

IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

PRESENT:

MR. JUSTICE NASIR-UL-MULK

MR. JUSTICE ASIF SAEED KHAN KHOSA

MR. JUSTICE SH. AZMAT SAEED

**CONSTITUTIONAL PETITION NO.91 OF 2011 & CMA
NO.2624 OF 2011 AND CONSTITUTIONAL PETITION
NO.57 OF 2012.**

CP.No.91/2011 & Raja Mujahid Muzaffar Vs.
CMA No.2624/2011: Federation of Pakistan and
others.

CP.No.57/2012: Babar Sattar Vs.
Federation of Pakistan, etc.

For the petitioner: Mr. Athar Minallah, ASC
(in CP.91/2011)

For the petitioner: Mr. Babar Sattar, Advocate,
(in CP.57/2012) In person

For the Federation/
State: Mr. Irfan Qadir, AGP
Mr. Babar Ali, DAG
Mr. M. S. Khattak, AOR
Raja Abdul Ghafoor, AOR

For the NADRA: Mr. Raza Kazim, Sr. ASC
Mr. Mehmood A. Sheikh, AOR
Dr. Tahir Akram,
Chief Administrative Officer

For M/s Hauwei Mr. Afnan Karim Kundi, ASC
Technology Company: Mr. Mehmood A. Sheikh, AOR

Dates of hearing: 25, 26, 28 & 29.06.2012.

JUDGMENT

SH. AZMAT SAEED, J.- This judgment will
dispose of Constitutional Petition No.91 of 2011 &
CMA No.2624 of 2011 and Constitutional Petition

No.57 of 2012, as common questions of facts and law are involved therein.

2. The instant constitutional petitions have been filed to call into question the award of the Contract dated 29.12.2009. It appears that a Supply and Implementation Contract was executed *inter-se* the Government of Pakistan through the Secretary, Ministry of Interior and M/s Hauwei Technology Company Limited (respondent No.8). The said Contract was for the procurement of goods, equipment and services for the purpose of establishing a Command Center and Network, initially at Islamabad for the total cost of US\$ 124,719,018. The said Project is referred to as Islamabad Safe City Project.

3. The essential factual background of the *lis* at hand, which can be gleaned from the record made available by the parties, is that apparently in the summer of 2009, respondent-M/s Hauwei Technology Company Limited a Chinese Company approached the respondent-National Database and Registration Authority (NADRA) offering to implement and execute

a comprehensive surveillance and monitoring system for security primarily at Islamabad i.e. the Safe City Project in question. Respondent-NADRA claims to have informed its parent Ministry i.e. Ministry of Interior regarding the offer made by respondent-M/s Hauwei Technology Company Limited, whereafter a meeting was convened, chaired by the Secretary, Ministry of Interior on 29.08.2009 of the various governmental stakeholders concerned, wherein it was decided that a ground-check may be carried out involving the end user. In the meanwhile, it was decided that a Memorandum of Understanding (MOU) be executed *inter-se* NADRA and M/s Hauwei Technology Company Limited with the Ministry of Interior not being made responsible for any contractual obligations. It was also decided that the said MOU may be presented to the Ministry of Law & Justice Division for their formal vetting.

4. In the above backdrop, a draft MOU was prepared and exchanged between the parties, however, such MOU does not appear to have been formally executed. Subsequently, vide a letter dated

01.10.2009, the Chairman-NADRA indicated to the Secretary, Ministry of Interior of the possibility of obtaining a long term concessional loan from the Chinese Government/the Export-Import Bank of China whereupon Economic Affairs Division was activated by the Ministry of Interior *inter alia* for the allocation of the concessional loan from China. Various communications in this behalf were exchanged and meetings held, including of the Central Development Working Party (CDWP) on the 19th of November, 2009 and 19th of December, 2009. In the latter meeting, it was *inter alia* decided that:

- i. The Interior Division will submit a summary to the Prime Minister for seeking decision regarding sponsoring and execution of the said project as the Prime Minister has already issued a directive to Ministry of Information Technology for execution of a similar project in 10 to 12 cities.
- ii. Procurement of equipments should be done through international competitive bidding (ICB) as envisaged in the PPRA's rules. In case of a tide loan, the competition should be within atleast Chinese Companies for Chinese equipment. If not possible, the Interior Division should seek special exemption from the Prime Minister.
- iii.

- iv. A feasibility study of the project and a quality assurance certificate of proposed equipments must be attached with modified PC-I."

5. Subsequently, a summery was submitted to the Prime Minister by the Secretary, M/o Interior, seeking approval for *inter alia* the following:

- i. The Ministry of Interior be approved as sponsor of this security related project instead of Ministry of Science & Technology and to execute it. The Ministry of Information Technology be required to extend due technical support to Ministry of Interior in expeditious completion of the project.
- ii. Exemption of PPRA's Rules 2004 regarding international competitive bidding (Annex-B).
- iii. The sponsoring agencies i.e. Ministry of Interior through (NADRA) to negotiate prices with Hawaii Company of China a reputed firm in manufacturing and supply of equipments/gadgets at lowest rates.
- iv. Approval to enter into negotiation with concerned Chinese authorities for extension of loan to finance "Safe City" Project for Islamabad and Peshawar valuing US \$ 124.7 million and US \$ 110 million respectively."

6. The Ministry of Finance, vide its communication, dated 23rd of December, 2009, made the following proposals:

- "9. The proposals at para 7 (ii) & (iv) relate to the Finance Division.

10. Regarding para 7 (ii) relating to exemption from PPRA Rules, 2004, since the project is yet to be approved by the competent forum, a decision on exemption or otherwise from PPRA Rules may be taken after approval of the project, in the prescribed manner.

11. Regarding para 7 (iv) relating to entering into negotiations with Chinese authorities for extending loan to finance the project, the proposal is supported as it would save valuable time to organize financing for the project."

7. Approval was accorded by the Prime Minister, as is mentioned in the letter, dated 24th of December, 2009, in the following terms:

"12. The Prime Minister has been pleased to approve the recommendations of the Finance Division contained in paras 10-11 of the Summary.

13. The Prime Minister has further desired that the Ministry of Information Technology may be kept on board on all issues related to this project and the formal approval of the project may also be obtained from the competent authority/Cabinet, as per prescribed procedure."

8. It appears that thereafter the Contract in dispute was executed on 29.12.2009.

9. It appears that contemporaneously, another project with more or less the same objective was being sponsored by Ministry of Information Technology with the involvement of another Chinese Company. The

said Project was referred to as GOTA to which reference has been made in the Minutes of Meeting of the CDWP, dated 19.12.2010. It appears from the record that the Ministry of Interior and the Ministry of Information Technology were canvassing for the respective projects sponsored by them. Both the Projects i.e. Islamabad Safe City Project and GOTA were competitive and obviously overlapping and only one of the two projects could go through. Apparently, the matter was brought to the notice of the then Prime Minister, who chaired a meeting in this behalf. It appears that in order to evaluate the two projects a Technical Committee was formed.

10 The Technical Committee formed a Sub Committee. The Sub Committee held its meeting on 26.03.2010, the minutes whereof are placed on the record in CP.No.91 of 2011. In the said Minutes with reference to the cost of the Project, it was observed, as follows:

“As far as the cost of equipment is concerned the cost of most equipment mentioned in the PC-1 is almost three times the cost of comparable equipment available in the market. (NADRA rep, are not a party to this comment). It is pointed

out that all the equipment could not be accompanied because of their providing nature and absence of detailed specifications. The cost of Shell Software quoted was also higher in the same range (1:3) and it was informed that the vendor had quoted the Chinese prices. Also the cost of proprietary software could not be determined and assumed to be similarly highly priced. In addition, the cost of customization, integration, and consultancy are included as 10.5% of total cost of the project which is quite high."

The said Committee made the following recommendations:

"5. It is therefore recommended that we may indicate our requirements in the shape of a Request for Proposal (RFP) providing details of our requirements of a pro-active and effective "Security System" along with a "Surveillance" and "Traffic Management System" and indicating our performance requirements e.g. response times. The vendors may also be provided with design parameters _____ (e.g. the nos. of exit/entry points, the types of detectors, cameras or various types, vehicle RFID readers, fingerprint, scanners etc. we wish to install) and the details of telecom infrastructure already available in Islamabad and these details and specifications were required by the sub-committee of Technical Committee have been included in a specimen RFP (copy enclosed) which is proposed to be handed over to the vendors for proposing an optimum solution. A PC-1 has also been prepared (copy enclosed as Annex-B) based upon the realistic costs of various items included in the PC-1. The total cost of PC-1 is rupee equivalent of USD 78 million Based upon the lowest bid. PC-1 may be provided to the Planning Commission for approval."

11. Pursuant to the said meeting, a note was put up to the Prime Minister of Pakistan by the Deputy Chairman of the Planning Commission, copy whereof is available with the paper book of CP.No.91 of 2011, wherein, it was observed *inter alia* as follows:

“v. The project will be executed as a pilot project in Islamabad or in any city to be identified by the Ministry of Interior. After its successful implementation, similar projects will be implemented in other important cities of the country benefiting from the lessons learnt.

x. Ideally, the work should have been done after the proper feasibility study, but in view of the urgency of security requirements, the work already carried out by the Ministry of Interior is proposed to be accepted.”

The final recommendations were made as under:

“xi. Final recommendation:

- a. Ministry of Interior may indicate their requirements in the shape of a Request for Proposal (RFP) providing details for a pro-active and effective “Security System” along with a “Surveillance” and “Traffic Management System” indicating performance requirements e.g. response times of computing equipment and resolution of cameras etc.
- b. The vendors may also be provided with design parameters along with generic specifications (e.g. the nos. of exit/entry points, the types of detectors, cameras of various types,

- vehicle RFID readers, fingerprint scanners, etc.) and the details of telecom infrastructure already available in Islamabad.
- c. All these details and the recommendations of the Technical Committee may be included in a RFP which is proposed to be handed over to the vendors for proposing an optimum solution.
 - d. Based upon the above recommendations a revised PC-1 may be prepared by the Ministry of Interior."

12. On 07.06.2010, a Summary was prepared by the Ministry of Interior for the Prime Minister of Pakistan regarding the said Project, which reads as follows:

"Prime Minister was pleased to chair two presentations regarding the above subject. Ministry of Interior's presentation dealt with "Safe City Project" and Ministry of Information & Technology explained the GOTA Project. The Prime Minister was pleased to constitute a Committee headed by Deputy Chairman Planning Commission with Secretary Ministry of IT, Secretary Finance and Secretary Interior as members, to look into the possibility of integration and rationalization of the two projects (Annex-A). Deputy Chairman, Planning Commission vide P&D Division's U.O. No.3(101) ICT/PC/2010 dated 15th April, 2010 (Copy enclosed as Annexed-B) has submitted the recommendations of the committee to the Prime Minister. In the light of the said recommendations, NADRA has improved the project proposal with proactive and effective security system alongwith a surveillance and

traffic management system based on performance requirements.

2. NADRA is of the view that the technically approved solution with aforementioned features, offered by M/s Huawei Technologies Co. China, is of propriety nature. The Company has a vast experience of installing such systems in China and a number of other countries. However, the Planning Commission Committee has advised Ministry of Interior to prepare a new PC-I and a request for proposal (RFP) which should be based on generic specifications for greater transparency.

3. NADRA as project executing agency has shown reservations on this approach. It was explained to the Committee that the Safe City Project is not merely a purchase of equipment and its assembly, it also envisages integration of various subsystems on a unified platform. NADRA is of the view that project components acquired through generic specifications would be hard to integrate and there were high chances of integration failure. It is also apprehended that preparation of new PC-I would delay the project as there was no assurance of foreign funding, particularly of Chinese concessional loan, for a new PC-I based on the generic specifications.

4. It is a recognized fact that complex security projects worldwide are mostly awarded through direct contracting. This is also permissible under PPRA Rules, 2004. Open tendering through generic specifications is preferable as long as it does not put the project itself in jeopardy. In the present case, this option may lead to technical difficulties and delays.

5. Ministry of Interior has been endeavouring to install safe city technology for the past more than three years, without success, mainly due to non availability of funds. The Chinese

assurance of availability of concessional loan for security related projects has led to the formulation of safe city Islamabad and Peshawar projects. The real cost of safe city Islamabad project expressed in Planning Commission's standard criterion i.e. Net Present Value (NPV) terms is competitive prices @ \$ 72 million, instead of the nominal amount of \$ 124.7 million. (Detailed calculations are attached) (Annex-C).

6. Central Development Working Party (CDWP) in its meeting on 19th November, 2009 had supported to arrange financing for the propriety solution proposed in the PC-I. Ministry of Interior on the recommendation of the CDWP and Finance Division was authorized by the Prime Minister to raise Chinese concessional financing. Proposals were accordingly submitted to the Chinese authorities. Ministry of Commerce, Government of China has formally recommended for inclusion of the project in the list of Pak China 5 years development program. This indicates that the load request is favourably being considered.

7. In view of the forgoing, approval of Prime Minister is solicited:

- a. To implement Safe City Islamabad and Peshawar Projects through Huawei Technology Co. Solution for which Chinese concessional financing is being arranged, and
- b. To permit direct contracting with M/s Huawei Technology Co. in terms of Rule 42 (c)(v) read with Rule 2 (g) of PPRA Rules 2004. (Annex-D).
- c. To authorize Planning Commission and Finance Division to assess price reasonability and negotiate with Huawei Technology Co.

8. Minister for Interior has seen and authorized submission of the summary."

13. Subsequently, another Summary dated 02.07.2010 was sent by the Ministry of Interior to the Prime Minister of Pakistan, which reads as follows:

"12. The committee constituted by the Prime Minister headed by Deputy Chairman Planning Commission with Secretary Ministry of IT, Secretary Finance and Secretary Interior as members reviewed the Safe City Projects and was satisfied with the technical aspects of the projects. It however recommended converting the propriety technology solution into generic specifications and awarding the project on the basis of open tender. It is apprehended that if we go for such generic tendering, the project may be indefinitely delayed.

13. Based upon the above the following submissions are made:

- (a) Security projects worldwide are mostly awarded through direct contracting. It is never advisable to publicize security project's capabilities. China wants such projects to be done in low profile.
- (b) Safe city proposal is based on Huawei Technology Co propriety solution. They are a leading company in China with proven ability. Open tendering on the basis of generic specifications and award of work to unproven multiple vendors is likely to create integration and technical problems.

- (c) M/s Huawei Technology Co. has been greatly instrumental in arranging soft loan. The soft loan request is tied to M/s Huawei Technology co proposal. The loan offer is likely to be diverted to other countries (Sri Lanka) if not availed in time.

14. There are many instances where tender waiver for acquisition of technology in sensitive areas has been granted. The case of Strategic Plans Division is cited. Tender waiver was granted for PAKSAT-IR and Pakistan Remote Sensing Satellite (PRSS) Project. Permission was accorded by the office of the Prime Minister on 19th November, 2007.

15. Safe city technology is essential to effectively combat terrorist threat. We cannot afford to delay acquisition of this capability.

16. In view of the forgoing, Ministry of Interior seeks approval for the following:

- a. Permission for direct contracting with M/s Huawei Technology Co in terms of Rule 42(c)(v) read with Rule 2(g) of PPRA Rules 2004.
- b. To authorize Planning Commission and Finance Division to assess price reasonability and negotiation with Huawei Technology Co.

17. Minister for Interior has seen and directed for submission of the summary."

14. The main thrust of the Summary appeared to be for seeking exemption from the operation and application of Public Procurement Regulatory

Authority Ordinance, 2002 (PPRA Ordinance) and the Public Procurement Rules, 2004 (PPRA Rules). The request for such exemption was endorsed by the Secretary, Ministry of Finance and granted by the Prime Minister, as is apparent from the communication issued by the Principal Secretary to the Prime Minister on 05.07.2010, however, in the context of the Summary, Ministry of Interior, dated 07.06.2010, referred to above, further discussions were called for.

15. On 17.12.2010, a Framework Agreement was executed *inter-se* the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China, whereby the Government of the People's Republic of China agreed that the Export-Import Bank of China would provide a concessional loan not exceeding Renminbi 850 million Yuan for the purpose of implementing "Safe City Islamabad Project". It is further agreed by the Chinese Government that it would pay interest subsidies for the Project Loan and the maturity period of the Loan would not exceed twenty years, including grace period

of five years. It was also perceived that a separate loan agreement would be executed *inter-se* Export-Import Bank of China and the Government of Pakistan. Consequently, on the same day i.e. 17.12.2010, a Concessional Loan Agreement was executed *inter-se* the Government of the Islamic Republic of Pakistan and the Export-Import Bank of China. The said Agreement envisaged a loan facility up to Renminbi 850 million Yuan for funding the said "Safe City Islamabad Project".

16. That in January, 2011, the Contract in question, dated 29.12.2009, was called into question, before this Court vide Constitutional Petition No.11 of 2011, filed by a citizen making allegations *inter alia* of lack of transparency and loss to the public exchequer by way of award of the said Contract. A Human Rights Application was also filed leveling similar allegations. Vide order dated 18.02.2011, this Court directed that both the Constitutional Petition No.11 of 2011 as well as the above-mentioned Human Rights Application be clubbed and heard together. The said matter was heard by this Court, notices were issued to the

respondents therein and response solicited from the Government. Eventually, after several dates of hearing, upon an application of the petitioner in Constitutional Petition No.11 of 2011, the proceedings were withdrawn, vide Order dated 02.12.2011. Whereafter, the instant CP.No.91 of 2011 was filed also on behalf of citizens through an ASC whereupon proceedings commenced. Subsequently, CP.No.57 of 2012 was filed also challenging the award and implementation of the Contract dated 29.12.2009, wherein the petitioner a citizen is appearing in person.

17. In pith and substance, it is case of the petitioners that the entire transaction has been carried out in an illegal and unlawful manner causing a huge loss to the public exchequer. It was contended that a similar project was undertaken for the City of Karachi in the year 2008-2009 at a total cost of US\$ 8 million. Furthermore, even as per the report of Planning Commission referred to in the Summary to the Prime Minister dated 07.06.2010, the net present value of the Project was @ US\$ 72 million, while the Contract has been awarded for a total amount of US\$

124.7 million. Furthermore, all Government Departments and concerned authorities other than the Ministry of Interior repeatedly indicated the cost of the project is at least three times higher than the value of the equipment being supplied. It is added that the Contract in question was executed on 29.12.2009 when the PC-I had not even been prepared.

18. It is further contended that the Contract in question dated 29.12.2009 has been executed with a Foreign Company in the name of the President of Pakistan purportedly in terms of Article 173 of the Constitution of the Islamic Republic of Pakistan, 1973 without fulfilling the necessary requirements contemplated by the Rules of Business, 1974. It is submitted that the Contract has executed without consultation with the Ministry of Finance as required by Rule 12 of the Rules of Business, 1974, and also no approval by the Ministry of Law & Justice was obtained, as required by Rule 14 of Rules, 1974.

19. It is added that the entire exercise was carried out in a nontransparent manner without soliciting any proposal or issuing any tender for the

Project in question. And in this behalf, the provisions of Public Procurement Regulatory Authority Ordinance, 2002 and the Public Procurement Rules, 2004 were violated. It is submitted that there was no legal or factual basis for exempting the transaction from the provisions of the said law. Reference to Rule 42(c)(v) of PPRA Rules, 2004, in the Summary to the Prime Minister, is wholly misconceived, firstly, as there was no Emergency as defined in Rule 2(g) of the Public Procurement Rules, 2004, and secondly, admittedly, no declaration in this behalf by the necessary authority was ever made, as required by the proviso to Rule 42(c)(v) of the said Rules. Further contended that term "Emergency" is not even mentioned in the Summary and the allied documents. The learned counsels further submitted that there was no desperate urgency in the matter as the project had been conceived at least 3½ years prior to the execution of the Contract in question as has been mentioned in the Summary of Ministry of Interior dated 07.06.2010. Furthermore, an almost identical project in the City of Karachi has been executed after

issuance of tender and following the procedure as has been laid down by the PPRA Ordinance and the Rules framed thereunder.

20. It is added that the entire exercise of the evaluation of the Project and the exemption of the PPRA Rules was *mala fide* inasmuch as the process was undertaken after the award of the Contract; that too without making any reference to the fact that the Contract in question had already been executed.

21. Mr. Raza Kazim, Sr. ASC, learned counsel for the respondent-NADRA, controverted the contentions raised on behalf of the petitioners. At the very outset, the learned counsel raised a preliminary objection as to the very maintainability of the instant Constitutional Petitions. It is the case of the said respondent that through the captioned petitions, no issue of public importance has been raised nor the enforcement of any fundamental right of the petitioners is involved. Consequently, the provisions of Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973, are not attracted. In this behalf, he further added that the petitioners are not

aggrieved persons, hence, have no *locus standi* to maintain the instant constitutional petitions.

22. On merits, it is contended by the learned counsel that the Safe City Project was conceived as a consequence of a spate of terrorists attacks carried out across the Country in general and in and around Islamabad in particular. The Capital is replete with sensitive places and buildings, which are obviously on the hit list of the terrorists and therefore the city requires special security measures. In view of the sensitive nature of the equipment, services and software required, the Countries from which the same could be procured was limited with the People's Republic of China, as the most obvious option. The details of the equipment and software could not be made public as in such an eventuality the terrorists could be enabled to adopt counter measures for evading detection. Thus, public tender soliciting bids would be a self defeating exercise. It is further added that the paucity of funds and limited available lines of credit did not help matters. And the funding for the Project was obtained from Export-Import Bank of

China through a tied loan. The learned counsel by relying upon the statutes of the said Bank contended that the line of credit was only available for purchases from a Chinese company that too after a contract in this behalf had been executed in its favour. In the above circumstances, an open bidding process was an impossibility, consequently, exemption from the PPRA Rules was not only necessary but duly obtained from the competent authority in the best interest of the country. It is added that even after the execution of the Contract in question, the price was renegotiated and reduced. The suitability of the equipment and its value has been thoroughly examined at every level by the various officers of all the Departments concerned and found to be both appropriate and cost effective. It is added that the petitioners have failed to bring on record any material that similar equipment and software was available at a lesser price. The learned counsel strongly contested the comparison with the system installed at Karachi, as it was his case that the equipment and software to be procured through the Contract in question is far superior, more elaborate

and sophisticated. It is added that an amount of over US\$ 68 million has already been drawn by respondent-M/s Hauwei Technology Company Limited in terms of the Contract from the Export-Import Bank of China and if the Contract in question is struck down, and the transaction reversed, as is prayed for by the petitioners, a huge loss would be occasioned to the Government of Pakistan and the public exchequer.

23. The Attorney General appearing on behalf of the Federation of Pakistan has also controverted the contentions raised on behalf of the petitioners. He has, however, not disputed the jurisdiction of this Court nor supported the preliminary objection *qua* the maintainability of the petition raised on behalf of respondent-NADRA. He has, however, contended that the exemption from the PPRA Rules was rightly granted by the competent authority but unfortunately, the wrong provision of the law was quoted. In fact the matter is covered by Rule 42(c)(ii) of the Public Procurement Rules, 2004. It is added that the best possible equipment and software at the best possible price has been obtained in a transparent manner and

this Court should not interfere therewith. It is further submitted that the transaction and Contract was critically examined by the various concerned departments of the Government and found to be in order. So much so the Contract was also sent to National Accountability Bureau (NAB) for its input in terms of Section 33 of the NAB Ordinance. And prays that the petitions be dismissed. In support of his contentions, learned Attorney General relied upon the judgment reported as Messrs Ittehad Cargo Service and 2 others v. Messrs Syed Tasneem Hussain Naqvi and others (PLD 2001 SC 116).

24. The learned counsel for respondent-M/s Hauwei Technology Company Limited has also vehemently controverted the contentions of the petitioners. It is his case that the instant petitions are *mala fide* and have been filed on the instigation of competitors of respondent-Hauwei Technology Company Limited. It is added that the said respondent was instrumental in facilitating the financing for the project through a concessional loan from Export-Import Bank of China. The said financial

facility was project specific, hence, Rule 5 of the PPRA Rules was attracted, therefore, procurement through an open bidding process was neither permissible nor possible. The only course of action available for the consummation of the transaction was through direct contracting as has happened in the instant case.

25. The learned counsel has further contended that the best equipment and software at the most competitive price is being made available. And in view of the long term concessional loan facility, the cost of the project in real terms is even lower and it is this fact, which has been alluded to, while referring to the net present value of the Project. It is further contended that the implementation of the Contract is at an advanced stage with an amount of over US\$ 68 million having already been drawn from Export-Import Bank by respondent-Hauwei Technology Company Limited and disbursed to third parties, therefore, rescission of the Contract at this stage would cause grave inconvenience resulting in multiplicity of legal proceedings involving not only the respondents but also third parties.

In support of his contentions, Mr. Afnan Karim Kundi, learned counsel for respondent-M/s Hauwei Technology Company has placed reliance on the judgment reported as Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 SCMR 455).

26. In rebuttal the counsel for the petitioner in CP.No.91 of 2011 and the petitioner in CP.No.57 of 2012 have submitted that the instant petitions have been filed by way of Public Interest Litigation by citizens of Pakistan. The matter involves public funds, which are in the process of being wasted so as to benefit a selected few at the expense of the public at large in a nontransparent and illegal manner. In such eventuality, it is contended, this Court is vested with the jurisdiction to entertain and adjudicate upon petitions under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973, as has been consistently and repeatedly held by this Court. Furthermore, it is contended, that the PPRA Rules were squarely applicable and exemption therefrom has been obtained for extraneous reasons in a *mala*

fide manner and violation of the said Rules is fatal for the Contract in question, which in law, is liable to be struck down and the transaction reversed. It is added that the payments allegedly drawn by respondent-Hauwei Technology Company Limited from the Export-Import Bank of China is or at least should have been secured by a bank guarantee made available by the said respondent-Hauwei Technology Company Limited in terms of the Contract, therefore, nullifying the transaction would not result in any loss to the public exchequer.

27. Mr. Ather Minallah, learned ASC for the petitioner in CP.No.91 of 2011, in support of his contentions, placed reliance on the cases as: (1) Federation of Pakistan, etc. v. Province of Baluchistan, etc. (PLD 1975 SC 66), (2) The Chairman, District Screening Committee, Lahore and another v. Sharif Ahmad Hashmi (PLD 1976 SC 258), (3) Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others (PLD 1996 SC 632), (4) Watan Party through Punjab President Ladies Wing Tasneem Shaukat Khan v. Chief

Executive/President of Pakistan and another (PLD 2003 SC 74), (5) Mian Muhammad Shahbaz Sharif v. Federation of Pakistan through Secretary, Ministry of Interior, Government of Pakistan, Islamabad and others (PLD 2004 SC 583), (6) All Pakistan Newspapers Society and others v. Federation of Pakistan and others (PLD 2004 SC 600), (7) Watan Party through President v. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others (PLD 2006 SC 697), (8) Jamat-e-Islami through Amir and others v. Federation of Pakistan and others (PLD 2008 SC 30), (9) Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61*), (10) Suo Motu Case No.5 of 2010, action regarding huge loss to public exchequer by ignoring lowest bid of Fauji Foundation and Multinational Energy from Vitol by awarding LNG Contract (PLD 2010 SC 731), (11) Human Rights Cases Nos.4668 of 2006, 1111 of 2007 and 15283-G of 2010, action taken on news clippings regarding Fast Food outlet in F-9 Park Islamabad (PLD 2010 SC

759), (12) Bank of Punjab and another v. Haris Steel Industries (Pvt) Ltd. and others (PLD 2010 SC 1109), (13) Suo Motu Case No.13 of 2009, action on press clipping from the Daily "Patriot", Islamabad dated 4-7-2009 regarding Joint Venture Agreement between CDA and Multi-Professional Cooperative Housing Society (MPCHS) for development of land in Sector E-11 Islamabad (PLD 2011 SC 619), (14) Corruption in Hajj arrangements in 2010, in the matter of Suo Motu Case No.24 of 2010 and Human Rights Cases (PLD 2011 SC 963), (15) Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others (PLD 2012 SC 132), (16) Syed Zulfiqar Mehdi and others v. Pakistan International Airlines Corporation through M.D., Karachi and others (1998 SCMR 793), (17) Non-Transparent Procedure of Purchase of 150 Locomotives by Ministry of Railways Resultantly Causing 40 Billion Losses to the National Exchequer, Suo Motu Case No.7 of 2011 (2012 SCMR 226), (18) Alleged Corruption in Rental Power Plants etc, Human Rights Case (2012 SCMR

773), and (19) Kedar Nath Motani and others v. Prahlad Rai and others (AIR 1960 SC 213).

28. Mr. Babar Sattar, Advocate-petitioner-in-person in support of his arguments placed reliance on the cases of (1) Aman Ullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others (PLD 1990 SC 1092), (2) Moulvi Iqbal Haider v. Capital Development Authority and others (PLD 2006 SC 394), (3) Suo Motu Case No.5 of 2010, action regarding huge loss to public exchequer by ignoring lowest bid of Fauji Foundation and Multinational Energy from Vitol by awarding LNG Contract (PLD 2010 SC 731), (4) Human Rights Cases regarding action taken on news clippings regarding Fast Food outlet in F-9 Park Islamabad (PLD 2010 SC 759), (5) PAKCOM Limited and others v. Federation of Pakistan and others (PLD 2011 SC 44), (6) Suo Motu Case No.13 of 2009, action on press clipping from the Daily "Patriot", Islamabad dated 4-7-2009 regarding Joint Venture Agreement between CDA and Multi-Professional Cooperative Housing Society (MPCHS) for

development of land in Sector E-11 Islamabad (PLD 2011 SC 619), (7) Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others (PLD 2012 SC 132), (8) Alleged Corruption in Rental Power Plants etc, Human Rights Cases (2012 SCMR 773), (9) Ramana Dayaram Shetty v. The International Airport Authority of India and others (AIR 1979 SC 1628), (10) Ajay Hasia etc v. Khalid Mujib Sehravardi and others (AIR 1981 SC 487), (11) Tariq Aziz-ud-Din and others, in Human Rights Cases [2011 PLC (CS) 1130], (12) Reliance Energy Ltd. and another v. Maharashtra State Road Development Corpn. Ltd. and others [(2007) 8 SCC 1].

29. Adverting first to the preliminary objection raised by the learned counsel for the respondent-NADRA as to the maintainability of the petitions under Article 184(3) of the Constitution as in his view no issue regarding enforcement of the fundamental rights of the petitioners is involved nor any question of public importance has been raised.

30. With the passage of time, the scope of jurisdiction of this Court under Article 184(3) of the

Constitution has steadily evolved and expanded with its contours now well established through the successive judgments handed down by this Court. It has been declared that such jurisdiction is not a closed shop limited to adversarial proceedings to be initiated by a wronged litigant seeking redressal of his individual grievance. The rule of *locus standi* has gradually been relaxed so as to include enforcement of the Constitutional rights of groups or class of persons, and public at large especially in the domain of Public Interest Litigation to ensure a meaningful protection of the Rule of Law to all citizens, as has been laid down in judgments reported as Miss Benazir Bhutto v. Federation of Pakistan and another (PLD 1988 SC 416), Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473), Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 SCMR 455) and Muhammad Yaseen v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others (PLD 2012 SC 132)].

31. Public funds, public property, licenses, jobs or any other government largesse is to be dealt with by public functionaries on behalf of and for the benefit of the people. Public authority must necessarily be examined in accordance with law keeping in view the Constitutional Rights of the citizens. Thus, this Court has not hesitated in the exercise of its jurisdiction of judicial review conferred by Article 184(3) of the Constitution to scrutinize matters where public money is being expended through procurement or public property is being sold, so as to ensure that transactions are undertaken and contracts executed in a transparent manner, legally, fairly and justly without any arbitrariness or irrationality. In this behalf, this Court in a judgment reported as Suo Motu Case No.13 of 2009 (PLD 2011 SC 619), held as follows:

“24. It is well-settled that in matters in which the Government bodies exercise their contractual powers, the principle of judicial review cannot be denied. However, in such matters, judicial review is intended to prevent arbitrariness or favouritism and it must be exercised in larger public interest. It has also been held by the Courts that in matters of judicial review

the basic test is to see whether there is any infirmity in the decision making process. It is also a well-settled principle of law that since the power of judicial review is not an appeal from the decision, the Court cannot substitute its decision for that of the decision maker. The interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by mala fides. ..."

32. It was further held as follows:

"... The Governmental bodies are invested with powers to dispense and regulate special services by means of leases, licences, contracts, quotas, etc., where they are expected to act fairly, justly and in a transparent manner and such powers cannot be exercised in an arbitrary or irrational manner. Transparency lies at the heart of every transaction entered into by, or on behalf of, a public body. To ensure transparency and fairness in contracts, inviting of open bids is a prerequisite. The reservations or restrictions, if any, in that behalf should not be arbitrary and must be justifiable on the basis of some policy or valid principles, which by themselves are reasonable and not discriminatory."

33. This jurisdiction has been exercised consistently and repeatedly by this Court to scrutinize transactions undertaken by the Government so as to ensure that public money and public property is not squandered or stolen. Reference in this regard may be

made to Suo Motu Case, action regarding huge loss to public exchequer by ignoring lowest bid of Fauji Foundation and Multinational Energy from Vitol by awarding LNG Contract (PLD 2010 SC 731), Human Rights Cases, action taken on news clippings regarding Fast Food outlet in F-9 Park Islamabad (PLD 2010 SC 759), Non-Transparent Procedure of Purchase of 150 Locomotives by Ministry of Railways Resultantly Causing 40 Billion Losses to the National Exchequer, Suo Motu Case (2012 SCMR 226), Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 SCMR 455), and Alleged Corruption in Rental Power Plants etc, Human Rights Case (2012 SCMR 773).

34. In the above circumstances, the objection raised by the counsel for the respondent-NADRA regarding the maintainability of the instant petitions is misconceived and overruled.

35. The matter at hand pertains to the procurement of goods and services, in the public sector, by way of the Contract in question, by the Ministry of Interior, for a rather large sum of money,

to be paid by the public exchequer. In order to ensure transparency and accountability, the Public Procurement Regulatory Authority Ordinance, 2002, have been promulgated whereunder the Public Procurement Rules, 2004, have been made, which are admittedly applicable to the transaction in question. Rule 3 specifically provides that the same are applicable to procurements by all procuring agencies of the Federal Government made whether within or outside Pakistan. Thus, obviously, the rules apply to Contracts for the procurement of good and services from outside the country, as is proposed to be done through Contract in issue. The method of procurement has been spelt out in great detail including through the issuance of public advertisement and envisaging an open bidding process. It is an admitted fact that such procedure of an open bidding was not employed by invoking the exemption therefrom in terms of Rule 42(c)(v) *ibid*. A summary in this behalf mentioning the aforesaid provision was submitted by the Ministry of Interior and reportedly approved by the Prime Minister. It is

the case of the petitioners that Rule 42(c)(v) *ibid* was inapplicable to the facts of the case, hence, the exemption granted is illegal.

36. Rule 42(c)(v) of the Public Procurement Rules, 2004, reads as follows:

"42(c):- **Alternative methods of procurements.** - A procuring agency may utilize the following alternative methods of procurement of goods, services and works, namely:- ..."

"(v) in case of an emergency :

Provided that the procuring agencies shall specify appropriate fora vested with necessary authority to declare an emergency."

37. The word "emergency" has been defined in Rule 2 (1)(g) of the Rules, 2004, which is as under:

"2(1)(g):- "emergency" means natural calamities, disasters, accidents, war and operational emergency which may give rise to abnormal situation requiring prompt and immediate action to limit or avoid damage to person, property or the environment."

38. The summary in question dated 02.07.2010 as well as the communications, minutes of meetings, preceding the same and the approval that followed has been examined. No reference whatsoever has been made to any natural calamity, disaster, accident, war

or operational emergency whatsoever. It has also been noticed that the procuring agency i.e. Ministry of Interior did not specify the appropriate *fora* vested with the necessary authority to declare emergency nor it is the case of the respondents that any such declaration has been made. Incidentally the word "emergency" is conspicuous by its absence in the said summary and the other allied documents. In fact, it has been specifically mentioned that the project had been conceived about 3 and half years ago, thereby excluding the possibility of an emergent situation. Thus, by no stretch of the imagination were the provisions of Rule 42(c)(v) *ibid* attracted to the facts and circumstances of the case. It has also been noticed that the Contract in question had already been executed on the 29th of December, 2009, while the summary in question is dated 2nd of July, 2010 i.e. after the event, without even mentioning the aforesaid fact. The entire exercise appears to be farcical. It is a classic case of pleading the law to defeat the law. In fact the invoking of Rule 42(c)(v) *ibid* was so divorced from reality that the learned Attorney

General and learned counsels for the respondents found themselves unable to defend the same and attempted to seek refuge under various other provisions of the PPRA Ordinance, 2002, and PPRA Rules, 2004, thereby tacitly conceding that the exemption has been granted for extraneous reasons as no other provision of the law finds mention in the summary and allied documents or the approval.

39. The learned Attorney General has referred to Rule 42(c)(ii) of Public Procurement Rules, 2004, which reads as follows:

“42(c)(ii):- only one manufacturer or supplier exists for the required procurement :

Provided that the procuring agencies shall specify the appropriate fora, which may authorize procurement of proprietary object after due diligence.”

There is nothing on the record to indicate that M/s Hauwei Technology Company Limited has a worldwide monopoly of the surveillance equipment and software, subject-matter of the Contract in dispute. In fact, it is not even the case of the respondent-M/s Hauwei Technology Company Limited that they have any such monopoly or exclusivity. In fact, it has been indicated

to us that various other Chinese companies were in a position to offer similar goods and services. The entire market, both national and international, was never taped. There is also no reference to such exclusivity or monopoly in the context of the requirement of NADRA/Ministry of Interior or mentioned in the summary nor such assertion have been made by the learned counsel for the respondent-NADRA before us.

40. The learned counsel for the respondents NADRA and M/s Hauwei Technology Company Limited variously contended that the equipment and the software subject matter of the Contract in issue pertains to matters of internal security, therefore, public advertisement was not possible or permissible in view of Rule 14(a) of the PPRA Rules, 2004. And the financing for the project was to be provided through a tied concessional loan by the Export-Import Bank of China, which was project specific, hence, the Rules were not applicable in view of Rule 5 of the PPRA Rules, 2004, which state that in case of International Contract the same shall prevail in case of any conflict with the Rules.

41. The contentions of the learned counsel do not appear to be well-founded, firstly, it was never the case of the sponsoring agency i.e. Ministry of Interior that exemption may be granted from the Rules in question in view of the provisions of Rule 5 or 14 of the PPRA Rules, 2004, which find no mention in the summary dated 2nd of July, 2010 or any allied document or the eventual approval. There was admittedly no conscious application of mind at the time of the grant of the approval by the Prime Minister that Rule 5 or 14 *ibid* or both were applicable to the transaction in question.

42. This Court is not insensitive to the fact that we live in difficult times, when compulsions of State Security may require to be taken into account. It is to safeguard the said compelling interest of the State that Rule 14(a) of the Public Procurement Rules, 2004 has been framed, which reads as under:-

14. **Exceptions.**- It shall be mandatory for all procuring agencies to advertise all procurement requirements exceeding [prescribed financial limit which is applicable under sub-clause (i) of clause (b) of rule 42]. However under following circumstances deviation from the requirement is permissible with the prior approval of the Authority,-

- (a) the proposed procurement is related to national security and its publication could jeopardize national security objectives;

43. An analysis of the aforesaid Rule reveals that it commences with a declaration that it is mandatory to advertise all procurement requirements exceeding a specified amount, whereafter an exception has been created permitting a deviation. It has been noted that the said Rule does not perceive of an exemption from the Rules and the necessity of public advertisement but only a deviation. Like all exceptions, it must be construed strictly keeping in view the proportionality of the requirement for such deviation.

44. It has also been noticed that the Government of the Province of Sindh undertook a project of the surveillance system through an open bidding process. Requests For Proposals (RFPs) for such surveillance system for project for various cities are regularly posted on the internet soliciting interested parties to submit their proposals. Such Request for Proposals in respect of City of Mumbai, City of Oakland - USA, City of Chattanooga - USA, City of Minneapolis - USA and

St. Louis - USA have been placed on the record by the petitioner in CP.No.57 of 2012. The learned counsel for the respondents have been unable to persuade us that it was impossible to ensure transparency and competitiveness through an open bidding process by inviting proposals publicly as was done in the case of Karachi and as is the common practice followed internationally as is evident from the Requests For Proposals solicited by various cities in India and the United States of America referred to by the petitioner. A public advertisement could have been tailored so as not to compromise security consideration.

45. Rule 14 of the PPRA Rules, 2004, also requires that such deviation is permissible only with the prior approval of the Authority i.e. the Authority constituted under Section 3 of the Public Procurement Regulatory Authority Ordinance, 2002. In the instant case, no such approval later or prior was ever obtained from the Authority with regards to the Contract in question. Needless to say that grant of such approval by the Authority would obviously be justiceable. Similarly, the mere raising of a specter of Internal

Security would not curtail the jurisdiction of this Court to insist on the implementation of the PPRA Rules, 2004, as an assertion in this behalf is always subject to judicial review.

46. Similarly, reference to Rule 5 of the PPRA Rules, 2004, also does not appear to be relevant. An attempt has been made by the learned counsel for the respondents to show that the Contract in dispute comes within the purview of Rule 5 *ibid* as it is an "international" Contract in between the Government of Pakistan and a Chinese Company. Rule 5 *ibid* reads as follows:

"5. International and inter-governmental commitments of the Federal Government.- Whenever these rules are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State or States, or any international financial institution the provisions of such international treaty or agreement shall prevail to the extent of such conflict."

47. The examination of the aforesaid Rule *in juxtaposition* with Rule 4 of the PPRA Ordinance, 2002, makes it clear and obvious that the same does not apply to a Contract entered into by the

Government of Pakistan and the manufacturer or provider of goods and services based outside the country as Rule 4 *ibid* clearly provides that the said rules apply to all procurement by the Federal Government whether from within or outside Pakistan. Furthermore, on the date of the execution of the Contract in dispute i.e. 29th of December, 2009, no other agreement was in the field.

48. The Loan Agreement dated 17.12.2010 also does not attract Rule 5 *ibid* as the Export-Import Bank of China is not an international financial institution. The latter term has not been defined in the Rules of 2004 or the Ordinance, 2002 whereunder the same were framed and therefore must be given its ordinary meaning as used in common parlance. The term refers to an International Organization and not a commercial bank based abroad. Reference is perhaps being made to the World Bank, the Asian Development Bank, International Monetary Fund and International Finance Corporation, etc.

49. The only agreement that too executed after the event to which Rule 5 of the PPRA Rules, 2004,

may apply is the Framework Agreement dated 17.12.2010 executed *inter-se* the Government of Pakistan and the Government of the People's Republic of China. A scrutiny of the said Framework Agreement reveals that there is no obligation or commitment cast upon the Government of Pakistan pertaining to procurement from the proceeds of the concessional loans to be granted. There is nothing inconsistent in the said Framework Agreement with Rule 5 *ibid* so as to prohibit issuance of a public advertisement inviting bids for the project in hand. In fact, there is no reference in the said Framework Agreement to the respondent-M/s Hauwei Technology Company Limited or the Contract dated 29th of December, 2009.

50. Even otherwise, it has not been disputed by the learned counsels for the respondents that the concessional loan facility would have been made available to any other Chinese company and was not specific to the respondent-M/s Hauwei Technology Company Limited.

51. There is yet another aspect of the matter. The Contract in question was executed without any

feasibility study as is obvious from the Report dated 26.03.2010 of the Technical Sub-Committee, whereby in paragraph (iv) thereof it has been stated that the work should have been done after a proper feasibility study.

52. It has also been mentioned in the minutes of the meeting of the above-said Technical Sub-Committee dated 26.03.2010 that the cost of the equipment is almost three times the cost of the comparable equipment available in the market. Similarly, the cost of the software quoted was also higher in the same range of 1:3. The said Sub-Committee estimated the cost of the project to be US\$ 78 million. Thus, the cost of the project appears to be at least suspicious if not inflated especially in the absence of any due diligence conducted by the Ministry of Interior or any other Government Department so as to ascertain the competitiveness of the offer qua the cost of the equipment and software in the open market. No material has been made available by the respondents in this behalf to this Court, even during the course of the proceedings.

53. The constant refrain of the Planning Commission and the Ministry of Information Technology that Request For Proposal (RFP) be issued and bidding be effected at least *inter-se* Chinese companies, which finds mentioned in the documents, was ignored and eventually silenced. Thus, not only the Contract dated 29.12.2009 was entered into in violation of the law in a nontransparent manner but was also at a cost which to say the least is suspicious if not vastly inflated.

54. The learned counsel for the respondents as well as the Attorney General for Pakistan have laid great emphasis on the fact that allegedly a sum of over US\$ 68 million has already been disbursed and interference by this Court may have serious pecuniary consequences for the Government and also result in exposure to multiple litigation. We are afraid, if the contentions of the learned counsels are accepted, we would open the door to illegalities, arbitrariness and the squandering of public wealth. Public functionaries merely by making a large upfront payment on the execution of an agreement would present this Court

with a *fait accompli* perpetuating an illegality which cannot be countenanced.

55. The upshot of the above discussion is that the Contract dated 29.12.2009 is illegal and invalid having been executed in violation of the mandatory provisions of the Public Procurement Rules, 2004, as the exemption therefrom purportedly granted under Rule 42 (c)(v) *ibid* was based on extraneous and irrelevant reasons and therefore of no legal effect or consequence. The entire transaction was carried out in a nontransparent manner and for a cost which appears to be inflated. Consequently, the respondent-Government is directed to reinitiate the process for the procurement of the required equipment, software and services in a fair, just, rational and transparent manner, strictly in accordance with the provisions of the Public Procurement Regulatory Authority Ordinance, 2002 and the Public Procurement Rules, 2004 and the law. Needless to say that the respondent-Company would be at liberty to participate in such *de novo* process of procurement.

The respondent-Government shall also take all necessary steps permitted by law to safeguard and protect itself from any liability under the Contract dated 29.12.2009.

56. Constitutional Petitions No.91 of 2011 and 57 of 2012 are allowed in the above terms. Consequently, the CMA No.2624 of 2011 is disposed of accordingly.

57. Let a copy of this judgment be sent to the Chairman, National Accountability Bureau, who shall ensure that appropriate proceedings are initiated in accordance with law.

Judge

Judge

Judge

Islamabad,
Announced on the _____ day of August, 2012.

'Approved for Reporting'

Mahtab

Judge