IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No. 3368 of 2019

Reserved on: 02.12.2020

Date of Decision: 14.12.2020

M/s Amit Singla through its Sole Proprietor
Mr. Amit Singla ....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

Coram:

The Hon'ble Mr. Justice Ajay Mohan Goel, Judge

Whether approved for reporting?[1] *Yes.*

For the petitioner: Mr. Shrawan Dogra, Senior Advocate, with M/s Pranay Pratap Singh, Gaurav Chopra and Tejasvi Dogra, Advocates.

For the respondents: Mr. Ashok Sharma, Advocate General, with M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals and Ms. Divya Sood, Deputy Advocate General, for respondents No. 1 to 8. Advocate.

Mr. J.S. Bhogal, Senior Advocate, with Mr. Suneet Goel, Advocate, for respondent No. 9.

(Through Video Conferencing)

Ajay Mohan Goel, Judge *:*

By way of this writ petition, the petitioner has, *inter alia*, prayed for the following reliefs:

1 ***Whether the reporters of the local papers may be allowed to see the Judgment?***

"(i) Issue a writ, order or direction especially a writ in the nature of certiorari for quashing the Order/Proceedings of the Evaluation Committee dated 04.11.2019 (Annexure P-16) passed by respondent Nos. 3 to 8, whereby the Technical Bid submitted by the petitioner in response to the Notice Inviting Tender bearing Tender ID 2019_PWD_31309_1, Tender Reference No. PW.SRJ/TA/Pub/2019-5939-42 dated 19.08.2019 for the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" (Annexure P/1) has been rejected as being illegal, arbitrary and contrary to the terms and conditions incorporated in the aforesaid Notice Inviting Tender as also the Standard Bidding Document Procurement of Civil Works (SBD) appended therewith.

(ii) Issue a writ, order or direction especially a writ in the nature of Mandamus for directing the Respondent No. 1 to withdraw the decision of its duly constituted Committee, which had technically evaluated the bids submitted by the respective bidders, including the petitioner in response to the Notice Inviting Tender bearing

Tender ID 2019_PWD_31309_1, Tender Reference No. PW.SRJ/TA/Pub/2019-5939-42 dated 19.08.2019 for the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" and open the Financial bid submitted by the petitioner and undertake the tender process strictly in accordance with the terms and conditions prescribed in the Notice Inviting Tender as well as the Standard Bidding Document Procurement of Civil Works (SBD) appended thereto.

(iii) A writ in the nature of mandamus for restraining the Respondent No. 1 from finalizing the tender process and awarding the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" to any other bidder who had participated in the E-Tender Process during pendency of the instant petition in this Hon'ble Court."

2. Brief facts necessary for the adjudication of present petition are as under:

Respondent No. 1 issued a Notice Inviting Bids (Annexure P-1) in the month of August, 2019 for *"Improvement and Strengthening of Thalout- Thachi-Somagd Road Km 0/0 to 34/0 (Section Thalout Panjain to Thachi Km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & Sign Board)".* The mode of submission of tender was *online*. As per the Notice Inviting Bids, the period and time for downloading of Bidding Documents from E-procurement portal was from 05.09.2019 at 9:00 a.m. to 20.09.2019 up to 5:00 p.m. The date and time of pre-bid conference was 11.09.2019 at 11:30 a.m. and the date and time of *online* submission of bid was from 05.09.2019 at 9:00 a.m. to 20.09.2019 up to 5:00 p.m. The date and time of opening of *online* technical bids was 21.09.2019 at 11:00 a.m. The date and time of opening of *online* financial bids was to be announced and the place of opening of *online* bids was the office of Chief Engineer, Mandi Zone, H.P. P.W.D., Mandi. The approximate value of work was Rs.20,99,53,724/-. The name of the Division where the work was to be executed was Seraj Division at Janjehali. The Bid Security amount mentioned in the Notice Inviting Tenders was Rs.41,99,000/- and the period of completion of work was two years.

Paragraph Nos. 9 and 10 of the said Notice Inviting Bids provided as under:

> *"9. Bid documents consisting of qualification information and eligibility criterion for bidders, plans specifications, drawings, the schedule of quantities of the various classes of work to be done and the set of terms and conditions of contract to be complied with by the contractors can be seen on website https://hptendersgov.in and scanned copies of the required documents and information as per Section 2 (Formats and annexure) should be attached in the Technical Bid as prescribed in SBD.*
>
> *10. Uploaded documents of valid successful bidders will be verified with the original before signing the agreement. The valid successful bidder has to provide the original to the concerned authority on receipt of such letter, which will be sent through registered post/e-mail."*

Paragraph No.-12 thereof provided as under:

> *"12. Conditional bids and the bids not meeting the qualification criteria on the date of receipt of bids shall be summarily rejected."*

3. Section-1 of the Notice Inviting Bids dealt with Instructions to the Bidders. It comprised of Six Table of Clauses. Clause-A thereof contained general conditions. Paragraph No. 4 of Clause-A dealt

with Qualification of the Bidder. Paragraph No. 4.3 thereof provided as under:

> *"4.3. If the Employer has not undertaken pre-qualification of potential bidders, all bidders shall include the following information and documents with their bids in Section 2:*
>
> *(a) copies of original documents defining the constitution or legal status, place of registration, and principal place of business; written power of attorney of the signatory of the Bid to commit the Bidder;*
>
> *(b) total monetary value of construction work performed for each of the last five years;*
>
> *(c) experience in works of a similar nature and size for each of the last five years, and details of works underway or contractually committed; and clients who may be contacted for further information on those contracts;*
>
> *(d) major items of construction equipment proposed to carry out the Contract;*
>
> *(e) qualifications and experience of key site management and technical personnel proposed for Contract;*
>
> *(f) reports on the financial standing of the Bidder, such as profit and loss statements and auditor's reports for the past five years;*
>
> *(g) evidence of access to line(s) of credit and availability of other financial resources facilities (10%*

of contract value), certified by the Bankers (Not more than 3 months old);

(h) undertaking that the bidder will be able to invest a minimum cash up to 25% of contract value of work, during implementation of work;

(i) authority to seek references from the Bidder's bankers;

(j) information regarding any litigation, current or during the last five years, in which the Bidder is involved, the parties concerned, and disputed Amount;

(k) proposals for subcontracting components of the Works amounting to more than 10 percent of the Bid Price (for each, the qualifications and experience of the identified sub-contractor in the relevant field should be annexed); and

(l) the proposed methodology and programme of construction, backed with equipment planning and deployment, duly supported with broad calculations and quality control procedures proposed to be adopted, justifying their capability of execution and completion of the work as per technical specifications within the stipulated period of completion as per milestones (for all contracts over Rs.5 Crore)."

Paragraph No. 4.5. of the same dealt with qualification criteria and Paragraph No. 4.5.1 thereof provided as under:

> *"4.5.1. Qualification will be based on Applicant's meeting on the following minimum pass/fail criteria regarding the Applicant's general and particular experience, personnel and equipment capabilities, and financial position, as demonstrated by the Applicant's responses in the forms attached to the Letter of Application (specified requirements for joint ventures are given under para 4.8 below). Subcontractors' experience and resources shall not be taken into account in determining the Applicant's compliance with the qualifying criteria. To qualify for more than one contract, the applicant must demonstrate having experience and resources sufficient to meet the aggregate of the qualification criteria for each contract given in paragraphs 4.5.4, 4.5.5, 4.5.6 and 4.6 below:"*

Paragraph No. 4.5.5 dealt with Equipment Capabilities, which provided as under:

> *"The applicant should own or should have assured ownership to the following key items of equipment, in full working order, and must demonstrate that, based on known commitments; they will be available for use in the proposed contract.*

S. No.	Equipment type and characteristics	Minimum number

		required
(1)		
(2)		
(3)		
(Suggested lists is given in Annexure-II)		

Paragraph 4.7 provided for disqualification, which reads as under:

"4.7 Disqualification

Even though the Applicants meet the above criteria, they are subject to be disqualified if they have:

Made misleading or false representation in the form, statements submitted; and/or

Records of poor performance such as abandoning the work, rescinding of contract for which the reasons are attributable to the non-performance of the contractor; consistent history of litigation awarded against the Applicant or financial failure due to bankruptcy. The rescinding of contract of a joint venture on account of reasons other than non-performance, such as Most Experienced partner of joint venture pulling out, Court directions leading to breaking up of a joint venture before the start of work, which are not attributable to the poor performance of the contractor will, however, not affect the qualification of the individual partners."

4. Clause-B of Section-1 dealt with Bidding Documents. Paragraph 8.3 thereof provided as under:

> *"8.3 The bidder is expected to examine carefully all instructions, conditions of contract, contract data, forms, terms, and technical specifications, bill of quantities, forms, Annexes and drawings in the Bid Document. Failure to comply with the requirements of Bid Documents shall be at the bidder's own risk. Pursuant to Clause 26 hereof, bids which are not substantially responsive to the requirements of the Bid Documents shall be rejected."*

5. Clause-C pertained to Preparation of Bids and Paragraph-12 thereof provided as under:

> *"12. Documents Comprising the Bid*
>
> *12.1 The bid to be submitted on-line by the bidder as Volume V of the bid document (refer Clause 8.1) shall comprise of scanned copies of the following in two separate parts/covers:*
>
> *<u>Part I</u> shall be named "Technical Bid" and shall comprise*
>
> *(i) Bid Security in the form specified in Section 8*
>
> *(ii) Qualification Information and supporting documents as specified in Section 2*
>
> *(iii) Certificates, undertakings, affidavits as specified in Section 2*

(iv) Any other information pursuant to Clause 4.2 of these instructions

(v) Undertaking that the bid shall remain valid for the period specified in Clause 15.1

(vi) Acceptance/non-acceptance of Dispute Review Expert proposed in Clause 36.1

Part II shall be named "Financial Bid" and shall comprise

(i) Form of Bid as specified in Section 6

(ii) Priced Bill of Quantities for items specified in Section 7

12.3. Following documents, which are not submitted with the bid, will be deemed to be part of the bid.

Section	Particulars	Volume No.
1	Invitation for Bids (1KB)	
3	Instructions to Bidders	Volume-1
4	Contract Data	
5	Specifications	Volume-II
8	Drawings	Volume-IV

6. Clause-E pertained to Bid Opening and Evaluation and Paragraph 23.4 thereof provided as under:

"23.4 (i) Subject to confirmation of the bid security by the issuing Bank, the bids accompanied with valid bid security will be taken up for evaluation with respect to the Qualification

Information and other information furnished in Part-1 of the bid pursuant to Clause 12.1.

(ii) After receipt of confirmation of the bid security, the bidder will be asked in writing (usually within 10 days of opening of the Technical Bid) to clarify or modify his technical bid, if necessary, with respect to any rectifiable defects.

(iii) The bidders will respond in not more than 7 days of issue of the clarification letter, which will also indicate the date, time and venue of opening of the Financial Bid (usually on the 21st day of opening of the Technical Bid).

(iv) Immediately (usually within 3 or 4 days), on receipt of these clarifications the Evaluation Committee will finalize the list of responsive bidders whose financial bids are eligible for consideration."

Paragraph No. 26.1 of Clause-E provided as under:

"26.1. During the detailed evaluation of "Technical Bids", the Employer will determine whether each Bid (a) meets the eligibility criteria defined in Clause 3 and 4; (b) has been properly signed; (c) is accompanied by the required securities and; (d) is substantially responsive to the requirements of the Bidding documents. During the detailed evaluation of the "Financial Bid", the responsiveness of the bids will be further determined with respect to the remaining bid

conditions, i.e., priced bill of quantities, technical specifications, and drawings."

7. Annexure-II appended with the Notice Inviting Tenders provided for List of Plant & Equipment to be deployed on Contract Work and the same reads as under:

"Annexure-II

List of Plant & Equipment to be deployed on Contract Work

(Reference Cl. 4.5.5)

Sr. No.	Type of Equipment	Maximum age as on	Up to Rs. 50 Million	Rs.51-200 Million	Rs.201-500 Million	Rs.501-1000 Million & above
1.	Recycler/Stabliser	2	-	-	1	-
2.	Tipper Truck	5-7	-	-	15	-
3	Motor Grader	5	-	-	3	-
4.	Front end Loader	5	-	-	2	-
5.	Smooth Wheeled Roller	5	-	-	3	-
6.	Vibratory Roller	5	-	-	2	-
7.	Batch Mix Plant	5	-	-	1	-
8.	Paver finisher with Electronic Sensor	5	-	-	1	-
9.	Water Tanker	5	-	-	4	-
10	Bitumen Sprayer		-	-	1	-
11	Tandem Roller	5	-	-	2	-
12	Concrete Mixers with Integral weigh Batching facility	5	-	-	2	-
13	Track Mounted Mobile stone crusher	5	-	-	1	-

8. Special conditions appended with the Notice Inviting Tenders, *inter alia*, provided as under:

> *"1. Machinery at S. No. 1 i.e. Recycler/Stablizer in the list of plants & equipments as per Annexure-II with reference to Clause 4.5.5 of SBD should be in the ownership of bidder, as this is special type of machinery required for treatment of sub bases/base course for major item of construction in this project.*
>
> *2. The evaluation Committee will verify the ownership proof of all the plants & equipments as per Annexure-II with reference to Clause 4.5.5 of SBD during technical evaluation. In case of any doubt Committee authorized by the Employer will physically check all the machinery required for the execution of work of technically qualified bidders. The financial bid will be opened only after the satisfaction of Committee.*
>
> *3. The bidder has to furnish an affidavit that he will not raise any dispute/claim if the formation width of existing roadway/carriageway is less than that for single lane road. Any such issue will be reported to the Engineer-in-Charge for resolving promptly by the department."*

9. Section-2 of the Notice Inviting Tenders dealt with Qualification Information and Paragraph 1.5 of the same provided as under:

"1. 5 Availability of key items of Contractor's Equipment essential for carrying out the Works (Ref. Clause 4.5.5).

The Bidder should list all the information requested below. Refer also to Sub Clause 4.3 (d) of the instructions to Bidders.

Item of Equipment	Requirement	Availability Proposals				Remarks (from whom to be purchased)
	No.	Capacity	Owned/Leased to be procured	Nos./Capacity	Age/ Condition	

Other relevant provisions of the Notice Inviting Bids shall be referred to at the relevant time.

10. Vide Corrigendum-II (Annexure P-2), the bid submission end date of the tender was extended by the Employer up to 21.09.2019 at 5:00 p.m. instead of 20.09.2019 at 5:00 p.m. It was also mentioned that the technical bid will be opened on 23.09.2019 at 11:00 a.m. instead of 21.09.2019 in the office of Chief Engineer, Mandi Zone, HP PWD, Mandi.

11. As per the records, two bidders responded to the Notice Inviting Bids, i.e., the petitioner and the private respondent. Whereas the petitioner submitted its bid on 20.09.2019, the private respondent submitted its bid on 21.09.2019 at 11:40 a.m. Initially, in terms of the Summary of Bid Opening of Part-1 Bids, the bids were uploaded on the Website on 23.09.2019. An objection was raised by the Evaluation Committee scrutinizing the tenders with regard to security submitted by the petitioner in the following terms:

> *"Cheques as submitted for bid security are not acceptable, valid instruments of bid security as per SBD may be submitted on or before 26.9.2019 upto 4 PM, otherwise bid shall be rejected."*

This is contained in Annexure P-7 appended with an earlier Writ Petition filed by the present petitioner, titled *M/s Amit Singla Vs. State of H.P. and others*, CWP No. 2688 of 2019 as well as running Page Nos. 229-230 of the paper-book of present petition.

12. Feeling aggrieved by the abovementioned observation of the Evaluation Committee, the petitioner approached this Court by way of CWP No. 2688 of 2019, in which, the petitioner primarily prayed for the following reliefs:

> *"(i) Issue a writ, order or direction especially a writ in the nature of Certiorari for quashing the Summary of Bid Opening of Part I*

Bids dated 23.09.2019 (Annexure P/7), passed by the respondent Nos. 3 to 8 whereby the Technical Bid submitted by the petitioner in response to the Notice Inviting Tender bearing Tender ID 2019_PWD_31309_1, Tender Reference No. PW.SRJ/TA/Pub/2019-5939-42 dated 19.08.2019 for the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" (Anneuxure P/1) has been rejected as being illegal, arbitrary and contrary to the terms and conditions incorporated in the aforesaid Notice Inviting Tender as also the Standard Bidding Document Procurement of Civil Works (SBD) appended therewith;

(ii) Issue a writ, order or direction especially a writ in the nature of Mandamus for directing the Respondent No. 1 to withdraw the decision of its duly constituted Committee which had technically evaluated the bids submitted by the respective bidders, including the petitioner in response to the Notice Inviting Tender bearing Tender ID 2019_PWD_31309_1, Tender Reference No. PW.SRJ/TA/Pub/2019-5939-42 dated 19.08.2019 for the work of "Improvement &

Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" and open the Financial Bid submitted by the petitioner and undertake the tender process strictly in accordance with the terms and conditions prescribed in the Notice Inviting Tender as well as the Standard Bidding Document Procurement of Civil Works (SBD) appended thereto;

(iii) a writ in the nature of mandamus for restraining the Respondent No. 1 from finalizing the tender process and awarding the work of "Improvement & Strengthening of Thalout- Thachi km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain shelter & sign Board)" to any other bidder who had participated in the E-Tender Process during pendency of the instant petition in this Hon'ble Court."

13. Said Writ Petition was disposed of by this Court vide judgment dated 01.10.2019 in the following terms:

"Notice. Mr. J.K. Verma, learned Additional Advocate General, appears and accepts service of notice on behalf of the respondents.

On hearing this matter for sometime, this Court is prima facie satisfied that the bid security amount to the tune of Rs.41,99,000/- has not been deposited by the petitioner in terms with the contract agreement. Learned Additional Advocate General, on instructions received from Executive Engineer, Seraj Division, HPPWD Janjheli, District Mandi, H.P., has submitted that subject to all other conditions in case this amount is deposited by the petitioner during the course of the day, by way of an instrument, assuring the payment thereof on demand to respondent No. 3, the Chief Engineer, HPPWD Mandi Zone, District Mandi, Himachal Pradesh, by 8.00 p.m. today either at the office/residence, the petitioner will also be considered alongwith other bidders during further process which has to take place in this matter.

Learned counsel representing the petitioner submits that the amount in question will be deposited today itself, in terms of tender document by 8 p.m. at the office/residence of respondent No. 3.

> *In view of the above and relief sought in this writ petition, nothing survives in this petition to be decided on merits. The same is accordingly disposed of with the above observations. Pending application(s), if any, shall also stand disposed of."*

A copy of the said judgment is on record as Annexure P-5.

14. Thereafter, vide Annexure P-16, the bid of the petitioner has been rejected on the ground that the bidder does not meet the minimum qualification criteria of bidding documents. Simultaneously, the bid of the private respondent has been held to be meeting the minimum qualification criteria and bidding documents by the Evaluation Committee.

15. Feeling aggrieved, the petitioner has filed this writ petition praying for the reliefs already enumerated hereinabove.

16. Mr. Shrawan Dogra, learned Senior Counsel appearing for the petitioner has argued that the act of the respondent-department of declaring the bid of the petitioner to be bad on account of not meeting the minimum qualification criteria of the bidding document is arbitrary and discriminatory because respondent-department has always been biased in favour of the second bidder and the entire intent of the department was to somehow oust any other bidder so as to ensure that there was no competitor for the second bidder, i.e. the private respondent

in the present petition. To substantiate his contention, Mr. Dogra has argued that the act of extending the date of online submission of bid from 20.09.2019 to 21.09.2019 by issuing a corrigendum was an arbitrary act which was done by the department just to accommodate the private respondent as said bidder was not in a position to submit its bid by 20.09.2019. Mr. Dogra has argued that the corrigendum dated 20.09.2019 (Annexure P-2) did not disclose as to what were the administrative exigencies, on account of which the date of bid was changed from 20.09.2019 to 21.09.2019 and the very fact that after the extension of date for submission of bid, it was only the private respondent who submitted its bid, this clearly demonstrates that extension of date of bid submission was tailor made act of the department to facilitate the private respondent herein to submit its bid. He has further argued that initially holding of the security bid submitted by the petitioner to be invalid by the respondent-department also demonstrates that the department was biased against the petitioner and it was only due to the intervention of this Court in the earlier petition filed by the petitioner that the technical bid of the petitioner was considered by the department. Mr. Dogra has further argued that as the petitioner was apprehending that the department was outrightly biased in favour of the private respondent and there was each and every likelihood of the bid of the petitioner being rejected to accommodate the

private respondent, the petitioner made a communication to the Employer vide Annexure P-7, dated 09.10.2019, in which inter alia apprehensions that the department was biased against the petitioner-firm and was bent upon to favour the private respondent, were raised. Mr. Dogra has drawn the attention of the Court to communication dated 11.10.2019 (Annexure P-8) addressed by the Employer to the petitioner vide which the petitioner was called upon to clarify its position on the points mentioned therein on the pretext that during the process of technical evaluation, the Evaluation Committee had decided to give an opportunity to the petitioner to clarify its position on the points mentioned in this letter. The argument of Mr. Dogra is that whereas vide this communication dated 11.10.2019, the petitioner was called upon to clarify its position within five days therefrom, the biasness of the employer can be guaged from the fact that this communication was posted on 19.10.2019 and was received by the petitioner only on 22.10.2019. Mr. Dogra submitted that in this background, vide communication dated 22.10.2019, the petitioner called upon the employer to grant five working days till 30.10.2019 to submit its response to the abovementioned communication. Mr. Dogra has also drawn the attention of this Court to communication dated 30.10.2019 (Annexure P-11), vide which, according to Mr. Dogra, all the queries which stood raised in communication dated 11.10.2019 (Annexure P-8),

were satisfactorily responded to by the petitioner. In order to substantiate the factum of biasness of the Employer, Mr. Dogra has also drawn the attention of this Court to Annexure P-12, which is a communication dated 26.10.2019, vide which, in response to the letter of the petitioner dated 22.10.2019, the petitioner was called upon to submit its response by 28.10.2020 to communication dated 11.10.2019, which communication as per Mr. Dogra, was itself posted on 29.10.2019, i.e. a day after the petitioner was supposedly required to submit its response to communication dated 11.10.2019 (Annexure P-8). Referring to the ground of rejection as are contained in impugned communication Annexure P-16, i.e. proceeding of Evaluation Committee, Mr. Dogra has argued that the petitioner could not have been declared technically unqualified because the petitioner was fulfilling the technical criteria to be eligible for being considered as having qualified the technical bid because Clause 25 of the notice inviting bids contained the word "minimum" and the petitioner was fulfilling the minimum criteria to enter the zone of consideration. Mr. Dogra has further argued that Evaluation Committee has given a complete go-bye to the special conditions which are mentioned on the back of Annexure-II, i.e. "List of Plant and Equipment to be deployed on Contract Work" which envisaged that the Committee was to verify the ownership proof of the plant and equipment as per Annexure-II during technical evaluation and in case of any doubt,

the Committee authorised by the Employer would physically check all the machinery required for technically qualified bidder. Mr. Dogra has further argued that Para 4.7 of Section-1 of the Notice Inviting Bids, which dealt with disqualification demonstrates that the petitioner was not suffering from any of the disqualification mentioned therein and this aspect of the matter had also been ignored by the Evaluation Committee while rejecting the technical bid of the petitioner. He has also argued that in the reply which has been filed by the Employer to the writ petition, there is no cogent explanation given as to why the date of submission of the online bid was extended from 20th September to 21st September, 2019 and further the allegation against the petitioner that it had not completed two works allotted to it in Kalpa Division was not only factually incorrect but the mode and manner in which the information was collected by the Employer at the back of the petitioner to its deterrent from the officer concerned at Kalpa also demonstrates the biasness of the Employer against the petitioner. On these basis, Mr. Dogra has argued that as the petitioner was not fairly treated and further as there was arbitrary extension of the date of submission of the bid to accommodate the private respondent and further as the employer was biased against the petitioner and in favour of the private respondent, the petition be allowed and after declaring the petitioner technically qualified, the Employer be directed to proceed with the opening of the financial bid.

17. Opposing the petition, Mr. Ashok Sharma, learned Advocate General has argued that the petition has no merit and the allegation of the petitioner that the technical bid of the petitioner stood rejected arbitrarily was completely incorrect as the bid of the petitioner was rejected by the Evaluation Committee after objective evaluation of the same and after rightly coming to the conclusion that the same did not meet the minimum qualification criteria of bid document. Learned Advocate General has argued that the date of submission of the bid was extended by the department on account of administrative exigency and as this extension did not cause any prejudice to the petitioner nor it had acted to the deterrent of the petitioner, therefore, the petitioner was not having any locus to assail the same. Learned Advocate General has further argued that earlier also a writ petition against the shortcomings which were pointed by the Evaluation Committee in the Security submitted by the petitioner was filed by the petitioner, in which, there was no such relief claimed by the petitioner and therefore also, this plea is now barred by the principle contained in Order 2, Rule 2 of the Civil Procedure Code. Learned Advocate General by exhaustively referring to various Clauses of the Notice Inviting Bids as well as other documents on record has argued that as the technical bid of the petitioner was not meeting the minimum qualification criteria of bidding documents, therefore, the bid of the petitioner was rightly rejected by the

department. Learned Advocate General has argued that list of the plant and equipments to be deployed on contract work, as supplied by the petitioner, was not in consonance with "Annexure-II" of the Notice Inviting Bids as the petitioner was neither having "Batch Mix Plant" nor a "Track Mounted Mobile Stone Crusher machinery" as per the requirement of the Employer. He argued that as these were the essential conditions of the Contract/Notice Inviting Bids, which were not complied with by the petitioner, therefore, the technical bid of the petitioner was rightly rejected because the bid of the petitioner was in fact a non-responsive bid. He further submitted that the response which was filed by the petitioner to communication dated 11.10.2019, itself speaks volumes that the petitioner was neither owning nor was having assured ownership of the equipments which were required to be deployed on contract work as on the date when the bid was submitted by the petitioner. He has drawn the attention of the Court to reply dated 30.10.2019 filed by the petitioner and by referring to the annexures appended thereto, he submitted that documents which were later on submitted by the petitioner to demonstrate that he had plant and equipments to be deployed on contract work, were misleading, as fact of the matter remained that as on the date when the bid was submitted by the petitioner, he was neither owning nor having assured ownership of the plant and equipments. Learned Advocate General has further

argued that kind of plant and equipments to be deployed on contract work was for the Employer to decide and in this case, whereas on one hand the petitioner was not having the plant and equipments to be deployed on contract work as required by the Employer, yet the petitioner had the audacity to say that the plant and equipments at the disposal of the petitioner were good enough for the purpose of the execution of the contract work without appreciating that it was not the satisfaction of the petitioner which was paramount but that of the Employer whose work was to be executed. Learned Advocate General has also argued that it was a matter of record that the works allotted to the petitioner in Kalpa Division were not being executed by him in terms of the agreement entered into and in this regard, the information which was sought by the Employer from the officer concerned, was *bonafidely* sought to ensure that the prospective bidder was having good credentials to carry out the work and there was no need to associate the petitioner in this regard. Learned Advocate General also argued that contention of the petitioner that its security bids were also arbitrarily rejected by the Evaluation Committee and it was only on account of intervention of this Court that the petitioner was allowed to participate in the bid is factually incorrect because a perusal of the judgment passed by this Court in the earlier petition filed by the petitioner would demonstrate that the Court had also observed that the security

deposited by the petitioner was not proper, yet it was the State which made a statement before the Court that if the petitioner was to rectify the defects with regard to the deposition of the security amount, the petitioner will be permitted to participate in the process and it was on the basis of the statement of the respondent-State that the petition was disposed of. On these basis, it has been urged by learned Advocate General that such petition is without any merit and the same be dismissed accordingly.

18. Mr. J.S. Bhogal, learned Senior Counsel appearing for the private respondent while adopting the arguments of learned Advocate General has argued that the plea of extension of time with regard to submission of technical bids by the Employer cannot be permitted to be agitated by the petitioner by way of this writ petition because had the petitioner been really aggrieved by the extension of time, then it should have had raised this issue in the earlier writ petition filed by it. As per Mr. Bhogal, failure on the part of the petitioner to do so in the earlier writ petition now bars it from raising this plea under the provisions of Order 2, Rule 2 of the Code of Civil Procedure. He has further argued that even otherwise the extension of time to submit the technical bid did not in any manner prejudice the petitioner and as the petitioner was not having machinery at the time when it submitted its bid, the technical bid of the petitioner has been rightly rejected by the Evaluation Committee. Mr.

Bhogal has also argued that Court cannot sit on the judgment over the decision of the Evaluation Committee because the role of the Court, as defined by various judgments of Hon'ble Supreme Court, is that the Court in such like matters is to see the "legality" of the decision of the Evaluation Committee and not the "soundness" of the decision of the Evaluation Committee. Mr. Bhogal has also argued by referring to Annexure P-11 i.e. communication dated 30th October, 2019 made by the petitioner to the Employer that it stood established from this communication that on one hand the petitioner was not having the equipments as was demanded by the Employer and on the other hand, the petitioner was making a conditional offer that in case the contract work was awarded to it, then a party who is owner of the equipments as was desired by the Employer, had consented to provide the petitioner on hire basis, provided the work was allotted to it. Mr. Bhogal submitted that as the offer of the petitioner was conditional one, therefore, also the same was otherwise also liable to be rejected. On these basis, he has argued that the petition be dismissed with costs.

19. During the course of arguments, learned counsel for the parties relied upon various judgments of the Hon'ble Supreme Court with regard to the scope of judicial review. As majority of those judgments relied upon find mention in one of the latest judgment of the Hon'ble Supreme Court in Silppi Constructions Contractors Vs. Union of

India and another 2019 SCC OnLine SC 1133, therefore, for the sake of brevity, the law as has been declared by Hon'ble Supreme Court in this regard, as reiterated in Silppi Constructions case *(supra)* is being quoted hereinbelow:

> *"7. In Tata Cellular vs. Union of India, it was held that judicial review of government contracts was permissible in order to prevent arbitrariness or favouritism. The principles enunciated in this case are :-*
>
> *"94. ……*
>
> *(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.*
>
> *Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers.*

More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

8. In Raunaq International Ltd. vs. I.V.R. Construction Ltd., this Court held that superior courts should not interfere in matters of tenders unless substantial public interest was involved or the transaction was mala fide.

9. In Air India Limited vs. Cochin International Airport Ltd., this Court once again stressed the need for overwhelming public interest to justify judicial intervention in contracts involving the State and its instrumentalities. It was held that Courts must proceed with great caution while exercising their

discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point.

10. In KSIIDC Ltd. vs. Cavalet India Ltd.4 it was held that while effective steps must be taken to realise the maximum amount, the High Court exercising its power under Article 226 of the Constitution is not competent to decide the correctness of the sale affected by the Corporation.

11. In Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson (P) Ltd.5 it was held that while exercising power of judicial review in respect of contracts, the Court should concern itself primarily with the question, whether there has been any infirmity in the decision-making process. By way of judicial review, Court cannot examine details of terms of contract which have been entered into by public bodies or State.

12. In B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd.6 it was held that it is not always necessary that a contract be awarded to the lowest tenderer and it must be kept in mind that the employer is the best judge therefor; the same ordinarily being within its domain. Therefore, the court's interference in such matters should be minimal. The High Court's jurisdiction in such matters being

limited, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

13. In Jagdish Mandal vs. State of Orissa it was held:

"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. 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……."

14. In Michigan Rubber (India) Ltd. vs. State of Karnataka & Ors. it was held that if State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract, interference by Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by State or public authorities.

15. In Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. it was held that a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision. The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It is possible that the owner or employer of a project

may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

16. In Montecarlo vs. NTPC Ltd.10 it was held that where a decision is taken that is manifestly in consonance with the language of the tender document or sub-serves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

17. In Municipal Corporation, Ujjain and Another vs. BVG India Ltd. it was held that the authority concerned is in the best position to find out the best person or the best quotation depending on the work to be entrusted under the contract. The Court cannot compel the authority to choose such

undeserving person/company to carry out the work. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work.

18. Most recently this Court in Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited observed that a writ petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing into economic activities. This Court observed that there are various checks and balances to ensure fairness in procedure. It was observed that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done.

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of

judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the

government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

20. Similarly, in ***Bharat Coking Coal Ltd. and others*** Vs. ***AMR Dev Prabha and others*** 2020 SCC Online SC 335, the Hon'ble Supreme Court has again reiterated as under:

> *29. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. Phrased differently, Courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon.5 However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former)."*

21. I have heard learned counsel for the parties and have also gone through the pleadings carefully as well as the judgments relied upon by learned counsel for the parties.

22. Annexure P-16 is the impugned communication, vide which the Evaluation Committee has rejected the bid of the petitioner on the ground that bidder does not meet the minimum qualification criteria of bidding document. A perusal of the said proceedings of the Evaluation Committee demonstrates that the Evaluation Committee while coming to the conclusion that the bidder did not meet the minimum qualification criteria of the bidding document, observed as under:

(A) *Representation/complaint received from one of the bidder M/s Amit Singla vide letter No. AS/HPPWD-MZ/2019-20.10.02 dated 9th October, 2019 has also been considered and opportunity has been afforded to the bidder vide this office letter No. PW-CE(MZ) CTR-1/2019-13757 dated 11.10.2019. Reply received from M/s Amit Singla vide letter AS /HPPWD-MZ/ 2019-20 /10/07 dated 30.10.2019 has also been gone through and after detailed deliberation following has been concluded:-*

1. The bidder's submission that Batch Mix Plant for item No. 16 (P/L bituminous concrete with 100-120 TPH batch type hot mix plan---) is a part of financial bid & not a part of the qualifying

criteria of technical bid is not tenable as bidding documents alongwith BOQ was uploaded and made available on the website and it is clear that batch mix plant for bituminous work is required and the same is required to be technically assessed as per Clause 4.5.5 (equipment capability). The bidder has not uploaded any document regarding ownership of batch mix plant for bituminous concrete item. The bidder after opening of technical bid has submitted the undated undertaking from M/s. NH Construction Pvt. Ltd. Vide his aforesaid letter dated 30.10.2019 regarding leasing out the batch mix plant on hire basis for execution of work which is on plain paper and without any reference and date.

2. The bidder's submission that invoice No. INV-00561 dated 19.07.2019 as uploaded by M/s Amit Singla for crusher is in consonance with requirement of track mounted mobile stone crusher is false as nothing in the invoice has been mentioned regarding track mounted stone crusher. Moreover submission of the bidder that the crusher is wheel mounted is also not mentioned anywhere in the invoice. Further as per MORTH specification for road and bridge works vide clause 116. Section 100 regarding crushed stone aggregates "where the terms crushed grave/

Shingle crushed stone, broken stone, or stone aggregate appear in any part of the contract Documents or Drawings issued for work, they refer to crushed gravel crushed shingle/crushed stone aggregate obtained from integrated crushing plant having appropriate primary crusher, secondary cone crusher, vertical shaft impactor and vibratory screen unless specified otherwise. Stone retained on 4.75 mm sieve shall have at least two faces fractured. Bidder have not submitted any documentary proof for the same and have no knowledge about it. The bidder after opening of technical bid has submitted the undertaking from M/s. NH Construction Pvt. Ltd. Vide his aforesaid letter dated 30.10.2019 regarding leasing out Roljack Jaw Crusher (Track Mounted Mobile Stone Crusher) on hire basis for execution of work which is on plain paper and without any reference and date.

3. Executive Engineer, Kalpa Division (B & R) HP PWD, Kalpa vide his letter No. PW/KNR/DB/PMGSY/2019-8339-40 dated 01.11.2019 has submitted in response to this office email dated 30.10.2019 that the performance of the bidder M/s Amit Singla in respect of following two packages/work is as under:-

(i) For package No. HP-05-44, the overall percentage/performance of work done till date is 9% only whereas fourteen month period has been elapsed against the allowed period of 17 months.

(ii) For package No. HP-05-42, the overall percentage/performace of work done till date is 13% only whereas fourteen month period has been elapsed against the allowed period of 17 months.

4. The bidder has written a letter dated 09.10.2019 to the office prior to the evaluation of technical bid with the intention of influencing the bidding process which is quite unwarranted before he publishing of technical evaluation report and in this way, he has violated the Clause No. 24 of the bidding document."

(B)

19.4.5.5		Equipment Capabilities:-	M/s Amit Singla, Sole Prop Sh. Amit Singla Booth No. 23, Sector 27D, Chandigarh.	M/s Garg Sons Estate Promoters, Pvt. Ltd. House No. 260, Sector 9-C, Chandigarh.		
	1	Recylcer/Stabliser	1 No.	1No.		
	15	Tipper Truck	15 No. (Owned/hired)	15 No.		
	3	Motor Grader	3 No. (Owned/hired	3 No.		
	2	Front end Loader	4 No. (owned/hired)	2 No.		

	3	Smooth Wheeled Roller	3 No. (owned/hired)	3 No.		
	2	Vibratory Roller	3 No. (owned)	2 No.		
	1	Batch Mix Plant	Not attached	1 No.		
	1	Paver finisher with Electronic Sensor	1 No.	1 No.		
	4	Water Tanker	4 No.	4 No.		
	1	Bitumen Sprayer	1 No.	1 No.		
	2	Tandem Roller	2 No. (owned/hired)	2 No.		
	2	Concrete Mixers with Integral weigh Batching facility	2 No.	2 No.		
	1	Track Mounted Mobile Stone crusher	Not attached	1 No.		

23. At this stage, it is necessary to refer to the Instructions to the Bidders, as were contained in the Bid Document. Para-9 of the Invitation for Bids provided that the bid documents consisting of qualification information and eligibility criterion for bidders, plans specifications, drawings, the schedule of quantities of the various classes of work to be done and the set of terms and conditions of contract to be complied with by the contractors can be seen on website https://hptendersgov.in and scanned copies of the required documents and information as per Section 2 (Formats and Annexure) should be attached in the Technical Bid as prescribed in SBD. Similarly, Para-12 thereof provided that conditional bids and the bids not meeting the

qualification criteria on the date of receipt of bids shall be summarily rejected.

Now specifically coming to Section-1 of the Invitation for Bids, i.e., Instructions to Bidders, Para- 4.3 of Para-4 which dealt with Qualification of the Bidder provided that all bidders shall include the information and documents mentioned therein below with their bids in Section 2.

24. Similarly, Para 4.5, which dealt with Qualification Criteria, provided that qualification will be based on applicant's meeting the minimum pass/fail criteria regarding the applicant's general and particular experience, personnel and equipment capabilities etc., as demonstrated by the Applicant's responses in the forms attached to the Letter of Application.

25. Para 4.5.5. thereof, which dealt with the Equipment Capabilities, envisaged that the applicant should own or should have assured ownership to the following key items of equipment, in full working order, and must demonstrate that, based on known commitments; they will be available for use in the propose contract. Following "Key Items of Equipments" stand referred in Annexure-II of the Invitation for Bids, which is again being reproduced hereinbelow:

"Annexure-II

List of Plant & Equipment to be deployed on Contract Work

(Reference Cl. 4.5.5)

Sr. No.	Type of Equipment	Maximum age as on	Up to Rs. 50 Million	Rs.51-200 Million	Rs.201-500 Million	Rs.501-1000 Million & above
1.	Recylcer/Stabliser	2	-	-	1	-
2.	Tipper Truck	5-7	-	-	15	-
3	Motor Grader	5	-	-	3	-
4.	Front end Loader	5	-	-	2	-
5.	Smooth Wheeled Roller	5	-	-	3	-
6.	Vibratory Roller	5	-	-	2	-
7.	Batch Mix Plant	5	-	-	1	-
8.	Paver finisher with Electronic Sensor	5	-	-	1	-
9.	Water Tanker	5	-	-	4	-
10	Bitumen Sprayer		-	-	1	-
11	Tandem Roller	5	-	-	2	-
12	Concrete Mixers with Integral weigh Batching facility	5	-	-	2	-
13	Track Mounted Mobile stone crusher	5	-	-	1	-

26. Now, in this background, this Court will refer to the infirmities, which stand pointed out in Annexure P-16 by the Evaluation Committee in the bid of the petitioner.

27. As per the Evaluation Committee, the list of Equipment Capabilities vis-a-vis Batch Mix Plant were not attached by the petitioner

and similarly list of Equipment Capabilities qua Track Mounted Mobile Stone Crusher was also not attached by the petitioner.

28. The Evaluation Committee further held that the contention of the petitioner that the Batch Mix Plant for Item No. 16 was a part of Financial Bid and not part of qualifying criteria of technical bid was not tenable as bidding documents alongwith BOQ was uploaded and made available on the website, which made it clear that batch mix plant for bituminous work was required and the same was required to be technically assessed as per Clause 4.5.5 (Equipment Capability).

29. The Committee also observed that the petitioner had not uploaded any document regarding ownership of batch mix plant for bituminous concrete item. Petitioner after opening of technical bid had submitted undated undertaking from M/s. NH Construction Pvt. Ltd. vide letter dated 30.10.2019 regarding leasing out the batch mix plant on hire basis for execution of work which was on plain paper and without any reference and date.

30. The Evaluation Committee also observed that petitioner's submission that invoice No. INV-00561 dated 19.07.2019, as uploaded by it for crusher was in consonance with requirement of track mounted mobile stone crusher was false as nothing in the invoice had been mentioned regarding track mounted stone crusher. Moreover

submission of the petitioner that the crusher was wheel mounted was also not mentioned anywhere in the invoice.

31. The Committee also observed that as per MORTH specification for road and bridge works vide Clause 116, Section 100 regarding crushed stone aggregates "where the terms crushed grave/ Shingle crushed stone, broken stone, or stone aggregate appear in any part of the contract Documents or Drawings issued for work, they refer to crushed gravel crushed shingle/crushed stone aggregate obtained from integrated crushing plant having appropriate primary crusher, secondary cone crusher, vertical shaft impactor and vibratory screen unless specified otherwise. Stone retained on 4.75 mm sieve shall have at least two faces fractured. The Committee also observed that the petitioner had not submitted any documentary proof for the same and had no knowledge about it. The petitioner after opening of technical bid had submitted the undertaking from M/s. NH Construction Pvt. Ltd. vide letter dated 30.10.2019 regarding leasing out Roljack Jaw Crusher (Track Mounted Mobile Stone Crusher) on hire basis for execution of work which was on plain paper and without any reference and date.

32. The Committee also observed that the Executive Engineer, Kalpa Division (B & R) HP PWD, Kalpa vide letter No. PW/KNR/DB/ PMGSY/2019-8339-40, dated 01.11.2019 had submitted in response to the email of the office of the employer that qua package

No. HP-05-44, the overall percentage/performance of work done by the petitioner was 9% only till the relevant date, whereas 14 months period had elapsed against the allowed period of 17 months and for package No. HP-05-42, the overall percentage/performance of work done till the relevant date was 13% only, whereas 14 out of 17 months period had elapsed.

33. The Committee also observed that the petitioner had written a letter dated 09.10.2019 to the office prior to the evaluation of technical bid with the intention to influence the bidding process which was unwarranted before the publishing of technical evaluation report and, thus, the petitioner had violated Clause No. 24 of the bidding document.

34. Now, the Court will straightway refer to Communication dated 9th October, 2019 (Annexure P-7), addressed by the petitioner to the employer.

35. It stood mentioned in this Communication that the petitioner intended to raise an objection against the biased behaviour of the Department against the petitioner, as the Department had tried its best to oust the petitioner-Firm from the tender process earlier by not accepting its bid security in the form of Certified Cheques, which was in absolute violation of Clause 16.1 of the Standard Bidding Document and was allowed to submit the security by way of FDR only, pursuant to order

dated 01.10.2019, passed by the High Court of H.P. in CWP No. 2688 of 2019.

36. It was further mentioned in this Communication that though the petitioner had quoted very competitive rates and was hopeful of being allotted that said work, but the Department was "hell-bent" of favouring the second bidder. It also stood mentioned in this Communication that during the earlier tendering process, the petitioner stood disqualified on the basis that Recycler bought by it was hypothecated by their seller and Note had been taken for non-performance of its two works in Kalpa Division. Petitioner also mentioned in this Communication that as per its knowledge, there was no slow progress of work being executed by it in Kalpa Division and that it had sent a Communication to Kalpa Division and informed that a re-tender for the subject work had to be carried out and that the petitioner be informed about non-performance of its work in Kalpa Division.

37. It was further mentioned in this Communication that the Department had tried its best to eliminate the petitioner from its tendering process and that there was a bias towards the second bidder, which was evident from the fact that the date of submission of tender was revised from 20.09.2019 to 21.09.2019, just to accommodate the second bidder, as there was no reason available with the Department to extend the date of submission of tender.

38. It was further mentioned in this Communication that the Department was working tooth and nail to disqualify and eliminate the petitioner from the bidding process and there was no reason for the Department to cancel the tender process.

39. It was finally mentioned in this Communication that the Department should conduct the tender process in a fair manner so as to save any unnecessary and exponential loss to the State exchequer.

40. There is on record as Annexure P-8 a Communication dated 11.10.2019, addressed by the Chief Engineer (MZ), HPPWD, Mandi to the petitioner, which reads as under:

> *"M/s Amit Singla,*
> *Plot No. 38-B, Industrial Area,*
> *Phase-II, Chandigarh.*
>
> *Subject: Tender for the work "Improvement & Strengthening of Thalout- Thachi-Somgad Road km 0/0 to 34/0 (Section Thalout Panjain to Thachi km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/Wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Rain Shelter, Sign Board and Road Furniture etc.) under CRF.*
>
> *The tender for the subject cited work is under process of technical evaluation. After detailed deliberation, it has been decided by the evaluation committee that an opportunity be afforded to you to clarify your position on the following points:-*

1. Invoice-cum-delivery challan for Batching Plant-CP1881518900 costing Rs.23,75,000/- as uploaded by you doesn't seem to be as per requirement of item No. 16 (P/L bituminous concrete with 100-120 TPH batch type hot mix plant…..).

2. Tax invoice No.INV-000561 dated 19.07.2019 as uploaded by you doesn't seem to be as per requirement of Track mounted mobile stone crusher as provided in the bid document.

3. You have been blacklisted by the Managing Director, H.P. Agro Industries Corp. Ltd. Vide Notification No. AIC/BD/2008=09/Tender-704 to 709 dated 18.10.2008 and also debarred by the Engineer-in-Chief, HPPWD, Shimla vide letter No. 17708-16, dated 30.12.2008 for participation in the tenders in future in HPPWD. It may be clarified whether the above orders have been revoked or not.

4. A note has also been taken for your non-performance in respect of two works awarded to you by Executive Engineer, Kalpa Division, HPPWD, Kalpa bearing package No. HP-05-42 and HP-05-44.

5. The committee has observed that your letter dated 09.10.2019 is an attempt to impede the Technical Evaluation process which is clear violation of Clause 24 (Process to be confidential) of

Standard Bidding Documents, Section-1:Instructions to bidders. The committee has taken serious view on your letter dated 09.10.2019 and is of the view that this letter on your part is an effort to influence the process of technical Evaluation by Employer in free, fair and impartial manner.

You are therefore directed to clarify your position on the above points within five days failing which your bid is liable to be rejected.

Chief Engineer (MZ),
HPPWD, Mandi."

41. Response to this communication is available on record as Annexure P-11, dated 30th October, 2019.

42. With regard to Point No. 1, the response of the petitioner was that the issue raised by the employer vide Point No. 1 was a part of financial bid and not a part of qualifying criteria or technical bid. It was further mentioned in response thereto that the petitioner had already shown ownership of a Cement Batch Mix Plant and "the petitioner was also submitting an undertaking from the owner of a similar Batch Mix Plant, as desired, as per letter dated 11.10.2019." It was further mentioned in this para that the undertaking clearly stated that if the petitioner was awarded the work, then the Company in issue had undertaken that a Batch Mix Plant shall be given on hire basis to the petitioner-Firm till the completion of work.

43. With regard to Point No. 2, it stood mentioned by the petitioner that the crusher machine jaw, plate for stone crusher machine with conveyor belt and idler roller were fully in consonance with the requirement of Track Mounted Mobile Stone Crusher, as provided in the bid document and the only difference between the invoice provided by the petitioner and the requirement of the tender was that the Crusher of the petitioner was Wheel Mounted, whereas, the employer has asked for a Track Mounted Crusher.

44. Petitioner further mentioned in Para-2 of the response that the mode of mounting of the crusher will have no impact on the output of the crusher, rather the Wheel Mounted Crusher will be more portable for a work to be executed for almost 25 Kms. It was further mentioned that the petitioner was annexing ownership proof and an undertaking of the Firm, which had consented to provide the petitioner with said crusher on hire basis, provided the work was awarded to the petitioner.

45. With regard to the points raised in Para-3 of Communication dated 11.10.2019, the stand of the petitioner was that the issue of blacklisting of the petitioner by the Managing Director, H.P. Agro Industries Corporation Ltd. was decided by the High Court of H.P. and the same was no more an issue.

46. With regard to the contents of Para-4 of the Communication of the employer, the petitioner had stated that there was no non-performance of the two works awarded to the petitioner by the Executive Engineer, Kalpa Division and the petitioner had also sought a clarification in this regard from the concerned Executive Engineer, which had not been given to the petitioner.

47. With regard to Para-5 of the Communication dated 11.10.2020, the petitioner had mentioned that it was only pointing out its concern as per the information received by it and the Communication dated 09.10.2019 was not a violation of Clause-24 of the Notice Inviting Tender.

48. This Court would like to pause at this stage itself, because from the facts which stand narrated hereinabove, in the considered view of this Court, the findings returned by the Evaluation Committee that the Technical Bid of the petitioner was not meeting the minimum qualification criteria of bidding document, were correct findings. This Court is holding so for the following reasons. The relevant Clauses of the Notice Inviting Bids have already been quoted by the Court in above paras of the judgment in extensio. It is clear from the relevant Clauses of the Notice Inviting Bids that the conditional bids and the bids not meeting the qualification criteria on the date of receipt of bids were liable to be rejected and bid documents consisting of qualification

information and eligibility criterion were to be attached in the Technical Bid, as prescribed in SBD as per Section-2 (Formats and Annexures). Para-4 of Section-1 of the Instructions to Bidders, which dealt with Qualification of the Bidder, clearly provided that if the employer had not undertaken pre-qualification of potential bidders, all bidders shall include the information and documents in their bids in Section 2, as mentioned in para-4.3. Thus, in terms of para-4.3(d), it included "major items of construction equipment proposed to carry out the Contract". Similarly, para-4.5, which dealt with Qualification Criteria provided that qualification of the applicant was to be based on, *inter alia*, equipment capabilities of the applicant. Para-4.5.5, which dealt with Equipment Capabilities, provided that the applicant should own or should have assured ownership of the Key Items of equipment in full working order and must demonstrate that, based on known commitments, they will be available for use in the proposed contract. The suggested list of Key Items of equipments is in terms given in Annexure-II, which also mentions "Batch Mix Plant" and "Track Mounted Mobile Stone Crusher". The proceedings of Evaluation Committee (Annexure P-18), vide which, the bid of the petitioner has been rejected, demonstrates that the Evaluation Committee, *inter alia*, concluded that the petitioner was neither having "**Batch Mix Plant" nor was it having "Track Mounted Mobile Stone Crusher**". In my considered view, as admittedly, the petitioner was

neither having "Batch Mix Plant" nor "Track Mounted Mobile Stone Crusher" by way of either ownership or hire ownership at the time when the bid document was submitted by the petitioner, the bid of the petitioner was not a responsive bid. The factum of the petitioner not possessing these essential equipments is evident from the contents of Annexure P-11, dated 30th October, 2019, written by the petitioner to the employer while answering some of the observations made by the Evaluation Committee.

49. The stand of the petitioner that the requirement of a Batch Mix Plant could not be said to be a part of Technical Bid, but a part of a Financial Bid, is completely baseless. It is common knowledge that bids comprise of two parts: (a) Technical Bid; and (b) Financial Bid. After the prospective Bidders respond to the Notice Inviting Bids, then first the Technical Bids are opened and if the Bidders are found technically qualified to execute the work, then the Financial Bids are opened. While evaluating the Technical Bids, generally the Evaluation Committee evaluates as to whether the prospective Bidders in issue are technically qualified to execute the work and besides experience etc., they have necessary machinery at their disposal to execute the work or not. Whether or not the prospective bidder has necessary machinery etc. to execute the work, is obviously a part of Technical Bid and the same is not a part of Financial Bid, as is the case of the petitioner.

50. Besides this, in its Communication dated 30th October, 2019, the petitioner in so many words has admitted that it neither had a Batch Mix Plant nor it had Track Mounted Mobile Stone Crusher, either at the time when it submitted its bid or at the time when it was responding to the queries of the Evaluation Committee. Incidentally and interestingly, the petitioner has expressly mentioned in this Communication with regard to these two machineries that in the event of the contract being awarded to it, then it was having undertakings from the owners of such like machinery that the machinery shall be given to the petitioner on hire for execution of the work.

51. A perusal of the undertakings, which were appended alongwith Annexure P-11 demonstrates, as has been pointed out by the learned Advocate General also, that the undertakings are undated. Though learned Senior Counsel for the petitioner had submitted that the factum of the undertakings being undated, is of no consequence, because reference of the work in issue has been mentioned therein, in my considered view, this does not improves the case of the petitioner, because the factum of the dates of undertakings not being there, leads to only one inference that such undertakings were not with the petitioner at the time when it submitted its bids, otherwise, in terms of the conditions of Notice Inviting Bids, it should have uploaded these undertakings with its tender.

52. Hon'ble Supreme Court in ***Vidarbha Irrigation Development Corporation Vs. Anoj Kumar Garwala*** 2019 SCC Online SC 89 has reiterated that essential conditions of a tender have to be strictly complied with and even the Employer has no power to condone such lack of strict compliance, as any such condonation would amount to perversity in the understanding or appreciation of the tender conditions, which then have to be interfered with by a Constitutional Court. Hon'ble Supreme Court has been pleased to specifically hold as under:

> *"15. The law on the subject is well settled. In Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd. and Ors., (2016) 8 SCC 446, this Court held:*
>
> > *"14. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. v.Ganesh Engg. Works [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] this Court held as under: (SCC p. 276, para 6)*
> >
> > *"6. ... The requirements in a tender notice can be classified into two categories—those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."*
> >
> > *15. Similarly in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [B.S.N. Joshi & Sons*

Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] this Court held as under: (SCC pp. 571-72, para 66)

"(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;..."

16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties."

16. However, learned counsel appearing on behalf of the appellant strongly relied upon Afcons Infrastructure Ltd. v. Nagpur Metro Rail

Corpn. Ltd., (2016) 16 SCC 818, and paragraphs 14 and 15 in particular, which state:

"14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

17. It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. Given the fact that in the present case, an essential

tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."

53. In view of the above legal position, the act of the Employer in this case of rejecting the Technical Bid of the petitioner on the ground that the same was not meeting the qualification criterion laid down in the Notice Inviting Bids, cannot be faulted with, as the employer has rightly rejected the bid of the petitioner, as petitioner was not technically qualified in terms of the conditions of the Notice Inviting Bids.

54. Accordingly, on the basis of the findings returned hereinabove, as this Court finds that the bid of the petitioner was a non-responsive bid, it finds no illegality in the act of the Evaluation Committee of rejecting the Technical Bid of the petitioner vide Annexure P-16.

55. With regard to the allegation of the petitioner that the entire process so undertaken by the Department was arbitrary, discriminatory and biased in favour of the private respondent, this Court holds that the petitioner has not been able to point out on the basis of

any material on record that the private respondent was not technically qualified to participate in the process, yet the employer went out of the way to make the said bidder technically qualified. As far as the allegation of the petitioner that the date of submission of online bid was arbitrarily extended from 20.09.2019 to 21.09.2020 is concerned, though this Court finds that neither in the Corrigendum, which was issued while extending the date, any reasons stood assigned as to why the same was done, nor in the reply to the petition, the reasons stand enumerated, however, as it is a matter of record that this act of the employer was not assailed by the petitioner either by way of earlier petition filed by it or immediately after issuance of the Corrigendum in issue, this Court concurs with the submissions made by learned Advocate General as well as learned counsel for the private respondent that the petitioner has no locus to raise this ground in this petition, on the analogy of the principles contained in Order II, Rule 2 of the Code of Civil Procedure. Once the plea which was available to the petitioner at the time when the earlier writ was filed, was not taken by it, then subsequently it is precluded from raising such plea in the subsequent petition.

56. Even the allegation of arbitrariness with regard to alleged rejection of the security amount submitted by the petitioner does not holds any water. A perusal of the judgment dated 01.10.2019, passed by this Court in CWP No. 2688 of 2019 (Annexure P-5) demonstrates that

this Court had observed that prima facie it was satisfied that the bid security amount deposited by the petitioner was not in terms of the contract agreement. The petition was admittedly disposed of on the basis of instructions received by the learned Advocate General that subject to other conditions in case the security amount was deposited by the petitioner during the course of the day by way of instrument, assuring the payment thereof, then the case of the petitioner would be considered alongwith other bidders during further process.

57. As far as the allegation of the petitioner with regard to posting of Communications to the petitioner post the date vide which responses thereto were called for from the petitioner is concerned, in the considered view of the Court, as it is a matter of record that the response submitted by the petitioner to the queries of the Evaluation Committee was taken into consideration by the Evaluation Committee while rejecting the Technical Bid of the petitioner, too much cannot be read into it, save and except that the employer has to set its house in order to ensure that ministerial machinery is in sync with the administrative machinery of the office.

58. As far as the allegation raised by the petitioner with regard to the mode and manner in which reports were purportedly procured from the Executive Engineer of Kalpa Division is concerned, the Court is not making any observation qua the same for the simple reason

that as this Court is convinced that the bid of the petitioner was not a responsive bid, as petitioner was not having requisite equipments, which were required for the work in issue in terms of Notice inviting Bids, the Court is not venturing into other aspects of the matter.

59. Accordingly, in view of the findings returned hereinabove, as there is no merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any. Interim orders, if any, stand vacated. No order as to costs.

(Ajay Mohan Goel)
Judge

December 14, 2020
(bhupender/narender)