

No. Per(AP-B)B(19)-6/2010-Vol.I
Government of Himachal Pradesh
Department of Personnel
Appointment-II

Dated Shimla-171002, 26th October, 2017

From

Chief Secretary to the
Government of Himachal Pradesh

To

1. All the Administrative Secretaries to the Government of Himachal Pradesh
2. All the Managing Directors/Secretaries/Registrars of Boards/Corporations/Autonomous Bodies/ Government Universities in Himachal Pradesh
3. All Heads of Departments in HP
4. All the Divisional Commissioners in HP
5. All the Deputy Commissioners in HP

Subject:

To sensitize/educate the officers/authorities with regard to procedure/approach required to be followed and adopted in the tender matters (CWP No. 910/2017-RSR Private Limited Versus State of HP & ors.)

Sir,

In addressing you on the subject cited above, I am directed to say that Hon'ble High Court of Himachal Pradesh, while expressing its displeasure over the practice adopted by the respondents-Authorities while dealing with the tender in the question, has directed to issue necessary instructions to all the concerned to follow and adopt the procedure/approach in the tender matters (copy of judgment dated 13-09-2017 delivered by the Hon'ble High court is enclosed).

2. It is accordingly advised that all the officers/authorities dealing with the tender matters may be sensitized/educated at the appropriate level with regard to the procedure/approach required to be followed and adopted in such matters keeping in view the guidelines/instructions issued by the Government from time to time.

3. The above advisory instructions of the Government may be brought to the notice of all concerned and should also scrupulously be followed in letter and spirit by all. In case any deviation




...2/-

is noticed or brought to the notice of the concerned Department/Government, an appropriate disciplinary action shall follow against the defaulter(s).

4. These instructions can also be seen on the departmental website i.e. www.himachal.nic.in/personnel.

5. Please acknowledge the receipt.

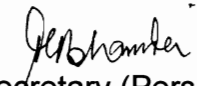
Yours faithfully,


(O.P. Bhandari)
Deputy Secretary (Personnel) to the
Government of Himachal Pradesh
Tel. No. 0177-2626097

Endst.No.Per(AP-B)B(19)-6/2010-Vol.I Dated Shimla-171002, the 26-10-2017

A copy is forwarded to the following for information and necessary action:

1. The Section Officer (Judicial), High Court of Himachal Pradesh, Shimla-1 w.r.t. letter No.HHC/Jud/CWP 910/2017-A-31214 dated 18th September, 2017.
2. Sh. Romesh Verma, Ld. Additional Advocate General, Himachal Pradesh, Shimla with the request to apprise the Hon'ble High Court of HP accordingly on next date of hearing.


Deputy Secretary (Personnel) to the
Government of Himachal Pradesh

**IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA**

**CWP No.910 of 2017
Judgment Reserved on: 30.08.2017
Date of decision: 13.09.2017**

RSR Private Limited

....Petitioner

Versus

State of H.P. & Others

....Respondents

Coram

**The Hon'ble Mr.Justice Sanjay Karol, Acting Chief Justice.
The Hon'ble Mr.Justice Sandeep Sharma, Judge.**

Whether approved for reporting ¹ yes.

For the Petitioner:

**Mr.Sanjeev Bhushan, Senior Advocate
with Mr.Rajesh Kumar, Advocate.**

For Respondent No.1:

**Mr.Romesh Verma, Additional
Advocate General with Mr.J.K.
Verma and Mr.Kush Sharma,
Deputy Advocate Generals.**

For Respondent Nos.2 & 3: Mr.Onkar Jairath, Advocate.

Sandeep Sharma,J.

Facts, as emerged from the record, are that the Himachal Pradesh Agro Industries Limited, invited tenders for the purchase of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) for the Department of Horticulture, Agriculture etc., Himachal Pradesh for the year 2017-2018 by advertising Notice Inviting Tender (for short 'NIT') in Hindustan Times (Delhi Edition) on 2nd February, 2017. Pursuant to aforesaid NIT, petitioner, who claimed itself to be authorized

¹ *Whether the reporters of Local Papers may be allowed to see the judgement?*

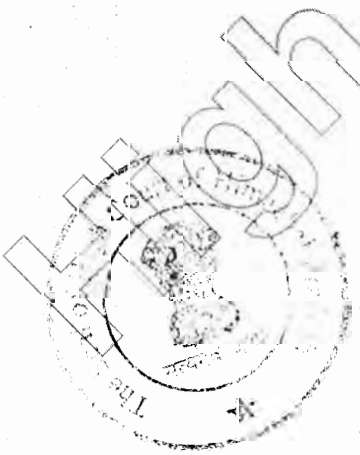
manufacturer of the Plant Protection Equipments, qua which tenders were issued/invited, submitted tender document (Annexure P-2). As per terms and conditions contained in tender form (Annexure P-3), tender was to be opened on 23rd February, 2017 at 3.30 P.M.

2. As per averments contained in the petition as well as record perused by this Court, tenders submitted by the petitioner as well as other tenderers were opened on the same day and thereafter rates were read-over and announced loudly by one of the Member of the Tenders Opening Committee (*for short 'TOC'*). As per petitioner, its tender was found to be lowest amongst other nine bidders and as such he was legitimately expecting that rate contract in terms of Tender Notice would be awarded to it on or before 31st March, 2017, since, till that date, there was already rate contract in operation. As per petitioner, on 23rd February, 2017, simultaneously other tenders pertaining to altogether different works were also processed and opened by the same 'TOC', who after opening the same out rightly rejected one tender for want of earnest money, whereas, in the case of present tender, all tenders were found in order and proper and as such after conclusion of meeting, 'TOC' apprised the petitioner that he would be awarded tender/rate contract with respect to the present tender on or before expiry of previous tenders i.e. 31st March, 2017. Petitioner has further alleged that respondents despite awarding work to it, being lowest tenderer, decided to convene a meeting of



Technical Scrutiny Sub Committee (*for short* 'TSSC'), having four members including one person, who was also a Member of TOC' i.e. respondent No.3. As per petitioner, 'TSSC' was otherwise required to call the present petitioner for negotiation and thereafter award the rate contract, but, Committee, referred above, without associating the petitioner, who was the lowest tenderer, convened the meeting. However, fact remains that the Committee, as referred above, did not take any decision with regard to awarding of work to the petitioner-firm, as a result of which it was compelled to file various representations vide Annexures P-4 to P-8. Since no action, if any, was taken by the Authorities concerned, pursuant to aforesaid representations sent by the petitioner, petitioner vide Annexure P-9 got legal notice served upon the respondents calling upon them to award work to it being the lowest bidder. In the aforesaid background, petitioner alleging malafide or inaction on the part of respondents in not awarding it work despite its being lowest bidder, approached this Court by way of instant petition on 2nd May, 2017.

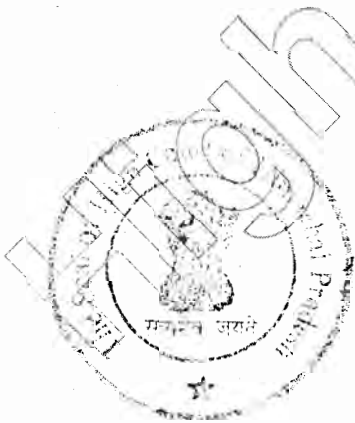
3. At this stage, it may be noticed that during the pendency of petition, referred above, communication dated 29th April, 2017 (Annexure P-10) came to be issued by respondent, cancelling therein tenders in question (Annexure R-2/C annexed with application filed under Order 6 Rule 17 of the Code of Civil Procedure for amendment filed by the writ petitioner). Pursuant to aforesaid development, petitioner sought permission of this Court



to amend writ petition, which was allowed and by way of amended petition, petitioner, apart from other reliefs, also prayed for quashing communication dated 29th April, 2017 (Annexure P-10).

4. Mr. Sanjeev, Bhushan, learned Senior Counsel representing the petitioner-firm, while inviting the attention of this Court to the document dated 29th April, 2017, whereby tender in question came to be cancelled, strenuously argued that after opening of tenders by 'TOC' on 23rd February, 2017, there was no scope left for 'TSSC' to reject the tender submitted by the petitioner on the grounds mentioned in the communication referred above. While alleging malafide and biasness on the part of Member of 'TOC', Mr. Bhushan, strenuously argued that respondent No.3, who happened to be a Member of 'TOC', was hell bent in ousting the petitioner from tendering process to favour another firm, which was at number two. Learned Senior Counsel further contended that since petitioner-firm highlighted irregularities committed by the office of Corporation while rejecting the valid tender of the petitioner, respondents without there being valid and just reason decided to cancel the tender.

5. At this stage, it may be taken note of that perusal of communication dated 29th April, 2017 issued by Managing Director, Himachal Agro Industries Corporation Limited, suggests that after opening of tender on 23rd February, 2017, cuttings/overwriting were noticed by the 'TOC' in one of tenders of 'Sprayers' and as such matter was decided to be placed before



'TSSC' consisting of Officers of the Department of Agriculture, Horticulture and Controller of Stores, Himachal Pradesh, who after having examined the tender submitted by the petitioner-firm, wherein certain cuttings were made, decided to refer the matter to the management of the Corporation for appropriate decision. It also emerge from the communication referred above that one of Member of Committee; namely; Shri J.S. Dhiman, SSPO, Horticulture gave the noting in the proceedings that petitioner M/s RSR Retail Pvt.Ltd. has made cuttings in its tender and attested the same and as such there is no illegality in the same. However, fact remains that Authority concerned decided to cancel all tenders for Plant Protection Equipments in the light of condition No.9 of the terms and conditions mentioned in the tender form.

6. Mr. Sanjeev Bhushan, learned Senior Counsel, while inviting the attention of this Court to condition No.4, as contained in tender form (Annexure P-3), contended that all cuttings/corrections, if any, in tender document were required to be signed by the tenderers and as such it cannot be said that if there were cuttings and corrections in the tender document, it was to be out rightly rejected. Learned Senior Counsel also made this Court to travel through tender filled up by the petitioner to demonstrate that cuttings made in the tender document were duly initialed and signed by the representative of the petitioner-firm and as such there was no occasion for 'TSSC' to reject its tender. While referring to the noting given by one of the Member of the

'TSSC' as stands mentioned in communication dated 29th April, 2017 (Annexure P-10), learned Senior Counsel contended that it stands duly proved on record that the cuttings made in the tender were duly attested by the authorized representative of the petitioner-firm. Learned Senior Counsel further contended that Authorities before proceeding to place matter before 'TSSC' invited another bidders/tenderers for negotiation, whose rates were definitely higher than the petitioner, which action of respondents itself smacks of extraneous consideration. Learned Senior Counsel, while referring to documents available on record, further stated that it is quite apparent from the conduct of the officers of respondent-Corporation i.e. respondents No.4 and 5, that they left no stone unturned to oust the petitioner-firm that too with a view to accommodate another firm and tried their best to impress upon the authorities that there was illegality in the tender submitted by the petitioner-firm. Respondents No.4 and 5, solely with a view to ensure ouster of petitioner, presented altogether false story before the management, who ultimately decided to cancel the tender.

7. Mr.Onkar Jairath, learned counsel representing respondents No.2 & 3, while inviting the attention of this Court to the reply having been filed on behalf of respondents No.2 and 3, seriously disputed the contents contained in the petition as well as arguments advanced by learned Senior Counsel representing the petitioner. Mr.Jairath contended that the petitioner has not approached this Court with clean hands; rather an attempt has

been made to conceal the material facts. Mr. Jairath contended that since there were major cuttings and over-writings in the tender form, submitted by the petitioner, he could not be awarded contract for supply of Plant Protection Equipment (Sprayer) in question. While referring to conditions No.4 and 9 of the tender document, which are reproduced hereinbelow, Mr. Jairath contended that rates and units were not required to be over written and as per terms and conditions, it was not permissible that rates and units are over-written.

"4. All the columns of the quotations (Schedule-A) form shall be duly properly and exhaustively filled in. The rates and units shall not be over written. Quotations shall always be both in figures and words. The words "No quotation" should be written across the item(s) in the schedule for which a tenderer does not wish to tender. All cuttings /corrections must be signed by the tenderers. Any omission in filling the columns of units and rates may debar a quotation, the tender opening committee is empowered to out rightly reject such quotation/tender.

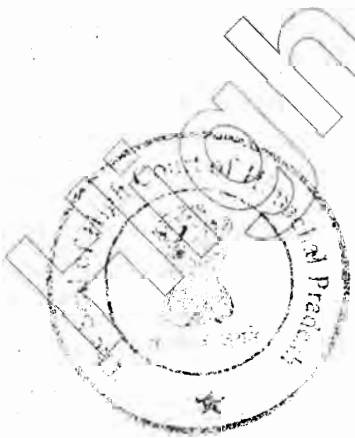
9. The HP Agro Industries Corporation Ltd. reserves the right of rejection/approval of all or any of the tender(s) without assigning any reasons thereto and reserves that right to negotiate with any of the tenderer(s) where deemed necessary and to award parallel rate contract to any or all of the participating tenderer(s)."

8. While referring to tender submitted by the petitioner-firm, learned counsel contended that perusal of the same suggests that neither petitioner-firm nor its authorized representative ever properly signed the cuttings/corrections in the tender form. There is no infirmity and illegality in the decision of the Committee to

174
reject the tender submitted by the petitioner. Learned counsel also disputed that tender submitted by the petitioner was finally accepted and he was declared to be the lowest bidder. As per Mr.Jairath, 'TOC', after having opened the tender on 23rd February, 2017, only announced/read-over the rates quoted by the parties in front of all the bidders and there representatives, but at no point of time, work was ordered to be awarded in favour of present petitioner. Learned counsel further contended that 'TOC' after having noticed major cuttings and over-writings on rates and units quoted in the tender document of the petitioner submitted the tender to 'TSSC' for further examination. Lastly, Mr.Jairath contended that during the pendency of present petition, Authorities concerned have decided to cancel the tender so that transparency is maintained while awarding the rate contract and as such the present petition deserves to be dismissed having rendered infructuous.

9. We have heard learned counsel for the parties and gone through the record.

10. Before ascertaining merits/demerits of the claims and counter-claims made by the respective parties, it may be noticed that this Court, taking note of allegations/counter-allegations made by the parties in their pleadings, deemed it fit to summon the record pertaining to tender in question, which was made available by learned counsel representing the respondents. Perusal of pleadings vis-à-vis record clearly suggests that the



petitioner amongst other bidders submitted its tender for the purchase of Plant Protection Equipments for the Department of Horticulture and Agriculture etc. on annual rate contract basis for the year 2017-18. It is also not in dispute that tenders submitted by various parties including the petitioner-firm came to be opened as per the terms and conditions contained in the tender form on 23rd February, 2017, where-after rates offered by respective bidders were read-over to all the bidders/their representatives.

11. This Court, solely with a view to ascertain the correctness of submission made by the learned Senior Counsel representing the petitioner that rates submitted by the petitioner-firm were found to be lowest and they were declared eligible being lowest, carefully perused the record including notings, perusal whereof suggests that tenders were opened by the 'TOC' on 22nd February, 2017, where-after comparative statement was prepared and decision was taken to call the meeting of 'TSSC' on 16th and 17th March, 2017 for evaluation of statement/tenders. There is no mention, as such, in the record with regard to petitioner-firm having found lowest bidder.

12. Proceedings of the meeting of 'TOC' held on 22nd and 23rd February, 2017 for opening tenders invited for rate contract of Pesticides, Plant Protection Equipment, Bio-Fertilizers and Organic Fertilizer, suggests that Committee, after having opened all nine tenders received for 'Sprayers' announced the rate in front of parties/their representatives. However, while preparing

176

comparative statement, it was noticed that M/s.RSR Retail Pvt.Ltd. Nodia (UP), petitioner herein, has made cuttings in the rates quoted by them for item code Nos.10017, 10018, 10019, 10020 and 10020A and accordingly Committee, taking note of condition No.4 of the tender document, submitted all tenders alongwith the proceedings to the 'TSSC' for examination for further recommendations.

13. Record further reveals that meeting of 'TSSC' held on 16th/17th March, 2017, wherein Committee, apart from approving selected items for negotiation qua other tenders, observed that while scrutinizing the tender documents, it was observed that M/s.RSR Retail Pvt.Ltd. Noida (UP), petitioner herein, has made cuttings in the rates quoted by them for item code Nos.10017, 10018, 10019, 10020 and 10020A and cuttings have been initialed and signed by the representative of the tenderer, as such, the Committee decided not to call all the parties of Plant Protection Equipment (Sprayers) and to place the matter before management for appropriate decision. Further perusal of noting placed on record by the Department, as have been taken note above, suggests that one of the member Shri J.S. Dhiman, SSPO, Department of Horticulture opined that "M/s.RSR Retail Pvt.Ltd.Noida (UP) has made the cutting and signed by himself on tender documents for code 10017, 10018, 10019, 10020, 10020A as per the provisions of tendered document No.4".

177

14. Perusal of decision, as taken by 'TSSC' in its meeting held on 16th/17th March, 2017 suggests that Committee, after having noticed cuttings/over-writing made in the tender documents submitted by petitioner decided not to call the parties as far as tender for Plant Protection Equipment (Sprayers) is concerned and as such decision was taken to place the matter before the management for appropriate decision. Notings, as referred at N-43-44 in the record of the Department, are contrary to minutes/recommendations of 'TSSC' held on 16th/17th March, 2017. Minutes of meeting of 'TSSC' as have been taken note above nowhere suggest that decision was taken by 'TSSC' to cancel the tender of petitioner-firm, rather Committee, taking note of cuttings in the rates quoted by the petitioner qua certain items decided not to call all the parties of Plant Protection Equipment (Sprayers) and resolved to place the matter before management for appropriate decision. Whereas, noting at N-47-48 on the record suggests that 'TSSC' in its meeting after having noticed cuttings/overwriting in the tender submitted by the petitioner decided to reject the tender of petitioner and to maintain transparency called L-II i.e. M/s.Hymark Agritech Pvt.Ltd., Noida, (UP) for negotiations. Though there is mention in the record, as noticed above, that decision was taken by the Committee to call L-II for negotiations, but noting given at N-44 to N-53 clearly suggests that none was called for negotiations, as claimed by the petitioner, rather matter was placed before the Competent Authority, who further advised to

seek legal opinion from the standing counsel of the Corporation vide order dated 7th April, 2017. It also emerge from the record that on 11th April, 2017, standing counsel of respondent-Corporation opined as under:-

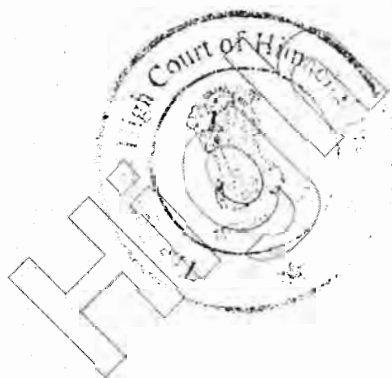
"There are few cuttings which have been made by the tenderer. The amount which have been shown in figures have rightly been shown in the words. Moreover, as per the requirement of the condition No.4 of the tender form the cuttings made in the tender form should be duly signed by the tenderer. In the present tender form the cuttings have been duly signed by the tenderer. In my opinion the cuttings made there in the tender are not material. These are duly signed as required by the terms and conditions of the tender."

15. It also emerge from the record that on 22nd April, 2017, Managing Director of Himachal Pradesh Agro Industries Corporation, after having taken note of legal opinion rendered by standing counsel, proceeded to pass following orders:-

"After going through the tender notice, tender documents, proceedings of the Tender Opening Committee, Technical Scrutiny Sub Committee and Legal Opinion, it has been observed that there are different opinion with regard to the tender of M/s RSR Retain Pvt.Ltd., Noida due to which it is difficult to come to any conclusion at this stage.

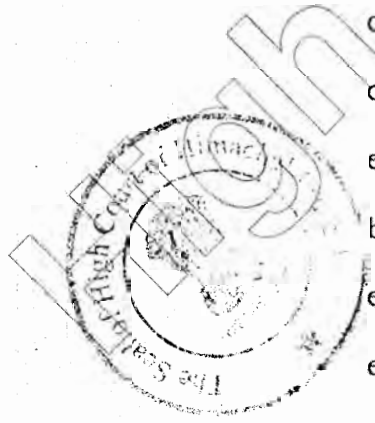
In the absence of any clear and specific recommendations by the Sub Committee, the under signed is left with no option but to cancel all the tenders of Plant Protection Equipment (Item Code No.AIC-0021(A))".

16. Pursuant to aforesaid decision taken by Managing Director of the Corporation, fresh proposal was initiated to re-tender the left out items. Accordingly, fresh notice inviting tender



came to be published in newspapers i.e. in "The Hindustan Times" (Delhi Edition) and in "Amar Ujala" (Chandigarh Edition), on 28th May, 2017, wherein rate contract for supply of Pesticides, Plant Protection Equipments, and Micronutrients for Annual Rate Contract for the year 2017-18, were again invited.

17. Though this Court, after having carefully perused record, finds that there are/were cuttings/over writings qua certain items in the tender document submitted by the petitioner-firm, but those appeared to have been initialed and signed by the representative of the petitioner-firm. Otherwise also, condition No.4, as contained in tender document, which has been taken note above, clearly suggests that all cuttings/corrections must be signed by tenderers. Any omission in filling the columns of units and rates may debar a quotation; meaning thereby that cuttings/corrections, if any, in the tender document, if are signed by tenderers, the tender cannot be rejected on the ground of cuttings/corrections. Though perusal of condition No.4, as contained in tender document, suggests that the 'TOC' is/was empowered to out rightly reject such quotation/tender submitted by the bidder, but, needless to say such power cannot be exercised arbitrarily, rather power, if any, in this regard is expected to be exercised judiciously. It also emerge from the record that one of the Member of 'TSSC' and standing counsel of respondent-Corporation categorically opined that cuttings/over writing, as allegedly made in tender document submitted by the



petitioner, are not material as same have been signed/initialed by the representative of petitioner-firm.

18. At this stage, it may be noticed that it also emerge from the record that there are contradictions in the notings prepared by concerned officers/officials for the perusal of competent Authority vis-à-vis actual proceedings/recommendations of 'TSSC', who held its meeting on 16th /17th March, 2017 for finalizing the rate contract of Pesticides, Micronutrients, Plant Protection Equipment, Bio-Fertilizers and Organic Fertilizer. This Court was unable to lay its hand to any document suggestive of the fact that after decision of 'TSSC', second lowest firm was ever called for negotiations as far as rate contract/tender for purchase of Plant Protection Equipment is concerned. No doubt, officials of respondent-Corporation had recorded that since tender of petitioner-firm has been rejected, Committee has decided to call M/s.Hymark Agritech Pvt.Ltd., Noida, (UP) to maintain transparency.

19. Definitely, aforesaid noting in the record is contrary to the actual recommendations/minutes of meeting of the Committee held on 16th 17th March, 2017, wherein decision was taken not to call any of tenderer as far as tender for purchase of Plant Protection Equipment is concerned.

20. Similarly, it is not understood that how the competent Authority, while taking decision to cancel the tender, proceeded to record that there are different opinions with regard to tender of

188

M/s.RSR Retail Pvt.Ltd. Noida (UP) due to which it is difficult for it to come to any conclusion, at this stage. Aforesaid conclusion drawn by competent Authority appears to be based upon wrong presumption because un-doubtedly one of the Member of Committee and standing counsel of Corporation, after having perused cuttings/over-writings allegedly made in tender by the petitioner-firm, categorically opined that these are not material, since cuttings/over writings have been initialed and signed by the representative of the petitioner-firm.

21. Leaving everything aside, this Court, after having taken note of condition No.4, as contained in tender document, has no hesitation to conclude that authorities responsible for scrutiny of tender document wrongly arrived at conclusion that in view of over-writings and cuttings made in tender document, which were duly initialed and signed by the representative of petitioner-firm, tender submitted by the petitioner deserves to be rejected. This is none of the case of respondents that cuttings/over writings were not initialed and signed by the representative of the petitioner-firm and as such there appears to be considerable force in the contention of learned Senior Counsel representing the petitioner-firm that frivolous objections were raised by the Members of Committee to oust the petitioner-firm, whose rates were admittedly lowest. There is no denial, as such, on the part of respondents that rates offered by the petitioner-firm were not lowest as compared to the other tenderers.

22. No doubt, after having carefully gone through the record as well as conditions contained in tender document, it can safely be inferred that decision taken by the respondent in cancelling the tender was taken in hot haste manner because admittedly there is no plausible/reasonable explanation available on record with regard to rejection of tender submitted by the petitioner-firm. Though there appears to be an attempt on the part of officials of respondent-Corporation to persuade competent Authority/concerned quarters to reject the tender submitted by the petitioner and thereafter offer the tender to second lowest bidder, but that may not be sufficient for this Court to conclude that there was malafide against the petitioner-firm. The competent Authority, who ultimately decided to cancel the tender in question, has nowhere assigned reason, if any, on record to differ with opinion rendered by one of the Member of the 'TSSC' as well as standing counsel of Corporation, who after having taken note of term No.4 of tender document, categorically opined that there is no material defect in the tender submitted by the petitioner-firm. After having carefully perused notings given at N/60-61, this Court is compelled to conclude that Authority, who ultimately decided to cancel the tender, had no valid reason to cancel the tender of petitioner-firm,

23. After having carefully perused record vis-à-vis tender submitted by the petitioner, we are unable to accept aforesaid conclusion drawn by the competent authority as far as his

observation that there are different opinion with regard to tender of M/s.RSR Pvt.Ltd. As has been taken note above, there are two opinions available on file, one is given by standing counsel of the Corporation and one by the Members of the Committee, where they have unequivocally stated that there is no defect in the tender of the petitioner.

24. Apart from aforesaid two opinions, this Court could not lay its hand to opinion, if any, rendered by any Authority, be it 'TOC' and 'TSSC' with regard to validity of tender document submitted by the petitioner-firm. As has been observed above, decision taken by the respondent-Corporation though appears to be taken in hot haste manner, but definitely there is no material which can persuade this Court to accept the contention of petitioner that entire exercise was done to help/accommodate second lowest bidder.

25. It is well settled by now that the Courts would normally not interfere in the tender/contractual matters while exercising powers of judicial review. Power of judicial review can only be exercised by constitutional Courts, if it is proved on record that process adopted or decision so made by the Authorities is intended to favour someone or the Authority has acted with malafide or decision made is so arbitrary and irrational that no responsible authority acting reasonably could have reached. Needless to say that Court can also exercise

power of judicial review in case it is shown that public interest is affected. In this regard, reliance is placed upon judgment rendered by Hon'ble Apex Court in **Tata Cellular versus Union of India**, reported in (1994) 6 SCC 651.

26. Hon'ble Apex Court in **Air India Ltd. versus Cochin International Airport Ltd.** reported in (2000) 2 SCC 617 held that even when some defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

27. Hon'ble Apex Court, in **Michigan Rubber (India) Limited versus State of Karnataka and others**, reported in (2012) 8 SCC 216, while discussing power of an authority in setting up terms and conditions of a tender, has specifically held that the Government undertakings should have a free hand while framing terms and conditions and Courts should only interfere in case there is material on record to demonstrate that same are arbitrary, discriminatory, malafide or actuated by bias. The Hon'ble Apex Court has held as under:

"35.....As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical....."

28. Recently, Hon'ble Apex Court in **Reliance Telecom Ltd. & Anr. v Union of India & Anr.**, reported in 2017 SCC OnLine 36 has specifically held that the condition to put a cap and make a classification not allowing certain entities to bid is not an arbitrary one as it is based on the acceptable rationale of serving the cause of public interest. Hon'ble Apex Court has further held that aforesaid exercise allows new entrants and enable the existing entities to increase their cap to make the service more efficient. Moreover, the Court cannot get and dwell as an appellate authority into complex economic issues on the foundation of competitors advancing the contention that they were not allowed to bid in certain spheres. Hon'ble Apex Court, in the aforesaid case has further approved the action of the authorities concerned, who put stringent conditions to ensure competition in the market by preventing large/big operators from acquiring large amount of spectrum. The Hon'ble Apex Court held as under:

"33. The objective behind Spectrum capping is to ensure competition in the market by preventing large/big operators from acquiring large amount of spectrum, which they may not require but only hoard to prevent the small operators from effectively competing in the

186

market, and that is why, TRAI has recommended on 02.07.2015 that the basic objective of prescribing a spectrum cap is to prevent a TSP from acquiring large holdings of spectrum through auction, M&A or trading, as it may lead to non-level playing field thereby disturbing the competition in the market. It cannot be left to the market forces alone to decide the maximum spectrum holding as a TSP and, hence, the provision of cap should continue on the spectrum holding that a TSP may acquire or otherwise. The argument that the respondent should have notionally included the spectrum surrendered by BSNL/MTNL would result in creating a situation where though the spectrum put to auction remains the same (i.e., limited), yet a large/big player will be able to bid for the entire spectrum (which it otherwise could not have done due to Clause 5.3.1.) thereby effectively giving a tool to the large/big operators to deprive/starve small operators, who quite avowedly, cannot match the buying power of larger operators of spectrum.

78. We have already discussed that the condition to put a cap and make a classification not allowing certain entities to bid is not an arbitrary one as it is based on the acceptable rationale of serving the cause of public interest. It allowed new entrants and enabled the existing entities to increase their cap to make the service more efficient. The Court cannot get and dwell as an appellate authority into complex economic issues on the foundation of competitors advancing the contention that they were not allowed to bid in certain spheres. As the stipulation in the tender was reasonable and not based on any extraneous considerations, the Court cannot interfere in the NIA in exercise of the power of judicial review. The contention is that the State cannot hoard the spectrum as per the 2G case. We are disposed to think that in the case at hand, it cannot be said that there has been hoarding. The directions given in the 2G case had been complied with and the auctions have been held thereafter from the year to year. The feasibility of communication, generation of revenue and its maximization and subserving of public interest are to be kept in view. The explanation given by the Union of India for not putting the entire spectrum to auction is a reasonable one and it is put forth that an endeavour would be made to put it to auction when it becomes available in sufficient

187

quantum. The Court cannot interfere with the tender conditions only on the ground that certain amount of spectrum has not been put to auction. The submission is that whatever has been put to auction and is available should have been notionally added so that the entities which have certain quantum of spectrum in praesenti could have participated in the auction and put forth their bids for a higher quantum. This argument may look attractive on a first blush but pales into insignificance on a studied scrutiny. As is evincible, one of the petitioners had earlier more than 65 MHz in a bid and because of the limited auction and non-addition of available spectrum on notional basis, it has obtained less quantum. With this submission, the contention of legitimate expectation has been associated. We have already repelled the submission pertaining to legitimate expectation. If there has been a reduction for a particular entity because of the terms and conditions of the tender, it has to accept it, for he cannot agitate a grievance that he could have obtained more had everything been added notionally. Notionally adding up or not adding up, we think, is a matter of policy and that too a commercial policy and in a commercial transaction, a decision has to be taken as prudence would command. In this regard, reference to the decision in *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.* would be apt. In the said case, the Court referred to the authority in *Tata Cellular (supra)* and thereafter opined that though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. In the instant case, we are unable to perceive any arbitrariness or favouritism or exercise of power for any collateral purpose in the NIA. In the absence of the same, to exercise the power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service."

29. The Apex Court in **State of Jharkhand v. M/s. CWE-SOMA Consortium** reported in AIR 2016 SCW 3366, has held that the State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. Apex Court held as under:

"13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-

"Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof." Clause 32.1 of SBD: "...the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action." In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.

14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender

189

and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness."

30. The Apex Court in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)** reported in AIR 2016 SCW 3814, has further held that Court can go into the question of malafides raised by a litigant, but in order to succeed, much more than a mere allegation is required. Bald and unfounded allegations of malafides are not sustainable and that malafides must be specifically pleaded and proved. Hon'ble Apex Court has held as under:

"44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.

56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."



31. By now it is settled law that burden of proving malafides is on the person making allegations and burden is very heavy as has been held by the Hon'ble Apex Court in **E.P. Royappa v. State of Tamil Nadu** (1974) 4 SCC 3.

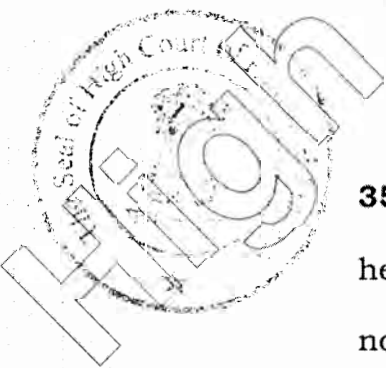
32. In **Gulam Mustafa Vs. State of Maharashtra** (1976) 1 SCC 800 Hon'ble Apex Court has held, "*It (malafides) is the last refuge of a losing litigant.*"

33. In the judgments referred herein above, Hon'ble Apex Court has held that there is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of malafides are often more easily made than proved and proof of high degree is required to prove the same.

34. In the instant case, it would be profitable to have a look at judgment passed by Hon'ble Apex Court in case **Union of India v. Ashok Kumar**, reported in (2005) 8 SCC 760, wherein it has been held that seriousness of allegations of malafides demands proof of high order of credibility and the Courts should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office having high responsibility. It was held:

"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR 1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579)."

- 35.** Careful perusal of expositions of law, as discussed herein above, certainly suggests that Courts should normally not interfere in the contractual matters in exercise of powers of judicial review and it can only be exercised in case it is satisfied that process adopted was malafide or made to favour someone



or process adopted or decision made is so arbitrary that no man of ordinary prudence could have reached.

36. It is well settled by now that every action of the executive/government must be informed with reasons and should be free from arbitrariness. That is very essence of the rationale and its bare minimal requirement and, to the application of this principle, it make no difference whether exercise of the powers involved an affectation of some right or denial of some privilege. In **Tata Cellular versus Union of India**, reported in (1994) 6 SCC 651 (supra), it has been specifically held that if an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. Recently, the Hon'ble Apex Court in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)(Supra)**, taking note of the aforesaid principles laid down in **Tata Cellular versus Union of India(Supra)** reiterated that Court, while exercising its power under Article 226 in tender/contractual matters, should pose to itself following questions:

“(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

Or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonable and in accordance with relevant law could have reached";

(ii) Whether public interest is affected."

37. Hon'ble Apex Court, while framing aforesaid questions, categorically held that if answers to aforesaid questions are in negative, in that eventuality, Court should not be inclined to interfere in the contractual matters, while exercising powers under Article 226 of the Constitution of India. In this regard, reliance is placed on the judgment of Hon'ble Apex Court in Central Coalfields Limited and another vs. SLL-SML (Joint Venture Consortium) and others, (2016) 8 SCC 622, wherein the Hon'ble Apex Court has held as under:-

36. It was further held that if others (such as the appellant in that case) were aware that non-fulfillment of the eligibility condition of being a registered II Class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of respondents 4. This resulted in unequal treatment in favour of respondents 4 â " treatment that was constitutionally impermissible. Expounding on this, it was held: â "It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.â (Emphasis given)

194

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and re-introducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-judge decision in *Tata Cellular v. Union of India*, (1994) 6 SCC 651 which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following *Tata Cellular*) in *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517 in the following words:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is **bona fide** and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted.

195

Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

This Court then laid down the questions that ought to be asked in such a situation. It was said:

"22. ...Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

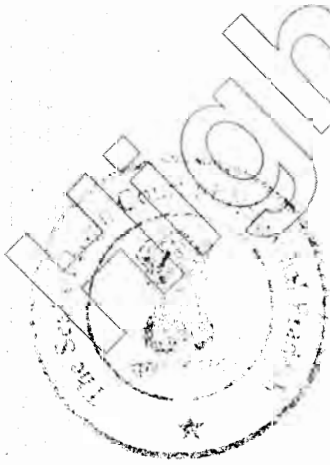
OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

38. After having carefully perused the pleadings and record made available by the respondent-Corporation, this Court has no hesitation to conclude that role of the Authorities responsible for taking final decision in the matter has not been very fair and reasonable, rather Authority competent to take final decision instead of examining the matter itself proceeded to cancel the tender, ignoring the opinion of standing counsel as well as one member of the Committee. Had competent Authority cared/bothered to examine tender form submitted by the petitioner itself in the light of terms and conditions in tender document, much time of the Department as well as this Court would have not been wasted and nobody would have raised finger



of suspicion as is being raised in the present case by present petitioner. In the case at hand, as has been observed above, though the authorities have not acted reasonably and judiciously, while taking final decision qua the tender submitted by petitioner firm, but definitely this Court was unable to find anything on record suggestive of the fact that the action of the authority in not accepting the tender of the petitioner was mala fide or intended to favour someone. Similarly, nothing has been placed on record by the petitioner, from where this Court could come to the conclusion that due to the rejection of tender submitted by petitioner, public interest would suffer.

39. Though, this Court, after having noticed aforesaid omissions and inaction on the part of competent authority, while examining tender submitted by the petitioner, would have exercised power under Article 226 of the Constitution of India, to undo the wrong committed by the respondent authorities, but, taking note of the fact that pursuant to decision dated 22nd April, 2017, respondent-Corporation has already issued fresh tender, deems it fit to restrain itself from passing any stringent order.

40. Having gone through the record, we are constrained to observe that action of the respondents, while dealing with the tender of petitioner-firm is not free from bias, rather there appears to be attempt on the part of certain officials to ensure fresh tendering as far as purchase of Plant Protection Equipment is concerned. Before parting, we deem it proper to place on record

19

our dis-pleasure and anguish over the practice adopted by the respondents-Authorities while dealing with the tender in question and respondents-Authorities are warned to be more careful in future while discharging their duties. This Court hopes and trust that authorities concerned while examining/analyzing tenders submitted by various parties including petitioner pursuant to fresh advertisement issued by the Department shall act judiciously in accordance with law without there being any malice towards the petitioner.

41. Consequently, in view of detailed discussion made herein above as well as law laid down by this Court, present petition is disposed of with a direction to the respondent authorities to be more careful and diligent in future, while dealing with tender matters. Registry is directed to supply a copy of this judgment to the Chief Secretary to the Government of Himachal Pradesh, so that effective steps are taken by the Government, to sensitize /educate its officers/ authorities with regard to procedure/approach required to be followed and adopted in the tender matters.

42. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

- Sd

(Sanjay Karol)
Judge

- Sd.

(Sandeep Sharma)
Judge

September 13, 2017
(aks)

Attested

[Signature]
16/9/17
Section Officer (Judicial)
H. P., Shimla