenders and can also mark his attendance as well as recite Holy Quran; and secondly, through counter affidavit, KDA has itself placed on record photographs of the proceedings which clearly reflects that various boxes of tenders out of the total of (7) seven were kept opened, as according to them there were more tenders than could be accommodated in the boxes. Counsel was further confronted as to any procedure was adopted to give acknowledgment of such tenders; to which her reply was that this is not provided in the procedure and as per the advertisement, the tenders were required to be dropped and not received. Once it has come on record that majority of tender boxes were kept opened; the onus then shifted on KDA to disprove the contention of the Plaintiff who has filed all tender documents along with Pay Orders of earnest money and therefore, it is difficult to presume at this stage of the proceedings that the Plaintiff never participated. If the boxes were kept opened, it is, but possible that tenders / bids of any participant could be lost or intentionally misplaced. In that situation it was the responsibility of KDA to ensure that all participants are allowed to submit their bids properly, and since the boxes were kept open even before opening of the bids, at least an acknowledgment should have been given. This was definitely an extraordinary situation in the given facts, and more caution should have been taken by KDA. Be that as it may, it is also a

matter of record that after filing of this Suit and issuance of notices, KDA itself wrote a letter dated 30.11.2018 to Askari Bank from where the Pay Orders were prepared, and the reply placed on record affirms that Pay Orders were prepared from the account of Plaintiff in favor of KDA. Therefore, I am of the view that for the present purposes, it could be safely said that the Plaintiff did participated in the proceedings and filed and submitted its bids and KDA has not been able to discharge its burden to this effect.

11. Notwithstanding the above, it may also be observed that insofar as the Plaintiff is concerned, it is not that the Plaintiff is claiming to be the successful bidder in all works. The precise case of the Plaintiff is to the effect that favoritism has prevailed, and the tenders have been awarded in a manner, wherein, only a favored bidder could have been successful. In view of the given facts and the discussion hereinafter, to my understanding, the contention of the Plaintiff cannot be simplicitor discarded or dismissed, as in the alternative, considering this to be a case of public money and its spending according to the mandate of law, Plaintiff could also be termed as a whistle blower as against the contention of one of the successful bidders. Therefore, this Court in a matter of public funds cannot lose sight of this fact, and brush aside the objections on such technical reasons.

12. It is also a matter of record that KDA has never placed before the Court the original minutes and record of the proceedings dated 17.09.2018 and it is only an extract / evaluation report prepared on 3.10.2018 which has been filed along with the written statement and counter affidavit. If the case of KDA was as strong as pleaded, then what prevented them from placing or at least showing to the Court the original record and the minutes of such proceedings dated 17.9.2018. In absence, contention of KDA could not be considered as well as the veracity and genuineness of their statement and the supporting affidavit. It is a matter of record that tenders were received and opened on 17.9.2018 but the evaluation report which has been prepared on the basis of minutes of meeting and proceedings dated 17.09.2018, on 3.10.2018. The photographs placed on record by KDA, as discussed hereinabove, also depict that there was every possibility of misplacing the bids / tenders of the Plaintiff and others, whether mistakenly or even intentionally.

13. As to the objection regarding availing alternate remedy as provided in Rule 31 & 32 of the (SPPRA) Rules, 2010 time and again Counsel for KDA was confronted as to when and in what manner, the Grievance Redressal Committee was constituted, who were its members and how it was notified; but it is regrettably observed, despite assurance on several dates, Court was never apprised regarding such formation of committee. No material has been placed on record that as to whether any such committee was ever constituted. Therefore, even otherwise, the Plaintiff cannot be non-suited on this ground that an alternate remedy was available. Again notwithstanding this, in terms of Rule 31((3) *ibid*, it is only a ***bidder*** who can be aggrieved by any act of the procuring agency and has to approach the Grievance Redressal Committee, whereas, as per stance of KDA, Plaintiff never filed or submitted any bids; therefore, cannot be called or treated as an unsuccessful bidder. In this situation and the given facts, it is not as simple to say that Plaintiff ought to have availed the alternate remedy provided in law. Here the situation is much different than normal. Moreover, as to maintainability of the Suit and the jurisdiction of this Court reference may be made to the dicta laid down by the Hon'ble Supreme Court in the case reported as ***Asaf Fasihuddin v Government of Pakistan (2014 SCMR 676)*** wherein the Apex Court has been pleased to hold that it is the duty of the Court to ensure that relevant laws are adhered to strictly, to exhibit transparency. It has been further held that it is universally recommended that the transaction involving public money must be made in a transparent manner for the satisfaction of the people who are the virtual owners of the national exchequer which is being invested in such projects. Further reliance in repelling this objection regarding alternate remedy as provided under Rules 31 and 32 of the SPPRA Rules, may be placed on the case of ***GETZ Pharma (Pvt) Limited v Province of Sindh (PLD 2016 Sindh 479)***.

14. Now coming to main issue and the case of the Plaintiff as a whistle blower. It has been pleaded that tenders have been awarded by misapplying the purported amendment carried out in the Regulations through insertion of Regulation 11.3.4 in the guidelines / regulation for Procurement of Works. The said amending Regulation reads as under:-

“In pursuance of the power conferred under Section 27 of the Sindh Public Procurement Act, 2009 and decision taken during 28th meeting of Board of Directors of Sindh Public Procurement Regulatory Authority, the Authority is pleased to notify the insertion of the following clause in the Guidelines / Regulation for Procurement of Works:

Clause: 11.3.4 “In case a procuring agency receives a bid, which is more than 30% **below the Engineer’s Estimate or Composite Schedule Rates (CSR)**, the procuring agency can reject that particular bid(s) or float tenders afresh, if deemed appropriate.”

Managing Director

Dated Karachi, 5th July, 2017”

15. Perusal of the aforesaid Regulation reflects that in case a procuring agency receives a bid, which is more than 30% below the Engineer’s Estimate or Composite Schedule Rates (CSR), the procuring agency can reject that particular bid(s) or float tenders afresh, if deemed appropriate. The case as setup on behalf of KDA is premised on the fact that in all works various bidders filed their bids and only such bidders were considered who were meeting this threshold of 30%, and thereafter, the lowest of these bidders in numerical value of 30% below were short listed and the first lowest were awarded the tender(s). This feature and stance is common in all 7 (seven) tenders. To have a better understanding it would be advantageous to reproduce the relevant part of the bid evaluation report and the rejected tenders in respect of one work as all of them are similar. The relevant findings of the evaluation report in respect of Work No. PPMS NIT ID: T00586-18-0001 (Improvement Reconditioning of Double Road University Road Link, Gulistan-e-Johar Block 5, Dubai Housing Bus Stop) is as under:-

“Out of 52 participants of the contractor’s bidder **03** Nos. of Participant did not quote any rate while **21** Nos. of participants quoted more than 30% below of the engineering estimate. The remaining bidders **28** Nos. of participant are quoted 30% below and less than 30% below.

As per SPPRA clause 11.3.4 stated “**a bid, which is more than 30% below the Engineer’s Estimate or Composite Schedule Rates (CSR), the procuring agency can reject that particular bid(s) or float tender afresh, if deemed appropriate.**”

Accordingly **21** Nos. of participant bidder quoted more than specified in above clause i.e. more than 30%. Hence the Procurement Committee decided in the light of SPPRA rules i.e. clause 11.3.4 of the above participant is rejected.

However, the bidders who bids 30% below or less than 30% have been scrutinized and found 03 Nos. of participants’ bids 30% below the engineering estimate and 25 Nos. of participant bids less than 30% Numerical Value.

The Procurement Committee has been decided that the **03 Nos.** of participated same bid percentage i.e. 30% below and the 1st lowest of contractor is not achieved out of 03 participants. However, due to repetition of the same premium of **03 Nos.** participants cannot be met out for awarding the tender.

Hence they all are rejected (i.e. 30% below only of 03 participants).

The following participants / bidders less than numerical value of 30% below are as under:-

Sr. No.	Name of Company	Above / Below % Engineer's Estimate	Quoted Amount	Remarks
1	M/s Untied Business System Pvt. Ltd.	29,999999927% Below	62,760,600.07	1 st Lowest
2	M/s Irshad Hussain	29,999999436% Below	62,760,600.51	2 nd Lowest
3	M/s Haji Sangeen Khan & sons	29,999998879% Below	62,760,601.01	3 rd Lowest
4	M/s. G. M Enterprises	29,999899787% Below	62,760,689.85	4 th Lowest

The above comparative shows the very close competition in percentage wise and cannot be makes the whole figure and can be consider the lowest bidder in their instant amount wise.

The Procurement Committee have also observed that in the best interest of the Government in execution of the project & utilization of the funds and to save time by avoiding the fresh tender the committee has decided the 1st lowest bidder M/s. United Business Systems Pvt. Ltd is the lowest bidder and the tender is awarding to M/s. United Business Systems Pvt. Ltd.”

16. Similar is, rather identical evaluation in respect of remaining (6) six works and have not been reproduced for the sake of convenience. Perusal of this working on behalf of KDA reflects that they have considered all tenders as rejected which were firstly on the higher side, and secondly, which were up to 30% or nearby, and thereafter, they selected four bidders whose bids were in the range of 29.999999927% to 29.999899787% and out of these four, first lowest was awarded the tender. Firstly, the aforesaid bids of the successful bidders and who were supposed to be qualified, reflects that in fact the first two out of four bids are of the same amount except in Paisa's. The first and second have a difference of only 44 Paisa's, whereas, the third has a difference of 94 Paisa from the successful first lowest bidder, and the last and the fourth has a difference of Rupees 897.80 from the 1st lowest; but even it has not been called as equal to 30% by taking into consideration figures

up to 9 digits after decimal while calculating the percentage. It is worthwhile noting that presently according to the State Bank of Pakistan, the minimum currency denomination in the Country is 1 (one) Rupee (which though in reality is not available and it is only Rupee 5 coin which again is seldom available). This is notwithstanding the fact that prices of petroleum products are quoted and notified in denomination of paisa; but again practically paisa is not in circulation and is always deemed to be either rounded up or rounded down. In this matter it is beyond comprehension as to how a bid was quoted in Paisas and so also accepted by KDA. Secondly, it is a mathematical rule that anything which is over and above 0.5 is to be rounded up and below 0.5 is to be rounded down. Here in this matter the calculations have been taken up to 9 (nine) digits after decimal, so as to make the bid not to be more than 30% of the Engineer's Estimate, whereas, in reality and fact, the bids of the four lowest as above are all to be treated as 30% and not 29.99999999%. There is a Latin expression i.e. Rule of "*De minimis*" dealing "about minimal things" which means that "*The praetor does not concern himself with trifles*" or "*the law does not concern itself with trifles*". It is a legal doctrine by which the Courts do not consider trifling matters. It is generally used to describe something that is too small or insignificant to be considered; something unimportant. A learned Division Bench of this Court in the case reported as ***Collector of Customs v. Qasim Iron Merchant (2011 P T D 2853)*** has been pleased to consider this rule of *diminimis* and has been pleased to hold that for the purpose of interpreting a Statute trifles are to be ignored. Here in this matter it appears that the Engineer's Estimate has been made in a manner that it became very convenient to a set of bidders to quote their bids which could not otherwise be rejected nor competed by any one. It is not understandable as to how, majority of bidders gave their bids which were so near or low to the Engineer's Estimate. Either the Estimate is highly exaggerated for providing a cushion of 30% or nearby; or the bidder's intent to make losses after securing the contracts. If commonsense prevails and which must, then it is only the Engineer's Estimate which could be questioned, as no Contractor would be bidding to make losses on the very face of it. This appears to be a well-planned and organized attempt to oust genuine bidders and give the blue eyed a clear and open field to play with mechanism of 30% and the Engineer's Estimate. Therefore, in my considered view the Procurement Agency i.e.

KDA fell in error in calculating the first lowest bid and awarding the tender on the basis of considering 8 or 9 digits after decimal so as to make it below 30%, whereas, in reality it is supposed to be equal to 30%. Therefore, if there are more than one bidders whose bids fall within 30% or up to 30% then the only way out was to cancel all tenders and call it afresh as even otherwise provided in Clause 11.3.4 of the Regulations so heavily relied upon by the Defendants. This is not the case and a novel idea has been floated as discussed hereinabove, which cannot be endorsed by this Court.

17. Now coming to the question that whether this Court ought to have taken any notice or cognizance or rejected the claim of the Plaintiff on the ground of technical objections as well as maintainability. And to this I may observe that the very purposes of calling bids in respect of public funds is to ensure that the best and lowest price is quoted by the bidders; and at the same time, the process is transparent and without any ambiguity. This Court has not been able to comprehend as to why firstly, Regulation 11.3.4 has been invoked by rejecting bids which are below 30% of the Engineer's Estimate. If this was to ensure that no unreasonable bids or imaginary bids come forward; then perhaps, in that case an alternate were available by asking the particular bidder to furnish a Bank Guarantee in respect of the differential amount of the Engineer's Estimate, and as and when the works are carried out the guarantee could be gradually discharged to such extent. This would have been a better option and would have definitely saved the exchequer's money. But instead a novel idea has been adopted and all bids below 30% of the Engineers (exaggerated or imaginary) Estimate have been out rightly rejected, and thereafter, trifles have been taken into consideration to a very substantial extent i.e. up-to 9 digits after decimal. This all does not appeal to this Court in any manner. It is settled law that every state functionary, while dealing with public money is required to show ultimate fidelity and is burdened with extraordinary obligation to maintain fairness, equity, and impartiality. Its conduct must be without ailment of bias and doubt. This is not understandable as to how in all (7) seven works the bids which have been selected as the lowest, are having a difference in Paisas and thereafter, the first lowest amongst the three or four has been awarded the tender, whereas, the bid of such successful bidder is also equal to

30% after ignoring the trifles for the above reasons. Such conduct on the part of the Procurement Agency does not reflect any fairness or transparency. In addition, this also appears to be an attempt which is against the public interest; and the mode and manner the defendants have attempted to proceed and rush-up, smacks a non-transparent and callous attitude in evaluating the bids and attempt to award the tenders to their favorites. This is a bewildering series of events and attempts and cannot be let passed by this Court. The discretion of public functionaries in awarding tenders and spending of public money always requires a vigilant and vibrant scrutiny by the Courts. The public authority cannot mess up with public funds as it is not permitted to give largess in its arbitrary discretion or at its sweet will or in such terms as it chooses in its absolute discretion. The award of tenders by a Governmental agency always have a public interest, and therefore, it ought to have fairness and equality in its conduct. When it awards a tender, it must do so with fairness and without discrimination and favor, and must also follow the procedure as far transparent as possible. 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 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 an 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.....

18. Secondly, there also appears to be a big question mark on the correctness of the Engineer's Estimate, which per-se appears to be exaggerated and on the higher side with a definitive motive to entertain bids in the range of 29.9999996% or so. This has in fact happened in all 7 (seven) works in a similar and identical manner. And how this has been possible remains a mystery for the Court. Why in this world the bidders are quoting their bids in this range of the Engineer's Estimate, and out of these 3 or four, one is definitely going to be successful, if this acceptance of percentage and paisa denomination is allowed. It is a guaranteed award of a tender with this mischief, and then, on behalf of all defendants including procuring agency, private defendants and more surprisingly, Public Procurement Authority, such act is being justified. Even the office of the Advocate General has failed to assist the Court with any convincing legal argument while supporting the case of official defendants. This is rather disappointing for the Court to take note of.

19. Insofar as the assistance provided on behalf of Sindh Public Procurement Regulatory Authority is concerned, the same also appears to be favoring the Procurement Agency which is very surprising and is not understandable. It has come on record that the SPPRA Website was showing the tenders in question as cancelled on 4.10.2018 and to this there is no proper reply or response on behalf of SPPRA, nor on behalf of KDA. The Plaintiff has specifically pleaded such fact in Para 13 of the plaint, and to this there is no satisfactory response or denial for that matter. It appears that under the new system of dispensation a procuring agency has a direct access to SPPRA's Website, and all such information is to be up-loaded by such procuring agency and not by SPPRA. In this case screen shots have been placed on record which reflects that the works in question were shown as cancelled on SPPRA Website on 4.10.2018; and to this, reply of the procuring agency is that it happened due to a mistake. It is not conceivable as to how such

access is being given to a procurement agency without any supervision, whereas, the procuring agency can even show cancellation of the tenders and then turns up with a plea that it happened due to mistake. Such notice of cancellation must have led the bidders to treat the tenders as cancelled and there can't be any mechanism, nor has been so pleaded, to apprise them regarding happening of such mistake and revival of the tenders. This couldn't have been undone so simply. What was SPPRA doing all this time? It is also surprising to note that on the very same date when the tenders are being shown as cancelled, the evaluation report was being prepared. No plausible justification has been given to this so called mishap or mistake as claimed by the procurement agency, nor by SPPRA, and the only inference which the Court could draw is that someone was being favored as against others.

20. In view of hereinabove facts and circumstances of this case, I am of the view that the Plaintiff has made out a case to the extent that the entire process was tainted with malafide and favoritism and lacks transparency and therefore, by means of a short order dated 21.12.2018 the listed application was allowed in the following terms and these are the reason thereof.

For the reasons to be recorded later on, listed application (CMA No.14533/2018) is allowed in the following terms:-

- i. The award of 7 (Seven) Tenders covered by this Suit as per Notice Inviting Tenders dated 3.9.2018 (pg:31) by defendants No.2 and 3 to defendants No.5 to 9 is hereby set-aside;
- ii. The procurement agency (KDA) shall re-advertise the Tender and while doing so, it shall clearly notify in the advertisement a proper procedure for receiving of Tenders and issuance of proper and due acknowledgment;
- iii. Before doing so, the Engineer's Estimate in respect of all 7 (seven) Tenders should be made afresh in consultation with NESPAK or any like agency, so as to bring the said Estimate nearer to realistic values instead of the Existing exaggerated estimate.
- iv. While invoking (if at all needed) clause 11.3.4 of purported Regulations for Procurement of Works inserted vide Notification dated 5.7.2017, only such bids shall be considered which are nearest to the rupee, and any bid quoted in paisa's shall not be considered."

J U D G E