

**THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

**WRIT PETITION No. 26049 OF 2019**

**ORDER :**

This Writ Petition is filed seeking a *mandamus* to declare imposition of conditions, namely i) the bidder has to place bids for entire quantity indicated in the lot and (ii) A(3) the bidder should have annual turnover in any one of the last three financial accounting years of Rs.100.00 crores per annum (i.e.2016-17, 2017-18, 2018-19) concerned authorities, as illegal, arbitrary, unconstitutional and violative of Article 19(1)(g) of the Constitution of India and consequently, direct the respondent to receive and process the Application of the petitioner without insisting on compliance of the said conditions and award contract, if found eligible, in the interest of justice.

2. The petitioner is a woman entrepreneur, who engaged in the business of trading in various agricultural commodities, such as Red Gram, Bengal Gram, Sunflower, Jowar, etcetera. The respondent – state-owned Federation published the tender notification on 20.11.2019 inviting Applications from various bidders for purchase of commodities, such as Red Gram, Sunflower, Bengal Gram, Jowar, Black Gram, etcetera. Similar is the case for all other agricultural commodities:

| Sl.No | Commodity                    | Qty in MT's Gross weight | Value of goods       |
|-------|------------------------------|--------------------------|----------------------|
| 1     | Red Gram (TS MARKFED & HACA) | 25760.824                | 130 Crores           |
| 2     | Bengal Gram                  | 22608.811                | 97 Crores            |
| 3     | Sun Flower                   | 1819.481                 | 4.75 Crores          |
| 4     | Jowar                        | 10490.210                | 12.6 Crores          |
| 5     | Black Gram                   | 2156.049                 | 16 Crores            |
|       | <b>Total</b>                 | <b>62835.375</b>         | <b>260.35 Crores</b> |

3. It is stated, in the tender notification issued by the respondent, certain stringent conditions were imposed, compliance of which / participation in the e-auction is virtually impossible for any trader in the district; that the said conditions imposed by the respondent eliminated all the local traders; that in earlier years, neither there was any turnover restriction nor bulk lifting; that these conditions were introduced for the first time without any reason or object sought to be achieved; that the tender notification indicates that one should have Rs.100 crores annual turnover; that the respondent is very well aware that none of the local traders could comply with the said conditions; that to illustrate, according to the tender notification, one is required to purchase Red Gram of 25,760.824 tones which would approximately cost Rs.130 crores, similarly Bengal Gram required to be lifted is 22,608.811 tones and the value would be around Rs. 97 crores. It is further submitted that by virtue of this condition, all the middle- class traders in Adilabad area are being eliminated from the process of participation.

4. When the Writ Petition came up for admission on 26.11.2019, an interim order was passed. On 04.12.2019, vacate petition was filed enclosing thereto the detailed counter sworn to by the Managing Director of the respondent Federation. The brief averments in the counter are that, the Writ Petition is not maintainable for mis-joinder and non-joinder of necessary parties. The respondent is an apex organization in cooperative sector in the state and undertakes activities as per the orders of the government for the benefit of farmer community, particularly implementing MSP rate for agricultural produce. The respondent procured Red Gram, Bengal Gram, Sunflower, Jowar and Black Gram from the farmers in the State for

2018-19 under state pool. They are required to be disposed of through e-auction/e-tender. The Government of Telangana has constituted a Disposal Committee (DC) for disposal of the agricultural commodities procured by TS MARKFED/ HACA / other State Nodal Agencies under state pool during 2018-19. Disposal Committee is headed by the Commissioner and Director of Agriculture as Chairman with other members being Director of Agricultural Marketing, Deputy Secretary to Government in Finance Department and the Managing Director of MAEKFED as Convener. The present tender was floated by the Federation on the orders of the government based on the recommendations of the Disposal Committee. On specific direction of the Government of Telangana *vide* Memo No. 6313/Mktg.II(2)/2019, the Managing Director of the Federation called for sealed tenders for entire quantity as single bid without base price in two bid system to get better price in transparent manner. The eligible criteria notified in tender notification are

- a. Bidder shall be an individual or Firm or Registered Company or Co-operative Society or any legal Organization, Dall Miller/ Producers / Traders, who are in operation for at least past (5)years in the trade. Relevant documents should be enclosed.
- b. Bidder should possess a valid GST registration issued by concerned authorities.
- c. The bidder should have annual turnover in any one of the last three financial / accounting years of Rs.100.00 crores per annum. (i.e. 2016-17, 2017-18, 2018-19) concerned authorities. This point is incorporated to ascertain that the bidder can be deemed to be this volume of business continuously.

Further the point (ii) of Rs.100.00 crores turn over criteria is only for the commodity Red Gram and the basis for keeping the turn over criteria is the 70% value of the Red Gram stocks available for Disposal. The condition has been proposed keeping in view of the point that the bidder should have good financial strength to purchaser the stocks in Tender. The respondent (TS MARKFED) requires only quality bidders with sound condition to participate in the e-tender. The

conditions are based on the CVC guidelines which are read as follows.  
(OFFICE MEMORANDUM No. 12-01-1-CTE-6 Government of India,  
Central Vigilance Commission, CTE's Organization)

*“While framing the prequalification criteria, the end purpose of doing so should be kept in view. The purpose of any selection procedure is to attract the participation of reputed and capable firms with proper track records. The PQ conditions should be exhaustive, yet specific. The factors that may be kept in view while framing the PQ criteria includes the scope and nature of work, experience of the firms in the same field and financial soundness of firms.”*

The tender which is published now and floated in [tender.telangana.gov.in/](http://tender.telangana.gov.in/) is purely based on the orders of the Government of Telangana vide Memo No. 6313/Mktg.II(2)/2019. The Government of Telangana intends to dispose the entire stocks at once to reputed experience firms in the same field with the financial soundness.

5. The government intends to dispose the entire stock at once to reputed firms with financial soundness. The tender notice was published on 20.11.2019 and technical bid was opened on 30.11.2019, thus providing ten days' time to file tenders. The financial bid was to be opened on 13.12.2019 after evaluation of the technical bid.

6. In the counter, the assertion of the petitioner that she was participating in tenders for more than a decade is denied and that it is stated, she had participated in the auction in 2014 and 2018 only. It is also stated, keeping in view the past experience, where the bidders did not lift the stock resulting in loss and hardship to the Federation, the respondent Federation imposed some conditions to dispose of the said agricultural produce. It is also stated, prescribing of annual turn over of Rs.100 crores for any one year was stipulated as per Memo No. 6313/Mktg.II(2)/2019 of the Government. The total stock to be lifted by the selected bidders is 62835.375 metric tones valued about Rs. 260.35 crores. In earlier tenders, the bidders did

not comply with the terms and conditions of the notification by paying security deposit and lifting stocks. It is only to ensure that responsible bidders participate in the tenders, the impugned conditions were stipulated, but not to benefit the multi-national companies, as alleged by the petitioner. Fixing of turnover of Rs. 100 crores is only to check the antecedents of the bidders ie. whether they are capable of lifting the stock by paying the bid amount within the time stipulated as the federation is required to procure the commodities of the next Rabi season which are likely to arrive in the market.

7. A reply affidavit is filed, once again, asserting the petitioner's credentials. It is further stated that the practice of granting 15 days' time for lifting the agricultural commodities with a further 15 days' grace period on payment of penalty is in vogue since 1975 and every trader is aware of the same. The assertion that in the next 20 days, Rabi season produce will come to the market is false, as, in yester years, procurement started only in 2<sup>nd</sup> or 3<sup>rd</sup> week of January. On account of the condition of minimum prescribed turnover to participate in the tender, the petitioner and others are required to deposit huge sum of Rs.2,60,00,000/- towards EMD which restricts them from participating in the tender process.

8. *Sri Pratap Narayan Sanghi*, learned counsel for the petitioner, placing reliance on the judgments of the learned Single Judge in ***Bharat Biotech International Limited, Hyderabad v. A.P. Health and Medical Housing and Infrastructure Development Corporation, Hyderabad***<sup>1</sup>, ***M/s Dhingra Construction Co. v.***

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<sup>1</sup> 2003(1) ALD 463

***Municipal Corporation of Delhi<sup>2</sup>, Universal Cables Ltd., Hyderabad v. State of Andhra Pradesh<sup>3</sup> and Bajaj Electricals Limited, Bombay v. State of A.P.<sup>4</sup>*** would submit that while the Courts have held the scope of judicial review though limited, a writ petition is still maintainable. However, such decision should withstand the test of reasonableness and must be free from arbitrariness not affected by bias or actuated by *mala fides*. He further submits that the stipulations in the tender shall not be arbitrary, excessive or disproportionate and they should correlate to the object and purpose for which they are framed. The stipulation of condition of minimum Rs. 100 crores turn over in the present case with a further restriction that bidder has to lift entire quantity is arbitrary and has no rational basis much less a reasonable basis and the same is intended to eliminate the local bidders and further the same also does not serve the purpose for which it is intended to, as there would be no competition and the Federation would be at the mercy of the big traders who may be few in number. The learned counsel would allege that if only the respondent had complied with the interim order of this Court, it would have known, by this time, the number of bidders, who would have participated in the bid, but the respondent did not chose to implement the orders of this Court.

9. Learned Standing Counsel Sri V. Ramesh Reddy, painstakingly, drawing attention of this Court to the pleadings in the counter-affidavit, would submit that on earlier occasion, when a minimum upset price was fixed, no bidders came forward to bid, hence, after

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<sup>2</sup> AIR 2005 Delhi 247

<sup>3</sup> 2018(5) ALD 130 (DB)

<sup>4</sup> 2001(6) ALD 285

analyzing the reasons for such non-participation of the bidders, on the advice of the Advisory Committee, the government had directed the Federation to stipulate the conditions so as to ensure timely clearance of the stocks without any hassle. The learned Standing Counsel would further submit that the godowns (warehouses) have to be emptied to ensure accommodation of crop which is to be procured to support the farmers in the Rabi season. By drawing attention to various judgments in ***State of Telangana v. Sri Venkateswara Industries, Mahabobnagar District***<sup>5</sup>, ***K. Suresh Babu v. K. Beeran Kutty***<sup>6</sup>, ***Radha Konduri v. State of Andhra Pradesh***<sup>7</sup>, ***Sri Laxmi Agencies, Hyderabad v. State of Telangana***<sup>8</sup> and ***K. Venkata Raju Engineers & Contractors (P) Ltd., Vijayawada v. State of Andhra Pradesh***<sup>9</sup>, he submits that the respondent is entitled to fix reasonable conditions to ensure only responsible bidders with proven capability of lifting the stock participate in the tender process and the conditions stipulated are not excessive and unreasonable, and that particularly such stipulations were made on the recommendations of the expert body i.e tender advisory committee which were also approved by the government. The learned Standing Counsel would further submit that on earlier occasions, the Federation had suffered huge losses on account of non-lifting of stocks in time and the conditions of minimum turnover with further condition that the entire quantity shall be lifted by the bidder are imposed only to ensure timely disposal of the commodities and to

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<sup>5</sup> 2017(4) ALD 31 (DB)

<sup>6</sup> 2017(5) ALD 520

<sup>7</sup> 2017(3) ALD 486

<sup>8</sup> 2019(5) ALD 517 (TS)

<sup>9</sup> 2017(4) ALD 133

avoid losses. He would further submit that the earlier attempt made by the Federation to dispose of the stock through e-tender not having been successful, after analysis of the reasons, on the advise of the tender committee, the present tender was floated with the conditions impugned in the Writ Petition, hence, he prays that the Writ Petition is not maintainable and the same is liable to be dismissed.

10. Apart from filing the counter-affidavit, the learned Standing Counsel had promptly placed before the Court the original file pertaining to the tender process.

11. Considering the importance and urgency involved in the matter, the Writ Petition is heard finally at the interlocutory stage itself, at the request of both the learned counsel.

12. The parameters of judicial review are well-settled and they do not require to be stated as the judgments referred to by both the learned counsel reflect the same. There being no dispute that a limited judicial review is permissible, however, when a challenge is made to the stipulations in a tender notification as being arbitrary, excessive and unreasonable, the Court is required to examine *whether the conditions imposed are irrational, arbitrary; whether the same have any nexus with the stated object; whether the criteria fixed had resulted in elimination of fair competition, preventing the otherwise eligible and competent bidders from participating in the tender process; and whether stipulation of conditions would serve the purpose for which they are intended.*

13. For coming to a fair conclusion, we may refer to the reasons stated in the counter and the record produced before the Court: to get better price for the commodities in transparent manner; in the

respondent's words *"this point is incorporated to ascertain that the bidder can be deemed to be this volume of business continuously"*. The quoted portion is meaningless. What probably the respondent might have desired to say is, to ensure that the bidders have the capability of lifting the stock with the required financial strength.

The functions which are required to be discharged by the respondent Federation is to procure the produce from the farmers ensuring fair price, preventing exploitation by the unscrupulous traders. This function can be discharged by the Federation only when they are able to sell the commodities procured with the state funds at a price which is inclusive of operational expenditure + procurement price on year-to-year basis. Though there is a possibility, in a given year, the Federation may incur loss, but however, the same cannot be continued year after year as otherwise the entire capital of the federation would get eroded, putting the survival and existence of the federation itself into a question.

The file produced before the Court discloses the commodity, which the federation seeks to dispose of are the commodities procured from State pool though stated to be of year of 2018-19, the Annexure to tender document TERMS AND CONDITIONS – REQUEST FOR PROPOSAL – EMPANELMENT OF BUYERS discloses the red gram stored is of the year 2017-18, 2018-19 at various godowns. The stand of the respondent for stipulating the conditions is the decision of the government based on the recommendations / remarks of the Disposal Committee held on 01.11.2019, wherein the Committee, having taken note of the result of the e-auction conducted on 30.09.2019 and the offers received therein, finally, opined as under:

“The Disposal Committee took a note of the e-auction conducted by TS MARKFED dated 30.09.2019.

The Disposal Committee discussed that why bidders not participated in the e-auction conducted by TS MARKFED and during the discussion, the Chairman of Disposal Committee took the remarks from the representatives of e-auction platform.

The representatives of the e-auction platform stated and submitted their remarks that due to the higher side of base price and due to the bulk quantities (single lot) for e-auction bidders showed their disinterest for participating in e-auction.

The Disposal Committee has discussed the possible ways for disposal of agricultural commodities procured immediately since the stocks were in storage for longer period and the fresh arrivals are about to exist in the markets.

The Disposal Committee also discussed that what if the lot size is decreased to godown wise as a lot for every commodity so that bidders can show an interest of participating in e-auction and stocks may get disposed off and Disposal Committee recommended submitting to Government for further action.

The Disposal Committee has also compared the market rates at present and the base prices of e-auction. It is noticed that market rates have come down and fixing of base price for e-auction at the present scenario will result into the increase of loss to Nodal Agencies.

On thorough discussions had, the Disposal Committee recommended to appraise the same to Government of Telangana to take necessary orders for the best possible ways to dispose the stocks at earliest.”

14. The minutes were forwarded to APC & Principal Secretary to Government, Agriculture and Cooperation under letter dated 11.11.2019.

15. The background for convening the meeting of the Disposal Committee was the failed attempt of the Federation to sell the commodities on account of there being no bidders to the e-auction conducted on 30.09.2019. In this context, the reasons offered by M/s Vupadhi Techno Services (e-auction platform provider) *vide* their e-mail dated 04.10.2019 are as under:

“ As per the feedback received from various bidders following points has been mentioned 1) due to base price is high most of the bidders are turned out; 2) as commodities has huge volume (High MT) as most of the bidders are turned out. Due to this only, couple of bidders has been participated”.

16. For the sake of clarity, it may be noted that in response to the e-auction dated 30.09.2019 with respect to the commodities Red Gram, Bengal Gram and jowar, no bids were received and with respect to Sunflower and Blackgram, there was only single bidder and even their offers were rejected on account of bidders not fulfilling the experience criteria. The notified conditions in the e-auction were a) the bidders shall be in operation for at least five years in the trade; b) they shall possess the GST Certificate issued by the GST authorities; and c) the bidder shall have annual turn over of Rs.100 crores in any one of the preceding three years. It may be clarified, for different commodities, different turnovers were mentioned. The summary of Minutes submitted to the government on 11.11.2019, extracted above, discloses the reasons for failure of the earlier e-auction being mainly on account of fixation of base price on higher side and also on account of specifying bulk quantities (i.e single lot) for e-auction. The remarks received from the government, as referred in the note file, dated 16.11.2019 read as under:

“Please see the Memo No. 6313/Mktg.II(2)/2019, date 16.11.2019 from the government of Telangana Agriculture & Cooperation (MKTG.II) Department.

Wherein the letter it is stated that the matter has been examined and the MD TS MARKFED is requested to take following action as per the following endorsement of the Hon'ble Minister for Agriculture & Marketing “Call for seal tenders for entire quantity as a single bid without base price in two system to get a better price in transparent manner” and also stated that a report in this regard may be submitted to the government”.

17. Thereafter, the present tender notification is issued with the impugned conditions. From the above-said noting, it is evident that precise reasons for failure of e-auction effort in September, 2019 were 1) fixation of minimum price which is normally termed as reserve price; and 2) the condition that the entire quantity shall be lifted by the single tenderer. The Tender Committee also opined the same but however they did not recommend anything. The only action proposed in the government memo dated 16.11.2019 is to call for tenders for entire quantity without base price in two bid system, and there are absolutely no reasons mentioned in arriving at such a decision and it is not discernible from the memo as to whether the recommendations / remarks of the Disposal Committee have been taken into consideration, particularly the reasons for failure of bidding process on the earlier occasion. For brevity, memo dated 16.11.2019 may be noticed verbatim:

**GOVERNMENT OF TELANGANA  
AGRICULTURE & COOPERATION (Mktg.II) DEPARTMENT**

**Memo. No.6313/Mktg.II(2)/2019**

**Date: 16/11/2019**

Sub:- A&C Dept. – Disposal of Agricultural Commodities procured by TSMARKFED & HACA under state pool during 2018-19- Observations and Recommendations of the Disposal Committee held on 01/11/2019 – Further Orders – Issued.

Ref:- 1. G.O.Rt. No.835, A&C (mktg.II) Dept., Dt: 24/12/2018.  
2. From the M.D. MARKFED Lr.No.624/P&M/Disposal of Redgram/2018-19, Dt: 11/11/2019 along with Minutes of the Disposal Committee meeting Dt: 01/11/2019  
3. Endorsement of Hon' ble Minister for Agriculture & Marketing, Dt: 14/11/2019.

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The M.D. TSMARKFED has submitted proposals about the disposal of all agricultural produce procured under State Pool under MSP i.e. Redgram (MARKFED), Redgram (HACA), Bengalgram, Sunflower, Jowar and Blackgram with total quantity of 62835.375 MTs.

In this regard, it is submitted that in the G.O. 1<sup>st</sup> read above, a disposal committee was constituted for agricultural commodities procured under MSP/PSS under the State Pool during 2018-19. The committee has convened its meeting on 01/11/2019 under the Chairmanship of Commissioner & Director of Agriculture.

The discussions of the committee are as follows:

- The disposal committee took a note of the e-auction conducted by TSMARKFED dated 30/09/2019.

- The disposal committee discussed that why bidders not participated in the e-auction conducted by TSMARKFED and during the discussion the Chairman of disposal committee took the remarks from the representatives of e-auction platform.
- The representatives of the e-auction platform stated and submitted their remarks that due to the higher side of base price and due the bulk quantities (single lot) for e-auction bidders showed their disinterest for participating in e-auction.
- The disposal committee has discussed the possible ways for disposal of agricultural commodities procured immediately since the stocks are in storage for longer period and the fresh arrivals are about to enter in the markets.

The disposal committee has also compared the market rates at present and the base prices of e-auction. It is noticed that markets rates have come down and fixing of base price for e-auction at the present scenario will result into the increase of losses to Nodal Agencies.

The matter has been examined and the M.D. TSMARKFED is requested to take the following action as per the following endorsement of the Hon' ble Minister for Agriculture & Marketing.

“Call for seal tenders for entire quantity as a single bid without base price in two bid system to get a better price in transparent manner”.

A report in this regard may be submitted to the Government.

APC & Prl. Secretary to Government.

To,  
The Managing Director, TSMARKFED, Hyderabad.  
Copy to the Managing Director, HACA, Hyderabad.

18. If the object of the respondent, as stated earlier, is to get the best price, in normal circumstances, any prudent and reasonable person would provide opportunity for more number of bidders to participate, as, only when there is a competition, one would get better price. There is no instance, earlier, of fixing such norms except the failed e-auction dated 30.09.2019 which had to be abandoned on account of there being no response. Though the inability or otherwise of the petitioner to participate or satisfy the pre-bid conditions may not be a factor that is required to be considered for invalidating the tender conditions, the reasonableness and rationality of the condition itself can be considered by the Court. At the cost of repetition, the objective for fixing Rs.100 crores turn over as a pre-requisite for lifting Red Gram and 70% of the estimated value for other commodities with respect to traders in agricultural commodities does not appear to be based on any data or intelligible

criteria as the same is not discernible from the original file produced before the Court. Further, it may be noted that even as per Annexure-II of the tender document, huge quantities of Red Gram are stored in 53 godowns, Bengal gram in 23 locations, sunflower in three locations, black-gram in 2 locations. While 85% of the bid amount is to be paid on receipt of sale confirmation, the successful bidder is to clear the entire stock within 15 days from the date of issue of release order, thereafter, the fact that providing further 15 days time on payment of storage charges of 0.25 per bag per day on the balance leftover stock and further provision for allowing further time at the discretion of the Managing Director on payment of penalty along with storage charges also is not in conformity with one of the stated objectives of ensuring clearing of the stocks by a single purchaser with Rs. 100 crores high turn over within a short span of 15 days.

19. At this stage, terms and conditions and the procedure that is being adopted by NCDEX e MARKETS LIMITED (National Agricultural Co-operative Marketing Federation of India Limited) has been placed on record by the learned counsel for the petitioner.

20. This Court cannot lose site of the fact that marketing / trading of agricultural produce is a very dynamic trade where fluctuations in prices of commodities vary on hour to hour and day to day basis and the market also is not insulated from the external supplies apart from free flow of commodities across the country. While this Court does not venture to go into the merits and demerits of the procedure adopted by the respondent and also by similar organizations at national level, what all the Court can say is that it is immensely desirable that the respondent be advised with an expert body in the

interest of the farmers for whose benefit the Federation exists. On an overall analysis, in the particular facts of the case, fixation of a pre-qualification to the bidder to have carried out the business of 70% of the total quantity with a further condition that the bidder has to lift the entire quantity is not based on any intelligible criteria much less relevant for the stated objective of selling the commodity so as to fetch the maximum price and clearing the stock from the godown within the shortest possible time which itself appeared to be impracticable on account of the fact the stocks being stored in about 56 and odd locations spread over the State. While no motives can be attributed to the respondent, this Court has no hesitation to state that due diligence required to be exercised in discharging the functions entrusted to the respondent Federation was not exercised.

21. The petitioner also challenges the clause stipulating payment of EMD of Rs.1,000/- per metric ton. This clause by itself may not be declared as illegal or arbitrary, however coupled with the stipulation that a bidder has to place a single bid for entire quantity that is being offered in the tender, makes the clause unreasonable as it creates an enormous entry barrier on the prospective bidders. Keeping in view the object that is sought to be achieved i.e to fetch higher price for the commodities to be sold, the clause is only a hindrance at the threshold and thus the same is also liable to be declared as unreasonable. Likewise, fixing of 70% turnover to the value of the goods to be sold is also arbitrary and illegal. The respondent Federation shall not lose sight of their objective of getting best price for the commodities to be sold for which purpose they are required to plan and frame terms and conditions of their transactions like a

prudent trader in the trade rather than yet another department of bureaucracy.

21. In the circumstances, the Writ Petition is allowed setting aside the Condition of payment of EMD of Rs.1,000/- per MT and Condition No.3 under Eligibility Criteria pertaining to turnover of Rs.100 Crores, Rs.75 Crores, and Rs.7 Crores, in respect of Red Gram, Sun Flower and Black Gram, respectively. It shall be open to the respondent Federation to take necessary steps expeditiously. No costs.

22. The miscellaneous Applications, if any shall stand closed.

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**CHALLA KODANDA RAM, J**

20<sup>th</sup> December 2019

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