

In the Federal Constitutional Court of Pakistan
(Original/Appellate/Advisory Jurisdiction)

Present:

Justice Amin-ud-Din Khan, Chief Justice
Justice Ali Baqar Najafi
Justice Arshad Hussain Shah

C.P.L.A. No.515-P of 2022

(On appeal from judgment of Peshawar High Court, D.I. Khan
Bench dated 30.3.2022 passed in Writ Petition No.585-D of 2015)

Managing Director, Frontier Highway Authority and others
Petitioners

Versus

M/s Brothers Constructions & Builders (BCB) through its Managing
Partner
Respondent

For the Petitioners: Mr. Khalilullah Khalil ASC with
Mr. Abid Shafi Director (Law)

For the respondent: Mian Abdul Rauf, ASC

Date of hearing: 3.2.2026

Judgment

Arshad Hussain Shah, J: Succinctly facts of the case are that the petitioners advertised Notice Inviting Tenders (NIT) on 16.5.2011, inviting tenders from pre-qualified contractors for five packages on 26.5.2011. Respondent No.1 (hereinafter referred to as the "bidder"), participated in the process of tenders and became successful for Package-I for improvement and widening of D. I. Khan-Chashma Road Phase-I in Package-I (8 km) with estimated cost of Rs.138.65 million. His tender was 7% below the Composite Schedule of Rates (CSR) 2009, therefore, he deposited earnest money amounting to Rs.2.773 million @ 2% of the estimated cost. The petitioners demanded 8% additional security on the basis of engineer estimate of Rs.143.563 million, as, according to the petitioners, the bid of the bidder was 22.5% below the engineer estimate, which the bidder refused to deposit. Resultantly, the bid was rejected, earnest money was forfeited and the bidder was also debarred from participating in bids for a period of six months vide Notification dated 18.7.2011.

2. The bidder challenged the Notification in the Writ Petition before the Peshawar High Court, judgement whereof has been assailed in the instant C.P.L.A. The High Court allowed the Writ Petition mainly on the ground that the petitioners did not mention the engineer estimate in the NIT, therefore, the bidder could not be burdened with additional security @ 8% on the basis of engineer estimate.

3. We have heard the learned counsel for the petitioners as well as the learned counsel for the bidder, who has appeared on caveat. Learned counsel for the petitioners argued that the High Court failed to appreciate the facts in the true perspective, contending that the bid of the bidder was 22.5% below the engineer's estimate and, therefore, under Clause No.3 of the NIT, the bidder was obliged to deposit 8% additional security. However, when confronted, learned counsel candidly conceded that the engineer estimate was not mentioned in the NIT. If the engineer estimate was available as early as April 2011, the reason for its non-incorporation in the advertisement dated 16.05.2011 remains unexplained. Learned counsel for the petitioner was also unable to offer any explanation in this regard. The petitioner's approach of computing the 2% earnest money on the basis of the estimated cost expressly disclosed in the advertisement, while switching to an undisclosed engineer estimate later on, is legally untenable, as it offends the requirements of transparency, consistency, and equal treatment in public procurement.

4. The Supreme Court of Pakistan in *Habibullah Energy Limited and another v. WAPDA through Chairman* (PLD 2014 SC 47) has categorically held that, "*an advertisement is universally accepted as a condition precedent for ensuring a free, fair, open, competitive and transparent process for transfer of public assets or rights therein*". Similarly, in *Ishaq Khan Khakwani and another v. Railway Board through Chairman and others* (PLD 2019 SC 602), the Supreme Court of Pakistan observed that, "*the bidding process must conform to the settled principles of transparency, fairness, and due process*", and further that, "*a change in one of the essential terms of the project specifically mentioned in the advertisements could not have been made without a fresh advertisement enabling all potential bidders to participate in the process*", particularly where, "*no compelling arguments have been put forward by the respondents for non-issuance of such advertisement*". This normative

standard also finds support in the decision of the Supreme Court of India in *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others* (AIR 2000 SC 2272), where it was held that, "*there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike*", and that modifying the applicable basis after bidding has commenced is, "*like changing the rules of the game after it had begun*". Any midstream departure from the stipulated tender terms, without prior public notice, and in the absence of legal/cogent justification, is inherently arbitrary, and undermines the principle of equal opportunity among bidders. The introduction of an additional security requirement by reference to a benchmark not disclosed in the advertisement, appears to be patently arbitrary and incompatible with the requirements of transparency and fairness in the facts and circumstances of the case.

5. In view of the foregoing, we find no legal infirmity in the judgment of the High Court. The conclusion drawn by the High Court is consistent with the applicable law and the governing principles of public procurement. No ground is made out for interference. Accordingly leave is refused and the petition is dismissed.

Chief Justice

Judge

Judge

Islamabad

3rd February, 2026

Approved for Reporting.

Riaz