

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

DATED : 15.03.2012

CORAM

**HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PERMOD KOHLI**

Writ Petition (C) No. 19 of 2011

1. SITAL ENTERPRISES,
Jorethang Bazzar,
P.O. & P.S. Jorethang,
South Sikkim.
2. Dhan Kumar Lepcha,
S/o Nima Tshering Lepcha,
R/o Bermoik-Sumbok,
West Sikkim.
3. Sanjay Subba,
S/o Tek Man Subba,
R/o Bermoik-Sumbok,
West Sikkim.
4. Binod Kumar Gurung,
S/o Mon Bahadur Gurung,
R/o Upper Barfok,
West Sikkim.
5. Subash Kumar Chettri,
S/o Pana Chettri,
R/o Kaluk Tadong,
West Sikkim.
6. Man Bir Subba,
S/o Bir Bahadur Subba,
R/o Bermoik-Sumbok,
West Sikkim.

... **Petitioners.**

- versus -

1. State of Sikkim,
represented by Secretary,
Human Resource Development
Department,
Government of Sikkim,
Gangtok, East Sikkim.
2. Bata India Limited,
6A, Surendra Nath Banerjee Road,
Kolkata-700013,
West Bengal.

... **Respondents.**

For Petitioners : Mr. D. R. Thapa, Mr. Barun Dahal,
Mr. Dinesh Chawhan, Advocates.

For Respondent : Mr. J. B. Pradhan, Addl. Advocate
General with Mr. Karma Thinlay
Namgyal, Govt. Advocate and Mr.
Bhusan Nepal, Advocate/Legal
Retainer for respondent no.1.

Mr. Sudesh Joshi, Ms. Manita
Pradhan, Advocates for
respondent no.2.

J U D G M E N T (O R A L)

Kohli, CJ

Respondent No.1 issued a Notice Inviting Tender (hereinafter referred to as 'the NIT') for supply of readymade School Uniforms, Shoes & Socks for Academic Session-2011 (Annexure-P2). The controversy in the present petition is confined to the supply of Shoes only. The notice contained various conditions for making the supply. Relevant conditions incorporated in it are reproduced hereunder: -

**"NOTICE INVITING TENDER FOR SUPPLY OF READYMADE
SCHOOL UNIFORMS, SHOES & SOCKS FOR ACADEMIC SESSION-
2011"**

For and on behalf of the Governor of Sikkim, sealed tender in the prescribed form/format are invited from reputed dealers/manufacturers/distributors for supply of following items for the academic session-2011.

Sl. No.	Brief description of items	Cost of tender Documents in Rs. [non-refundable]	Earnest Money in Rs. [2.5% of estimated cost]	Total estimated cost in Rs.
1.	-	-	-	-
2.	-	-	-	-
3.	-	-	-	-
4.	Shoes	50,000/-	7,80333/-	3,12,13,331/-

TERMS & CONDITIONS

4. The bidder shall quote the rate for above items strictly as per the design and quality of samples for uniforms, shoes and socks displayed in the textbook section of the HRD department. The bidder shall visit the office on any working day to view/examine the sample at his own cost.
5. The rate of beneficiary items quoted should be inclusive of transportation, packaging & handling and delivery charges upto the respective departmental stores located at Gangtok, Gyalzing, Mangan and Namchi.
6. The chargeable taxes (VAT, CESS etc.) should be quoted separately.
12. The Human Resource Development Department reserves the right to accept or reject any or all the tenders without assigning any reason thereof or order for re-tender of entire work at any time. The decision of the Human Resource Development Department in this matter shall be final and binding upon all the bidders/tenderers.

2. Besides the above conditions, the date of issue of Bid documents was notified as between 10.01.2011 to 12.01.2011. Last date of submission of completed Bid documents was 22.01.2011 till 1200 hours. The date and time of opening of Bid was fixed as 22.01.2011 at 1230 hours at the venue notified in the NIT. This NIT was followed by an addendum (Annexure-P4) whereby the last date for

submission of completed Bid documents was shifted to 24.01.2011 upto 1200 hours and the date and time of opening of Bid was also fixed as 24.01.2011 at 1230 hours.

3. In response to the aforesaid NIT, 15 firms purchased tender documents including the petitioner and respondent no.2. Whereas only 13 firms submitted their tender documents within prescribed time. The Department had constituted a Committee consisting of following members for consideration of the Bids: -

- "(1) Special Secretary as Chairman,
- (2) Director (Text Book),
- (3) Director (Accounts),
- (4) Joint Director (Text Book),
- (5) Dy. Director (DPER & NECAD),
- (6) Dy. Director (Finance Rev. & Exp. Deptt.) and
- (7) Assistant Planning Officer as the members"

4. The Committee of the officers accordingly opened the Bids received from 13 firms and prepared a comparative statement of the rates quoted by the bidders. It is relevant to note that as per the NIT, the prospective tenderers were required to quote the rates as per the design and quality of samples displayed in the HRD department and also in respect to samples that may be offered by the bidders. Thus, two kinds of rates were required to be quoted by the bidders for two different kinds of samples. Some of the bidders quoted rates as per the departmental sample, whereas some bidders also quoted rates for the samples tendered by them along with

the tender document. The petitioner quoted rates for both the samples, whereas the respondent no.2 quoted rates for only the sample kept by the department. It is relevant to note here that department had kept sample of BATA shoe. On preparing the comparative statement, the Committee found that the 3 firms including the petitioner and respondent no.2 had quoted rates lower than the proposed rates. The rates quoted by the lowest 3 firms are as under: -

(i)	M/s. Sital Enterprises, Jorethang	-	Rs.357/-
(ii)	M/s. Zambala Enterprises, Gangtok	-	Rs.398/-
(iii)	M/s. BATA Ltd., Kolkata	-	Rs.397/-

5. The Committee, however, rejected the Bids of 12 out of 13 firms including that of the petitioner and respondent no.2 for non-compliance of one or the other condition of the NIT. The Committee found that only one firm, namely, M/s. Basun Bishnu Enterprises, Namchi has submitted the tender documents complete in all respects. However, the rate quoted by the said firm was Rs.407/- plus VAT and CESS, i.e. the total cost of Rs.461.95 per pair of shoes. The tender documents of the petitioner and respondent no.2 were rejected with the following endorsements: -

S. No. as per documents	Sl. No.	NAME OF FIRMS	NAME OF ITEMS	As per firm RATE-I	As per Departmental RATE-II	REMARKS
5	10	M/s. Sital Enterprises, Jorethang, S.Sikkim	-	357.00	357.00	No dealership of BATA No VAT & CESS shown extra

S. No. as per	Sl	NAME OF FIRMS	NAME OF	As per firm	As per Departmental	REMARKS
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documents	No.		ITEMS	RATE-I	RATE-II	
11	2	M/s.Bata India Ltd. Kolkata, West Bengal	-	-	397.00	No VAT & CESS shown. Extra on quoted rate. VAT shown on MRP.

6. After rejection of the Bids of all the tenderers except M/s. Basun Bishnu Enterprises, Namchi in respect to the supply as per the samples of the department, the Committee called the said bidder who agreed to supply Bata shoes at the rate of Rs.397/- plus taxes, equal to the lowest rate quoted by respondent no.2 and accordingly, recommended the purchase of shoes from M/s. Basun Bishnu Enterprises, Namchi at the above rate. The Government examined the recommendation of the Committee and it was decided to purchase the shoes from the lowest bidder, i.e. respondent no.2, who is the manufacturer of the shoes instead of recommendee M/s. Basun Bishnu Enterprises, Namchi, who was only a dealer and had agreed to supply at the rates quoted by respondent no.2. The Government seems to have disagreed with the ground of rejection of the bid of respondent no.2, the original manufacturer of Bata shoes. From the perusal of the records it appears that the tender of the respondent no.2 was rejected by the Committee merely on the ground that Shri Subasis Das, the signatory of the tender documents on behalf of M/s. BATA India Ltd., has not submitted any documents authorizing him to represent the Company. On consideration of the fact that

the respondent no.2 had quoted the lowest rate and is the original manufacturer, the Government placed the supply order dated 31.03.2011 with the respondent no.2 for supply of the notified quantity of the shoes at the lowest rate of Rs.397/- plus 1% CESS and inclusive of transportation, loading, unloading and delivery upto the respective stores in all the four Districts of Sikkim.

7. Aggrieved of the aforesaid order of award of contract for supply of the shoes in favour of respondent no.2, the present petitioner has filed the present petition seeking quashment of award of contract in favour of respondent no.2 with further prayer to re-advertise the contract and also to stay the operations of the contract awarded to respondent no.2. This Court while admitting this petition on 13.05.2011, further directed that the action taken on the basis of the impugned tender process shall be subject to the outcome of the writ petition.

8. I have heard the learned counsel for the parties at length.

9. Mr. D. R. Thapa, learned counsel for the petitioner has assailed the award of contract (Annexure P-11) *inter alia* pleading that petitioner's rates were lowest for supply of the shoes and, thus, the award of contract to respondent no.2 at a

higher rate and rejection of the tender of the petitioner is totally illegal, arbitrary, warranting interference in exercise of the power of the judicial review by this Court. According to Mr. Thapa, at the time of opening of the tender documents on 24.01.2011, the Committee approved the lowest rate of the petitioner as the petitioner had agreed to supply the shoes as per the samples of the department. However, subsequently, the Committee has recorded a different report/recommendation. It is also the case of the petitioner that the Committee had rejected the tenders of all the bidders including that of the respondent no.2 for non-compliance of the conditions of NIT and, thus, the award of contract to respondent no.2 for supply of the shoes is totally wrong and actuated by bias. He has also challenged the rejection of petitioner's tender as illegal as there was no stipulation in the NIT for annexing any document to be a dealer of M/s. BATA India Ltd. According to the petitioner, he had submitted samples of Action shoe under category-1 and that of Bata shoe under category-2 for which the same rate of Rs.357/- per pair was quoted which was the lowest. This fact is apparent from the comparative table (Annexure-P5). It is not in dispute that the petitioner had submitted tender for supply of ACTION shoes as also BATA shoes. The tender of the petitioner was rejected on the twin grounds; (i) no dealership of BATA and (ii) no VAT and CESS shown extra. It is, however, admitted

position that the petitioner's rate Rs.357/- per pair for both brands of shoes was the lowest.

10. Mr. J. B. Pradhan, learned Addl. Advocate General appearing for the respondent, while defending the action of the Government, respondent no.1, submitted that the petitioner was not qualified as per the terms and conditions of the NIT and, thus, the Committee and Government rightly rejected its tender notwithstanding the lowest rates quoted by it.

11. I have perused the NIT. The preface of the NIT itself indicates that tenders were invited from the reputed "dealers", "manufacturers" and "distributors". Even though the NIT did not even suggest that one should be a dealer, manufacturer or distributor of BATA. However, it is a pre-qualification for a tenderer that he should be a dealer, manufacturer or distributor of the branded shoe for which tenders have been submitted. According to petitioner's own submission, the petitioner produced the samples of ACTION and BATA shoes. No document whatsoever was produced with the tender (Annexure-P3) nor placed before this Court to indicate that the petitioner was/is a dealer, distributor or manufacturer of either ACTION shoes or BATA shoes. This fact has been fairly conceded by Ld. Counsel for the petitioner.

The petitioner thus did not fulfill the essential qualification stipulated in the NIT for eligible tenderer. The Committee rightly rejected the tender of the petitioner on the ground of ineligibility. It is settled law that every NIT contains certain essential and certain non-essential, i.e. ancillary conditions. Whereas the essential conditions must be strictly adhered to, though there can be relaxation or deviation from the non-essential or ancillary conditions.

12. In Poddar Steel Corporation v. Ganesh Engineering Works and others : (1991) 3 SCC 273,
Hon'ble Supreme Court laid down the following principles: -

"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."

13. Since the petitioner lacked the fundamental qualification to be an eligible tenderer being neither dealer, manufacturer or distributor of any of the branded shoes for which the Bid was made, the petitioner cannot have grievances for rejection of his tender. In view of ineligibility of the petitioner, he also loses locus to challenge the award of contract to the respondent no.2, particularly, in absence of any allegation of malafide in award of contract in favour of the respondent no.2. Apart from the eligibility of the petitioner,

the award of contract to the respondent no.2 also does not suffer from any arbitrary, mala fide or unfair action on the part of the respondent no.1. It is undisputed that the respondent no.2 was/is a manufacturer of the BATA shoes, a reputed brand. Its tender was rejected merely on the ground that its representative, who signed the tender document, had not produced any proof of his status in the company. It is, however, admitted position that the tender document was submitted by the Company itself. The Committee seems to have acted in an extra cautious manner while rejecting the tender. As a matter of fact, the Committee should have sought further information/ clarification from the Company, respondent no.2 and/or signatory of the tender document in this regard. The Committee, however, in its wisdom without seeking any further clarification/information, rejected the tender. The error committed by the Committee seems to have been rectified by the Government which is the final accepting authority of the tender and rightly so. Amongst the eligible tenderers, respondent no.2 had quoted lowest rate and being the manufacturer, the Government rightly preferred respondent no.2 over its dealer/distributor, i.e. M/s. Basun Bishnu Enterprises, Namchi. Even if there is any irregularity in award of contract to respondent no.2, it does not call for any interference in exercise of the power of judicial review. Power of judicial review in commercial field is to be exercised to

examine the validity of decision making process of public authorities and not the decision itself. If, in the opinion of the Court, the decision making process suffers, from the vice of arbitrariness, unfairness, illegality, irrationality, mala fide/bias or unreasonableness by Wednesbury principle, i.e. whether decision is such that no reasonable person on proper application of mind would take, judicial review of administrative action is called for. It is also a settled law that the High Court in exercise of the power of judicial review under Article 226 of the Constitution of India do not sit as a Court of appeal over the administrative decision of the public authorities, even though a different view is possible. Hon'ble Supreme Court time and again has cautioned about the interference in the administrative action of the public authorities in the matter of award of contracts.

14. In **United India Periodicals Pvt. Ltd. v. M/s. M & N Publications Ltd. and others : (1993) 1 SCC 445**, Hon'ble Supreme Court was examining the grant of contract by the MTNL for publishing telephone directories. The MTNL entered into a supplemental agreement with the Sterling Computers Ltd. without inviting fresh tenders. While considering the action of MTNL, a public authority, the Hon'ble Supreme Court observed as under : -

*28. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by

Irrelevant ones. If such decision is influenced by extraneous considerations which it ought not to have taken into account the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias. The contract awarded for the publication of the directories had not only a commercial object but had a public element at the same time i.e. to supply the directories to lakhs of subscribers of telephones in Delhi and Bombay, every year within the stipulated time free of cost. In such a situation MTNL could not exercise an unfettered discretion after the repeated breaches committed by UIP/UDI, by entering into a supplemental agreement with the Sterling for a fresh period of more than five years on terms which were only beneficial to UIP/UDI/Sterling with corresponding no benefit to MTNL, which they have realized only after the High Court went into the matter in detail in its judgment under appeal."

15. In TATA Cellular v. Union of India : (1994) 6 SCC 651, while laying down the principles for judicial intervention in the matter of award of contracts, Hon'ble Supreme Court thus observed: -

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State.* The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

After examining various judgments on the power of judicial review in the matter of grant of commercial contracts by the public authorities, the Hon'ble Supreme Court laid down the following principles: -

"94. The principles deducible from the above are:

- (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."

16. Above judgments in **Sterling Computers Ltd.** and **TATA Cellular** (supra) were followed by the Supreme Court in **Jagdish Mandal v. State of Orissa and others : (2007) 14 SCC 517**. In this case, Hon'ble Supreme Court further laid down the principles warranting interference in exercise of power of judicial review. The relevant observations are noticed hereunder: -

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

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

OR

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

(ii) Whether public interest is affected.

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

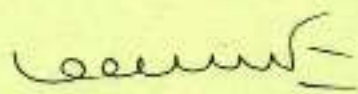
It has also been held that the judicial review of the administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides.

17. While exercising the power of judicial review, the Court has to examine whether the decision making process has been fair, transparent, non-arbitrary and is not influenced by any extraneous or irrelevant considerations. In absence of any such infirmity on examination even if it is found that decision, per se, may not be sound, no interference is warranted provided the decision is in public interest.

18. Applying the principles in the above noticed judgments to the facts of the present case, it can be conveniently inferred that the action of respondent no.1 cannot be said to be arbitrary, illegal, irrational or unreasonable in any manner nor does it suffer from any *malafide* or bias action as no specific allegation is made. The petitioner being ineligible was rightly denied consideration for award of the contract. Amongst the other two lowest bidders, respondent no.2 had the better credentials being the manufacturer of the shoes, whereas the other tenderer M/s. Basun Bishnu Enterprises, Namchi was only its dealer/distributor who could not have better credentials than the manufacturer. Admittedly, respondent no.2 had quoted

the lowest rate and it fulfilled all other eligibility conditions except some doubts about the status of its representative which was only ancillary question and did not relate to either the eligibility of the tenderer or its qualification. The Government/public authority has always the discretion to choose the best which recourse has been adopted in the present case. The tenderer, i.e. M/s. Basun Bushnu Enterprises recommended by the Committee had has no grievance against the award of contract to the respondent no.2. The said tenderer had also to procure the material from respondent no.2 for supply to the Government. In any case the contract stands executed and there is no infirmity in the award of contract to respondent no.2.

19. On consideration of the relevant facts and the settled legal proposition of law, this petition deserves to be dismissed. No order as to costs.


(Permod Kohli)
Chief Justice
 15.03.2012

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Approved for Reporting: Yes/No
Internet: Yes/No