

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ
PROVINCE OF PUNJAB through Secretary C&W, Lahore and others---Appellants

Versus

**Messrs HAROON CONSTRUCTION COMPANY, GOVERNMENT CONTRACTOR and others---
 Respondents**

C.P.L.As. Nos. 2226-L of 2021 to C.P.L.A. No. 2241-L of 2021, C.P.L.As. Nos. 2253-L of 2021 to C.P.L.A. No. 2255-L of 2021, C.P.L.A. No. 2270-L of 2021, C.P.L.A. No. 2277-L of 2021, C.P.L.As. Nos. 371-L of 2022 to C.P.L.A. No. 373-L of 2022 and C.P.L.A. No. 3396-L of 2022, decided on 20th February, 2024.

(Against the judgment(s) of Lahore High Court Lahore all dated 30.09.2021, passed in I. C.A. No.18231 of 2021, etc.).

(a) Punjab Procurement Rules, 2014---

---Rr.27 & 56---Tenders for construction works---Bidding documents---Additional performance security imposed by procuring agency---Legality---Bidding documents should comply with the Punjab Procurement Rules, 2014 (Rules) especially Rules 27 and 56---Procuring agency cannot introduce additional security in violation of the Rules---Procuring agency cannot require the bidder to pay additional performance security over and above the bid security and performance guarantee provided under Rules 27 and 56 of the Rules.

The imposition of additional security not only disincentivizes the contractors trying to submit competitively low bids, but it also defies logic as the successful bidder has to give lesser security than the lowest bidder, who might not be a successful bidder, eventually. Where the lowest bidder becomes the successful bidder, he will have to furnish two securities while any other bidder who is not the lowest bidder, but has been declared successful bidder, must only furnish one security. This incongruence in the bidding documents leads to discrimination and offends the principles of public procurement. Therefore, compliance to the regulator framework becomes mandatory in public procurement to uphold the foundational principles of public procurement. Therefore, in the present case the insertion of additional performance security in the Bid Document and the follow up clauses dealing with the consequence of non-payment of additional performance security in the bidding document are beyond the scope of the Punjab Procurement Rules, 2014 (Rules) being inconsistent with Rules 27 and 56 of the Rules. Consequently, the Supreme Court set aside the demand raised for the payment of additional performance security by the procurement agencies as being unlawful and violative of the Rules, and directed that any additional security to be imposed on a contractor can only be introduced through Rules to be framed by the Government so that the principles of procurement are met and there is transparency, level playing-field and non-discrimination in public procurement.

(b) Punjab Procurement Rules, 2014---

---R.68---Procurement---Bidding documents, dispute over---Mediation---Significance of mediation and pro mediation bias of courts explained.

Courts must encourage out of court settlements through Alternate Dispute Resolution ("ADR"), in particular mediation. The essence of mediation lies in its voluntary and confidential process, where a neutral third party, the mediator, assists disputants in reaching a consensus. Unlike in litigation, where the outcome is often a zero-sum game, mediation thrives on the principle of win-win solutions, preserving relationships and allowing for creative resolutions that legal parameters might not accommodate.

Justice Sandra Day O'Connor, Speech at the Minnesota Conference for Women in the Law, April 1985 ref.

Mediation, as a form of alternative dispute resolution (ADR), has garnered widespread acclaim for its efficiency, cost-effectiveness, and ability to facilitate amicable settlements. In contrast to the adversarial nature of litigation, mediation embodies a collaborative approach, encouraging parties to find mutually beneficial solutions. The courts should not only encourage mediation but also exhibit a pro-settlement bias and a pro-mediation bias. Pro-mediation bias or pro-settlement bias means a predisposition or preference within the legal system for resolving disputes through mediation rather than through litigation or other forms

of dispute resolution. This bias is not about favoring one party over another but rather about favoring the process of mediation itself as a preferred method of dispute resolution. This bias is grounded in the belief that settlements are generally more efficient and satisfactory for all parties involved compared to outcomes determined by a court. Courts may exhibit a pro-settlement bias by encouraging parties to settle even before the case goes to trial or during the litigation process.

By fostering a pro-settlement bias, courts can contribute to a more harmonious and efficient dispute resolution landscape, where parties are empowered to resolve conflicts collaboratively and constructively. Encouraging mediation aligns with the broader goals of justice systems worldwide: to resolve disputes in a manner that is fair, efficient, and conducive to the long-term well-being of all involved parties.

Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, July 1996 ref.

Ms. Samia Khalid, Addl. A.G. Pb., Zakir Shah, SLO, C&W., Rana Azhar, S.E. Highway and Muhammad Usama, XEN, Mian Muhammad Kashif, Advocate Supreme Court, Assisted by: Ms Alizeh Akbar, Advocate (in C.P. No. 2277-L of 2021) and Ch. Muhammad Sarwar, Advocate Supreme Court (in C.P. No. 3396-L of 22) for Petitioners.

Mian Muhammad Kashif, Advocate Supreme Court and Ch. Muhammad Sarwar, Advocate Supreme Court for Respondents (in C.P. No. 2228-L of 2021).

Muhammad Younis, Contractor (In person)

Date of hearing: 20th February, 2024.

ORDER

SYED MANSOOR ALI SHAH, J.---Brief facts of the case are that through public advertisement made by different procuring agencies¹ i.e., Communication and Works Department and Irrigation Department of the Government of the Punjab and Punjab Local Government, tenders were sought for various construction works. In pursuance thereof, the contractors submitted their bids. Clause 26(A) of the General Directions for the Guidance of the Tenderers (Bid Document) provided that if there is a difference between the total tendered amount and the approved estimated amount, the lowest bidder shall deposit additional performance security ranging from 5% to 10% of the difference. Through impugned letters dated 29.12.2020 and 18.01.2021 issued by the Executive Engineer, Highway Division, Gujranwala and Narowal, respectively, demand was raised against the contractors for the payment of additional performance security. The contractors challenged the said demand before the High Court, where the claim of the contractors was dismissed vide impugned judgment while interpreting Rule 56 of the Punjab Procurement Rules, 2014 ("Rules"). The private contractors, the Provincial Government and the procuring agencies are all aggrieved of the impugned judgement for different reasons but primarily regarding the interpretation of Rule 56 of the Rules, hence these petitions.

2. The central question before us is whether the procuring agency could require the bidder to pay additional performance security over and above the bid security and performance guarantee provided under Rules 27 and 56 of the Rules. In other words, can the bidding documents include terms and conditions of the tender which are over and above or inconsistent with the Rules.

3. Learned Additional Advocate General representing the Provincial Government and the procuring agencies submits that the Punjab Procurement Regulatory Authority Act 2009 ("Act") and the Rules do not bar the procuring agency from including additional performance security in the bidding documents and therefore there is no violation of the Rules. Clauses 26(A), 26(B) and 15 of the bidding documents provide for the additional performance security, its rates and the consequence of non-payment of the said security.

4. On the other hand, learned counsel for the private contractors submit that the bidding documents are to be regulated by the Act, as well as, the Rules and in the presence of Rules 27 and 56 the bidding documents cannot provide for additional security by violating the upper limit on securities provided under the Rules. He submits that Rule 27 provides that bid security shall not exceed 5% of the estimated price while Rule 56 provides that performance guarantee dealing with the successful bidder shall not exceed 10% of the contract

amount and there is no provision under the Rules for any additional performance security at any stage of the bidding.

5. We have gone through the provisions of the Act, as well as the Rules. The preamble to the Act provides for the establishment of the Procurement Regulatory Authority for regulating procurement of goods, services and works in the public sector. Public procurement² means procurement of goods, works or services by a procuring agency wholly or partly financed out of the Provincial Consolidated Fund or the Public Account of the Province or funds of a procuring agency. Procuring agency³ means a department of the government or an autonomous body of the government, a local government, etc. The functions and powers entrusted to the Authority under the Act are geared towards improving governance, management, transparency, accountability and quality of public procurement. These functions and powers include: monitoring the application of laws, rules, regulations relating to public procurement; making regulations and laying down codes of ethics and procedures for public procurement; establishing performance indicators for public procurement; preparing standard documents to be used in connection with public procurement; presenting an annual report to the government regarding overall functioning of the public procurement system; and make rules for carrying out the purposes of the Act.

6. The Rules promulgated by the Government for carrying out the purposes of the Act, inter alia, define; "bidding documents", "bid security" and "performance guarantee⁴." Rule 4 lays down the principles of procurement i.e., (i) procurement to be in a fair and transparent manner (ii) the object of procurement is to bring value for money to the procuring agency and (iii) the procurement process be efficient and economical. Under the Rules the procuring agency is to use standard bidding documents as and when notified under the regulations and until the standard bidding documents are specified under the regulations, a procuring agency may use bidding documents already in use of the procuring agency to the extent that they are not inconsistent with the Rules.⁵ And any violation of these Rules amounts to mis-procurement⁶. Rules 27 and 56 provide for bid security and performance guarantee in the following manner:

27. Bid security.---The procuring agency may require the bidders to furnish a bid security not exceeding five per cent of the estimated price.

Explanation.---In this rule, the words 'estimated price' mean the price of procurement estimated by the procuring agency before initiation of the process of procurement.

56. Performance guarantee.---Where needed and clearly expressed in the bidding documents, the procuring agency shall require the successful bidder to furnish a performance guarantee which shall not exceed ten percent of the contract amount.

7. The above regulatory framework provides a stable and predictable environment for both the procuring agency and the contractor. Deviating from this framework can create uncertainty and confusion, potentially deterring qualified bidders from participating in the procurement process and possibly leading to disputes or litigation. One of the fundamental principles of public procurement is compliance with the law. Procurement activities must adhere to the legal and regulatory framework established by the law. Introducing new terms and conditions outside or inconsistent to the regulatory framework under the law can compromise the fairness and transparency of the public procurement process. It could lead to perceptions or instances of bias, unfair advantage, or discrimination against certain bidders, which undermines the integrity of the public procurement process.

8. According to Organization for Economic Co-operation and Development ("OECD"), public procurement is the regulation of principles, rules and procedures applied to States in order to implement efficient processes when acquiring goods, services or works, and comply with its' policy objectives.⁷ It is within this context that the OECD Principles for Enhancing Integrity in Public Procurement come into play which are primarily directed at policy makers in governments at the national level, but may also offer guidance for sub-national government and state-owned enterprises. These Principles provide a policy instrument for enhancing integrity in the entire public procurement cycle and take a holistic view by addressing various risks to integrity, from needs assessment, through the award stage, contract management and up to final payment. These twelve (12) Principles⁸ are anchored in four pillars⁹ namely transparency, good management, prevention of misconduct

and accountability and control in order to enhance integrity in public procurement and, inter alia, include; (i) Transparency; providing an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers, (ii) Integrity; preserving the integrity of the public procurement system through general standards and procurement specific safeguards, (iii) Access; facilitating access to procurement opportunities for potential competitors of all sizes, (iv) Balance; recognizing that any use of the public procurement system to pursue secondary policy objectives should be balanced against the primary procurement objective, (v) Participation; fostering transparent and effective stakeholder participation, (vi) Efficiency; developing processes to drive efficiency throughout the public procurement cycle while satisfying the needs of the government and its citizens, (vii) E -procurement; improving the public procurement system by harnessing the use of digital technologies to support appropriate e-procurement innovation through the procurement cycle, (viii) Capacity; developing a procurement workforce with the capacity to continuously deliver value for money efficiently and effectively, (ix) Evaluation; driving performance improvements through evaluation of the effectiveness of the public procurement system from individual procurements to the system as a whole, at all levels of government where feasible and appropriate, (x) Risk Management; integrating risk management strategies for mapping, detecting and mitigating throughout the public procurement cycle, (xi) Accountability; applying oversight and control mechanisms to support accountability throughout the public procurement cycle, including appropriate complaint and sanction processes, (xii) Integration; supporting integration of public procurement into overall public finance management, budgeting and service delivery processes.

9. The regulatory framework under the Act and the Rules closely monitors and regulates public procurement and provides for the bidding documents, the steps to be taken during public procurement and the securities that can be furnished by a contractor, which include bid security and performance guarantee. The Authority under the Act is to lay special emphasis on the governance, management, transparency, accountability, and quality of public procurement. While the global guideline on public procurement developed by OECD mentions fundamental pillars of public procurement as: transparency, good management, prevention of misconduct and accountability and control. Therefore, to enhance integrity in public procurement; transparency, level playing-field, standardization of bidding documents and uniformity of compliance of the regulatory framework are essential ingredients that cannot be waived or comprised. It is to uphold these guiding principles that the procuring agency cannot go beyond the regulatory framework and introduce terms in the bidding documents that are inconsistent to the regulatory regime under the Act, Rules, etc. In this case strangely the additional performance security is sought from the lowest bidder and not from the successful bidder who is to deposit only performance guarantee (mentioned in the bidding document as performance security). The imposition of additional security not only disincentivizes the contractors trying to submit competitively low bids, but it also defies logic as the successful bidder has to give lesser security than the lowest bidder, who might not be a successful bidder, eventually. Where the lowest bidder becomes the successful bidder, he will have to furnish two securities while any other bidder who is not the lowest bidder, but has been declared successful bidder, must only furnish one security. This incongruence in the bidding documents leads to discrimination and offends the principles of public procurement discussed above. Therefore, compliance to the regulator framework becomes mandatory in public procurement to uphold the foundational principles of public procurement. Therefore, insertion of additional performance security in clause 26(A) and the follow up clauses 26(B) and 15 dealing with the consequence of non-payment of additional performance security in the bidding document are beyond the scope of the Rules being inconsistent with Rules 27 and 56 of the Rules. Consequently, the demand raised for the payment of additional performance security vide letters 29.12.2020 and 18.01.2021 by the procurement agencies along with the above clauses are set aside being unlawful and violative of the Rules. Any additional security to be imposed on a contractor can only be introduced through Rules to be framed by the Government so that the principles of procurement are met and there is transparency, level playing-field and non-discrimination in public procurement.

10. We have notice that Rule 68 of the Rules provides that after the coming into force of the procurement contract, disputes between the parties to the contract shall be settled through mediation or arbitration. The words of Justice Sandra Day O'Connor are telling: "The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."¹⁰ Even though in the instant case alternate dispute resolution mechanism was not available as interpretation of the Act and the Rules were involved, which is best left to the court of law, we wish to underline that courts must encourage out of court settlements through Alternate Dispute Resolution ("ADR"), in particular mediation. The essence of mediation lies in its voluntary and confidential process, where a neutral third party, the mediator, assists disputants in reaching a consensus. Unlike in litigation, where the outcome is often a zero-sum game, mediation thrives on the principle of win-win solutions, preserving relationships and allowing for creative resolutions that legal parameters might not accommodate. "The notion that ordinary people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as settings to resolve their disputes is incorrect. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."¹¹

11. Mediation, as a form of alternative dispute resolution (ADR), has garnered widespread acclaim for its efficiency, cost-effectiveness, and ability to facilitate amicable settlements. In contrast to the adversarial nature of litigation, mediation embodies a collaborative approach, encouraging parties to find mutually beneficial solutions. The courts should not only encourage mediation but also exhibit a pro-settlement bias and a pro-mediation bias. By Pro-mediation bias or pro-settlement we mean a predisposition or preference within the legal system for resolving disputes through mediation rather than through litigation or other forms of dispute resolution. This bias is not about favoring one party over another but rather about favoring the process of mediation itself as a preferred method of dispute resolution. This bias is grounded in the belief that settlements are generally more efficient and satisfactory for all parties involved compared to outcomes determined by a court.

12. Prominent legal scholars and jurists, including the likes of Roger Fisher and William Ury, authors of the seminal work "Getting to Yes," advocate for mediation. They emphasize its potential to produce outcomes that are more satisfactory to all parties involved, compared to the often rigid and polarizing verdicts of court proceedings. Their work underscores the importance of interests over positions, encouraging parties to seek common ground rather than entrenching themselves in adversarial stances. For instance, in "Judging Civil Justice," legal scholar Hazel Genn discusses the encouragement of settlement as a way to reduce court caseloads and promote the efficient use of judicial resources. Courts may exhibit a pro-settlement bias by encouraging parties to settle even before the case goes to trial or during the litigation process.

13. By fostering a pro-settlement bias, courts can contribute to a more harmonious and efficient dispute resolution landscape, where parties are empowered to resolve conflicts collaboratively and constructively. Encouraging mediation aligns with the broader goals of justice systems worldwide: to resolve disputes in a manner that is fair, efficient, and conducive to the long-term well-being of all involved parties. "In the future, it is likely that the traditional trial will be the exception rather than the rule."¹²

14. In this view of the matter, the impugned judgments are set aside and C.P.L.A.2226-L/2021 to C.P.L.A.2241-L/2021, C.P.L.A.2253-L/ 2021 to C.P.L.A.373-L/2022 are dismissed and leave declined;

whereas C.P.L.A.2277-L/2021 and C.P.L.A.3396-L/2022 are converted into appeals and allowed in the above terms.

MWA/P-8/SC

Order accordingly.

¹ See Section 2(l) of the Act.

² Section 29(n) of the Act

³ Section 2(l) of the Act

⁴ Rules 2(g), (h) and (w).

⁵ Rule 25 (5) & (6)

⁶ Rule 69

⁷ Arciniegas Parra Juan David and Kabir Duggal, 'Public Procurement' Jus Mundi ≤
<https://jusmundi.com/en/document/publication/en-public-procurement>>

⁸ OECD, OCED Recommendation of the Council on Public Procurement (2015) ≤
<https://www.oecd.org/gov/public-procurement/OECD-Recommendation-on-Public-Procurement.pdf>>

⁹ OECD, OECD Principles for Integrity in Public Procurement (2009)
 < <https://www.oecd.org/gov/ethics/48994520.pdf>>

¹⁰ Justice Sandra Day O'Connor, Speech at the Minnesota Conference for Women in the Law, April 1985

¹¹ Attributed to: Warren E. Burger, former Chief Justice of the United States

¹² Lord Woolf, Harry, "Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales." HMSO, July 1996.