



The Federal Supreme Court (FSC) has been convened on 9.10.2018, headed by the Judge Madhat Al-Mahmood and the membership of Judges Farouk Mohammed Al-Sami, Jaafar Nasir Hussein, Akram Taha Mohammed, Mohammed Saib Al-Nagshabandi, Michael Shamshon Qas Georges, Hussein Abbas Abu Al-Temmen, Mohammed Rajab Al-Kubaise and Mohammed gassem Al-Janabi who are authorized in the name of the people to judge and they made the following decision:

The Plaintiff: The deputy director for Dhiyfath Al-Iraq company for food and food's substances and public transport (alif,jim,kaf) / being in his capacity his agent the lawyer (ha,kha,ha).

The Defendant: Minister of planning / being in his capacity his agent legal officer (ain,zin,ain).

The Claim:

The plaintiff's agent claimed that the ministry of planning issued the instructions No.(2) for the year (2014) which specialized in the regulations No.(1) (instructions of tenders providers), it came in the clause (1<sup>st</sup>-jim) (the request from tenders providers to attach list of similar businesses with their tenders which concern the nature of competition supported by agreement from contracting parties which consider as standard for qualification) , then the ministry of planning issued an appendix for regulations No.(12) which competence regulations and qualification standards and adjudication for public government tenders for businesses and supplying contracts which stipulated (jim- similar and finished businesses when it requested from tenders providers and according to the issued contract importance...). Then the ministry of planning informed the general company for cereal trading by its letter (814/714) on 23/05/2017 (for the final counting and similar businesses financial efficiencies). Then the ministry of planning issued a generalization for the appendix of its regulations No.(18256/714) on 29/08/2017 it directed in accordance with it that the similar businesses requests should be discretionary because the ministries consider it as the condition to the similar businesses , the plaintiff's agent claimed that the mentioned instructions violated the

Constitution from where the equivalence in work opportunities, so he initiated challenged by its Unconstitutional and annulled it for the following reasons :

1) Considering the similar businesses is one of the qualification standards better than consider it as a condition to enter the bids, because it gives bigger opportunities to enter of many companies.

2) The similar businesses considered according to the regulations No.(12) from the conditions of enter the bid and Not from qualification conditions.

3) the Ministry of planning considered in its generalization No.(18256/714) on 29/8/2017 that the similar businesses is discretionary order in the small businesses and it doesn't achieve the justice because most of the ministries consider it as essential condition to enter the bid, although that the transport charging and discharging businesses doesn't includes technique.

4)the ministry of planning issued in its instructions No.(2) for (2014) the regulations No.(3) for tasks of opening and analyzing tenders committees which stipulated (2<sup>nd</sup>) (5) to exclude the tenders which amounts are more or less than (20%) and more than the estimated cost which allocated for referral, and this observance considered as wasting for public fund because many of company owners ready to provide any real estate guarantee to protect the rights of the other parties and to get down about (20%) increases of the competition between the companies.

5) the mentioned regulations violates the principle of equality between people, and it leads to devoting the dominance of some persons and certain companies.

6)this matter also violates the Constitution and the article (22) of it, the plaintiff's agent requested to call upon the defendant to the argument, and to annul the clause (3<sup>rd</sup>-2-jim) from the regulations (12) and to annulled the clause (dal) from the generalization No.(18256/714) and to annulled the clause (5 from 2th) from the regulations No.(3) and to keep the clause (1<sup>st</sup>-jim) from the regulations No.(1) and the defendant –being in this capacity has been Notified by the petition and its documents. He answered it according to his draft dated on (31/7/2018), and he listed in it that what mentioned in the regulations No.(12) is a standard for comparison and evaluation between tenders providers is an order that the standards documents confirmed it for the implementation of the government contracts and approved under the directives of the ministry involuntary from 1/7/2016, for the announcement No.(4/7/18256) , so the claim is rejected because considering the similar businesses standard as discretionary order may be requested or Not, it is a validity Not related to the ministry because it is discretionary power for contracting office. In the large projects, the contractor request for similar businesses is essential condition for comparison. And it's possible for the company which doesn't has any similar businesses to get in union with other companies. As for accepting the tenders if

it were more or less than (20%) and more than the estimated cost, because that's came after studying the circumstance of the case, and it's considered a clear evidence for the Non-seriousness of the tenderer or there is No real desire to carry out the work. these instructions characterized with sobriety and seriousness after being discussed with a number of ministries, and he requested to reject the case. also the defendant presented a warrant with Notifying letter, listed in it as much as it related by competitive criteria subject as condition to introduce the bid, so the regulations set the criteria for the competition between tenders providers and Not to enter the bid and in case of violate it from the contract office and eliminate the company from the analysis, it can complain this decision according to the article (7/1<sup>st</sup>) from the instructions of implementation of the government public contracts No.(2) for year 2014. The day of argument set on 9/10/2018 and both agents of the parties attended, the plaintiff's agent repeated the case's petition and requested to judge according to what listed in it, and presented an answering draft summarized it in the argument. The defendant's agent answered that he answered the claim subject, also what he presented today in the session is Not related to the claim subject. Whereas Nothing left to be said, the argument has been made clear, and the court issued the following decision

#### The Decision:

During scrutiny and deliberation by the (FSC), the Court found that the plaintiff challenges the regulations No.(1) because of Unconstitutionality which specializes in the instructions of tenders providers for the bids which announced by official parties and the regulations (12) which specializes in the qualification and adjudication standards for the government tenders and the instructions which regulations had been issued according to it. He requested to annul the clause (3<sup>rd</sup>-2-jim) from the regulations No. (12) And to annul the clause (dal) from the generalization No.(18256/714) dated on 2017/8/29 and to annul the clause (2th/ha) from these regulations No.(3) and to keep the clause (1<sup>st</sup>/jim) from these regulations No.(1). whereas the ministry of the planning clarified by its internal warrants No.(1196) on 2/9/2018 that the regulations had set the mentioned standards for competition between the tenders providers and Not for entering the bid, therefore in case of violation of the contract office for this matter, and excluded a company from analyzing, the company can complain this decision according to the article (7/1<sup>st</sup>) from the instructions of the implementation of government public contracts No. (2) For year 2014 which published in the Iraqi gazette No. (4325) on 16/6/2014 which formalized a method for the objection presented by tenders providers against the referral decision. The objection shall be tried by a central committee which reports its recommendations to the Head of the office which signed the contract with the tender providers who takes decision in theses recommendations. the

FSC finds the decision of the contract office Head of rejecting the recommendation clearly or by judgment considered as administrative decisions which the law formalize a way to challenge it, besides, the challenge is about Unconstitutionality of this decision. Aforementioned challenged regulations considered technical administrative options, and the law determined a method to challenge it, and Not to be challenged before the (FSC). Therefore, the Court decided to reject the plaintiff's case for the above-mentioned reasons and to burden him the expenses and the advocacy fees for the agent of the defendant amount of one hundred thousand Iraqi dinars. The decision has been issued decisively and unanimously according to the article (94) of the Constitution on 9/10/2018.