

# IN THE HIGH COURT OF SINDH, KARACHI

*Present:*

*Mr. Justice Mohammad Karim Khan Agha*

*Mr. Justice Amjad Ali Bohlo*

## CONSTITUTION PETITION NO.D-4529 OF 2023

Petitioner: M/s. NEIE-SMADB-LILLEY-RMS through Mr. Muhammad Haseeb Jamali, Advocate .

Respondent No.1: NAB Through M/s. Zahid Hussain Baladi and Syed Dilshad Hussain Shah, Special Prosecutors NAB.

Respondent No.2: Federation of Pakistan through Mr. Ghulam Sarwar Baloch, Assistant Attorney General

Respondent No.3: WAPDA through Syed Ali Ahmed Zaidi, Advocate

Respondent No.4: PEC through Mr. Ghulam Haider Shaikh, Advocate.

Date of Hearing : 02.10.2023

Dated of Order : 06.10.2023

## ORDER

Mohammad Karim Khan Agha, J: The petitioner has in effect sought a direction that the Water and Power Development Authority (Wapda) incorporate the Pakistan Engineering Council (PEC) guidelines relating to price escalation into his contract with Wapda as due to the economic meltdown which has hit the country in recent times it is not possible/economically viable for the petitioner to complete the terms of his contract.

2. The brief facts of the case are that the petitioner entered into a contract with Wapda on 13.01.2011 to construct a mega public project called the NaiGaj Dam in Dadu (the project).The construction of the project in essence primarily dragged on on account of the petitioner not being paid the relevant advances/funds on time by the concerned Government authority which lead to {



the Supreme Court taking Suo Moto notice of the matter and seeking update reports from Wapda concerning the delay in completing the project. Allegations were also made that the petitioner had provided a fake bank guarantee, which lead to the involvement of the National Accountability Bureau (NAB), and as such the contract was sought to be terminated by Wapda. After much litigation between the parties in respect of this purported termination and other issues the parties entered into arbitration whereby they settled their dispute by consent on 19.02.2021 which also became an order of the court. In essence the key aspects of the Arbitration settlement was that (a) the contract should be completed within 3 years and (b) there would be no further escalation in price.

3. Thereafter the economy of Pakistan went into virtual meltdown which put a number of public contracts at risk throughout Pakistan. Hence, the Pakistan Engineering Council (PEC) created under the PEC Act 1996 devised guidelines for upward price adjustment keeping in view the dire economic conditions for implementation of contracts through out Pakistan so that contractors could complete their contracts on time which would otherwise have been abandoned causing great loss to the public exchequer and to the public itself through non completion of the contract in question.

4. The petitioner wrote to Wapda requesting that PEC's price adjustment policy/guidelines be applied to his contract as due to the adverse economic conditions which had suddenly arisen after agreeing the arbitration settlement which had lead to a massive escalation in price he would not be able to complete the contract as he could no longer afford to do so. The respondent Wapda however declined his request and insisted on the no escalation clause remaining in place. Hence the petitioner has approached this court for relief under the PEC price adjustment guidelines.

5. Learned counsel for the petitioner has contended that the project was now almost 50% complete and since the economic meltdown which had recently hit the country the petitioner would not be able to complete the project unless there was an upward adjustment in price; that had the economic meltdown been taking place at the time when he agreed to the non escalation clause obviously he would have not agreed to it; that even otherwise the economic meltdown was completely unforeseen and he needed the protection of PEC's price escalation clause in order to complete the project which otherwise would probably be



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abandoned half way through which would be a waste of public money; that PEC had devised these guidelines to meet the ground realities and to save contracts like his and the PEC guidelines were retrospective in effect and applied to his contract. In support of his contentions he placed reliance on the cases of Government of Pakistan through Secretary Ministry of Commerce V Messrs Village Development Organization, VPO Landrwan, District Laki Marwat (2005 SCMR 492), Port Qasim Authority v Industrial Management and Investment Co. Ltd. (2020 CLC 721), The Collector of Customs, through Additional Collector of Customs (Law), Karachi v Messrs Super Star Company (2021 PTD 1094) and Collector of Customs, Lahore v Mrs. Shahida Anwar (2012 SCMR 1698).

6. On the other hand learned counsel for Wapda contended that Wapda was not bound by the PEC guidelines and even otherwise the PEC guidelines were not applicable as the parties had entered into a non escalation clause which had been endorsed by the court and as such could not be varied and as such the petition be dismissed. Learned DAG adopted the submissions of learned counsel for Wapda.

7. Learned special prosecutor NAB assisted by the IO of the case contended that the IO had recommended closure of the case but this had not been accepted by the head office. When confronted by the fact that the NAB appeared to lack jurisdiction in this case as it at best appeared to be an act of bank fraud he had answer except that the NAB head office had insisted that the inquiry into the fake bank guarantee be continued despite the fact that a new bank guarantee had been given and that there had been no default by the petitioner to date.

8. Learned Counsel for PEC submitted that the PEC was the concerned regulatory authority which had stepped in to save contracts once the Pakistani economy had started its down ward spiral by devising price escalation guidelines which would enable contracts which were hit by the extreme economic down turn to be completed by up lifting the prices of the contract to counter the economic meltdown and that the guidelines were fully applicable in this case.

9. We have heard the parties, considered the record as well as the relevant law.

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10. At the outset we have noted that the project is very important to the area of Sindh to which it relates and that 50% of the project has already been satisfactorily completed and most likely the remainder will be if funds are made available. We note that in Sindh there are countless projects which stand half completed for whatever reason and have lead to not only a complete loss to the exchequer in respect of those projects and the people living in the area to which the projects relate have also been deprived of the benefit of such projects be it schools, hospitals, housing projects etc. This situation is unforgivable able in any country let alone a developing country like Pakistan.

11. Now when we consider the date when the settlement agreement reached by consent of the parties was made between the parties which was later endorsed by a single Bench of this court there was no drastic economic crisis effecting the country and as such at the time the settlement agreement by consent was entered into it would have been reasonable for both parties to assume that the contract would have been completed within three years without any further escalation in price.

12. However shortly after the settlement agreement by consent was entered into the country went into an economic tail spin resulting in devaluation, depreciation, huge increase in inflation etc which is still the case today. This circumstance which was entirely unforeseen by the petitioner has meant that due to escalation in prices the petitioner will not be able to complete the project without an upward adjustment in price which if not made available to him might lead to a force majeure situation which would not be beneficial to either the parties, the country or its people. This would result in the contract not being completed, the petitioner probably going bankrupt with the consequent loss of jobs, massive loss to the exchequer and the people of the area leaving another half built white elephant haunting the landscape of Sind.

13. It is an admitted fact that after the settlement agreement by consent was entered into the country went into an economic meltdown as is evidenced by the record which lead to the intervention of PEC by devising price escalation guidelines for government contracts.

14. On 28.02.2022 PEC wrote to the Ministry of Housing and Works as under which was also copied to the Chairman Wapda;



February 28, 2022

The Secretary,  
Ministry of Housing & Works  
B-Block, Pakistan Secretariat, Red Zone,  
Islamabad.

**Subject: PRICE ADJUSTMENT ON UNPRECEDENTED PRICE HIKE OF  
CONSTRUCTION MACHINERY AND CONSTRUCTION MATERIAL.**

Pakistan Engineering Council (PEC) is a statutory body, constituted under the PEC Act 1976 to regulate the engineering profession in the country such that it shall function as Key driving force for achieving rapid and sustainable growth in all National, economic and social fields.

Presently, more than sixty thousand construction firms are registered with this council which are contributing their services in construction industry including all associated industry and executing engineering works in private and public sector development programs at Federal and Provisional level i.e. concoction of roads, highways, bridges, dams, buildings, hospitals, Installation of electrical and mechanical equipment and other development projects.

Unprecedented inflation and recession of economy in the country coupled with the pandemic COVID-19 outbreak and the exorbitant price hike since February 2020, has crippled the construction activities in the country and have been badly affected. The cost of construction, construction materials and machinery have also increased drastically. The medium and small projects have come to grinding halt and medium/large PSDP projects are on the verge of closure.

PEC as a regulator and licensing authority has a deep concern on the prevailing situation. The growth in construction sector has not only come to halt rather is in the negative state, causing the on-going projects/contracts have gone unviable. The situation is beyond control and for this purpose, PEC has approached Planning Commission of Pakistan and other relevant forum/agencies to find out a viable solution. Planning Commission is reportedly constituting a high level committee to work-out the solution of this issue.

PEC has also requested the Hon'ble Prime Minister, for taking detailed brief on this emergent matter of price escalation and formulating a professional solution towards price adjustment for ongoing projects/contracts in all categories enabling the construction industry and engineering projects to run for the economic revival of the country.

Forgoing above, it is desired that no default, liquidated, damages or any other punitive clauses of the conditions of the contract be invoked against any consultant, constructor/operator till the time a revised price adjustment policy is approved and notified.

This issue with the approval of competent authority.

Sd/-  
(Engr. Dr. Nasir Mahmood Khan)  
For Secretary/Registrar



**Copy to:**

1. Chief Secretary, Punjab
2. Chief Secretary, Sindh
3. Chief Secretary, Balochistan
4. Chief Secretary, Khyber Pakhtunkhwa
5. Secretary, Ministry of Energy (Power & Petroleum Division)
6. Secretary, Ministry of Water Resources
7. Secretary, Ministry of Communication
8. Secretary, Ministry of Industries and Production
9. Secretary, Ministry of Information Technology and telecommunication,
10. Secretary, Ministry of Railways,
11. Chairman, OGDCL, Islamabad ,
12. "Chairman, PTCL, Islamabad ,
13. Chairman Civil Aviation Authority, Islamabad,
14. Chairman, Board of Industries, Islamabad,
15. Chairman, NARTC, Haripur,
16. Chairman, NHA, Islamabad,
17. Chairman, CDA, Islamabad,
18. Chairman, WAPDA Lahore.

15. The Ministry of Housing and Works realizing the significance of PEC's letter and its potential devastating effect on the Country's economy and existing and future contracts called a meeting of the Planning Commission, Ministry of Planning, Development and Special Initiatives in order to address the issue and vide its minutes dated 13.07.2023 reached the following conclusions and decisions;

**Financial Impact by adopting Pakistan Engineering Council PEC Formula versus Termination and Re-bidding.**

*18. The Member-I & RC also informed that the Cost Impact by adopting Price Adjustment Formula is much lower and better option for the resumption of the construction industry as compared to terminations of the contracts and re-bidding process. The Financial Impact worked out on project cost by adopting PEC Price Adjustment Formula v/s Termination and re-bidding is as follows:*

- a) Cost Impact by adopting PEC Price Adjustment on PSDP: c 5.98% (Rs 168 billion)*
- b) Cost Impact in case of Termination & Rebidding: c 50% (Rs 520 billion)*

*19. The Honorable Minister / Deputy Chairman for Planning, Development & Special Initiatives / Planning Commission (Chair) explained the background and the deliberations made in this regard to both the Ministers for Communications and Housing & Works, respectively.*

*20. The Honorable Minister for Communications and Minister for Housing & Works attended the meeting via Zoom-link / Online. The Minister for Communications stated that the Price Adjustment Formula has already been delayed. The delay in implementation has caused stalling of projects all around the Country. The Honorable Minister for Housing & Works endorsed the views / recommendations of the Minister for Communications.*



21. On directions of the Committee the Pakistan Engineering Council (PEC) prepared Price Adjustment Formula, which was considered in the meeting and was unanimously approved by the all-respective Members of the Committee.

22. The Price Adjustment Formula (Proposed Amended SPFPA-2023) will be applied on Case-to-case basis and will be approved by the concerned Forum i.e DDWP / CD WP / ECNEC etc.

23. All Member of the Committee either personally attended the Meeting of sent their Representatives, except Chief Executive Officer (CEO), Public Private Partnership Authority (P3A), who neither attended the Meeting nor sent any representative in the Final Meeting.

Decision:

24. The Committee recommended the "Standard Procedure & Formula for Price Adjustment (SPEPA-2023)" on case-to-case basis and will be approved by the concerned approving Forum i.e DDWP / CDWP / ECNEC etc.

16. This lead to the PEC writing a letter to all concerned on 21.08.2023 which is reproduced as under;

**Pakistan Engineering Council**

(Constituted under Pakistan Engineering Council Act, 1976 enacted by the Parliament)

To \_\_\_\_\_  
As per Distribution List.

August 21, 2023

**Subject: Criteria and Procedure for Incorporation of Price Adjustment Provisions in the On-Going Contracts**

**Reference:** PEC letter No. PEC/IT/SBDC/PA/2022 dated September 19, 2022 (copy enclosed as Annex-A).

1. Pakistan Engineering Council (PEC), enacted through Parliament vide PEC Act-1976 as the national Regulator for engineering profession in totality including constriction works and services, had formulated the Price Adjustment (PA) mechanism for ongoing projects with the title 'Unprecedented Price Hike in Construction Inputs - Criteria and Procedure for Incorporation of Price Adjustment Provisions in the Ongoing Contracts August 2022'. This document was notified vide PEC's above referred letter and the same was posted on PEC Website as well, for implementation by all concerned.

2. Subsequently, the above cited mechanism has been deliberated in a series of meetings held at Planning Commission Islamabad, under the chair of Minister Planning, Development and Special Initiatives/ Deputy Chairman Planning Commission by taking all stakeholders onboard. The focus was to review the formula making it financially more viable. PEC revised the document with title



"Criteria and Procedure for Incorporation of Price Adjustment Provisions in the On-Going Contracts August 2022 (Amended June 2023)" making it more prudent, while keeping the professional content intact and ensuring that the win-win equilibrium between all the stakeholders: procuring agencies, contractors, projects and overall construction sector, is not compromised.

3. Finally, as communicated by the Planning Commission vide their letter No. 04(647)PC/T&C/2023 dated August 09, 2023, the document has been endorsed by all the stakeholders in 6<sup>th</sup> meeting held in Planning Commission on July 13, 2023.

4. Apropos, please be apprised that:

a. Pakistan Engineering Council, in the capacity of Regulator for engineering profession, hereby issues "Criteria and Procedure for Incorporation of Price Adjustment Provisions in the On-Going Contracts, August 2022 Amended June 2023" (Annex-C), for implementation in all the ongoing contracts. The same document has also been up loaded on PEC Website(<https://www.pec.org.pk/downloads-documents/pec-bidding-documents/>).

b. It is imperative to note that, after evaluating the PA value for a particular project in the light of procedure and formula given in the said document, the matter is to be processed further as per the decision of the Planning Commission vide para-22 of aforementioned minutes, which is in conformance to para B-3 of the PEC cited document. The said direction stipulates that the Price Adjustment Formula will be applied on case to case basis and will be approved by the concerned forum i.e. DDWP/CDWP/ECNEC, etc.

For any elucidation/assistance about the stipulations of document, please contact PEC HQ Islamabad on

- 1) Contact No. 051-9219049, 03335267105.
- 2) Email: [hagleghari@pec.org.pk](mailto:hagleghari@pec.org.pk), [m.c@pec.org.pk](mailto:m.c@pec.org.pk),

5. Forwarded for your information and necessary action, please.

Sd/-  
Engr. Dr. Nasir Mehmood Khan  
Registrar/Secretary PEC

Encl. As above.

Distribution List:

- a. Chief Secretary, Punjab
- b. Chief Secretary, Sindh
- c. Chief Secretary, Balochistan
- d. Chief Secretary, Khyber Pakhtunkhwa
- e. Chief Secretary, Azad Jammu and Kashmir
- f. Secretary, Ministry of Energy (Power & Petroleum Division)
- g. Secretary, Ministry of Water Resources
- h. Secretary, Ministry of Communication
- i. Secretary, Ministry of Industries and Production
- j. Secretary, Ministry of information Technology and telecommunication,
- k. Secretary, Ministry of Railways,
- l. Chairman, OGDCL, Islamabad,

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- m. Chairman, PTCL, Islamabad,
- n. Chairman Civil Aviation Authority, Islamabad,
- o. Chairman, Board of Industries, Islamabad,
- p. Chairman, NARTC, Haripur.

17. We have been informed by the PEC that the Government of Punjab has already implemented price escalation guidelines in a number of contracts in that province in order to ensure their implementation and that no wastage to the exchequer is caused on account of non performance of contracts to the recent economic meltdown.

18. Even Wapda's report to the Supreme Court dated June 2023 states as under in terms of progress in the project and reasons for delay;

### 3. UPDATED STATUS

- i) The Project re-commenced w.e.f 28.10.2021 and is scheduled to be completed within 03 years period i.e. 27.10.2024.
- ii) The work on different components of Project was in full swing and overall physical progress of Project was 42.78% against planned 42.88% upto occurrence of flood triggered by heavy rainfall in Sindh and Baluchistan Provinces in July 2022.
- iii) The work remained suspended for 5 months i.e July 2022 to December 2022 due to flooding in river as well as of access road connecting Dam site with Indus Highway and damages occurred to it. The work has been resumed w.e.f 18.12.2022 with limited earthwork activities and the overall physical progress of Project is 45.78% against planned 65.02% upto 31.05.2023.
- iv) The financial Progress of the Project as on 31.05.2023 is 35.79%

### 4. FACTORS AFFECTING PROGRESS OF WORKS

The factors affecting the progress of works after their recommencement in October 2021 are as under: Flood 2022

#### A. Flood 2022

- i) The work remained suspended for 5 months i.e July 2022 to December 2022 due to occurrence of heavy flood flows from Hamal lake and Gaj river triggered by heavy rainfall in Sindh & Baluchistan Provinces and consequent damages to only access road connecting dam site with Indus Highway (N-55)
- ii) As a result of pursuance by WAPDA, the access road was strengthened/ rehabilitated by Works and Services Department Govt. of Sindh and limited earthwork activities of Project have been resumed by the Contractor w.e.-f 18.12.2022. However, proper rehabilitation / reconstruction of road is still required to be carried out by Govt. of Sindh



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for enabling the Contractor of Nai Gaj Dam Project to execute the works at required pace for which concerned departments are being constantly perused by WAPDA.

**B. Unprecedented Price Hike in HSD and other Construction Inputs.**

- i) As per clause (iii) of MoU signed between WAPDA and Contractor on 21.09.2021, the escalation allowed to Contractor stands freeze at cost indices of August 2018 (i.e Pre 40%) after re-commencement of works w.e.f 28,10,2021,
- ii) However, overwhelming rise in the prices of HSD and other construction inputs have been witnessed in local/ International market which together with freezing of escalation allowed to Contractor under MoU has squeezed the flow of cash and thereby adversely affecting the efficiency of Contractors performance to complete the Project works.(bold added)

19. Wapda's own comments in reply to the petition which are reproduced in material part as under concede that the economic meltdown has made the project virtually unviable on account of price escalation;

- viii. It would not be out of place to mention here that no doubt unprecedented price hike has been occurred during last three years and it is very difficult for any contractor to carry out works at escalation freezes at cost indices of 2018. However, it is made as per Draft Terms and Conditions made part of rule of Court. The Respondent No.3 shall strictly act as per the directions from Honourable Court in this regards.(bold added)

20. Wapda it seems even in its own correspondence appears to be of the view that it would have reconsidered the petitioners request for price escalation but was of the view that its hands were tied by the settlement agreement by consent as it had been endorsed by the this court. In this respect Note of Chairman Wapda's site visit dated 17.05.23 is reproduced in material part below;

Chairman WAPDA's Visit of Nai Gaj Dam

17<sup>th</sup> May 2023

6. Contractor raised some contractual Issues including escalation freezed at the price indices of 2018 as a result of MoU, The Contractor further apprised that It made it nearly impossible for the Contractor to carry out reinforced cement Concrete work due to unprecedented price hike of steel, cement, HSD and other construction inputs. Chairman clarified that since escalation is freezed due to settlement agreement/MoU and the same Is made rule of court, It is not possible for Employer to allow escalation to the Contractor beyond MoU provisions. However, if the Contractor gets some relief from the court regarding escalation on the basis of ground realities, the same will be considered by the Authority. (bold added)



21. Due to the language used in the PEC guidelines we find that they are retrospective in effect especially as the guidelines are beneficial in effect and "apply to all ongoing projects" (such as the petitioners) and will apply to the petitioner's instant contract with Wapda. In this respect reliance is placed on the cases of **Government of Pakistan through Secretary Ministry of Commerce V Messrs Village Development Organization, VPO Landwan, District Laki Marwat (2005 SCMR 492)** **The Collector of Customs, through Additional Collector of Customs (Law), Karachi v Messrs Super Star Company (2021 PTD 1094)** and **Collector of Customs, Lahore v Mrs. Shahida Anwar (2012 SCMR 1698)**.

22. With regard to a Divisional Bench of this court being able to vary a settlement agreement by consent which had been endorsed by a single bench of this court we find that we have the power to vary the same if circumstances so demand. In this respect reliance is placed on the case of **Port Qasim Authority v Industrial Management and Investment Co. Ltd. (2020 CLC 721)**.

23. We also find that based on the particular facts and circumstances of the case the PEC's guidelines on price escalation are binding on Wapda which is a statutory body.

24. The question before us in essence is whether due to an unforeseen virtual financial meltdown/emergency in the economy of this country we should sit back and allow a project which is for the benefit of the people to fail with the consequences that it would cause a massive loss to the exchequer and to the people of Sindh when we have legal tools at hand to try to prevent this scenario keeping in view that the PEC guidelines require a decision to be made based on the particular facts and circumstances of each case.

25. As such based on the particular facts and circumstances of this case and contract and the unforeseen economic meltdown in the country and the objective of saving the contract and preventing wastage of tax payers money we hereby substitute the non escalation clause in the settlement agreement by consent as endorsed by this court and replace it with the PEC guidelines on price escalation which the Chairman Wapda is directed to consider not with standing any MOU or other document in the field vis a vis the petitioners case after considering its



written contentions and affording a personal hearing to the petitioner and thereafter issue a speaking order within 6 weeks of the date of this order. In making such order/decision we expect Wapda to keep the best interests of the economy, completion of development projects of this country in mind and any potential loss to the exchequer/tax payer whose money should not be wasted unnecessarily as indicated above in terms of the cost of re tendering as opposed to negotiating keeping in view the current economic melt down.

26. We leave the question of whether the PEC guidelines should be implied into the contract of every Government, Semi Government, Statutory Organization etc for another time if it is not already deemed to be so.

27. So far as NAB's notice is concerned we find that NAB has no jurisdiction in the matter of the allegedly forged bank guarantee especially as a new guarantee has been put in place and no default has occurred to date and as such its enquiry is quashed and NAB is expected to concentrate on mega corruption cases being the Apex Anti corruption body in the Country especially when the issue in hand could be dealt with by another investigative agency if deemed necessary.

28. A copy of this Order shall be sent to Chairman Wapda, Deputy Chairman/DG Operations NAB Islamabad for information and compliance.

29. The petition is disposed of in the above terms.