

IMPACT ASSESSMENT OF JUDICIAL APPROACH TOWARDS TENDER PROCESS IN INDIA

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In

Department of Law

By

Satish Singh

Supervisor

Dr. Tarun Arora

Associate Professor



Department of Law

School Of Legal Studies and Governance

Central University of Punjab, Bathinda

May, 2018

DECLARATION

I declare that the dissertation entitled "IMPACT ASSESSMENT OF JUDICIAL APPROACH TOWARDS TENDER PROCESS IN INDIA" has been prepared by me under the guidance of Dr. Tarun Arora, Associate Professor, Department of Law, School of Legal Studies and Governance, Central University of Punjab, Bathinda. No part of this dissertation/thesis has formed the basis for the award of any degree or fellowship previously.

Satish Singh

16llmlaw-01

Department of Law

School of Legal Studies and Governance

Central University of Punjab,

Bathinda - 151001.

Date:

CERTIFICATE

I certify that Satish Singh has prepared his dissertation entitled “IMPACT ASSESSMENT OF JUDICIAL APPROACH TOWARDS TENDER PROCESS IN INDIA” for the award of LL.M. Degree of the Central University of Punjab, under my guidance. He has carried out this work at the Department of Law, School of Legal Studies and Governance, Central University of Punjab.

Dr. Tarun Arora
(Dissertation Supervisor)

Associate Professor

Department of Law

School of Legal Studies and Governance

Central University of Punjab

Bathinda - 151001

Date:

ABSTRACT

IMPACT ASSESSMENT OF JUDICIAL APPROACH TOWARDS TENDER PROCESS IN INDIA

Name of Student : Satish Singh
Registration Number : 16llmlaw-01
Degree for which submitted : Master of Laws
Name of Supervisor : Dr. Tarun Arora
Name of Centre : Department of Law
Name of School : School of Legal Studies and Governance
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partnership.

With the growth of population the need for infrastructural and other development has also arisen much and it has created an over burdened responsibility upon the government. Thus, the government had in order to come out of such over burdened work had adopted the measure of tender process through which it invites the private participants in the developmental projects.

Tender is a process in which a competent authority of the government as authorised by it invites a bid which is generally in terms of contract law is an invitation to offer whereby the private participants makes their best possible offer to the competent authority and out of such offers best of best is accepted which is both economically and socially is in general public interest by this way the individuals are also give opportunity to develop more and more while trading with the government.

No doubt it provides opportunity to individuals to grow but it does not guarantee as a right to any particular individual to contract with government as under the Indian Constitution every person has the right to equal opportunity under Art. 14 of the Constitution. Therefore, the tender process has been evolved in to order to provide fair and equal opportunity to every participants in developmental works and also to

avoid the possibilities of turning discretionary power into arbitrary power and the mal practices which may crop up in the procurement process. Though procurement process plays a very vital role in development of the country but yet India does not have any uniform law on it which could be applicable throughout the whole country beside the CVC guidelines and General Financial Rules. But now a days some states like Kerala, Rajasthan & Karnataka have framed the statutes to maintain transparency in tender process but still many are left behind.

In absence of central legislation there have been many drawbacks present in tender process like corruption, unwanted exercise of discretionary power, favouritism, etc. So in order to check such lacunas the judiciary played a vital role in plugging the loopholes in tender process and also maintained the balance in the society through its judicial approach. This work ventures to present the impact of judicial such approach in maintaining transparency and fairness in tender process in India as supplementary to the regulatory provisions.

Satish Singh

Dr. Tarun Arora

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LIST OF ABBREVIATION

S. No.	Full form	Abbreviation
1.	All India Reporter	AIR
2.	All India Reporter (Supreme Court)	AIR(SC)
3.	Article	Art.
4.	Central Vigilance Commission.	CVC
5.	General Financial Rules	GFR
6.	India Law Reports	ILR
7.	Westlaw journal Indian Supreme Court cases	Indlaw SC
8.	Manupatra	Manu
9.	Organisation for Economic cooperation and Development.	OECD
10.	Public Private Partnership	PPP
11.	Supreme Court Cases	SCC
12.	Above Used	Supra
13.	Supreme Court	SC
14.	South Africa (Supreme Court of Appeal)	SA (SCA)
15.	United Nation Commission on International Trade Law	UNCITRAL
16.	United Nations Convention against Corruption	UNCAD
17.	United State cases	US
18.	Volume	Vol.

Chapter I

Introduction

Prologue

Public procurement also called “Tender” is a process through which the government authorities purchase resources from outside suppliers either for its own utilization or for other purposes.¹ It is an activity of purchase of goods and services, from private sectors by the government authorities, ranging from the basic stationery to military weapons.² The World Bank has noticed that the Public procurement is an area where public and private sectors co-operate financially, and are involved in it relatively a high level of transactions.³

Tender also known as “Bidding” is a process of inviting bids for projects, goods, and services or to accept a formal offer. The tender request documents are, in the form of Invitation to Tender, Request for Tender (RFT), Request for Proposals (RFP), Expression of Interest (EOI), etc.⁴

Whenever goods or services are acquired by Government agencies, it is known as public procurement. It has been stated, that “It is a method through which governments and public sector organisations acquire services for important public investment in infrastructural projects and to strengthen human potentialities that are the base of nation growth”.⁵

With the rapid growth of industrialisation, infrastructural and transportation development, the concept of public procurement has also developed very much on an equal footing. As purchase of goods, services, and works through tender system has always been the most preferable and feasible method of securing

¹ Delhi Jal Board v. Grasim Industries Ltd. and Ors. MANU/CO/0066/2017.

² E Mantzaris, "Public Procurement, Tendering, and corruption: Realities, challenges, and tangible Solutions", Vol. 7 African Journal of Public Affairs (2014), available at: file:///G:/Mantzaris_Public_2014.pdf (Visited on December 20, 2017).

³ Kavisha Pillay & Janne Erasmus, “Understanding Corruption in Tenders”, Corruption Watch, South Africa, available at: file:///G:/Understanding%20tender%20corruption%20e-book_0.pdf (Visited on December 30, 2017).

⁴ Ibid.

⁵ Unidentified author, “Public Procurement Reforms to Enhance Value for Money”, 16th November, 2009, available at: http://saiindia.gov.in/sites/default/files/6publicprocurementreforms15_12_09pdf (Visited on March 6, 2018).

best services at best price form the private participants for the citizens and their administrator of the country via commercial transactions.⁶

Background of Tender Process

The concept of tender or procurement process is not a new one but is an old concept prevailing since the time of 2400 to 2800 B.C. As written on a red clay tablet found in Syria, the earliest procurement order dates from between 2400 to 2800 B.C. The bid was for "50 jars of perfume smooth oil for 600 small weights in grain."⁷ Other evidence of conventional procurement involves the development of silk trade between China and a Greek colony in 800 B.C.⁸

During the Industrial Revolution, the concept of procurement assumed more importance. When the practice enriched more than part of a worker's skill set, but a job function all its own. When industrial plants needed resources to help manufacture their products, many of them wound up hiring "materials" men to handle the acquisition and transportation of supplies. That often meant strategic thinking in negotiating with suppliers for the best possible price to offset manufacturing costs.⁹ By mid-1960's, procurement process has taken a managerial role on a broad scale. The concept of material management has become the focus Public Sector Undertakings. Procurement professionals have emphasized the competitive bidding, with price as the determining factor for most contracts. An addition to the number of trained professionals during this period reformed the procurement process on its way to regaining the departmental status.¹⁰

With the boom in Information Technology sector, (which is also now days called as Industrialisation 4th generation) the procurement process is also undergoing a transformational phase. The expansion of e-commerce in 20th century

⁶ Sunil Seth and Vasanth Rajasekaran, "The Government Procurement Review", available at: [file:///G:/SGP%20\(2\).pdf](file:///G:/SGP%20(2).pdf) (Visited on October 10, 2017).

⁷ Khi V. Thai, "Public procurement Re-examined", Journal of public procurement Vol. 1, Issue 1, 9-50, available at: <http://ippa.org/jopp/download/vol1/Thai.pdf> (Visited on October 6, 2017).

⁸ Ibid.

⁹ A brief history of procurement: Key Points from Past and Present, available at: <https://blog.procurify.com/2015/11/19/a-brief-history-of-procurement-key-points-from-past-and-present/> (Visited on October 6, 2017).

¹⁰ Ibid.

engaging with the Business to business e-commerce transaction has led to the evolution of e-tender¹¹ procurement process.¹²

Public Procurement: An Important Governmental Activity

Public procurement is an important government activity which affects the economy of the country. Approximately 10 to 15 percent of national budget in developed countries and 20 percent in developing countries, the public procurement accounts for the major part of the economy.¹³ A similar case exists for India also where public procurement is an important means not only for meeting day-to-day functional needs, but also for ensuring the socio-economic objectives, and for the promotion of economic growth. In India, various ministries, departments, municipalities, other local bodies, statutory corporations and public undertakings being at the centre and at the state level do the procurement activities for purchase of goods and services. Here, it constitutes approximately 25-30 percent of GDP. It is important to note that the major departments of government such as defence, railways, and telecommunication, spend around 50 percent of their budget on procuring.¹⁴ It has been estimated that annual expenditure on public procurement for Central Government is in the range of rupees 2.5-3 lakh crore.¹⁵ Since public resources are limited, the primary goal of the public procurement policy is to get 'value for money', i.e. to get the best goods and services at the lowest cost.

Consequently, the public procurement is significantly influencing the economy by creating demand and consumption. The government can run the market in a particular direction on the basis of its purchasing power. It also functions as a means to achieve social results. Through preferential treatment in purchasing, it can be used for the indigenization of foreign technology, development of

¹¹ E-tender is an internet-based process wherein the complete tendering processes, from advertising to receiving and submitting tender related information are done online. It enables the firms to be more efficient as paper-based transactions remain reduced, and it facilitates a more rapid exchange of information, available at: <http://businessdictionary.com/definition/e-tendering.html> (Visited on September 9, 2017).

¹² Supra note 8.

¹³ Pratyush Sinha, CVC, "Enhancing value in public procurement", Conference on Competition, Public Policy and Common Man, 16th November, 2009, available at: <http://www.cci.gov.in/menu/speechesbypratyushsinhacvc.pdf> (Visited on March 10, 2018).

¹⁴ Bhabesh Hazarika and Pratap Ranjan Jena, "Public Procurement in India: Assessment of Institutional Mechanism, Challenges, and Reforms", available at: http://nipfp.org.in/media/medialibrary/2017/07/WP_2017_204.pdf (Visited on May 7, 2018).

¹⁵ Ibid.

backward areas, or the promotion of small scale industry. Late, environment, human rights, children's safety, and gender equality are also being leveraged by the procurement process.¹⁶ Some of the representative factors that high lights the academic importance of public procurement are as:

- a. Involvement of large capital.
- b. Hefty contracts are involved, mainly those related to infrastructure and defence sectors.
- c. Stakes of the taxpayers who look for the value for money, transparency and non-discrimination.
- d. Major influence on the domestic industry all the way through development, construction work, purchases and overall boom in the economy and also its impact on the society.
- e. To improve the image of the Government as it is basically influenced by the quality of procurement it did.

The process of Public Procurement

Tendering is one of the most important, general and popular mechanisms for public procurement. It involves the following stages as:

1. To Identify the broad scope of determining technical specifications by the concerned authority;
2. To invite tender from the interested participants;
3. Assessment of technical bids in case where two stage bid system is followed as it enables to shortlist the bidders whose financial bids would be assessed at later stage;
4. Assessment of financial bids of the shortlisted bidders and to identify the appropriate match or bidder; and
5. Forming a contract with the selected bidder.¹⁷

Need For Transparency and Fairness in Public Procurement

Public procurement is an important factor in our daily lives because it plays a vital role in building both social and economic infrastructures like roads,

¹⁶ Anthony Kayode Bodunrin, "Empirical Review and Analysis of Public Procurement Practices in Nigeria: Challenges and Prospects", available at: file:///C:/Users/ASUS/AppData/Local/Temp/29717-32524-1-PB.pdf (Visited on May 5, 2018).

¹⁷ Harsh Sinha, "Effective Public Procurement Policy- need of the hour", available at: http://indialawjournal.com/volume4/issue_4/article_3.html (Visited on May 8, 2018).

schools, hospitals, drinking water, sanitation etc. As mentioned above, areas like railways, defence, health, and telecommunication have allotted major part of their budget in public budget. In many OECD countries, 15 percent of GDP and expenditure related to procurement amount in most developing countries, this can be quite high. Also, in view of the fact that in India, public procurement system accounts for around 30% of the country's GDP, the importance of having an 'effective' public procurement system can never be understated. Ideally taken, public procurement means to acquire goods or services at the right place, at the right time, in the right quality and quantity, at the best possible cost for the last benefit of the people.

Being a big buyer of goods and services in the economy, public sector can affect the allocation of overall resources, competitiveness, and economic efficiency. Transparency in public procurement can be achieved through an open and non-discriminatory competitive bidding.¹⁸ Efficient and competitive procurement procedure is important for obtaining the goods and services at the best prices for the benefit of taxpayers, consumers, and general public services users.

However, there are definite rules which govern the procurement process, likewise, the manner in which a tender is to be made out and the contents of the tender documents itself may hinder the competition and promote corruption in the whole system.

Public Procurement and Corruption

As public procurement involves the matter of public finance which owes constitutional, moral & legal responsibility upon the government agents to take utmost care and due diligence while allotting tender and entering into a contract with the bidder. There are certain challenges from both sides i.e., from the government side and from the private individual side in procurement process some of them are mentioned here below as.¹⁹

From the side of Bidders-

1. Incomplete Bids.

¹⁸ Fair Play Promoting and Sustaining Competition in Markets, Quarterly Newsletter of CCI, Vol. III, Oct-Dec, 2012, available at: [www.cci.gov.in/sites/default/files/ News letter.../CCI_NL_%281%292012.pdf](http://www.cci.gov.in/sites/default/files/News%20letter.../CCI_NL_%281%292012.pdf) (Visited on December 12, 2017).

¹⁹ Glenn Ackerley, Clive Thurston, John Stephenson, "Current Challenges in Bidding and Tendering, and how to overcome it", available at: [file:/// G:/1337193613_Current ChallengesinBidding.pdf](file:///G:/1337193613_Current%20ChallengesinBidding.pdf) (Visited on October 20, 2017).

2. Flawed Bids.
3. Bid Rigging.

From, Government side-

1. Insufficient Number of Bids: only one or two bids received.
2. Manipulation of bid result using alternate or separate prices.
3. In a case where two identical bids are received awarding of bid upon non disclosed criteria.
4. The inclusion of an uninvited bidder after the prequalification process.
5. The exercise of privilege clause to award a bid in accordance with non-disclosed criteria.

Consequences of these challenges-

1. Limited competition.
2. Loss of time to assemble bids submitted.
3. Inadvertently Opening of bids and/ Loss of Bids.
4. Loss of concentration and poor Evaluation Report.

Objectives in Public Procurements

There are some of the objectives in public procurement process as:

1. To achieve the best value for taxpayer's money.
2. To provide equal opportunity to all qualified bidders.
3. To promote and advance competition.
4. To have transparency and openness.
5. To ensure accountability and responsibility.
6. To prohibit corruption and abuse.
7. To develop the domestic economy.²⁰

HISTORICAL BACKGROUND of PUBLIC PROCUREMENT IN INDIA

Status of Procurement System in India:

²⁰ Shivangi Vaid, "Research Paper on Bid Rigging in Public Procurement", available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.646.8036&rep=rep1&type=pf> (Visited on May 7, 2018).

It usually refers to the process whereby the Government agencies issue a tender and invite bids for large projects that must be submitted by the requirement specified and within a finite deadline.²¹ Agencies in public sector are expected to perform multiple tasks and are always under an obligation to procure or higher the goods & services respectively on the competitive rates. Since these public sector organizations are the custodian of the public money thus, they are always under the obligation to ensure transparency, accountability, non- arbitrariness and fairness, while procuring.

The tendering process is being used for procurement or contracts, involving substantial amounts of money. It is usually adopted by:

1. Government departments, offices & agencies;
2. PSU's;
3. NGO's;

In India, despite the acceptance of the ability to be a properly established procurement system, such institutional system of purchase is not present in the form till date. The main role is played by Ministry of Finance in the Center. The Government, which issues the basic guidelines, which is to establish 'the principle of financial behavior'. Central agencies such as Central Vigilance Commission (CVC), supplement this effort by putting vigilance benchmarks in the purchase system. Nevertheless, some ministries come out with their own rules and regulations, which should be followed by all ministries while applying their purchase policies. These manuals provide preferential treatment to fixed areas such as Micro, Small and Medium Enterprises (MSME), Khadi and Village Industries (KVI), Central Warehousing, Cooperative Sectors etc. Besides that, the individual ministries and departments in the Government of India are also increasingly having their own procurement procedure.

State-level status is in an even worse condition. Many state governments are yet to institutionalize a procurement system that is transparent, flawless, and consistent with the three E's i.e. economy, efficiency, and effectiveness.

In fact, at the state level, procurement procedures are not available, financial advice system is not established, an audit mechanism is questionable.

²¹ E-tender manual, CIDCO, available at: https://file:///G:/e_Tendering_Manual.pdf (Visited on September 29, 2017).

Inappropriate use of the taxpayer's money as a result of such an inadequate, misappropriate and chaotic procurement system in India at the national and state level, the purchase of low quality goods and services in recent days has become the basis of major scandals in the country.

Government Guidelines on Procurements

The detailed rules and instructions regarding purchase by the Central Government are contained in the following as:

- i. General Financial Rules (GFR),
- ii. Delegation of Financial Powers (DFPR), and
- iii. Manual on Policies and Procedures for Purchase of Goods.

A review of these rules is made from time to time. They are mandatory in nature and are required to be followed by all departments and Ministries.

However, major Departments like Defence, Railway, Public Works, etc. have their own purchase procedures. But they are more or less based on the guidelines contained in the GFR and DFPR. The basic principles guiding the public procurement, inter-alia, are as:

1. Maximization of economy, efficiency, and effectiveness in procurement.
2. To ensure fair and equitable treatment to all the prospective suppliers/bidders.
3. To promote and advance competition among the suppliers for supply of goods/services to be procured. So, that at the most economical price services and goods can be procured.
4. To achieve transparency in the procurement procedure.

Indian Tendering Method

Rule 144 of General Financial Rules, 2017 enunciates the fundamental principles of public buying:

- a. Adequate information and announcement
- b. Transparency of bidding as well as the evaluation process
- c. Accountability
- d. Non-restrictive bidding conditions to unlock market
- e. Non-discriminatory practices to provide equality of opportunity

Tenders are generally invited through four modes as:

1. Open Tenders- In the open tender process, the bid is invited from all the qualified bidders for good, services and infrastructure works giving wide and adequate publicity. It is invited where the procurement of goods or services is of Rs. 25 lakh or above. It the most preferred mode of tendering and is also known as open competitive bidding.

Features of open tender:

- a. It is open to all qualified and interested bidders;
 - b. It is advertised locally and internationally when required;
 - c. It has objective qualification criteria;
 - d. It has clear technical specifications; and
 - e. It has clear and objective evaluation criteria.
2. Limited Tenders- In this, the tender is invited from such bidders who are impaneled in government lists as registered and pre-qualified suppliers of goods and services. It is invited for the purchase of goods or services up to Rs. 25 lakh. A minimum 3 response is required under limited tender in order to procure goods or service through it. It is helpful for confidential issues like procurement for army or military.
 3. Single Tender/Nomination Basis- This type of tender is awarded only in exceptional circumstances such as natural calamities and emergencies or there were no bids to repeated tenders has come or in case where only single dealer has been licensed (proprietary item) in respect of items sought to be procured.
 4. Two-Stage Bidding- In this bid is obtained in two stages with receipt of the financial bids after receipt and evaluation of the technical bids. In this first technical bid is invited containing all the terms and conditions of the contract.

Tender can be invited by two ways as-

1. Single bid system: In single bid system, tender is only accepted subject to recording of the detailed justification in support of the acceptance with the approval of the competent authority.²² It is beneficial in emergency need such as national calamities but not in other cases as

²²

Ministry of Rural Development, "Circular no. 11/2010 on Transparency in Implementation of PMGSY", available at: pmsgsy.nic.in/circulars/asb.doc (Visited on January 21, 2018).

it would amount to unfairness and inconsistency with Article 14 of the constitution.

In *Virendra Kapoor Proprietor Fantasy Lights v. Airport Authority of India*²³ few guidelines regarding acceptance of the single bid have been laid down by the Delhi High Court as:

- a. Generally, the cancellation of tender only will not be recommended because only one proposal has been received, till it is a valid proposal.
- b. It must not be financially miserable.
- c. Where there is no prospect left of getting a much higher bid. If there is any prospect of getting higher bid than the tender can be set aside and a new tender can be invited.
- d. The decision taken by the administrative authorities shall not be in an arbitrary manner and it must be for attaining any collateral purpose.²⁴

2. Two Bid Systems: In a two bid system, there is a simultaneous submission of two separate technical and financial bids. Where the technical bid consists of all the technical specifications along with commercial terms and conditions while financial proposal indicates an item-wise price for the items mentioned in the technical proposal. These two bids are submitted separately in different- different sealed envelopes. The technical bid is opened first and evaluated by the authorities, after that, financial bid is opened and evaluated after indicating the date and time of opening of the financial bid. The object of this two bid system is to ensure fairness in the procurement process.

Other than this, each and every notice inviting tender document consist of the certain essential content like:

- a. Instruction to bidders.
- b. Conditions of contract.
- c. Specification and allied technical details.
- d. Price schedule (to be utilized by the bidders for quoting their

²³ 158 (2009) DLT 530.

²⁴ Raj Kumar, "A Curious Case of Single Bid", available at: <http://lex-warrier.in/2013/01/a-curious-case-of-single-bid/> (Visited on January 21, 2018).

prices).

- e. Contract form.
- f. Other standard forms, if any, to be utilized by the purchaser and the bidders.²⁵

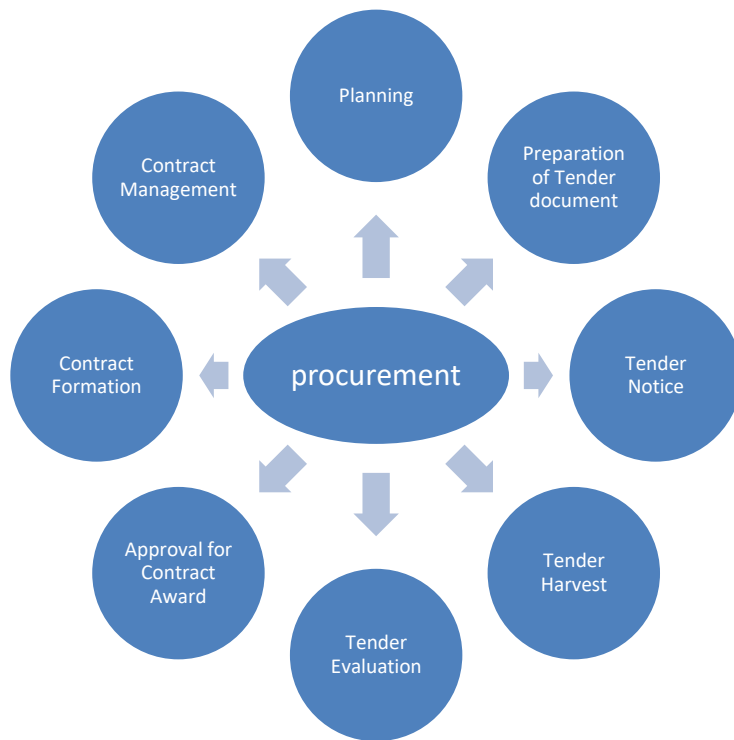
It would be important here to note that since the main object of the public procurement process is to achieve the value for money through an open competitive tendering process, thus it is not necessary to accept only the highest or the lowest bid but the value of money has to be calculated by taking into consideration other factors also like-

1. Relative Risk of the proposal.
2. Fitness for purpose
3. Performance history of the supplier/ contractor/ service provider.
4. All the direct and indirect financial costs and benefits over the life of the procurement.
5. The elasticity of the proposal to adopt possible changes.
6. The anticipated price that could be obtained, or cost incurred, at the time of disposal.²⁶

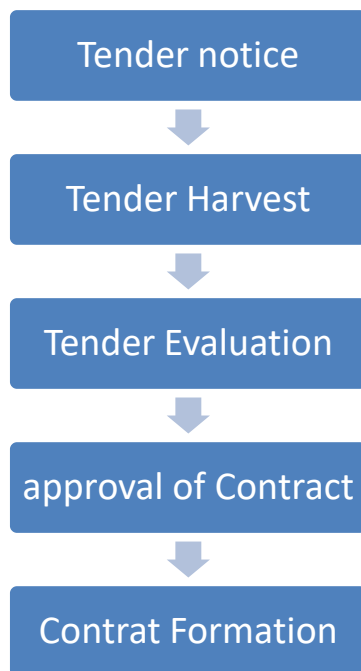
²⁵ Rule 168 Contents of Bidding Document, General Financial Rules, 2017.

²⁶ Onafowote, Fatai Idowu, "Tendering Procedures & It's Attendant Challenges", Lagos State Public Procurement Agency, available at: <http://www.lagosppa.gov.ng/sites/default/filesm/TENDERING%20PROCEDURES%20%26%20IT%E2%80%99S%20ATTENDANT%20CHALLENGES.pdf> (Visited on March 10, 2017).

Procurement Cycle



Stages of Procurement



Role of Public Private Partnership in Tender System

The exponential growth of industry-based economic activities, to meet out the needs of the burgeoning population have resulted in a meteoric rise for the developments of roads, infrastructure, seaports, power supply, railways, airports, water, sanitation services, and so on. The increasing responsibilities of the government, and participation in trade and commerce, have added one more obligation upon the government to act fairly & impartially.

This rising demand for the infrastructural development has placed an additional burden upon the government, both in terms of infrastructures and resources. Thus, to come out of it government had opted the new policy of Public Private Partnership (PPP) to minimize its burden as it would have become challenging for the government agencies to fulfil such needs alone both by economically and by manually. Article 14 of the Constitution provides for the equal opportunity for all on the ground of equality. Thus, to ensure public-private participation on account of fairness in development and other business activities, the method of tender process has been adopted by the government so that everyone could be given equal opportunity for participating with the government to enter a contract with it, and to earn wealth along with the development of the state and business activity.

For projects and purchases, most institutions have a transparent tender process, as well as the process of opening, evaluating, and controlling the final selection of vendors. It is to be ensured that the selection process is fair and transparent. In view of the tender proposals related to acquisition attempt, the terms of the proposal have to be clearly identified, including the purchase price, the number of shares requested and the deadline for the response.²⁷

The concept of public-private partnership has emerged as a viable option for the infrastructure and other development projects in developing countries. The public-private partnership has reduced the government budgetary constraints by accessing private capital for infrastructure investments.²⁸ As PPP is an innovative finance technique that allows the improvements in infrastructure

²⁷ Tender, available at: <http://www.investopedia.com/terms/t/tender.asp#ixzz4tITW48BA> (Visited on September 30, 2017).

²⁸ Introduction to the public-private partnership, Shodhganga, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/50293/6/06_chapter%201.pdf (Visited on September 22, 2017).

projects while keeping taxes and fees low.²⁹ The public Private partnership is based upon the economic factors, wherein the realization that the government did not have adequate funds to own, control, and manage all the infrastructure development projects and due to this it has invited private players who would do build-and-maintain public utility services on behalf of the government. This model envisages governmental developmental projects to be built, operated, and maintained by private investors and later, after the realization of a reasonable return handover the project to the government. Thus, it can be observed that PPP is not a license for a private player but is a contract on certain fixed terms and conditions.³⁰

Public-private partnership is defined as a partnership between the public sector unit (sponsorship authority) and a private sector unit, (a legal entity in which 51% or more equity is with private partners) for the formation and supervision of the infrastructure for public purpose within a specific period of time (concession period) on commercial terms in which the private partner got the contract for it through a transparent and open procurement system.³¹

It is necessary to discuss here that in the first phase of PPP, government had opted the competitive bidding route, where it calls upon the interested private players to invest and manage the public utility service. Competitive bidding route has always been favourable and suited for the contracts as it provides the best service at a best and reasonable price. Competitive bidding routes involve a public auction, tender process, and open procurement, in order to ensure fairness and transparency in the selection of the private players. It is open to all the qualified bidders, where the conserved bids are opened in public for examination, and are chosen on the basis of their price and quality quoted in order to have value for money.³² The policy of such selection of private players by the government authorities could hardly be challenged in the court as observed by the Supreme Court in Bharat Aluminium Company Ltd. v. Kaiser

²⁹ Sairam Bhat, Law of Business Contracts in India, (Sage Publication, New Delhi, 1st edn., 2009).

³⁰ Ibid.

³¹ Department of Economic Affairs, Ministry of Finance, Government of India, 2007, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/50293/6/06_chapter%201.pdf (Visited on September 22, 2017).

³² Business dictionary, available at: <http://www.businessdictionary.com/definition/open-tender.html> (Visited on September 22, 2017).

Technical Service³³ which is also known as BALCO case. As a government contract could be judicially challenged if it is found to be in violation of Art. 14 of the Indian Constitution, the principle of good faith to enter into contract/procedure to enter into contract is stated under Article 299.³⁴

Art. 14 Equality before the law: The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of Indian.

Judicial restraint in administrative action could be made in order to ensure transparency, accountability, and procedural fairness, as upheld by the Supreme Court in *Tata Cellular v. Union of India*.³⁵ On a prima facie view one can get about PPP as a government contract and hence the stipulations under Article 299 of the Indian Constitution as mandatory. Thus, judicial review of government contracts is determined by the duty of courts in confining itself to check the legality of:

1. Whether a decision-making authority exceeded its powers;
2. Whether the contracts committed an error of law;
3. Whether the contract committed a breach of rules of natural justice;
4. Whether the government reached a decision which no reasonable tribunal would have reached; or
5. Whether there is an abuse of power.

The grounds upon which the administrative action in a government contract is subjected to challenge by the judicial review as:

1. Illegality- It determines that the decision making authority must be aware of the law correctly that

³³ AIR 2002 SC 1950.

³⁴ Art. 299 Contracts: (1) All contracts made in the exercise of the executive power of the union or of a state shall be expressed to be made by the President, or by the Governor of the state, as the case may be, and all such contracts and all assurances of property made in exercise of that power shall be executed on behalf of the President or Governor by such persons and in such manner as may be direct or authorised.

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purpose of this Constitution, or for the of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

³⁵ AIR 1996 SC 11.

regulates the decision making power and must give effect to it.

2. Irrationality; or
3. Procedural Impropriety.³⁶

As the role of Public Private Partnership in tender process is discussed here so, it would be important here to discuss the importance of socialistic regulators in PPP, as these regulators are not only a facilitator and a provider but are also an important agency to regulate the conflict between the state and private parties. A regulator acts as a facilitator in terms of the single window clearance.³⁷ For PPP, An administrator for the Tariff Determination, and policy certainty and as an adjudicator to redress the grievances of the consumers, as well as between the government and the private agencies. Thus, in each PPP projects for the developments, there is a need for the regulators as it would amount to following benefits in public interest:

1. The consumer will be protected- private enterprises would not be able to make undue profits from public works executed by them.
2. Government regulation in key infrastructure projects.
3. It will work as a grievance redressal mechanism.
4. It reduces direct government interference by political decisions.
5. It helps in avoiding a lot of litigation as courts usually uphold the judgments of such authorities as they are experts bodies in their respective filed with the statutory role.

It is a well known fact that state, is the source of wealth, and owes the responsibility to maintain socialism in the modern era of a welfare state. By social contract theory, the government owes the duty of protecting its people. In return, the people have to pay revenue & taxes like Income Tax, Sales Tax, GST, etc. to the government (the process of collection of money by the government and its utilisation is called as Public Exchequer).³⁸ Thus, it acts as a trustee of that public money which has to be utilized by it for the welfare of its

³⁶ Ibid.

³⁷ A single window system is a business facilitation idea that would enable the real estate developers and builders to submit all the applications and documents at a single location or to a single authority.

³⁸ A royal or national treasury, English Oxford Dictionary, available at: [https:// en.Oxford dictionaries.com/definition/exchequer](https://en.oxforddictionaries.com/definition/exchequer) (Visited on October 11, 2017).

people and their development. Today Government's economic activities are expanding, and it is providing a vast number of services to the individual subjects. A large number of individuals and business agencies enjoy extensively in government contracts, licenses, quota, mineral rights, jobs, etc. Government agencies and their officers have the possibility of using power by discretionary power and administrative officials arbitrarily fashion which cannot be denied. It is evident that the state or each of its agencies ought not to be allowed to act arbitrarily to confer benefits on whomsoever they want. Thus, to ensure fairness, transparency, and flexibility, the concept of tender process in procurement by public agencies has transpired into existence.

Law Governing Tender Contracts in India

The Public Procurement legislation in India has its very much root foundation in the Constitution of India under Article 14 i.e. right to equality and non-discrimination, Article 298³⁹ i.e. power to carry on trade and Article 299 i.e. contract. It has incorporated an obligation upon the government both at centre and state level to undertake all contractual arrangements through reasonable and non-arbitrary procedures and practices. The government is not as free as a layman person to enter into a contract with anyone according to his sweet will but is bound to observe the certain standard of equality and fairness while entering into a contract as observed by the Supreme Court in Radhakrishna Agarwal v. State of Bihar⁴⁰ that Article 14 of the Constitution imports a limitation and imposes an obligation upon the state's executive power under Article 298.⁴¹ No doubt, the parliament (centre) has supreme legislative power in comparison to the state in making law for the procurement process as the seventh schedule of the constitution which consist of three exhaustive lists i.e. union list, which enlists items that are legislated on by the central government; state list, which

³⁹ Art. 298 The executive power of the union and of each state shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of a contract for any purpose:

Provided that-

- (a) The said executive power of each state shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each state to legislation by the State; and
- (b) The said executive power of each state shall, in so far as such trade or business or such purpose is not one with respect to which the state legislature may make laws, be subject to legislation by Parliament.

⁴⁰ AIR 1977 SC 1496.

⁴¹ Atul Setalvad (ed.), *Halsbury's Laws of India* Vol. 11, (Lexis Nexis, New Delhi, Reprint 2012).

describes the item that are to be legislated by the state government; and concurrent list, which describes the items that can be legislated by both the central and the state government. Procurement, as the subject does not fall under any of the lists. Therefore, the union parliament has the exclusive power to make any laws on the subject of procurement.⁴²

Though India does not have any exhaustive national law on procurement process, still procurement has been the most feasible and preferred method of inviting services from private participants. In the absence of any nationalised law, the legislators have nominated General financial rules, 2017 and the Delegation of Financial Power Rules, 1978 as the two piece of subordinate regulation that regulates procurement in the public sectors besides there are guidelines issued by Directorate General of Supplies and Disposals and the Central Vigilance Commission (CVC) together with the instructions of Ministry of Finance. On the other hand the state governments and the central public sector, units have their own general financial rules based on the broad principles outlined in the GFR. All this would be discussed in detail in Chapter III of this work.

The rule of tender/ procurement after it being accepted by the government authorities on behalf of President or Governor is governed by the Law of Contract, as it involves all the essentials of the formation of the Contract like:

1. Invitation to Offer
2. Offer
3. Acceptance
4. Agreement
5. Consideration
6. Competent parties

Contract is defined in sec. 2 (h) of the Indian Contract Act as “An Agreement enforceable by law”, therefore the contract of tender only completes when the tender is accepted by the tender inviting party, and a formal agreement is made between them prior to this there would be a no contract enforceable by the law even though the bidder may be the highest or lowest bidder as the Government

⁴² Jonathan Davey and James Falle, The government Procurement review Chapter 11, (second edn.) available at: file:///G:/Government%20Procurement%20Review%20-%20Law% 20 Business%20Research%20-India%20Chapter.pdf (Visited on January 20, 2018).

possess the right to accept or reject any bid at any level of the assortment process of the tender subject to the terms and conditions of the tender document. Once a Government agency accepts the bid, it becomes binding upon both the parties as a contract.

Contract, by issuing notification or notice inviting tender is nothing but an invitation to tender. Each tender amounts to an offer unless the request specifies that it will accept the lowest or highest tender or other conditions. Therefore, acceptance of such tender constitutes the valid acceptance and thereby an agreement. In case of *Tata Cellular v. Union of India*⁴³, it was observed by the Supreme Court as under:

A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, followings are the prerequisites of a valid tender:

1. It must be unconditional.
2. It must be made at the proper place.
3. It must conform to the terms of obligation.
4. It must be made at the proper time.
5. It must be made in the proper form.
6. The person by whom the tender is made must be able and willing to perform his obligations.
7. There must be a reasonable opportunity for inspection.
8. The tender must be made to the proper person.
9. It must be of the full amount.

It would important here to note that the contract involves the principle of good faith at the formation stage, good faith and fair dealing compels honesty and avoids any kinds of fraudulence and misrepresentation. At the performance stage, it requires cooperation and observation of reasonable commercial standards in order to ensure good faith and fair dealing while excluding any kind of behaviour which is inconsistent with the decency, fairness, reasonableness and with the parties who are agreeing upon common purposes and justified expectations.⁴⁴ If such good faith is not found prima facie in any contract with

⁴³ AIR 1996 SC 11.

⁴⁴ *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 191 (N.H. 1989) available at: <https://www.casebriefs.com/blog/law/commercial-law/commercial-law-keyed-to>

the government then the legislature can in its wisdom nullify the agreement already entered into as upheld by the Supreme Court in *State of Karnataka & Anr. v. All India Manufacturers Organisation & Ors.*⁴⁵ As entering into contract do not amounts to any promise for doing any act which is unlawful and against the public policy.

No doubt, tender contract is a public contract or so-called statutory contract. Thus, it is very much different from the ordinary contracts entered between the private parties in this the state is bound to follow the principle of natural justice and Art. 14 of the Indian Constitution as in *Assistant Excise Commissioner v. Issac Peter*⁴⁶ it was upheld by the Supreme Court that:

The doctrine of fairness and reasonableness is a doctrine of administrative law field to ensure the rule of law and for the prevention of failure of justice wherever the action is in administrative nature. Just as the principle of natural justice ensures fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action also where action to be performed is in administrative nature.

Entering into a contract, on behalf of the government is an administrative function within the preview of Article 299. Thus, the government agents are bound to follow a fair and reasonable procedure. As in *R.D. Shetty v. Airport Authority of India*⁴⁷ it was upheld by the Hon'ble Supreme Court that every action of the executive government must be informed of the reasons and should be free from arbitrariness. This is the essence of the rule of law and its minimum requirement. It does not matter that the practice of power involves the effect of refusing certain rights or privileges.⁴⁸

J. Mathew in *V. Punnath Thomas v. State of Kerala*⁴⁹ observed that "the government is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the government is still the government and will be subject to restraints, inherent in its position in a

lopucki/performance/Centronics- corporation-v-genicom-corporation/ (Visited on January 17, 2018).

⁴⁵ [2006] Indlaw SC 166.

⁴⁶ (1994) 4 SCC 104

⁴⁷ AIR 1979 SC 1628

⁴⁸ M.A. Sujan, *Law Relating to Government Contracts* 156, (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 3rd edn., 2003).

⁴⁹ AIR 1969 Ker 81.

democratic society. A democratic government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.”

There is no fixed parameter of the power of the government in the matter of contract award. Though, flexible they have to be exercised subject to constitutional constraints. Court has restrained itself from extending their area of control over the government affairs in the sphere of awarding a contract. Judicial review can only be exercised where it would be found that the awarding of a contract by the government is by an unfair, unreasonable, or unconscionable term in order to strike down it. Though the contents of the contract have come within the scope of judicial review, the area of pre-contract period i.e. the process of selection of one or other competing contractors is being hesitatingly brought within the scope of judicial review.

Though a Government Contract is a species of the genus contract and is governed by the same law of Contract, i.e. Indian Contract Act, yet it is a thing apart by the class itself calling for special and distinct consideration. As here the contract involves public interest and public finance is affected, it is subjected to certain limitations – Constitutional, Legal & Moral as well as which would not be relevant to a private contract.

Major Concerns in the Procurement system in India

The Indian procurement system has the following challenges and concerns:

1. **Multiplicity of Tender Guidelines:** There is a multiplicity of tender guidelines, which causes great confusion both the sides i.e. purchasers and the tenderers. There is no solitary inclusive public procurement standard to deal with tender policy. Unlike in the U.S. where the purchase of services is governed by the code Federal Acquisition Regulation.⁵⁰
2. **No Transparent Grievance Reprisal Mechanism:** There is no transparent grievance reprisal mechanism where a complaint against the fault present in tender process could be lodged except with the procuring entities only. Therefore, it leaves a modest chance of transparency. In matters where the procuring entity has participated in manipulation of the

⁵⁰ Devika Malhotra, “Study on Government Procurement”, available at: file:/// G:/SGP %20 (2).pdf (Visited on October 15, 2017).

result, the probability is very low that the victim's bidder will get the proper hearing.⁵¹

3. Unskilled manpower and lack of training: In India, despite knowing the importance of its impact on the economy, public procurement is treated as an inefficient activity. Even the most important and complicated purchases have been handled in a non-professional manner. Apart from the Railways and DGS & D, no other organization has created a special employee. There is need for the recruitment of the specialized staff for procurement purpose. Despite the huge portion of the taxpayers' money for public procurement, India still has no dedicated institutional mechanism for training on procurement issues.⁵²
4. Frequent updates of manuals: The practice of updating policies and manuals without causing compulsory work to inform officials of purchase of such changes can cause serious problems.
5. Procurement postings not linked to qualifications: Unlike many countries, the purchase authorities in India are not related to functional merit. So often, the purchase officers / managers often vary with their job requirements and consequently do not stand up to expectations. As a result of which at all levels, procurement officers are not interested in keeping themselves updated about the procurement policies and procedures.
6. No centralized data sharing facility: Whether it is decision making, crisis management, operational issues, negotiation or training, and capacity building exercises, availability of updated data inspires the elements of rationality and fairness which are likely to be effective and sustainable. In organized areas such as government, the role of data sharing cannot be undermined because it brings so much similarity and cost-effectiveness in the vast and complex bureaucracy so far.
7. No sole authority to regulate and ensure compliance with procurement policies: At present there are many authorities regulating public procurements. The Government of India has framed rules for procurement of goods and services and contract management. The

⁵¹ Ibid.

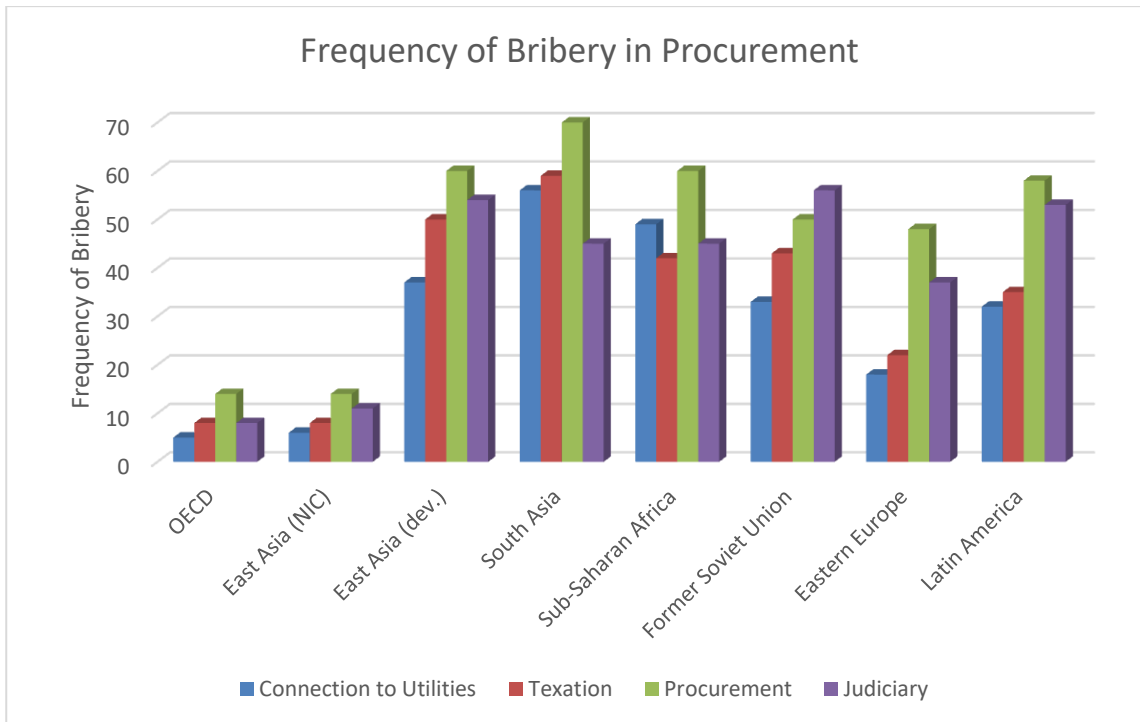
⁵² Ibid.

central body of the Central Vigilance Commission (CVC), Central Bureau of Investigation (CAG), and Central Bureau of Investigation, plays an important role in the rule of public procurement but this role is the best thing, in fact only pre-post. These agencies or officers come into play only after perceived irregularity or misconduct and hence, there is a lack of structures and machinery to attack and eliminate such practices from their roots. Apart from this, there is also an important role in the regulation of public procurement of the Competition Commission (CCI) of India. But only in such cases, where due to such unwanted practice, there is adverse impact on competition in India. Therefore, where corruption and anti-competitive practices are found in the procurement process, many agencies may be involved in the investigation, according to their respective mandates, which may (as always) result in a conflict, the concerned authority or how the agency is interpreted by the mandate.⁵³

8. Corruption: Fatal problems of corruption are present at every stage of the procurement process, and sometimes, demand for goods or services are made by unscrupulous persons in order to benefit the private parties; The privacy of bids is misused; After publishing the notice inviting tender, but before its acceptance in favor of a particular bidder, the corrupt officials add or tweak the specifications at the last moment, can accept an improper request for an increase in the cost of the contractor, thus the contractor can be benefited and cause loss to the government. In a research paper entitled 'Study on Government Purchase' by IIT Delhi student Devika Malhotra, the authors note the following facts: Such practices of bribe are quite frequent in almost every part of the world. In one of the World Bank studies, 117 nations from around the world have been informed of the frequency of bribe in public procurement. The highest frequency is seen in South Asia, and the lowest frequency is observed in the OECD and East Asian countries. The bar chart below shows the frequency of bribe in public procurement.⁵⁴

⁵³ Harsh Sinha, "Effective Public Procurement Policy- need of the hour", available at: http://indialawjournal.com/volume4/issue_4/article_3.html (Visited on May 7, 2018).

⁵⁴ Supra note 49.



STATEMENT OF PROBLEM

Tender processes are often very complex and transparency of the process is sometimes limited, therefore, manipulation of tendering procedures is hard to detect. There are certain types of mal-practices being carried out by the government authorities in tendering process like:

1. Abuse of discretionary powers;
2. Framing of terms and conditions to favour certain supplier/s;
3. Undue rescheduling of dates;
4. Adherence to improper methods of advertisements frustrating the purpose of transparency and promotion of fair competition in tender process;
5. Selection of bidders raising suspicion resulting into a lack of transparency and fair use of the process.

Thus, the researcher intends to analyze the approach of the judiciary to make tender process free from defects and in order.

OBJECTIVES OF THE STUDY

On the basis of preliminary examination of literature, the researcher has undertaken this study to analyze the tools of judicial monitoring of public procurement. The primary aim of the researcher is to develop critical perspectives and elaborate the judicial approach towards the tender process.

The study has been conducted with the aim to:

1. To evaluate the judicial approach towards tender process in India;
2. Identify the grounds of judicial intervention in public procurement through the tender process;
3. To observe the limits adhered by the judiciary in exercising judicial restraint.

RESEARCH QUESTIONS

In order to achieve the objectives of the proposed research, an attempt shall be made to find out the answer to certain questions. These questions can be summarized as under:

1. To examine the impact of judicial decisions upon the various constituencies. The study carried out by the researcher has resulted in an identification of following constituencies:
 - a. State as a custodian of public money;
 - b. Bureaucratic and implementing mechanism;
 - c. Bidders, Vendors/ service providers;
 - d. Common man.
2. To find out the precautionary measures in order to ensure transparency, efficiency, accountability, and expediency.

SCOPE AND SIGNIFICANCE OF STUDY

As the present study is based on the secondary data, therefore, the scope of the study would be to analyze the role of judiciary towards tender process in India in the absence of any uniform statutes thereon. Since the State is the trustee of the public exchequer and obliged to act for the welfare of its people and utilize its resources in a fair and transparent manner. The constitutional concept of rule of law enfolding equality before the law in its womb provides for equal opportunity to all. Thus, judiciary being the guardian of citizens is always

under an obligation to promote the fair and reasonable use of powers, and put a restraint upon the exercise of power in an arbitrary and fanciful manner. Against the backdrop of above, the scope of the study has been confined to elaborate the judicial approach towards the law of tender depicting judicial supervision and judicial restraint as well. The study will cover the landmark judgments of the Supreme Court as well as High Courts on the tender process in India.

To identify the role of the judiciary in construing laws of the tender process through its judgments like Acceptance of tender, Agreement between debtor & creditor, Agreement for sale, Auction- Sale, Award of Tender, cancellation of tender, etc. As, tender involves the matter of finance and government works which are mainly done through procurement process only, and the government is a trustee of public money thus to keep a check over it, judiciary plays a vital role through its judicial intervention and review to ensure the fairness and prohibition of arbitrariness. Legal judgments had helped a lot in farming of the tender law as in financial matter positive law, i.e., positive school of jurisprudence is applicable and judiciary internet-based this work nicely in the absence of any uniform tender law.

Limitations of Study

The scope of research study has been confined to the examination of judicial approach towards tender process in India. The researcher has relied upon the landmark judgments which have been afterwards quoted and adhered to by applying the doctrine of 'stare decisis' in evaluating the constitutionality and legitimacy of the tender process.

Structure of Study

This research work is divided into V Chapters. Chapter I is the introductory part describing nature and meaning of procurement process followed by historical background. Besides, the stages involved in the tender process and the methods of procurement have also been elaborated. The role of Public Private Partnership in the tender system has been analyzed and the history of procurement process has also been detailed here along with the challenges faced in the tender process and the laws governing the tender process in India. It also consists of statement of problem, research methodology, limitation of study, significance of study.

Chapter II of this work deals the literature review part in which the researcher had briefly discussed the various research done on upon the procurement process and had come to the conclusion that no work has been done in the direction of analyzing the role of the judiciary in framing the tender laws.

Chapter III discuss the regulator frames works governing the tender process in India. In this chapter, some of the important provision of General Financial Rules, 2017 governing the procurement of goods and service had been discussed besides it the Railway Code for stores department volume 1 and DGS&D purchase rules related to procurement of goods and service have been discussed. CVC guidelines on procurement have also been analyzed here while a gist of certain states legislative measure for governing the tender process adopted by some of the states like Rajasthan, Karnataka & Tamil Nadu have also be discussed here.

Chapter IV of this research work is the detail discussion chapter which discusses and analyses the role of the judiciary in framing the tender laws in India. This chapter covers the analysis of various judgments and order of the court which are divided into three categories viz. judicial approach in marinating status- quo the power and right of the government agencies in framing and taking decision of policy matters in the light of directive principle of state policy, role of judiciary in protecting the private persons while he is contracting with the government and lastly to adhere its limitation from interfering uselessly and without any warrant in shoes of executive wings.

Chapter V of the work is the conclusion and suggestion part in which the researcher had given some suggestion which may be incorporated in future for framing any policy related to procurement system in order to make it sounder and more transparent.

RESEARCH METHODOLOGY

The methodology applied in this research would be analytically based on the primary and secondary data as here the researcher seeks to analyze:

1. The circulars, notification and the instructions given by government bodies regarding the tender process;
2. To analyze the present legislative framework having regard to tender process in India;

3. Besides this, the main task of the researcher would be to analyze the role of the judiciary in elucidating the law of tender by analyzing the judgments of the Supreme Court and the various High Courts of India, books, research papers, published newspaper articles, government website, online database etc.

The primary focus of this research works will be upon the judgments of the Supreme Court and High Courts of India available through the judgment reporters like AIR, SCC and online database Westlaw, Hein-Online, Manupatra, SCC online, etc.

Chapter II

Review of Literature

Despite the fact that the public procurement/ or tender process is an interesting area of research. Yet at the same time constrained research has been done in this area. So far as literature is concerned on the tender process in legal perspective it is as yet limited. As tender process is an area which includes the expenditure of public money and it is very much concerned with the national interest and economy of the country. In order to accomplish this study, the researcher reviewed following literature.

Devika Malhotra⁵⁵ has in her article "Study on Government Procurement" had examined the corrupt practices like market sharing and cartel formation, entry barriers created by policies or by parties in procurement system. Author had also examined the anti-competitive rules, regulations etc. In public procurement process which is adopted by the government authorities in what manner they are anti-competitive in nature. The failure of the competition authorities to tackle with such anti-competitive and unfair trade practices which had the thorough impact on the tender process in India. The author had also suggested the measure in the form of competition advocacy to be adopted in order to prohibit such anti-competitive practices. Besides this, the author had also suggested certain principles for designing tender documents which may be adopted in order to promote more effective competition in the public procurement process.

After reviewing this work of the author, the researcher had adopted in its research work the idea of kinds of corruption prevailing across the world in the tender process and the challenges faced by the procuring authorities and as well as by the qualified bidders, from it.

Sunil Seth and Vasanth Rajasekaran⁵⁶ in their article "Public Procurement in India: An overview" had described the legislative framework i.e. what are the principal legislation for regulating the public procurement process in India, why

⁵⁵ Devika Malhotra, "Study on Government Procurement", available at: [file:///G:/SGP%20\(2\).pdf](file:///G:/SGP%20(2).pdf) (Visited on October 15, 2017).

⁵⁶ Seth Dua & Associates, "Public Procurement in India: An Overview", available at: <file:///G:/Public%20Procurement%20-%20India%20Chapter-%20PLC.pdf> (Visited on October 16, 2017).

regulatory authorities are responsible for the enforcement of public procurement process, what are the basic requirements concerning technical specification of tenders in order to promote the economic efficiency, transparency, for the fair and equitable treatment of suppliers and competition. Besides this, the authors had also discussed that who can file a claim in case of non-compliance with the procurement legislation and what are the available review procedures.

Glenn Ackerley, Clive Thurston, John Stephenson⁵⁷ in their article “Current Challenges in Bidding and Tendering, and how to overcome” had described the current problems in tendering and procurement process from the perspective of bidders like incomplete bid, flawed bids, etc. And also from the perspective of authorities/ owners like insufficient number of bids, opening of late bid either because few bids received or owner known/ preferred bidders bid, adding of uninvited bidder after a prequalification process, etc.; legal framework of tendering process like general principles of tendering process i.e. good faith, openness, transparency, fairness, etc. and ways to overcome such problems like risk management, evaluation process, quality based tender etc.

Competition Commission of India⁵⁸ had in its publication Advocacy Series “Provisions Related to Bid Rigging” which is a part of the competition advocacy and awareness programme of the Competition Commission of India. Describes here that what is bid rigging as defined under Section 3 (3) of the Competition Act i.e. “bid rigging” as “Any agreement, between enterprises or persons referred to in Sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.” And its type like Bid Suppression, Complementary Bidding, Bid Rotation, Subcontracting, etc., problems created by bid rigging in tendering process and the role of Commission to solve such problems.

⁵⁷ Glenn Ackerley, Clive Thurston, John Stephenson, “Current Challenges in bidding and tendering, and how to overcome it”, available at: file:/// G:/1337193613_Current Challenges inBidding.pdf (Visited on October 20, 2017).

⁵⁸ Competition Commission of India, “Provisions Related to Bid Rigging”, available at: file:///G:/Bid%20Rigging.pdf (Visited on October 20, 2017).

Divya Bharati Sharma in her article “Liberalisation of Government Procurement Regimes: Issues and Implications for India”⁵⁹ had examined the Indian government procurement process under aegis of the WTO framework and attempts towards a global understanding of Government procurement which was initiated in the Tokyo Round where plurilateral agreement on Government procurement was adopted which is known as Agreement on Government Procurement, 1979. The author had also discussed the salient features of the Agreement on Government Procurement, 1996 whose object is to eliminate the discrimination between the domestic producers and the foreign producers/suppliers, and between foreign suppliers. The author had concluded after his first finding that India's procurement policies are odd with the requirements of the GPA i.e. Government Agreement on Procurement, 1996. Secondly, India is not the signatory of the Tokyo Round GPA and is against the multilateral agreement but is willing to negotiate an agreement on transparency.

Sidheshwar Tiwari in his article “Public Procurement as a Demand Side Innovation Policy in India”⁶⁰ has examined the role of public procurement in promoting innovation. While discussing public procurement process in India and its legal framework he had examined from both, the supply and demand side and innovation policies in the context of developed and developing Countries like European Union, UK, China, and India. Author had also examined India's public procurement policies under the light of Innovation methodologies from both public and private sector side.

Nunzia Carbonara, Louis Gunnigan, Roberta Pellegrino, Fabio Sciancalepore in their Article “Tendering Procedures in PPP: A Literature Review”⁶¹ had provided an overview of the literature on tendering process in a public-private partnership, with special regard to transportation PPP cases. The authors had

⁵⁹ Divya Bharati Sharma, “Liberalisation of Government Procurement Regimes: Issues and Implications for India”, Hein Online 2017, available at: file:///G:/DivyaBharati Sharma Liberal.pdf (Visited on February 6, 2018).

⁶⁰ Sidheshwar Tiwari, “Public Procurement as a Demand Side Innovation Policy in India”, Hein Online 2017, available at: file:///G:/SidheshwarTiwariPublicPro.pdf (Visited on March 3, 2018).

⁶¹ Nunzia Carbonara, Louis Gunnigan, Roberta Pellegrino, Fabio Sciancalepore, “Tendering Procedure In PPP: A Literature Review”, Dublin Institute of Technology Arrow@DIT, 2012, available at: file:///G:/Tendering%20Procedures%20in%20PPP_%20A%20Literature%20Review.pdf (Visited on February 2, 2018).

also discussed the three major issues related to the tender process in PPP. Firstly, the procedure to be followed in the tender: different phases of the PPP tendering process; secondly, the different methods of awarding tender used in real projects; thirdly, complexity in such awarding. Five different kinds of procedure for PPP tendering had been described in this article like open competitive tendering, invited tendering, registered list, project-specific prequalification and short listing, negotiated tendering beside six phases of it likewise request for prequalification, prequalification, invitation to tenders, tender evaluation and short listing, negotiation with shortlisted tenders, selection of best tender and award.

E Mantzaris in his article “Public Procurement, Tendering, and Corruption: Realities, Challenges and Tangible Solutions”⁶² analyzed the main elements and processes of the procurement and tender system in South African public service, with the accent on risk management, anti-corruption system and the importance of budgetary control in procurement management. Other than this, the author had also described the role of risk management imperatives and procurement management in skirmishing corruption like a shield against fraud, collusion, extortion, and similar corrupt activities.

Kavisha Pillay, Janine Erasmus in their article “Understanding Corruption in Tenders”⁶³ had discussed how Government tendering works, how to apply for a tender, how tender is awarded and the ways in which corruption creeps into the Government tender process? Mainly the authors have focused on the corrupt practices involved in tendering process and common red flags which indicate the presence of corrupt activities at the different stages of the tender process. Some common sign or red flag of corruption in tender process are as purchase of unnecessary or inappropriate items, manipulation of the procurement threshold, to avoid prior review, misleading contract, short or inadequate notice to bidders, exclusion of qualified bidders, awarding of the multiple contract to the same companies, winning bid very close to the estimate, rotation of winning

⁶² E Mantzaris, “Public Procurement, tendering and Corruption: Realities, challenges and Tangible Solutions”, volume 7 number 2, African Journal of Public Affairs, June 2014, available at: file:///G:/Mantzaris_Public_2014.pdf (Visited on March 3, 2018).

⁶³ Kavisha Pillay and Janine Erasmus, “Understanding Corruption in Tenders”, Corruption watch E-book, available at: file:///G:/Understanding%20tender%20corruption%20e-book_0.pdf (Visited on January 20, 2018).

bidders etc. While on the other side some of the corrupt activity in tender process had also discussed by the authors like unjustified no-bid awards, manipulation of bids, collusive bidding, and failure to make bidding documents available. Corruption in the tender process has a detrimental effect on the country because it eliminates the state's funds from the public needs, often leads to delivery of protest, and erases public confidence in the Government. It enhances competition in bribery rather in good quality or price.

Raj Kumar in his article "A Curious Case of Single Bid"⁶⁴ had discussed the matter of allotment of the sole bid to the bidder in an open bid and the legislation and guidelines governing such allotment of single-bid like The Indian Contract Act, The Constitution of India 1872, CVC guideline vide circular no. 4/3/07, tendering process- negotiations with L-1, and circular no. 31/11/2008, time-bound processing of procurement, etc. CVC guidelines on the single bid are that in case even after the re-tendering only single bid has come then the competent authority may accept the single bidder bid after giving the detailed justification for it. To accept it provided that there should not be any negotiation with the bidder at all. There is an exception to this rule where the requirement is of urgent need and the re-tender process would delay the availability of the items than in such case negotiation with the L-1 bidder is permitted for the supply of the bare minimum quantity. Besides this, the author has also analyzed the judicial approach towards single bid process. Where the court had laid down the principle for single bid acceptances as In Virendra Kapoor v. Airport Authority of India⁶⁵ it was laid down by the Delhi High Court that it is not desirable to cancel a tender simply because only single bid has been received. As long as it is suitable, provided that single bid shall not be economically miserable. There should be no scene of getting a much higher bid and the decision of the public authorities must not be arbitrary and must not subjective and must not be expected to achieve any collateral purpose.

⁶⁴ Raj Kumar, "A Curious Case of Single Bid", The Lex-Warrior, Jan 2013, available at: <file:///G:/Curios%20bid.pdf> (Visited on January 21, 2018).

⁶⁵ Writ Petition (Civil) no. 8529 of 2008.

Jatin Aneja in his article “Public Procurement”⁶⁶ had described an overview of public procurement in India. In which he had discussed the principal elements of public procurement regulation like Constitution of Indian and its interpretation pursuant to judicial precedents, Central and State government guidelines; what are the public agencies who are obliged to the general public procurement regime. No obligation is upon the non- public entities except in certain cases; requirement for the foreign companies to participate in public procurement processes. As any foreign company which desires to take part in public procurement process in India is required to set up the branch or subsidiary in India or shall enter into any commercial agreement with local partners; what are the criteria for assessment and evaluation of bids like technical qualification requirement, financial qualification requirement and financial proposal; public procurement of projects proposed by private companies; resolution of disputes and review procedure of bidding process.

Chuks Okpaluba in his article “Bureaucratic Bungling, Deliberate Misconduct, and Claims for Pure Economic Loss in the Tender Process”⁶⁷ revealed the liability of the public office in case of bad faith, fraud, and dishonest conduct in tender process. In South African by giving reference to some of the judgments of the South African Court as South African Post Office v. De Lacy and Another⁶⁸; Olitzki Property Holdings v. State Tender Board⁶⁹; Steenkamp NO v. Provincial Tender Board, Eastern Cape⁷⁰ in all these three cases plaintiff claimed the financial loss occurred to them on account of being unsuccessful in tender award but they failed while in Minister of Finance and other v. Gore⁷¹ plaintiff succeeded in recovering damages from the Government authority. The difference of opinion of the Court in these cases had been well explained by the author on the basis of three interrelated strands to claim damages. Firstly, that the award of damages in public law can only be availed in exceptional circumstances as far an act which constitutes the administrative illegality.

⁶⁶ Jatin Aneja, “Public Procurement”, Lex Mundi, 2012 available at: file:///G:/GPG _CI_PP_ India 222.pdf (Visited on February 12, 2018).

⁶⁷ Chuks Okpaluba, “Bureaucratic Bungling, Deliberate Misconduct and Claims for Pure Economic Loss in The Tender Process”, Hein Online 2014, available at: file:///G:/ Chuks OkpalubaBureaucratic.pdf (Visited on February 5, 2018).

⁶⁸ 2009 (5) SA 255 (SCA).

⁶⁹ 2001 (3) SA 1247 (SCA).

⁷⁰ 2006 (3) SA 151 (SCA).

⁷¹ NO 2007 (1) SA 111 (SCA).

Another remedy of public law could be avail then in such case award of damages is not necessary. Secondly, a claim for pure economic loss concentrates on the nature of the damage. Thirdly, a claimant is required to show something more than a mere statutory breach or bureaucratic bungling in order to recover for the pure economic loss. The presence of bad faith on the part of public authorities in case of Gore distinguishes it from the other three cases.

The idea which I, got for my research work after review this work of the author was to make an suggestion for incorporating the provision of the compensation to the bidders in case they suffer loss on account of fault of the procuring authorities in legislative framework of tender process in India.

Sumeet Kachwaha in his article "Public Procurement: India- Best Practices"⁷² had briefly discussed the role of the judiciary in determining public procurement policy of India while emphasizing upon the judgment of Erusian Equipment and Chemicals v. State of West Bengal⁷³. Where it was upheld by the Supreme Court that equal treatment, fair procedure, and equality is the paramount principle of the procurement process. The author had also discussed in brief about the three mandatory manuals issued by the government which serves as a guidelines to Government Departments / Ministries in order to ensure transparency, competition, fairness and to prevent arbitrariness action of public authorities. Somehow the work of an author is very much similar to my work. Yet here the role of the judiciary had been analyzed on the basis of single judgment. While my work deals with various judgments from the different perspective of tender process in India and this is how my work would be different from the author's work.

OECD manual "Guidelines for Fighting Bid Rigging in Public Procurement"⁷⁴ illustrated the common forms of bid rigging, guidelines to reduce risk of bid rigging. Like collection of data regarding the varieties of products and services

⁷² Sumeet Kachwaha, "Public Procurement: India- Best Practices", Mondaq, available at: <http://www.mondaq.com/india/x/90252/Government+Contracts+Procurement+PPP/Public+Procurement+India+Best+Practices> (Visited on February 17, 2018).

⁷³ 1975 AIR 266.

⁷⁴ OECD Manual, "Guidelines for Fighting Bid Rigging in Public Procurement", available at: <https://www.oecd.org/competition/cartels/42851044.pdf> (Visited on February 17, 2018).

available in the market, design of tender should be such which maximise competition. By providing opportunity to more and more participants, conditions of requirement must be in clear terms and language, spreading of awareness among other staff of Departments about the risk of bid rigging. Other than this, it likewise describes the guidelines/ checklist to detect bid rigging from public procurement.

B.N. Narayan in his book "Public Finance"⁷⁵ had discussed in its chapter 2 about the general principles governing public finance. First, the principle of maximum social advantage to the society, secondly to ensure the greatest happiness to the greatest number, and third to ensure equity and social justice. Chapter 3 of the book deals with the concept of public expenditure. It describes the areas where the public money is invested by the government like public health, education, social security etc. Other than it canons of public expenditure had also been discussed i.e. public expenditure must provide the greatest happiness to the greatest number of people and aim at assuring social justice, equity, and equality among the people.

John Handoll in his article "Establishing Breach of Section 3 of the Competition Act, 2002 The Indian Bid Rigging Cases"⁷⁶ had explained the bid rigging as a particular form of collusive price-fixing behaviour by which firms match up their bids on procurement or project contracts. These acts twist the procurement process and refute the procuring authorities from the benefits of competition which amounts to financial and even social harm. He had also discussed that the effective competition law and enforcement both are the critical weapons in the public procurement weapon store.

Jedrzej Gorski in his article "The Impact of the TPP on opening Government Procurement to International Competition in the Asia- Pacific Region"⁷⁷ has analyzed the transpacific partnership which is a world's largest Regional Trade Agreement. It also covers Government procurement process in its chapter 15

⁷⁵ B.N. Narayan, Public Finance chapter 2, (Anmol Publication Pvt. Ltd., New Delhi, 1st edn., 2002).

⁷⁶ John Handoll, "Establishing Breach of Section 3 of the Competition Act, 2002 The Indian Bid Rigging Cases", 27 (2) NLSI. Rev.147 (2015), Westlaw India.

⁷⁷ Jedrzej Gorski, "The Impact of the TPP on Opening Government Procurement to International Competition in the Asia- Pacific Region", 8(2) Trade L. & Dev. 66 (2016), Westlaw India.

which is especially in terms of standards, rulemaking and much more straightforward. The author had also revived the limited public procurement, liberalizing commitments and later had scrutinizes the new public procurement commitments under the TPP. In terms of:

- (1) Procedural provisions,
- (2) Coverage, and
- (3) The scope of allowed pursuit of non- commercial considerations in the procurement process.

Chang-Fa Lo in his article "Making the Anti-Corruption provisions in the new Government Procurement Agreement under the WTO Operable"⁷⁸ discussed the new revised Government Procurement Agreement under the World Trade Organization which is an important development to prevent corruption. He emphasized upon the importance of preventing corruption in procurement process in the preamble of its article coupled with the requirement of prevention of the corrupt practices in the conduct of the procurement.

M.C. Bhandari in his book "Law of Contract & Tenders" had described the meaning of the public contract, public offer, and the various essential points related to tender process. Like Acceptance of tender, Agreement between debtor and creditor, Agreement for sale, Auction- Sale, Award of tender, Cancellation of tender etc.

BAM PPP v. National treasury Management Agency & Minister for Education and Skills⁷⁹ Judgment of the Irish Court which stated that it is valid to accept the no of documents related to bid submitted late after the dead line under exceptional circumstance, even though such discretionary power either expressly or impliedly is not given in the tender documents. On the other hand what constitutes an exceptional circumstance had to be decided by the procuring authority and is such matter the executive have the wide margin for gratitude. The brief facts of this were as government machinery NTMA had invited a tender for the selection of a competent contractor to design, finance,

⁷⁸ Chang- FA Lo, "Making The Anti- Corruption Provision in the New Government Procurement Agreement Under the WTO Operable", 7(1) Trade L. & Dev. 21 (2015), Westlaw India.

⁷⁹ (2015 No. 176 JR).

and build and to maintain a new academic building for Dublin Institute of Technology, Grangegorman campus, Dublin. Around 100 of documents along with quotation were required to be filed through an e-portal; three bidders including the petitioner participated in the process. The last date for tender submission document was 28, November 20114 by 5 P.M. two bidders were not able to submit all the documents within the stipulated time while the petitioner had submitted its bid in time. But the procuring authorities have allowed the time concession and the accepted the tender of the other two bidders by considering that they have the discretion to do so. On the date of evaluation a company other than petitioner's company was elevated as the preferred tenderer to this decision of the authorities' objection was raised by the petitioner and a petition was filed before the Court in order to set aside its decision on the ground of misuse of its discretionary power to accept the tender.

On going through the review of this case, I found an idea for my research work i.e. to analysis the Indian executive's discretionary power in commercial matters and its limitation from judicial point of view and the judicial permissible limits within which it can be exercised.

Besides this the researcher had also gone through some of the landmark judgment of Supreme Court on the tender process like M/s. Poddar Steel Corporation v. M/s. Ganesh Engineering Works⁸⁰; Michigan Rubber (India) Limited v. State of Karnataka and others⁸¹; Tata Cellular v. Union of India⁸²; G.J. Fernandez v State of Karnataka & Ors.⁸³ And Ramana Dayaram Shetty v. International Airport Authority⁸⁴ In order to examine the landmark principles stated by the Court in the area of procurement process in India.

As here the focus of the researcher in this present work is upon the approach of judiciary in reframing of the tender process in India by covering and maintaining, its loop holes ignored by the regulatory frame work. Thus, other than these landmark cases researcher had also gone through many other several cases & case laws on tender process in India.

⁸⁰ MANU/SC/0363/1991.

⁸¹ (2012) 8 SCC 216.

⁸² (1994) 6 SCC, 651.

⁸³ MANU/SC/0175/1990.

⁸⁴ 1979 AIR 1628.

Chapter III

Regulatory Frameworks Governing Tender Process in India

Tender is a matter which comes under the ambit of public finance. Public finance is the backbone of any nation as without it a Government cannot exist i.e. without hike and expenditure of money. The India Constitution had provided an elaborate provision for parliamentary control over the public finance which means indirectly in control of the citizens of India, as parliamentarian are the elected representatives of the people. There are four principles which determine the parliamentary control over the public finance as:

1. Constitutional Relation between the Government and Parliament in the matter of finance as executive cannot raise the funds without the authority of the Parliament by way of taxation or otherwise.
2. Concentration of financial power with Lok Sabha i.e. power to raise money by tax or loan and authorizing expenditure while Rajya Sabha act as merely a subsidiary body in such matters.
3. Restriction on the power of the Parliament to imposes taxation without the recommendation of the Executive.
4. Restriction on the power of the Parliament to authorize expenditure. Parliament cannot vote money for any purpose whatsoever except on demand of Ministers.⁸⁵

There is no uniform law or particular Act which governs the tender/ procurement process in India. Although, Public Procurement Bill, 2012 was presented in Lok Sabha in 2012⁸⁶ with the object of ensuring accountability, probity, and transparency in the tender system by fair and equitable treatment of the tenderers, enhancing competition, and for gaining integrity and public confidence in efficiency, economy, or public procurement process and for matters connected to it or incidental to it. This bill was framed on the model law of UNCITRAL. Beside it the law and practice of procurement process of the United States and European Union Countries were also taken into consideration. The bill envisages within its ambit, the procurement of goods and services; procurement in the field of public-private partnership, joint ventures,

⁸⁵ M.P. Jain, "Indian Constitutional Law 71", (LexisNexis, Nagpur, 6th edn., 2012).

⁸⁶ By the 58th bill of 2012.

and special purpose vehicles; and such other procurements which have been specified by the Central Government. Although this bill has not overruled any previous rules and guidelines, it proposes to restrict their applicability to the extent that such rules or guidelines are not inconsistent with the provisions of the bill.

Currently, in the absence of any nationalized law, the Government of India has nominated General Financial Rules, 2017; Delegation of Financial Power Rules, 1978; CVC (Central Vigilance Commission) and DGS&D (Director General of Supplies and Disposal)⁸⁷ guidelines as the instrument governing procurement process in India. At all the institutions under Central Government, while each Centre and State Public Sector Undertakings has formed their own general financial rules which are generally founded upon the wide principle stated in GFR.

General Financial Rules, 2017: General financial Rules are those rules which have been made by the Ministry of Finance. As the President of Indian has by virtue of Article 53⁸⁸ of the Constitution delegated the financial power of the Indian Government in the Ministry of Finance through his order and under Government of India (Allocation of Business) Rule.⁸⁹ It comprises of the principles governing the general financial management and procedures for government procurement. It is an accumulation of all those rules and order of the Government of India which is to be followed while dealing with public finance matter. These rules and order are executives in nature. Thus, they are mandatory for all the Department and Organizations under the Government to

⁸⁷ This body of government has been closed now by the government of India on 31st October, 2017 and now the work of regulating the public procurement of goods and services are being managed by the Ministry's E- market platform called GeM.

⁸⁸ Art. 53 The executive power of the Union:
(1) The executive power of the union shall be vested in the president and shall be exercised by him either directly or through officers subordinate to him in accordance with this constitution.
(2) Without prejudice to the generality of the foregoing provisions, the supreme command of the defense forces of the union shall be vested in the president and the exercise thereof shall be regulated by law.
(3) Nothing in this articles shall
(a) Be deemed to transfer to the president any function conferred by any existing law on the government of any state or other authority; or
(b) Prevent parliament from conferring by law functions on authorities other than the president.

⁸⁹ Krishna Nehra, "Government Procurement Law, and policy: India", available at: <https://www.loc.gov/law/help/govt-procurement-law/india.php#Procurement%20Guidelines> (Visited on 27/01/2017).

be followed by them. It was issued firstly in 1947 by compiling at one place all the existing order and instruction pertaining to financial matters. Later in 1963 and in 2005 it has been subsequently modified and issued as GFR 1963 and GFR 2005. GFR, 2017 is the latest governing rules which has been modified after GFR, 2005.⁹⁰

Rule 1 of GFR, 2017 discusses its title, commencement, and applicability of it. It is applicable to all Central Government Ministries/ Departments, attached and subordinate bodies. Its provision is also deemed to be applicable upon autonomous bodies like Central Universities. To that extent the bye-laws of these autonomous bodies provide for separate financial Rules which have the approval of the Central Government.

Chapter 6 of the GFR, 2017 deals with the procurement of goods and services. While chapter 8 deals with contract management, yet before discussing it let us discuss here about Public Account and Public Fund. As all procurement process involves an expenditure of public funds from the Public Account.

Rule 2 of GFR, 2017 which is a definition clause in its sub-clause (xxiv) defines Public Account as “Public Account of India referred to in Article 266 (2)⁹¹ of the Constitution of India”.

While Rule 22 of GFR, 2017 (Expenditure from Public Funds) talks about Public Funds as:

No Authority may incur any expenditure or enter into any Liability involving expenditure or transfer of money for Investment or deposit from public funds

⁹⁰ Preface, GFR, 2017, available at: file:///G:/GFR2017.pdf (Visited on 25/11/2017).

⁹¹ Article 266 Consolidated Funds and Public Accounts of India and of the States:

- (1) Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled the Consolidated Fund of India, and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all money received by that Government in repayment of loans shall form one consolidated fund to be entitled the “Consolidated Fund of the State”.
- (2) All other public money received by or on behalf of the Government of India or the Government of a State shall be entitled to the public account of India or the public account of the State, as the case may be.
- (3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

(Consolidated fund/ contingency fund and the public accounts) unless the same has been sanctioned by a competent authority.

Consolidated fund is defined in Rule 2 (vii) of GFR, 2017 as “The Consolidated Fund of India referred to in Article 266 (1) of the Constitution.” While the Contingency Fund has been defined under rule 2 (ix) of the GFR, 2017 as “The Contingency Fund of India established under the Contingency Fund of India Act, 1950 in terms of Article 267 (1)⁹² of the Constitution”.

The procedure of public procurement/ tender involves expenditure from these funds only of which the provision is given in Chapter 6 and 8 of the General Financial Rules, 2017.

Chapter 6: Procurement of Goods and Services

Rule 142 to Rule 176 deals with the procurement of goods and those from Rule 177 to Rule 196 deals with procurement of services. Some of these Rules have been discussed and analyzed here as beneath.

Rule 142 says that GFR, 2017 contains general rules which are applicable in India in its all Ministerial Departments, regarding procurement of goods required for the use in public service and this rule has to be used as a conformity norm by each and every Department while procuring.

GFR, 2017 contains a very comprehensive definition of goods under Rule 143 as it includes a group of all articles, materials, commodities, livestock, fixture, raw materials, furniture, machines, spares, machinery, equipments, industrial plants, aircraft, vehicles, ships, railway rolling stocks, medicines, assemblies, accessories, machines, or its subgroups as an integrated production process or

⁹²

Article 267:

- (1) Parliament may by law establish a Contingency Fund in the nature of an imprest to be entitled the Contingency Fund of India into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by Parliament by law under Article 115 or Article 116.
- (2) The Legislature of a State may by law establish a Contingency Fund in the nature of an imprest to be entitled the Contingency Fund of the State into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the Governor of the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorization of such expenditure by the Legislature of the State by law under Article 205 or Article 206 Distribution of Revenues between the Union and the States.

such other category of goods or intangible products like software, technology transfer, licenses, patents or other intellectual properties purchased or otherwise acquired for the use of Government. Excluding publications, books, and periodicals, etc. for a library. It also includes any work and services which are incidental or consequential to the supply of such goods like transportation, insurance, installation, commissioning, training, and maintenance.

Rule 144 Talks about the procedures to be followed by every authority while procurement of goods and services as:

1. There should be the proper and clear description of the subject matter of procurement like its objectivity, functionality, generic and measurable. Other than it any other technical and qualitative performance characteristics.
2. Not to indicate any particular trademark, trade name or brand as essential requirements. It is done in order to ensure every that individuals right guaranteed under Article 19 (1) (g)⁹³ i.e. Right to practice any profession or to carry on any occupation, trade or business and under Article 14 i.e. Right to equal opportunity is not infringed.

Rule 144 (ii) says that there should be a complete and clear specification of the terms of quality, type etc. so, that no hidden facts would be there for the bidders.

Rule 144 (iii) defines the criteria for procuring entity to keep the technical specification to the extent practicable in accordance with the national technical regulations or recognized national standards or building codes. Wherever such measures exist and in their absence it should be based on the relevant international standards. While in case of abroad funded project by government of India the technical specification may be framed based on prerequisites and standards of the host beneficiary government where such standard exists. Given that a procuring agent may adopt any other technical specification additionally by giving a reason in writing to be recorded. Consequently, it can see that this Rule 144 (iii) makes as the boundary line for the government agencies for determining the technical specification. So,

⁹³ The Constitution of India.

that they do not create any such technical specification which amounts unreasonable favouritism to any particular private members.

Rule 144 (iv) forces a restriction upon the procuring entities for not to acquire in excess quantity than required in order to avoid inventory carrying costs.

Rule 144 (v) says that the offer is required to be invited subsequently following to a fair, transparent and reasonable procedure. It requires attention here that however this rule had made obligatory for all the procuring entity to follow a fair and transparent procedure while inviting tender/ bid, yet no punishment has been prescribed here in case of default by the procuring entities.

Rule 144 (vi) obliges the procuring authority to satisfy themselves. That the offer which they are selecting satisfactorily meets as according to the requirements in all respects. This rule works as cross- check method for the procuring entities in order to ensure them. That they are not accepting any offer with biasness, carelessly and fraudulent (bid rigging).

Rule 144 (vii) says that it should be guaranteed by the Government agents. That the price of the selected offer is reasonable and consistent with the quality required.

Rule 144 (viii) forces an responsibility upon the procurement authorities to maintain a record in exact term and consideration which weighed with it at each stage of procurement. This obligation has been imposed as a method to ensure fairness in the procurement process.

Rule 144 (ix) can be called as a transparency clause as it provides for the publication of a complete procurement cycle right from the notice of inviting tender to date of issuing of contract.

Rule 144 (x) this clause of GFR, 2017 can be seen from the preview of Article 14 of the Indian Constitution. As it provides that all Ministries/ Departments are required to prepare an annual procurement plan before the commencement of the year and that has to be displayed on their respective websites. So that every interested private participant who is interested to

trade with the Government must know about it, or may not be denied equal opportunity to participate in dealing with Government.⁹⁴

On an analysis, it can be observed that the procedure contained in Rule 144 is mandatory in nature. They are intended to observe the fair practice in every procurement process. So that every individual may have access to trade with the Government on equality basis and no corrupt, misguided and biased practice may be involved in procurement process.

Other than this GFR, 2017 has divided the procurement of goods process in two modes on the basis of pecuniary jurisdiction as:

1. Rule 154 Purchase of goods without quotation- Purchase of the goods up to value of Rs. 25,000 on each instance can be made without inviting the quotations or bids, by giving a certificate⁹⁵ which is required to be recorded by the competent authority.
2. Rule 155 Purchase of goods by Purchase Committee- Purchase of goods above value of Rs. 25,000 (only 25 thousand rupees) and upto Rs. 2,50,000 / - (only two lakhs and fifty thousand rupees) on each instance can be made upon the recommendation of the duly constituted Local Purchase Committee which consist of the three members of an suitable level as decided by the Head of the Department. The committee needs to check the market to ensure the rationality of rate, quality and specifications and to identify the appropriate supplier. Prior to recommendation of any assignment of the purchase order, the members of the committee are jointly required to record a certificate.⁹⁶

While the method of procurement has been provided under Rule 158 of the GFR, 2017 which is again divided into 5 categories on the basis of the amount of procurement as:-

⁹⁴ General Financial Rules, 2017.

⁹⁵ Certificate under Rule 154: I, am personally satisfied that these goods purchased are of the requisite quality and specification from a reliable supplier at a reasonable price.

⁹⁶ Certificate under Rule 155: Certified that we, members of the purchase committee are jointly and individually satisfied that the goods recommended for purchase are of the required specification and quality, priced at the prevailing market rate and the supplier recommended is reliable and competent to supply the goods in question, and it is not debarred by Department of Commerce or Ministry/ Department concerned.

1. Advertised Tender Enquiry (Rule 161, GFR): For the procurement of goods of an estimated value of Rs. 25 Lakhs and above provided that advertisement for this purpose shall be given on Central Public Procurement Portal (CPPP).
2. Limited Tender Enquiry (Rule 162, GFR): This method is adopted when the procurement of goods is of estimated value upto Rs. 25 lakhs. In this generally, the copies of the bidding document are sent directly through speed post or mails to firms which listed as registered suppliers referred under Rule 150 of GFR, 2017.
3. Two- Stage Bidding (Rule 163, GFR): In a case where the procurement of goods is of a complex and technical nature like the purchase of high-value plants, machinery etc. Then in such case this method is adopted where procurement occurs at two stages as-
 - a. Technical Bid Stage which consists of all the technical details along with commercial terms and conditions.
 - b. Financial Bid Stage in which item-wise price for each item mentioned in the technical bid is evaluated.
4. Single Tender Enquiry (Rule 166, GFR): This method of procurement is generally adopted under certain circumstances and not in all cases as:
 - a. Where it is in the knowledge of the procuring agencies that only a particular firm is the manufacturer of the required goods.
 - b. Where there is an emergency and the goods required is to be purchased from a particular source only then by reason in recording and with the approval of the competent authority, it may be done.
 - c. In case of standardization of machinery or spare parts to be compatible to the existing sets of equipment, and the required item has to be purchased only from a selected firm (on the advice of the competent technical expert and approved by competent authority).
5. Electronic Reverse Auctions (Rule 167, GFR): It is an online real-time purchasing technique utilized by the procuring entity to select the

successful bid, which involves the presentation by bidders of successively more favorable bids during a scheduled period of time and automatic evaluation of bids.

Rule 173 of GFR, 2017 can be seen as one more step of the Government in the path of fairness in procurement process as this talks about the transparency, competition, fairness and elimination of arbitrariness in the procurement process this rule has 22 sub-clauses guiding different- different ways to be adopted by the Government agencies in procurement process in order to ensure fairness and competition at most resulting in general welfare.

Rule 175 of GFR, 2017 has contained the provision of Code of Integrity. This Rule consists of two clauses where clause (2) of Rule 175 is a remedial clause in case any act of the bidder or prospective bidder is found to be in contravention of clause (1) of Rule 175. Clause (1) of Rule 175 is here below as:

Rule 175 (1)- No official of a procuring entity or a bidder shall act in contravention of the codes which includes

(i) Prohibition of-

- a. Offer, solicitation or acceptance of either bribe, reward or gift or any physical benefit either directly or indirectly, in exchange for inappropriate benefit in the purchase process or otherwise affecting the purchase procedures.
- b. Any mistakes, or misconceptions that might try to mislead or mislead. So that financial or other benefits can be obtained or avoided from a liability.
- c. Any collusion, bid rigging or anti-competitive behavior that may impair the transparency, fairness and the progress of the procurement process.
- d. Improper use of information provided by the procuring entity to the bidder with intent to gain an unfair advantage in the procurement process or for a personal gain.
- e. Any financial or business transactions between the bidder and any official of the procuring entity related to tender or execution process of contract; which can affect the decision of the procuring entity directly or indirectly.

- f. Any coercion or any threat to impair or harm, directly or indirectly, any party or its property to influence the procurement process.
- g. Obstruction of any investigation or auditing of a procurement process.
- h. Making false declaration or providing false information for participation in a tender process or to secure a contract;

(ii) Disclosure of conflict of interest.

(iii) Disclosure by the bidder of any previous transgressions made in respect of the provisions of sub-clause (i) with any entity in any country during the last three years or of being debarred by any other procuring body.

Comparison between GFR, 2005 & GFR, 2017

Sr. No.	GFR, 2005	GFR, 2017	Changes Made in GFR, 2017 from GFR, 2005
1.	Procurement of Good And Service Rule 135 to 185	Procurement of Good and Service Rule 142 to 206	Introduction of the some new rules in 2017.
2.	Rule 137 Deals with the Fundamental principles of buying	Rule 144 deals with the Fundamental principle of public buying for all procurements including procurement of works.	<ul style="list-style-type: none"> • The provision for procurement of works has been added in addition to other procurement activity. • The provision for the description of the subject matter of procurement has been inserted. And not indicate of any particular

			<p>trade mark or trade name or brand.</p> <ul style="list-style-type: none"> • Provision for disclosure of the complete schedule of the procurement has been inserted.
3.	No provision of E-platform	Rule 149 deals with Government e-Market Place i.e. GeM for the mandatory procurement of Goods and services from the registered supplier at GeM.	<p>This new provision of online hiring or procuring of goods and services has been made which says that:</p> <ul style="list-style-type: none"> • Upto 50,000 procurement can be made from any available suppliers on GeM subject to meeting of specifications of quality. • More than 50,000 and upto 30,00,000 from the available service providers having the lowest price i.e. L1 among the other available suppliers, of at least three different

			<p>manufacturers on GeM. Provision for online auction has also been provided there.</p> <ul style="list-style-type: none"> • Above 30,00,000 from the suppliers having the lowest price subject to specification of quality.
4.	Rule 142 Registration of Suppliers	Rule 150 deals with Registration of Suppliers	The provision for the display of the registered suppliers on the Central Public Procurement Portal and websites has been inserted.
5.	No provision for debarring the bidder	Rule 151 deal with the Debarment from bidding	<p>Certain conditions for debarring the bidders for a period of not exceeding 3 years has been made in GFR, 2017 like:</p> <ul style="list-style-type: none"> • If the bidder is convicted under prevention of Corruption Act, 1988. • If convicted under IPC and under any other law for the

			time being in force.
6.	Rule 145 Purchase of Goods without quotation upto Rs. 15,000	Rule 154 Purchase of Goods without quotation upto Rs. 25,000	Increase in value of purchase has been made.
7.	Rule 149 Purchase of goods by obtaining bids. By: 1. Limited Tender Enquiry. 2. Single Tender Enquiry.	Rule 158 Purchase of Goods by obtaining bids	Two new provision have been inserted as: 1. Two-Stage Bidding. 2. Electronic Reverse Auctions.
8.	Rule 150 Advertisement of Tender Enquiry up to 25 lakh Rupees and above in Indian Trade Journal printed by the D.G., Commercial Intelligence and Statistics.	Rule 161 Advertised Tender Enquiry of estimated value upto 25 lakhs and above to be made in Central Public Procurement or on GeM.	A shift in advertisement provision from Indian Trade Journal to Central Public Procurement
9.	No provision of Two-stage bidding	Rule 164 deals with the process of two stage bidding.	Two stage bidding i.e. financial bid and technical bid.
10.	No provision for Code of Integrity.	Rule 175 Code of Integrity.	Provision of code of integrity has been inserted in GFR, 2017.

The Railway Code for Stores Department Volume 1⁹⁷:

⁹⁷ Government of India, Ministry of Railways, India Railway Code for the Stores

Chapter III of this code deals with the Purchase Policy and Rules of railway stores. Purchase Policy and in this chapter Rules, 324-325 talks about the open tender process in all cases where the estimated value of the purchase is-

1. Over Rs. 10 lakhs in normal circumstances, for procurement of items other than safety items.
2. Over Rs. 2 Crore in emergency cases, and
3. Over Rs. 2 Crore for safety items Procurement and the purchase of those items, whose approved inventory suppliers are issued by the centralized approval agency like RDSO / PU / Core etc.⁹⁸

On an analysis of this section it can be found that although this section talks about the open tender process. But still in a complete sense it cannot be called as an open tender. Because it has put a restriction of purchase only from the approved vendors of RDSO/ PU/ CORE etc. therefore, leaving no space for unapproved vendors to participate.

Rule 328 of the Railway Code: Talks about the Limited Tender System it discuss about the condition when the limited tender system may be adopted. As and when there is no procurement of safety items, procurement in emergency and in procurement of items whose approved list of vendor is issued by centralized agency. Then this system may be adopted where the estimated order value is not exceeding Rs. 10 lakhs. Whereas, in a case when the procurement is in an emergency, procurement of safety items and procurement of items whose approved list of vendors is issued by a centralized agency i.e. RDSO/ PU/ CORE than up to amount not exceeding Rs. 2 crore.⁹⁹

On an analysis of this section, it is seems that it is very restrictive in nature and will lead to the formation of very limited vendors. Thus, restraining the other from equal opportunity to trade with the government and also affecting the competition fairly in the market which would result in financial and social loss both to the people.

Department Vol. 1, Revised Edition 1990, available at: <http://www.indianrailways.gov.in/railwayboard/uploads/codesmanual/StoreDept-I/main%20page.htm> (Visited on 12/2/2018).

⁹⁸ Ibid.
⁹⁹ Ibid.

Rule 330:¹⁰⁰ Talks about the single tender system which is opted for small purchase not exceeding of value Rs. 3 lakh in context of non- proprietary articles (provided decision to opt single tender process for articles beyond Rs. 5,000/- . But less than Rs. 10,000/- in value is taken by a officer not below the rank of a junior Administrative Grade Stores) and Rs. 5 lakhs in case of proprietary articles (with PAC “a” certificate) and articles in the process of indigenous development are subject to properly quoted rates.

DGS&D (Directorate General of Supplies and Disposals) purchase:¹⁰¹

Though this body has now been replaced by the Government of India with new platform i.e. GeM (Government e- Marketplace) which is Centre like portal platform which has been formulated in order to encourage more transparency in the procurement process. But still here it would be important to discuss some of the provisions of DGS&D purchase manual effective from 1999 which contain the provision for registration of suppliers in its chapter V. It says that in order to establish reliable sources of supply for Government purchases, firms are required to be registered for a definite period of time depending on the category of registration. The category for registration of the firms for supply of indigenous items is made into of manufacturers, assemblers, and converters, sole selling agents of Indian manufacturers who supply to imported stores, foreign manufacturers and their Indian agents.

It can be examined here that such rules limit the number and range of suppliers which will again create entry barriers for the non-registered suppliers. Secondly, it does not have the time period clause for an invitation of application for registration along with the group of items for which registration is being processed. Thus, it seemed to be a non-transparent process and it is not able to provide a wide opportunity to every intended person who is willing to be suppliers and service providers.

Chapter 13 of the DGS&D manual talks about the procedure to be followed for concluding rate contract for procurement of standard items of common use with

¹⁰⁰

Ibid.

¹⁰¹

DGS&D Manual, 1999, available at: <http://www.cga.nic.in/writereaddata/DGS&DManual.pdf> (Visited on March 12, 2018).

an estimated annual withdrawal of Rs. 25 lakh or more directly by the user departments. Rate contract is an agreement between the purchaser and the supplier to supply stores at specified prices during the period covered by the contract. It is in the nature of a standing offer from the supplier firm. A legal contract comes into existence when the placement of individual order (supply order) is made and each supply order will constitute a separate contract. The supply orders can be placed on any of the rate contract holding firms either directly by the authorized officers of the indenters (Demanding Officer) or by the DGS&D. The decision to bring or delete an item from the rate contract will be taken by the Standing Review Committee (SRC) under the chairmanship of DG(S&D). SRC has representatives from major indenting Departments like Defence, Railways, Home Affairs, Health, Telecommunications, State Government, and Trade Organizations and is assisted by the subcommittee under the Chairmanship of ADG (suppliers) with the Director (CDN) as Member Secretary.

The rate contract is awarded to the firms registered with DGS&D/ NSIC. The firms getting registered within 90 days from the date of a tender opening are also considered, if their offer is otherwise eligible. The past performance of a firm is one of the considerations in awarding fresh rate contract to the firm.

Chapter 8 of the DGS&D manual says about the opening of tenders. It says that the bid must be opened by an assigned Purchase Officer, he shall be another person than one who has makes the purchase subsequently, and he/ she shall under no situation open the bids. Besides it all tenders are required to be open only in the presence of the bidders, who have filed the bid.

This rule ensures the transparency and public confidence upon the working of the Government Department. That it is working fairly, unbiased, non-arbitrary and in a non-discriminatory manner.

Constitutional and Government Regulatory Bodies

- 1. Public Accounts Committee:** It is a 15 member committee chaired by the Leader of Opposition. 7 members from Rajya Sabha are the member of this committee while no minister of ruling party can be the member of

the Committee. The Committee has the power to examine the accounts in order to find out the appropriation of the grant made by the Parliament for Government expenditure. It can examine the accounts of the government corporations and autonomous and semi autonomous bodies and can examine, take evidence, hear and prosecute the government officials if it any allegation of corruption or misuse of the public fund in CAG report submitted to the Parliament. Thus, this body scrutinizes the action of the government officials and ensures the check on the negligence, slackness and absolutism of the Executives.

2. Comptroller and Auditor General of India: In order to ensure that the expenditure out of the public account is in accordance with the parliamentary intentions there is necessity to have an independent body like CAG to scrutinize the expenditure incurred by the executive agencies as it ensure the parliamentary control over the appropriations. CAG is an Constitutional body whose provision is give under Article 148 of the Constitution which says that CAG is to be appointed by the President of India. His power and Function is given under Article 149¹⁰² of the Constitution.

Two kinds of function have been categorized by the parliament to be performed by the CAG under The Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971. As to be an Accountant and to compile all the accounts of the Center and States Second, as an Auditor and to audit all the receipts and expenditure incurred by the Government agencies in order to make out that whether such investment is legally available for, and applicable to, the purpose for which it was made. Audit ensures that the Government Agencies i.e. Executive keeps within the sums allotted and the purpose authorized.

Under Article 149 CAG has the power to examine and audit all the public purchase done by the public servants in other to find out the irregularities

¹⁰²

Article 149: Duties and powers of the Comptroller and Auditor General The Comptroller and Auditor General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.

present in it and to report the same to the Parliament to be putted before the Public Account Committee. In Association of unified tele service providers and Ors. v. Union of India¹⁰³ it was stated by the Supreme Court by relying upon the judgment of S. Subramaniam Balaji v. State of Tamil Nadu and Ors.¹⁰⁴ that CAG is an important functionary under the Constitution and is the guardian of the public purse. Thus, it has the power and duty to check that not a single penny of the public money has been spent without the authority of the Parliament. CAG exercises the Constitutional powers and duties in relation to public account in the same manner as the Supreme Court and High Court exercises under Article 32 and 266 of the Constitution. Thus, power and duties conferred under Article 149 of the Constitution amounts to be the basic structure of the Constitution which cannot be change by Parliament. While Manipur High Court had observed in Zimomi Traders v. Food Corporation of India and Ors.¹⁰⁵ in its para 32 that being the custodian of the scarce public wealth and resources, State and its agencies are expected to discharge their functions scrupulously and efficiently in order to avoid undue expenditure. It is in this context only the role of CAG comes into play being a Constitutional authority CAG is entrusted with the task of auditing the expenses of the State and can make necessary advice for proper fiscal management which are required to be highly considered by the Government authorities.

- 3. Central Vigilance Commission Guidelines:** Central Vigilance Commission of India was established in 1964 for advising and guiding the Central Government agencies in the field of vigilance upon the recommendation of Committee on Prevention of Corruption headed by Shri K. Santhanam. The object of the committee is to monitor vigilance activities under the Central Government and to advise other Central Government authorities in planning, executing, reviewing and reforming their vigilance work. In the matter public purchase also CVC plays a vital role for preventing corruption and for this purpose it issues from time to

¹⁰³ MANU/SC/0328/2014.

¹⁰⁴ MANU/SC/0668/2013.

¹⁰⁵ MANU/MN/0102/2017.

time certain guidelines for public procurement process, in order to maintain transparency in it as-

- a. Vide Circular No. 01/02/2011¹⁰⁶ whose subject was transparency in tendering system advised to all the Government agencies to invite expression of interest from the bidders. In a case where the technical specification is required to be iterated more than once and then to proceed to finalize specification based on technical discussion/ presentations with the experienced manufacturers/ suppliers in a transparent manner. In such cases, the two-stage tendering process should be adopted. During the first stage of tendering the acceptance of the technical solutions would be evaluated. After calling for the expression of Interest from the experienced manufacturers/ suppliers in the field of procurement. At the second stage of tendering calling for the techno-commercial bids. As per the usual tendering system under single bid or two bid system, as per the requirement of each case and final selection would depend upon the quoted financial bids and the evaluation matrix.
- b. Vide Circular No. 01/01/2014¹⁰⁷ subjected Short- Comings in Bid Documents the Commission has impressed upon all the organizations to ensure transparency and fair play in all procurement/ contracts. One of the concerns is related to the framing of the notice inviting tenders and bid documents which results in ambiguity and scope for interpretation differently during processing and award of contracts by the organizations. The commission had advised to all the Government agencies that whatever pre-qualification, evaluation/ exclusion criteria, etc. which agencies want to adopt should be made explicit at the time of inviting tenders. So that basic concept of transparency and interests of equity and fairness are satisfied. The acceptance or rejection of any bid shall not be arbitrary. But it must on justified grounds, in

¹⁰⁶ Central Vigilance Commission Guidelines, Government of India, available at: <http://cvc.nic.in/011VGL01414022011.pdf> (Visited on February 12, 2018).

¹⁰⁷ Central Vigilance Commission Guidelines, Government of India, available at: <http://cvc.nic.in/Short%20comings.pdf> (Visited on March 12, 2018).

accordance with the specifications, evaluation/ exclusion criteria laid down so, that no room for complaints would be there. As bidders spend both time and energy, besides the money for making and filing the bids and, thereafter, in follow up to the organization for submitting clarifications and presentations as and when required.

c. Vide Circular No. 01/01/10¹⁰⁸ subjecting Tendering process Negotiations with Lowest Bidder (L1) the Commission said that the post-tender negotiation could often be a source of corruption. It is directed that there should be no post-tender negotiations with Lowest Bidder (L1), except in certain exceptional situations.

There are various other guidelines which have also been issued from time to time by CVC. In order to maintain fairness and transparency in the public procurement process as it acts as a watchdog upon all the government agencies indulge in the procurement process.

4. **Central Bureau of Investigation (CBI):** It traces its history during the World War period from the establishment of Special Police Establishment (SPE) in 1941 with the object to investigate cases of bribery and corruption.¹⁰⁹ The object of CBI is to investigate all the matters of corruption and bribery under the Prevention of Corruption Act, 1988 present in Government agencies functioning. Thus, in the matter of all public purchase CBI has the power to investigate and prosecute the procuring officers practicing mala-functioning. CBI is governed by the Delhi Special Police Establishment Act, 1946 whose section 6 A says that approval of the Central Government would be required prior to conduct any investigation of alleged matters under Prevention of Corruption Act, 1988. While as per section 4 of the Act CBI is subject to supervision of CVC while making investigation under Prevention of Corruption Act.¹¹⁰

¹⁰⁸ Central Vigilance Commission Guidelines, Government of India, available at: <http://cvc.gov.in/tpn20012010.pdf> (Visited on March 12, 2018).

¹⁰⁹ History, Central Bureau of Investigation, available at: cbi.gov.in/ (Visited on May 22, 2018).

¹¹⁰ CVC new notice no. 12.9.2003

Judiciary had also observed the importance of role of CBI in preventing unfairness in tender matters where large sum of public money is involved. As in *Nutan Thakur v. State of U.P. and Ors.*¹¹¹ where a PIL (Public Interest Litigation) was filed before the Allahabad High Court seeking direction of the Court to CBI to investigation and lodged the FIR against the respondent Yadav Singh under the provision of IPC and Prevention of Corruption Act who was alleged to make Noida flat scam at the time when he was appointed as a Chief Engineer in New Okhla Industrial Development Authority, Greater Noida Industrial Development Authority and Yamuna Expressway Authority. In this case the respondent was alleged for allowing the certain companies to carry out work even prior to the allotment and finalization of the tender. Secondly, the respondent had within a short duration executed a bond agreement for the release of amount of Rs. 954.38 crores in favour of the contractors by Engineering Department of Noida. The Court had passed the direction to CBI for making investigation into the alleged matter having due regard to-

- a. Involvement of huge corruption.
- b. High level bureaucratic irregularities.
- c. Need for specialized investigation by an agency
- d. Need to preserve the public confidence in administration of criminal Justice.

5. Competition Commission of India: The Competition Commission of India was established by the Central Government in the year 2003 under sec. 7¹¹² of the Competition Act, 2002. The object of Commission is to promote competition in the market and to ensure welfare of the public at

¹¹¹ MANU/UP/0826/2015.

¹¹² Establishment of Commission:

1. With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India".
2. The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.
3. The head office of the Commission shall be at such place⁴ as the Central Government may decide from time to time.
4. The Commission may establish offices at other places in India.

large by prohibiting practices causing adverse effect on competition. The Commission is playing a vital role in public procurement system, as it keeps an eagle eye upon the corrupt practice of bid rigging usually practiced by the bidders while bidding in any tender and endeavors to ensure that the procurement are not framed so that it provides a space for collusion, entry barriers, and cartelization in the market in order to enlarge the optimum utilization of public funds. This bid rigging has a serious consequence as it effects the competition in the market which ultimately causes a great loss to the public exchequer. Section 3 (3) (d)¹¹³ of the Competition Act, 2002 deals with bid rigging/ collusive bidding which is prohibited by the Commission in any public purchase as it causes a great loss to the public account and effect the private persons pocket too. Therefore, always keep a check up such unwanted activity in public purchase and take suo moto cognizance of the offence and imposes heavy penalty, thereby ensuring transparency and fairness in the tender system. As in Delhi Jal Board v. Grasim Industries Ltd. and Ors.¹¹⁴ it was stated by the Commission that Competition in a bidding is an important aspect as suppliers with their offers compete with each other for getting the tender but if these vendors do not compete with each other and mutually form an agreement among themselves for allocating the markets, quote bid prices on agreed terms between them or withdraw the bids, display a pattern in winning and losing of bids and winning bidder sub-contracting the work repeatedly to the losing bidder, etc. no doubt then in such cases the very objective of promoting

¹¹³ Section 3 Anti-competitive agreements:

- (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
- (d) Directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

¹¹⁴ MANU/CO/0066/2017.

competition in the bidding process would be affected. Since, public procurement involves the expenditure of taxpayer's money and consumer welfare; bid rigging must be viewed as a most malicious anticompetitive conduct inviting serious penalty.

- 6. Central Public Procurement Portal:** The Government of India had provided a common platform in the form of CPPP for all the Central Government Institutions for advertising their tender notices, Corrigendum and details of the contract awarded. The main object of this platform is to provide a single point of access to the information on procurements made across various Central Government Institutions.

Besides these central legislative regulatory measures, there are certain states of India where the legislation governing procurement process have been adopted respectively in order to ensure fairness and prevention of corruption in the tender process. These are here under as:

- 1. The Tamil Nadu Transparency in Tenders Act, 1998:** This Act was passed by the Tamil Nadu Government and received the assent of the President on 11th December 1998. The object of the Act was to provide transparency in the public procurement and to regulate the procedure of inviting and accepting the bids and matters connected in addition to or incidental to it. To maximize economy and efficiency in government procurement, to foster and encourage adequate participation by tenderers in the process of tenders. To provide fair and equitable treatment to all bidders, to promote healthy competition among the tenderers, in order to eliminate irregularities, interventions and corrupt practices in matters relating to tender procedures by providing transparency.¹¹⁵

The Act has 23 sections and it covers all the areas of tender process like Section 4 of the Act deals with Regulation of Tenders; Section 7 of the Act deals with appointment of the Tender Inviting and Accepting Authority; Section 9 with Functions of the Tender Inviting Authority; Section 8 deals with opening of tender; Section 12 provides right to reject

¹¹⁵ The Tamil Nadu Transparency in Tenders Act, 1998, available at: www.tnpsc.gov.in/tender/tender_act.pdf (Visited on October 14, 2017).

tender while Section 11 provides for appeal provision to the Government against the order passed by the tender accepting authority.

2. **Karnataka Public Procurement Act, 1999:** It was passed by the Karnataka Government in 1999 and had received the assent of the Governor in 2000 and was amended in the year 2001 and 2004. With the object of assuring transparency in public procurement of goods and services by a smooth system of invitation, processing and acceptance of the bid by purchasing entities and for subjects incidental to it.¹¹⁶

This Act has 27 sections divided into 3 chapters. Chapter 1 of the Act deals with Short title, extent, and commencement of the Act, definitions, and Exceptions to applicability. Chapter 2 of Act covers the Regulation of Procurement process like opening of tender, general rejection of tenders, acceptance of tenders, procedure to be followed by the procuring entities and appeal against the order of procuring entity. While Chapter 3 of the Act deals with miscellaneous topics like penalty, power to make rules, bar of jurisdiction of courts etc.

3. **Rajasthan Transparency in Public Procurement Act, 2012:** This Act came into force on 21st May, 2012 after receiving the assent of the Governor. The object of this Act is to regulate the bidding system by ensuring transparency, fairness and equitable treatment to all the bidders. For advancing competition, enhancing efficiency and economy and to protect the integrity in the procurement process and for other matters which are incidental to it. Whereas, the state government (Rajasthan) deems it inevitable in ensuring the peak standard of transparency, accountability, and probity in the tender process in order to gain and maintain the public confidence in public procurement system and to make the system sound.¹¹⁷

It has 59 sections divided into 5 Chapters. Chapter 1 of the Act deals with short title, extent, commencement of the Act and definition clauses. Chapter 2 of the Act is again divided into two parts where part A deals

¹¹⁶ The Karnataka Transparency in Public Procurement Act, 1999, available at: <http://www.finance.kar.nic.in/trans/Trans-Act.pdf> (Visited on October 14, 2017).

¹¹⁷ The Rajasthan Transparency in Public Procurement Act, 2012 available at: <http://latestlaws.in/wp-content/uploads/2015/07/Rajasthan-Transparency-Public-Procurement-Act-2012.pdf> (Visited on October 14, 2017).

with the general principle of the procurement and part B deals with the method of procurement. Chapter 3 of the Act provides for the provision of Appeal against the decision of procuring authorities to the government. Lastly, Chapter 4 of the Act deals with miscellaneous topics.

4. **Defence Procurement Procedure, 2016:** Besides Preamble it has 7 Chapters where Chapter 1 deals with the operational context, acquisition categories and acquisition plans; Chapter 2 deals with defence procurement procedure for categories under 'Buy' and 'Buy and Make' schemes; Chapter 3 deals with defence procurement procedure for 'Make Category'. Chapter 4 deals with the procedure for defence sip building. Chapter 5 deals with fast track procedure; Chapter 6 deals with standard contract document and the last Chapter 7 of the Act deals with strategic partners and partnership. This Defence Procurement Procedure, 2016 has replaced the DPP 2013 and has come into force on 1st April 2016 with the object of ensuring timely procurement of defence (military) equipment, systems. This Act includes all capital assurances made by the Union Ministry of Defense, both indigenous sources and imports (i.e. Defense Services and Indian Coast Guard). It gives the Defense Acquisition Council the power to take a fast track route to acquire weapons, which till now was confined to the armed forces. DPP, 2016 has been prepared on recommendations of Dharmendra Singh Committee.¹¹⁸

International Provisions for Prohibition of Corruption in Tender Process

At the International Level likewise there have been provisions for the prohibition of corruption in the procurement process in order to ensure fairness and to prevent unlawful loss and unlawful gain as¹¹⁹:

1. **UNCAC (United Nations Convention against Corruption)** - It is a vital effort at international level in order to promote and fortify measures to avert and curb corruption more efficiently and effectively. To promote,

¹¹⁸ Defence Procurement Procedure, 2016, G.K. Today, available at: <https://currentaffairs.gktoday.in/union-government-unveils-defence-procurement-procedure-2016-03201631753.html> (Visited on October 14, 2017).

¹¹⁹ Chang- Faló, "Making the Anti- Corruption Provisions in the New Government Procurement An agreement under the WTO Operable", 7(1) Trade L. & DEV. 21 (2015), Westlaw India,

facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery". To promote integrity, accountability and proper management of public affairs and property.

Article 9.1 of the UNAC requires that all the states which are the signatory or party to it shall "take the necessary steps to establish appropriate systems of procurement, in beam of competition, transparency and objective criteria in decision making, which is effective in prohibiting corruption".¹²⁰

2. **OECD Anti- Bribery Convention-** OECD Convention for Prohibiting Bribery of Foreign Public Officials in International Business Transactions was adopted on 17th December, 1997 and came into force on 15th February, 1999. It requires the parties who are the signatory to it to establish a specific criminal offence for bribery, which would include offering, promising or giving any undue pecuniary or another advantage to foreign public officials in the conduct of international business.

3. **The Failed Transparency of Government Procurement Agreement-** World Trade Organization has built up a multilateral agreement on transparency in government procurement process in order to improve the "certainty and reviewability of the national procurement procedures respectively, and subject them to the WTO dispute settlement mechanism". It was adopted with the hope corruption from government procurement process would be reduced effectively.

Other than it there are judgments of the foreign Courts also which had laid down the principle of fairness in procurement process like the European Court of Justice in its judgment of Commission of the European Communities v. Kingdom of Denmark¹²¹ expressed that the principle of equality must be observed by the commissioning party as it has an obligation to ensure equal opportunity and efficient competition for all the participants in tender process.

¹²⁰

Ibid.

¹²¹

Case C- 243/89, 22 June 1993 , available at: <https://eur-lex.europa.eu/legalcontent/t/EN/TXT/?uri=CELEX%3A61986CJ0302> (Visited on March 30, 2018).

In *Perkins v. Lukens Steel Co.*¹²² the U.S. court had made an imprecise and unwarranted suggestion that “the Government may for the purpose of keeping its own house all together lay down guidelines. Through which its agents have to proceed while procuring goods and services.”

Despite the fact, India is not a signatory party for these international conventions. Still it has been briefly incorporated here, keeping in mind to discuss the initiative taken at international level for restricting corrupt practices in procurement system.

Therefore, these were the legislative measures adopted by the government of India in order to ensure transparency and fairness in public procurement process. Presently procurement and the subject of Government contracts have assumed great importance and played a significant role in the perspective of the modern business. The institutional and legal framework for purchase in India is derived from the Constitution of India. The Constitution enshrined the executive powers in the hand of the President of India.¹²³ The President, by his order, and issuance of Government of India (Allocation of Business) Rules¹²⁴ had transferred/ delegated the financial powers of Government in the Ministry of Finance. And Ministry of Finance had again sub-delegated this power to the administrative organizations. Consequently, in order to guarantee transparency in the acquisition of the tender process in India.

On an analysis of these legislative and regulatory measures it can be found that there is still lacuna in it as:

1. There is no provision for the compensation to the bidder in case he suffers loss due to fault of the procuring authorities.
2. There is no provision stipulated that how much and by what procedure the procuring authorities may condone the terms and conditions of the tender notice while accepting tender.
3. No accurate penalty provision had been stipulated upon the procuring authorities in case of their fault.

¹²² 310 U.S. 113 (1940), available at: <https://supreme.justia.com/cases/federal/us/310/113/> (Visited on March 3, 2018).

¹²³ Article 53, The Constitution of India.

¹²⁴ The Government of India (Allocation of Business) Rules 1961, available at: http://cabsec.nic.n/abr/abr_odr.htm (Visited on October 6, 2017).

4. CVC had power directly to investigate into the matter. Secondly, its instructions are advisory in nature.
5. CBI requires the prior permission of the Central Government before making any investigation which again creates a conflict in division of power as in the matters of state governments also it require permission of the Central Government which are sometimes opposed by the state government on the ground of division of power.

On the other hand due to the growth of procurement process and due to non-availability of any central rule to govern its procedure in order to ensure transparency and fairness in the tender system. More complexity has arisen today which required the judicial impedance to reframe and to fill-up the lacunas in procurement laws of tender system in India.

Chapter IV

Legal Framework for Tender process in India

Amid more recent years, the quantity of cases including difficult issues of responsibility and abuse of power under tender process is additionally developing everyday because of the request in the high-value tenders and contracts of Government works. On one side, the Government is battling this course on the ground that it is a regulatory function of the state, that too about business contracts henceforth, courts ought not to intercede than again the interested parties are asserting that there is a gross abuse of statutory powers by the Government authorities while utilizing their administrative discretion in such issues. At the point when there is an arbitrary decision taken for mala fide reasons at that point people in general or public interest at large is also affected by way of a poor quality service or increased costs, etc.¹²⁵ Against this backdrop, the present work has been embraced with the aim to expound legal approach towards tender process and to assess its effect.

Analysis of Landmark Judgments on Tender law in India

Ramana Dayaram Shetty v. International Airport Authority of India and Ors.¹²⁶

Today with the expansion of the welfare and social service functions, there have been increase in the control of materials and economic resources and large-scale assumption of industrial and commercial activities by the state; thereby the power of the government to affect the life of the people is progressively growing. Procurement is a process through which private persons come into the relationship of direct encounter with state power- holder. Thus, there a need arises to structure and restrict the power of the executive government so as to prevent its arbitrary action. This principle was very clearly observed by the

¹²⁵ Law Senate, tender and contract service, available at: <http://www.lawsenate.com/dispute-resolution-services/tender-and-contract-services.html> (Visited on October 17, 2017).

¹²⁶ MANU/SC/0048/1979.

Supreme Court in Ramana Dayaram Shetty v. International Airport Authority of India and Ors.¹²⁷

Nature of Suit

Special Leave Petition (SLP) under Article 136¹²⁸ of the Constitution against the judgment of the Division Bench of the High Court.

Brief Facts of the case:

A notice for inviting tender was invited by the International Airport Authority of India for setting up and managing a second class restaurant and two snacks bars at International Airport, Bombay on 3rd January 1977. Clause 1 of the notice contained a condition that a "sealed tenders in the prescribed form are hereby invited from the registered second class hoteliers having at least 5 year experience."

Six tenders were submitted, in response to the notice and out of it tender of respondent no. 4 were only accepted by the authorities as it was the highest bid among the others and was complete in form while the other rejected tenders were incomplete. It would be important here to disclose that the respondent no. 4 whose tender was accepted was not complying with the condition stipulated in clause no. 1 of the notice inviting tender, yet it was accepted by the respondent no. 1 to this case after its negotiation with the respondent no. 4 and exchange of letter between them whereby the respondent no. 4 has stated that he had 10 year experience of running the catering to reputed commercial house and also a license issued under the prevention of food adulteration Act.

After the acceptance of the tender respondent no. 4 had got prepared with everything like furniture, the dress of workers deposited the security amount of

¹²⁷

Ibid.

¹²⁸

Art. 136:

1. Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
2. Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Rs. 39,999.99 in the form of fixed deposit and has also paid an amount of Rs. 6666.66 representing a licensee fee for one month for running the restaurant and two snack bars. But respondent no. 1 was unable to handover the possession of the sites as it was still under the possession of A.S. Irani who was running the restaurant upon the previous contract.

By the time a civil suit was filed by K.S. Irani proprietor of cafe excelsior who was closely connected with A.S. Irani as both were the partner of the Royal restaurant and store running by them, at the Civil Court of Bombay against the respondent no. 1 challenging his decision of accepting the tender of the respondent no. 4. Earlier an ad-interim injunction against the respondent but after hearing the respondent the Court had dismissed the injunction was vacated by the court. An appeal was made by K.S Irani to High Court but that too was also dismissed by the Court. On the same day, two sites were handed over to the respondent no. 4 which was different from the sites held by A.S. Irani and beside it an ad- interim injunction was also obtained by the respondent no. 1 against the A.S. Irani from preventing him to run the restaurant and snack bar. An appeal was filed against this order which was ultimately rejected by the Supreme Court. Again an appeal was filed by Irani for preventing the respondent no. 4 from taking contract given by respondent no. 1 but it failed.

Later on, the appellant of the present case i.e. R.D. Shetty who was not a participant of the tender and was just a mere stranger filed a writ petition in the Bombay High Court challenging the decision of the respondent no. 1 of accepting the tender of respondent no. 4.

But unfortunately it was rejected and finally, a special leave petition was filed before the Supreme Court under Article 136 of the Indian Constitution.

The Question of Law Raised

The question law which was raised and discussed before the Supreme Court in this case were:

1. Constitutional Obligation of the state, while it exercising its statutory or executive power to take action.

2. Contract making power of the state and constitutional limitations there upon it.
3. What is the diameter of the state agencies while exercising their executive power in the matter of contract making?

Issues involved in the case

1. Whether the respondent no. 1 i.e. Airport Authority of India is a state within the meaning of the Article 12 of the Constitution.
2. What is the meaning of the “Registered second class hotelier” & what category of people fall within the meaning of this description and was this essential condition of tender notice?
3. Whether the respondent no. 1 is justified in awarding the tender to respondent no. 4? And if not justified then can it be set aside at the instance of the appellant.

Legislative framework

1. Article 12 of the Constitution defining the state as "the state includes the government and parliament of India and the Government and the legislature of each of the state and all local and other authorities within the territory of India or under the control of the government of India.
2. Article 14 of the Constitution defining equality before the law that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Arguments Advanced and the Analogy of the Court

As regard to the issue no. 1 raised before the Court that whether the respondent no. 1 i.e. International Airport Authority of India comes within the definition of state under Article 12 of the constitution to determine this question the Court had taken into consideration some of the provision of the International Airport Authority Act, 1971 (herein after called as Act) like section 3 (1) of the Act which provides that the central government shall constitute an authority to be called the International Airport Authority of India which would be a body corporate with perpetual succession and common seal; section 3 (3) the

authority shall consist of the chairman and other members to be appointed by the central government whose term period would be for 3 years. Section 28 of the Act provides that the officers and employees of the Authority would be a public servant and would have the immunity from suit, prosecution or other legal proceedings for anything done in good faith or intended to be done in pursuance of the Act or any rule or regulation made under it (section 28). While section 35 of the Act gives power to the central government to give directions in writing from time to time on the question of policy and provides that the authority must be bound by such directions.

By taking into consideration these conditions the court upheld authority to be a state within the meaning of Article 12 and therefore it is subject to the limitation and restriction provisions of constitutional and other public laws.

The court had also thrown light upon the various judgments in order to come to this conclusion. Likewise, *Rajasthan State Electricity Board, Jaipur v. Mohan Lal & Ors.*¹²⁹ In which the court had said that Article 12 is adequately adequate to include all the works made by law under the control of the province of India or under the sovereignty of the Government of India. As it was identified by Bhargava, J that the expression “other authorities” in Article 12 would include all constitutional and statutory authorities on whom powers are conferred by law. It was also stated by the learned judge that if anybody of persons has authority to issue directions and the disobedience of which would be punishable as a criminal offence that would be an indication that the authority is a state.

Reliance was also placed upon the judgment of Supreme Court in *Sukhdev v. Bhagat Ram*¹³⁰ where Mathew, J have adopted an broader test to determine the meaning of other authorities in Article 12 he observed that whether the statutory corporation or other body or authority, claimed to fall within the definition of State is an instrumentality or agency of Government: if it is, it would fall within the meaning of the expression other authorities and would be state.

Observation of the Court in present was that there is no clear-cut and dried formula which would provide the correct division of corporations into those

¹²⁹ MANU/SC/0360/1967.

¹³⁰ (1975) 3 S.C. R. 619.

which are instrumentalities or agencies of Government and those are not. The Court had enumerated the following test to determine whether an agency comes within the definition of the state or not under Article 12 of the Constitution as:

1. Whether financial aid was given by the Government and upto what extent of such.
2. Any other form of aid given by the Government whether of the usual or extraordinary in nature.
3. When there is control over the management and policies of the corporation by the State.
4. When State conferring or protects monopoly status.
5. Where the operations carried out by the body, whether public operation closely related to Governmental functions, would determine that whether a corporation is an instrumentality or agency of the State or not.

As regard to the second issue i.e. the meaning of second-class hoteliers, what category of people fall under it and dose it was the essential clause of the notice in accepting of the tender.

Regarding this issue the arguments given on behalf of the respondent no. 1 were that the grades given by the Bombay City Municipal Corporation were given to the hotels and to restaurants and, therefore, there may be a registered second class hotel but no such grades are given to persons running hotels and restaurants. Thus, it would be inadequate to speak of a person as a registered second class hotelier. But ultimately this argument was rejected by the court and it was observed that it is very much settled principle of interpretation applicable that the Court must not prompt ascribes superfluity to the language of a document and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use. To reject word as meaningless shall be the last resort of judicial interpretation as it is an elementary rule that no author of a formal document has intended to be acted upon by the others should be presumed to use the words without a meaning. Thus, the expression is written in clause 1 of the notice inviting tender i.e.

registered second class hotelier no doubt it was intended to delineate a certain category of persons who alone would be eligible for submitting a tender. It was the condition of eligibility and it would be very much undigestible how this condition could be said to be satisfied by any person who did not have five-year experience of running a second class hotel or restaurant. The test laid down in the notice was the objective test and not the subjective thus it cannot be left to the respondent no. 1 to decide it in a subjective discretion that the respondent no. 4 was capable of running such a restaurant. Since the respondent no. 4 was not satisfying the condition of eligibility laid down in clause 1 of the notice and had also impliedly conceded it also by his letter dated 26th February, 1977 wherein he stated that he had 10 year experience of catering in reputed corporate firm which would be equivalent to the condition specified in clause 1 of the notice. Thus, respondent no. 4 was, accordingly not eligible for submitting the tender and action of respondent no. 1 in accepting such tender is in contravention of the condition specified in clause 1 of the notice.

Now coming towards the third and the last issue of this case i.e. whether the respondent no. 1 is justified in awarding the tender to respondent no. 4? And if not justified then can it be set aside at the instance of the appellant.

The arguments presented on behalf of the respondent no. 1 and 4 were that since the appellant was stranger and no tender was submitted by him he had no locus standi to maintain the petition. As appellant did not enter the field of competition by not submitting a tender so nothing should be affected to him. Besides, it was also argued that there was nothing wrong in the respondent no. 1 acceptance of the tender of respondent no. 4 as it was competent to him to reject all the tenders received by it and to negotiate directly with respondent no. 4 directly for giving him the contract. The respondents have relied upon the decision of the Supreme Court in *Trilochan Mishra v. State of Orissa and Ors.*¹³¹ where the court had upheld the action of the Government agency in accepting the lesser bid and rejecting the highest bid, by giving reason that the Government is not bound to accept the highest bid but may accept a lower bid in case it thinks fit that the lower tender would in an overall consideration be

¹³¹ MANU/SC/0058/1971.

preferred to the highest tenderer as no person has the right to contract with the Government.

Reliance was also paid upon the judgment of C.K. Achuthan v. State of Kerala¹³² a strong reliance was paid by the respondents upon the Hidayatullah, J. Observation made in this case that “there is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Article of 14, because the choice of the person to fulfil a particular contract must be left to the Government.”

The argument made on behalf of the appellant was that he was differentially treated and denied equality of opportunity as enshrined under Article 14 of the Constitution with the respondent no. 4 in submitting a tender. It was said that if it were known to him that non-fulfilment of the conditions of eligibility would be no bar for consideration of a tender he would have also submitted a tender and competed for obtaining a contract.

Finding of the Court after hearing the arguments of both sides was that it observed that the respondent 1 was not justified in accepting the tender of respondent no. 4 and it was clearly discriminatory since it excluded another person similarly situated from tendering for the contract and it was plainly arbitrary and without reason. It was invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action.

Since the respondent no. 1 is a state within the meaning of Article 12 of the Constitution therefore, having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law it is obvious that respondent no. 1 was not entitled to act arbitrarily in accepting the tender of respondent no. 4 but was bound to take in consideration the norm laid down in clause 1 of the notice. The Court paid reliance upon the observation of Mathew, J in V. Punna Thomas v. State of Kerala¹³³ "that the Government is not and

¹³² MANU/SC/0033/1958.

¹³³ MANU/KE/0020/1969.

should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its positions in a democratic society."

It is a well-settled rule of administrative law that an executive authority must be strictly organized against the standards through which it claims its action to make a decision and that it will be found in those standards on the pain of the invalidity of that value should be carefully followed as stated by Justice Frankfurter in *Viteralli v. Seton*.¹³⁴

Reliance was paid upon the decision of Supreme Court in *E.P. Rayappa v. State of Tamil Nadu*¹³⁵ and *Maneka Gandhi v. Union of India*¹³⁶ where it was settled that Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. It requires that state action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory, it must be not be guided by any extraneous or irrelevant considerations, because that would be a denial of equality.

Judgment

The appeal of the appellant was finally dismissed by the Court and the order passed by the Bombay High Court was confirmed and the respondent no. 4 acceptance of tender was not set aside on the reason that respondent no. 4 had already made an expenditure of Rs. 1,25,000/- in getting prepared for running the restaurant and the two snack bar i.e. furniture, freezer, dress etc. Secondly, it was also found by the Court that the appellant had made the delay of more than five months in filing the petition against the acceptance of the tender of respondent no. 4. Thirdly, it was also founded by the court that the earlier petition and civil suits filed prior to this SLP were filed by the person who was connected with the A.S Irani who was not delivering the possession of the restaurant and the two snacks bar to respondent no. 4 and there preventing him to run his business and caused loss to him.

Ratio Decidendi

¹³⁴ U.S. 535: 3 L.Ed. 1012.

¹³⁵ MANU/SC/0380/1973.

¹³⁶ MANU/SC/0133/1978.

Article 14 of the Constitution is also applicable to the policy matter of the government and if the policy or any action of the government, including contractual matter, is not consistent with the test of reasonableness that would declare void.

M/s G.J. Fernandez v. State of Karnataka and others¹³⁷

Nature of suit

It a Special Leave petition under Article 136 of the Indian Constitution against the judgment and order of the Karnataka High Court in the writ petition and a further writ appeal filed by the petitioner.

The decision of the single judge of the High Court adopted a view that the pre-qualification for the supply of tender form was contained in para 1 of the notice while the documents called for in para V could be supplied any time. While the division bench in appeal did not express any opinion but was of the view that awarding of the contract by respondent was not unfair and arbitrary in nature.

Brief facts of the case

Karnataka Power Corporation an instrumentality of the State of Karnataka had invited a tender from the registered contractors for the construction of the main station building of a powerhouse at Raichur Thermal Power Plant through a Notice Inviting tender dated 27.12.1988. The Notice Inviting tender contained the certain pre-qualification requirements as:

Para 1 of the notice required that every tenderer must-

1. Have executed civil and architectural work including insulation in a power plant/ industrial complex, preferably in power plant;
2. Have executed at least 1000 cubic meters per month of concrete pouring and at least 300 cubic meters per month of brickwork at one site; and
3. Have an annual turnover of at least 1 crore for each of the preceding three years.

¹³⁷ 1990 AIR 958.

Para V of the notice requires the furnishing of the following documents along with the application for issue of blank tender books as-

1. Audited Balance Sheet/ Certificate from Chartered Accountant for preceding three years;
2. Latest income tax clearance certificate;
3. Copy of the registration certificate;
4. The annual output of the works of all the above nature carried out by it at any site and certificate from such body for which such work was done by the tenderer furnishing the details such as rate of pouring of concrete, manufacturing of hollow concrete block, precast etc.

The time period specified in the notice as the last date for receipt of application forms for issue of the blank tender was 17, January 1989 for the submission of the completed tender book was by 3:00 P.M. on 6.02.1989, and however, their alteration in time was made as

1. Last date for receipt of 10.2.1989 clarification.
2. Period to issue blank tender books 13.2.1989 to 16.2.1989.
3. Last date and time for receipt of completed tender books 27.2.1989 by 3:00 P.M.

Six tenders were submitted in response to such notice after the scrutiny of them four firms were found pre-qualified and tender books were issued to them. After their submission of tender, the authorities have found the tender of Mysore Construction Co. (M.C.C.) to be adequate to award contract to it and as a result, the contract was awarded to M.C.C.

Issues Involved in the Case

- 1 Whether there is any difference between the requirement in para 1 and para V of the notice inviting tender and whether only para 1 and not para V sets out the pre-conditions of eligibility to submit a tender for the contract.

- 2 Whether the Mysore Construction company shall be denied the right to tender for the contract consequent on the delay in submitting the documents.

Legislative Framework

Article 14 of the Constitution defining equality before the law that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Arguments Advanced and Analogy of the Court

As regard to the first question raised the arguments advanced from the side of petitioner was that para I and V of the notice specified pre-qualifying requirements unless these requirements were fulfilled the tenderers were not even entitled to be supplied with the tender books. As the M.C.C. does not comply with these requirements hence its application for tender should have been rejected.

But the Court viewed that the prequalification criteria laid down in para V of the notice share a common thread with the conditions laid down in para I of the notice they both are supplementary to each other in nature. It is clear that at least some, if not all, of the documents referred to in para V, are intended to verify the fulfilment of the three pre-qualifying requirements of the para I. Thus, it would be very much incorrect to read para I in isolation and treat it as an only condition precedent for the supply of book of tender. After coming to this conclusion the Court went to further examine that up to what extent M.C.C. failed to fulfil the prequalification conditions of notice.

In regard to this issue petitioner contended that there is two defect as regard to para I of the notice the first is that as against the requirement that the applicant "should have executed...work including insulation", the certificate produced by the M.C.C. was only to the effect that it "is constructing" a building in Hyderabad for the National Geophysical Research Institute" in which they have done wall insulation and roof insulation for air-conditioning work. The second was that, as against the requirement i.e. applicant to have executed at least 300 cubic meters per month of brickwork at one site, the certificate from one M/s

Vasavadatta Cements was produced by the M.C.C. which stated only that it had "constructed over 300 cubic meters of brick masonry for the packing plant and D.G. building totalling to 327.29 cubic meters during the month June 1985.

While as regard to para V of the notice the objection raised was that the two requirements stipulated in clause (d) of para V were not supplied along with the request for application of tender book, but were supplied much latter.

But ultimately Court had rejected this contention of the appellants and said that the differences in wording as between the language of para I and that those of the certificates produced by the M.C.C. is too weak to be accepted and it is for opposite party i.e. state to consider the sufficiency of these certificates and not for the judiciary. Secondly, it would be too extreme to hold that the omission in supplying of every small detail referred in para V would affect the eligibility under para I of the notice and would disqualify the tenderer. While as regard to para V objection raised it was stated by the Court that only first criticism i.e. hollow cement block works done by the M.C.C delay in filing is thinkable and too for the opposite party only and not for the state that how much such delay had affected the conditions of para I of the notice.

Now coming towards the second issue i.e. whether the Mysore Construction Company shall be denied the right to tender for the contract consequent on the delay in submitting the documents it was contended on behalf of the appellant that the rule has been demonstrably infringed in the present case by the opposite party, as can be evident from the two documents filed by the Karnataka Power Corporation Ltd. Out of which first is a note on the tendering system in Karnataka Power Corporation Ltd. which is not a matter for consideration here while second which requires concern as raised by the appellant is the record of minutes showing what did the opposite party actually did. The minutes of the meeting contain that there was a discussion over the stipulations cited in tender notice other than those cited under pre-qualifying conditions to be consider it as mandatorily fulfilled before the tender were filed. But in meeting it was clarified that only three pre-qualifying conditions were prescribed in para I while conditions of para V were only for the information and that could be met before the consideration of the tenders. And any shortcoming

in furnishing the details at the time of tendering will not disqualify the tenderer from bidding. In the minutes it was also stated that in the present case of accepting the tender the lacuna in furnishing the information has been set tight subsequently by the tenderer before opening of the tender, Chief Engineer had also come to the conclusion that the M.C.C. had fulfilled all the pre-qualifying requirements while on the other hand it was also clarified by GM (T) that the use of cement hollow block masonry may not be required at all and in place of it the brick masonry may be used.

It was pointed here by the appellant that the last line of the second document i.e. minutes of the meeting contains a condition which in favour of M.C.C. and thus, the action of the opposite party amounts to biased and arbitrary the appellants have paid the reliance upon the decision of the Supreme Court in *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.*¹³⁸, *A.S. Ahluwalia v. State of Punjab*¹³⁹ and *Sukhdev v. Bhagtram*¹⁴⁰ where it was observed by the court that an executive authority must be rigorously held to be the standards by which it professes its actions to be judged and it should be violated by those standards which should be carefully observed on the pain of the invalidity of any act in their violation.

But, the Court was of the view that the minutes relied upon shows that after getting a clarification from the GM (T), the conclusion that the contract was unlikely to need any work in hollow cement blocks and so the documents in question was considered to be of no importance in judging the pre-qualifying requirements. Secondly, the note of notice by the opposite party reveals the general procedure adopted by them for inviting tender from time to time. In the present case also opposite party had cleared the view that only para I of the notice incorporate the eligibility conditions while para V was in nature of general requirements as usual practice adopted by them. Thus, it cannot be made out that the opposite party had deviated from the guidelines at all in any situation and had not acted arbitrary or discriminatory.

Judgment

¹³⁸ MANU/SC/0048/1979.

¹³⁹ MANU/SC/0363/1974.

¹⁴⁰ MANU/SC/0667/1975.

The Court had dismissed the appeal of the appellant with no cost on the reason that the non-conformity with, or relaxation from the prescribed standards had not resulted in any substantial prejudice or injustice to any of the parties involved in the tender process or to the general interest of the public. As any changes in time frame made by the opposite party had affected alike to all the intending applicants and were not objectionable and it was not intended to benefit to some and denied to others. Secondly, acceptance of the belated document of one of the tenderer by the opposite party does not prejudice other participants as they were not denied such extension of time for filing the documents.

Ratio Decidendi

Deficiencies in tender conditions could be condoned in cases where the action of the administrative authorities is found to be promoting competition and public welfare.

Michigan Rubber (India) Ltd. v. State of Karnataka & Ors.¹⁴¹

Nature of Writ

The case was brought before the Supreme Court under Article 136 of the Constitution as a special leave petition against the judgment and order of the Division Bench of the Karnataka High Court which had dismissed the writ petition of the appellants while upholding the order of the single judge.

Facts of the Case

A notice inviting tender was issued by the respondent no. 2 which is a state instrumentality i.e. Karnataka State Road Transport Corporation (herein as KSRTC) on 4.8.2005 for the supply of tires, tubes & flaps. The tender notice contained the two pre-qualification conditions as:

- 1 Only the tyre manufacturers who have supplied a minimum average of 5000 sets of tyres, tubes and flaps set per annum, in the preceding three years out of 2003-04, 2004-05, 2005-06 and 2006-07 to any one of the OE chassis manufacturer, i.e. Ashok

¹⁴¹ 2012 (8) SCR 128.

Leyland, Tata Motors, Eicher, Swaraj Mazda and Volvo are eligible to participate, for supply of respective size/type of Tyres, Tubes and Flaps set. They should produce purchase order copies and invoice supplies in support of the same.

- 2 The firm should have a minimum average annual turnover of Rs. 500 crores in the preceding three years out of 2003-04, 2004-05, 2005-06 and 2006-07 from the sale of Tyres, Tubes, and Flaps.

A writ petition was filed in the High Court against this pre-qualification condition by the appellant who was aggrieved by such condition but before the opening of the bid respondent no. 2 had modified the above-mentioned condition by removing the name of the vehicle manufactures and the only classification of the vehicles was maintained there as :

1. Only the tyre manufacturers who have supplied a minimum average of 5000 sets of Tyres, Tubes and Flaps set per annum, in the preceding three years out of 2003-04, 2004-05, 2005-06 and 2006-07 to any of the heavy goods/passenger vehicles/chassis manufacturers in the country are eligible to participate. They should produce purchase order copies and invoice supplies in support of the same.
2. The firm should have a minimum average annual turnover of Rs. 500 crores in the preceding three years out of 2003-04, 2004-05, 2005-06 and 2006-07 from the sale of Tyres, Tubes, and Flaps.

After making such amendment a fresh tender was issued by the respondent no. 2 on 5.7.2007. Seven tenders were submitted in response to such notice out of which bid of CEAT and J K tyres were accepted.

Being aggrieved by the said pre-qualification criteria, the appellant- company had filed a writ petition before the single judge of the High Court of Karnataka but it was dismissed thereafter after appellant had challenged the order of the single judge before the division bench of the High Court but ultimately it was also dismissed by the Court.

Facts in Issue

- 1 Whether the process adopted or decision intended made by the statutory authority was mala fide, or was intended in favor to someone whereby public interest was affected.
- 2 Whether there is a limitation of judicial review in the administrative action of awarding the contract.

Arguments Advanced and the Analogy of the Court

As regard to the first issue, the grievance raised by the appellant was that the pre-qualification criteria as stated by the respondent no. 2 is arbitrary, unreasonable, discriminatory and opposed to the public interest in general. It was incorporated to exclude the appellant company and similar type of companies from the tender process on unsustainable grounds in law.

While the respondent contended that in order to have the best equipments for the vehicles which ply on road carrying passengers that sought if proper to incorporate the eligibility criteria of high standard level and it was incorporated after the recommendation and decision of the Contract Management Group (herein as CMG) which consist of persons of high-level officials having technical knowledge.

The Court had while resolving the first issue had also add-up the second issue and resolved that too. The Court observed that the tender condition stipulated was the policy decision taken after due deliberation by the KSRTC i.e. respondent no. 2 and such condition was imposed with a view to obtain good quality material from the reliable and experienced suppliers. Secondly, fixation of any value in the tender process is an entirely an executive function and the judiciary cannot interfere in that except when action is exercised by arbitrary, unreasonable and in a discriminatory manner. The Court paid the reliance upon many judgments of the Supreme Court in order to come out with this finding as Reliance Airport Developers (P) Ltd. v. Airport Authority of India and Ors.¹⁴² in this case, it was upheld by the Court that judicial review cannot be denied in contractual matters or matters in which the Government exercises its contractual powers, such review is intended to prevent arbitrariness and must be exercised in larger public interest. Judicial review of administrative action is

¹⁴² MANU/SC/4912/2006.

intended to prevent arbitrariness, irrationality, unreasonableness, and bias and mala-fide. Its purpose is to check whether choice or decision is lawfully made and is sound or not.¹⁴³

It was also observed that the fixation of a value of the tender is entirely within the purview of the executive and Courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable.¹⁴⁴

Judgment

The Court had dismissed the appeal with no cost upon the appellants and it observed that the appellant failed to make out that amendment made by the respondent no. 2 in tender notice was arbitrary, unfair and contrary to public interest and since it is a Government instrumentality thus, it had a free hand to determine the terms and conditions of the tender. The Court upheld that the respondent no. 2 was justified in applying the eligibility criteria of high standard and amending it too and it was a bona fide decision of the respondent no. 2 as they have taken into consideration while framing the pre-qualification criteria in tender notice the safety of passengers, recommendation of the Contract Management Group consisting of highly technical officers, public interest, revised tender condition and discussed in detail conditions regarding pre-qualification criteria and evaluation criteria.

Ratio Decidendi

1. No person can claim as a fundamental right to carry on business with the government unless he is found to be affected under Article 14 of the Constitution.
2. There is a judicial restraint in judicial action from interfering in the administrative action of awarding contract where such action is bona fide and is not unfair, unreasonable and contrary to the public interest.

¹⁴³ Jagdish Mandal v. State of Orissa and Ors. MANU/SC/0090/2007.

¹⁴⁴ Jespat I. Slong v. State of Meghalaya and Ors. MANU/SC/0466/2004.

Tata Cellular v. Union of India¹⁴⁵

Nature of Suit

Special Leave Petition under Article 136 of the Indian Constitution against the judgment of Delhi High Court.

Facts of the case

A notice inviting tender from the Indian Companies was call upon by the Department of Telecommunications, for yielding the license for running “Cellular Mobile Telephone Service” in four municipal cities of India i.e. Delhi, Bombay, Madras, & Calcutta. It was a two-stage tender process i.e. technical and financial both and the last date for filing the tender was 31.3.1992. Thirty bidders have initially submitted the bid at the first stage out of them 16 were shortlisted by first tender evaluation Committee

The telecom Commission which was constituted on 6.4.1989 and consist of a Chairman and four full-time members as one from the production side, one from services side, one from technology and one from finance.

Out of the 16 shortlisted candidates, only 12 were found eligible without any defect while in case of the remaining four the committee had recommended condo-nation of certain defects within a given time period i.e. from 19.5.1992 to 27.5.1992 and this recommendation of the committee was submitted to telecom commission and it was accepted by the commission. The Chairman recommended that the shortlisted bidders, the recommendation of the evaluation committee and the proposal for financial bids to be placed before the selection committee at earliest. Before the high power committee consisting of Principal Secretary to the Prime Minister and three other Secretaries to the Government of India had been set up by the Minister for final evaluation of the bid.

One Mr. Nair who was Member (Budget) of the telecom commission was appointed as a Member (Services) on 25.5.1992 the selection committee met a number of times with minister and discussed the matter. Minister had submitted

¹⁴⁵ MANU/SC/0002/1996.

its interim report on 16.7.1992 by the time committee had not only de novo exercised but had also modified the short list prepared by the Technical evaluation committee and approved 14 bidders. On 20.7.1992, the revised financial bid and the short-listed bidders list were put up before the Minister for approval. On 24.7.1992, again a meeting of the selection committee was held and the financial bid documents were revised and on 28.7.1992 a final report was submitted by the selection committee and on the very next day Mr. Nair was appointed as Director General of Telecommunications and was authorised to exercise all the powers of Telecom Authority U/s 3 of the Telegraph Act. The minister approved the issue of financial bids with modification to the shortlisted companies on 30.7.1992 as recommended by the selection committee on 29.7.1992.

The financial tenders were issued on 30.7.1992 and it consists of the seven criteria which had been approved by the Selection Committee. However, no marks were marked for any criteria. By 17.8.1992 14 bids were received as it was the last cut-off date and on the same day only the tender was opened and read out in front of the bidders who were present.

Another departmental tender evaluation committee examined the financial stage of the bidders and had adopted some of the parameters and devised the marking system which was not dined by the selection committee and on 2.9.1992 the second tender evaluation committee had submitted its recommendations. However, the matter was referred back to it for a fresh gradation on the basis of 21.75% rate in respect in respect of 13 % rate which was earlier adopted and on 7.9.1992 recommendation was re-submitted. The adviser operation recommended only 4 operators based on the evaluation and financial bids and they were Bharati Cellular was on the first choice for all the four cities while BPL was second for Delhi & Bombay and Tata Cellular and Skycell were the second choices for Calcutta & Madras. On 10.9.1992 the chairman of the tender evaluation committee directed that all the documents and recommendation be sent to the selection committee for its consideration and for making the final recommendation to the Government. When the file was put up before the minister on 9.10.1992 he made out three points as:

- 1 In view of the time taken by the High- Powered Committee, the selection is completed by Department of Telecommunication internally.
- 2 One party for one city license to be granted.
- 3 The actual selection of the licensee should be made primarily on the consideration of rentals and the marks obtained in respect of foreign exchange inflow and outflow criterion and experience of the licensee.

After this direction of the minister on 9.1.1992, a list of 8 shortlisted bidders was prepared and the reason for the remaining 6 bidders was recorded. The Chairman in its final recommendation, made on 9.10.1992, noted that Bharati Cellular, Modi Telecom and Mobile Telecom did not fulfil the conditions provided under clause 2.4.7 of chapter 11 of the financial bid which requires that foreign exchange requirements be met by foreign collaborator and Sterling Cellular was rejected due to pending of some CBI inquiry against it. However, later on the minister had reviewed the decision regarding the exclusion of Sterling Cellular and Indian Telecom limited from the list of finally approved bidders and directed the same to be considered. As a result of which on 10.10.1992 the list was recast and Sterling Cellular was provisionally selected for the city of Madras. And on 12.10.1992 the selected bidders were notified of their provisional selection subject to the acceptance of rentals and others terms as might be advised.

Being aggrieved by such result four writ petition was filled which were clubbed together in the Special Leave Petition under Article 136 before the Supreme Court against the judgment and order of the Delhi Court.

It is to be noted that after an order of the Delhi High Court, A newly revised list of provisionally selected bidders was prepared on 27.8.1993 as:

1. Bharati Cellular & Hutchison Max for Bombay
2. BPL Projects & Systems and Sterling Cellular Ltd. for Delhi.
3. India Telecom (p) Ltd. & Usha Martin telecom for Calcutta.
4. Mobile Telecom Ltd. & Skycell for Madras.

As a result of which Tata cellular was excluded for Delhi which was originally selected by the list of 12.10.1992. Therefore, it filed an SLP before the Supreme Court besides Tata Cellular other aggrieved companies have also filed SLP which was clubbed together.

Issues Involved in the Case

- 1 The scope of judicial review in matters of this kind.
- 2 Whether the selection is vitiated by arbitrariness regarding financial projection and regarding rental.
- 3 Biases of Mr. Nair whether affected the selection.
- 4 Whether the Apex Committee has been bypassed.
- 5 Evaluation on the basis of hidden criteria whether valid or not.

Legislative framework

Article 14 of the Constitution defining equality before the law that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Art. 299 contract making power of the government.

Art. 226 judicial review power of the High Courts to issue writs.

Arguments Advanced

It was contended on behalf of the petitioner i.e. Tata Cellular that the whole process of selection of bidders was based upon the two-stage bidding system in which one after qualifying the technical evaluation can only come to the next stage i.e. for financial evaluation. Emphasis was also paid upon chapter 11 of the notice inviting tender which contains certain general conditions framed into the bids as:

1. Entire foreign exchange requirements shall be met by the foreign collaborator.
2. Minimum reliance on Indian Public Financial Institutions will be preferred.
3. Debt equity ration should not be more than 2:1.

The Committee had totally ignored out of the seven one of the criteria for the evaluation of the bids and only six parameters have been taken into consideration. Besides it was also contended that High Court in its finding that Mr. Nair whose son was employed in the BPL System and projects company is not coming within the preview of biasness and is wrong as Mr. Nair is bias for the very beginning of his participation and in regard to various cases have been referred from the appellants side like *Manak Lal v. Prem Chand* ¹⁴⁶; *J. Mohapatra & Co. v. State of Orissa* ¹⁴⁷; and *Ashok Kumar Yadav v. State of Haryana* ¹⁴⁸ and by relying upon them it was stated that there is no degree of biasness and even if the appellant i.e. Tata Cellular had to be eliminated he ought to have been provided an opportunity to be heard as required by the principle of natural justice. Secondly, the DoT was under the obligation to disclose the maximum marks allotted for each criterion at the threshold of the financial bid in order to ensure transparency. In most of the bidders case foreign exchange is not met by the foreign collaborator and it is a mandatory condition at the first stage of the evaluation only and no change could be allowed at later stage yet in case of BPL this factor was ignored by the committee. Thirdly, BPL had not filed any application regarding the proof of indicating that he had obtained foreign collaborator approval which was required for the all the bidders to be submitted before the competent authorities and on the same ground Ashok Leyland had been disqualified thus, the principle of equality has been breached.

It was also contended that selection was arbitrary in nature due to the following three reasons as:

1. Bypassing of the Apex Committee and entrusting to a Committee which did not follow the norms.
2. Certain hidden criteria which were not disclosed earlier were applied not as parameters, but for elimination.
3. There were five glaring errors in the selection.

In response, it was contended on behalf of the respondents that three questions arise as:

¹⁴⁶ AIR 1957 SC 425.
¹⁴⁷ (1984) 4 SCC 103.
¹⁴⁸ (1985) 4 SCC 417.

1. The scope of and ambit of judicial review with regard to decisions bona fide arrived at in tender cases (pre-contract).
2. Applicability of judicial review in these cases.
3. The interference under Article 136 of the Constitution where the power of judicial review has been exercised by the High Court under Article 226.

The respondents have referred the decision of Supreme Court in G.B. Mahajan v. Jalgaon Municipal Council¹⁴⁹ where it was stated that the reasonableness in administrative law means to distinguish between the proper use and improper use of the power and the test is not the Court's own standard of reasonableness. The respondents also insisted upon the Poodar Steels Corn. v. Ganesh Engineering Works¹⁵⁰ where it was upheld that to insist upon a strict compliance with each and every tender document is not the law and the waiver of technical, literal compliance of the tender documents can be done.

While in regard to Mr. Nair biasness it was contended that whenever disqualification on the ground of personal involvement is alleged the following matters are required to be considered as:

1. The Person alleged must be the decision maker.
2. There must be the sufficient nexus between the decision maker and the party complaining in order to justify the real likely hood of bias.¹⁵¹

It was argued that Mr. Nair was neither a decision maker as he was just a recommending authority and his son was only one the officers in BPL which had 5500 employees and 89 officers of his rank in 27 offices all over India.

Beside this, it was also contended on behalf the state that the High Court was not justified in scrutinizing the tendering process in such detail the minute examination by High Court is unwarranted as it cannot constitute itself as the selecting authority.

¹⁴⁹ 1990 Indlaw SC 831.

¹⁵⁰ 1991 Indlaw SC 1002.

¹⁵¹ Ranjit Thakur v. Union of India 1987 (4) SCC 611.

Court Analogy

After going through the arguments contended for and against both the Court had determined itself to observed four question of law as:

1. The scope of judicial review in matters of this kind.
2. Whether the selection is vitiated by arbitrariness regarding financial projection and regarding rental.
3. Biasness of Mr. Nair whether affected the selection.
4. Whether the Apex Committee has been bypassed.
5. Evaluation on the basis of hidden criteria whether valid or not.

It was observed by the Court that it cannot be denied that the principles of judicial review would apply in the exercise of contractual powers by the government bodies in order to prevent arbitrariness or favouritism but there is also an inherent limitation in the exercise of that weapon of judicial review, as it is the government only which is the real care taker of the public account of the nation and is entrusted to protect the same. Therefore, the right to reject the lowest or the highest bid is always in the hand of the government but subject to the condition that right to choose had not been exercised arbitrarily.

It was stated that the judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or of social policy issue. The court had relied upon the statements of Lord Scarman in *Nottinghamshire County Council v. Secretary of State for the Environment*¹⁵² that "the judges had the grand warhead in the form of judicial review, but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficial power" and upon the Judgment of Chief Constable *North Wales Police v. Evans*¹⁵³ where Lord Brightman, J. Said that "Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. It has no anxiety with the decision, but with the way in which such decision has been taken and unless such restriction on the

¹⁵² (1986) AC 240.

¹⁵³ (1982) HL.

power of the Court is not observed the court will in my opinion under the guise of preventing the abuse of power, be itself guilty of usurping power.”

It was also stated by the Court after refereeing these judgments that it is a duty of a Court to restrain itself to the issues of legality and its apprehension must be to check:

1. Whether a decision-making authority exceeds its powers.
2. An error of law if any committed.
3. The breach of the rules of natural justice.
4. Reached a decision which no reasonable tribunal would have reached. or,
5. Abused its power.

The Court had determined the broad ground on which judicial review can be exercised only as:

1. Illegality.
2. Irrationality.
3. Procedural impropriety.

For formulating such principle the court had relied upon the various historic judgments. Likewise, *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*¹⁵⁴ where the famous Wednesbury principle was stated as “The decision of the Public Authority can be cancelled or otherwise disposed of by proper order in the judicial review proceedings, where the court concludes that such a decision decides to direct any authority to proper law and work properly could not have made out”. In this case, only Lord Greene stated that:

The Court deserves to examine the action of the local authority to check whether he has not paid attention to the account or not, or has refused to pay attention to the opposite account or what he should do. Once the answer to that question is given in favour of the local authority, it is possible to say that even though the local authority was placed in the four corners of the cases they should consider, yet they can be found at a conclusion have come that no

¹⁵⁴ (1948) 1 K.B. 223.

one is unreasonable, the proper authority could ever come. In such a case, I think the court can intervene.¹⁵⁵

Court had also relied upon the judgment of Union of India v. Hindustan Development Corporation¹⁵⁶ where it was observed that the Government had the right to either accept or reject the lowest offer but that of course if done on a policy ground, shall be based on some rationality and reasonable grounds by referring to the observance of Erusian Equipment and Chemicals Ltd. v. State of W.B.¹⁵⁷ as under:

When the Government is trading with the public, 'the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions'. Every action of the State has a public element and thus, it must be fair, reasonable, and ensuring equality. The state does not need to enter into any contract with anyone, but if it does, it should do so without discrimination and without unfair treatment.

Reliance was also paid upon the decision of Sterling Computers limited v. M & N Publication Limited¹⁵⁸ where it was stated that in case of commercial matters, some more discretion is required to be given to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in those matters also authorities are required to follow the norms as recognized by the Courts while dealing with public property. As it is not possible for the courts to adjudicate every decision taken by the authorities, as many of the Government instrumentalities have acquired the monopolist position in the matter of sale and purchase of products and with so many ventures in hand, they come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Therefore, under certain special circumstances, discretion is required to be conceded to the authorities who have to enter into the contract in order to provide them liberty to assess the

¹⁵⁵

Ibid.

¹⁵⁶

MANU/SC/0219/1994.

¹⁵⁷

MANU/SC/ 0439/1993.

¹⁵⁸

AIR 1996 SC 51.

overall situations for the purpose of taking the decision as to whom the contract is awarded and at what terms & conditions.

With regard to the issue of Mr. Nair biasness and it affects upon the selection process. The Court before coming to the conclusion had first discussed what bias means by referring to well known Maxim Nemo Judex Non Causa Sua i.e. no man can be the judge in his own case and Black's Law Dictionary 6th Edition pg. No. 162 where bias has been defined as a condition of mind, which sways judgments and renders judge unable to exercise his functions impartially in particular case.

The Court had relied upon the De Smith's Constitutional and Administrative Law where it is stated that "first, an adjudicator must not have any direct financial or proprietary interest in the outcome of the proceedings. Secondly, he must not be reasonably suspected, or show a real likelihood, of bias". Besides this, the Court had also relied upon the judgments of Supreme Court in Ashok Kumar Yadav v. State of Haryana¹⁵⁹ where the Court had emphasized upon the reasonable likelihood of bias as:

It is a good and sufficient reason to invalidate the selection process if it could be shown that there was the likelihood of bias. The likelihood of biasness can be made out from proprietary interest or on account of personal reasons, like hostility to one party or personal friendship or family relationship with others. Where such type of biasness is alleged on the ground of relationship, the question would always arise as to how close the degree of a relationship was as to give the reasonable apprehension of bias on the party of the authority making selection.

While in the present case the Court found Mr. Nair to be un-bias and also that his involvement did not vitiate the selection. Due to the following grounds:

- 1 Mr. Nair was not a decision maker at all but was only a recommending authority. He became Director General of

¹⁵⁹ MANU/SC/0691/1987.

Telecommunication by notification dated 28.7.1992 and as such he was bound to exercise all the powers rendered under Section 3 (6) of the Telegraph Act, 1885. Therefore, he could not dissociate himself from the decision-making process and in such cases, the court ought to apply the doctrine of necessity as stated by the Supreme Court in Charan Lal Sahu v. Union of India¹⁶⁰ where the doctrine of necessity was reiterated as elaborated in Halsbury's Law of England where it is stated that even if all the members of the tribunal competent to determine a matter were subject to disqualification, they might be authorized and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. As adjudicator who is subject to disqualification due to the reason of biasness may in certain cases be required to adjudicate where no other person who is competent or authorized to adjudicate can be there.

- 2 Mr. Nair son is just only one of the officers in BPL Systems & Projects, which has over 5500 employees in 89 officers of his rank in 27 offices across India.

In regard to the issue of bypassing the Apex Committee the Court find that there was no bypassing by relying upon the letter made by Mr. G.T. Narayan (Advisor) operation dated 8.9.1992 in which he talked about the position of tata cellular that it fulfils all the conditions but in a bid document its calculation is found to be based upon single operator concept. However, if the Telecom Commission and the High Power Committee approves we may make a counteroffer to operate on a non-exclusive basis. Therefore, Departmental Order (D.O.) had to be issued by the Chairman Telecom Commission that the apex committee had been dissolved via a note of 10.9.1992 therefore, it cannot be contended that the apex committee had been bypassed.

In regard to the context of hidden criteria for evaluation of the bids Court had firstly taken into consideration the note of Mr. G.T. Narayan, Adviser (Operations) which says that in order to acquire god operators with experience

¹⁶⁰ MANU/SC/0285/1990.

the minimum marks of 10 out of 15 is required to be considered and those bidders who score less than 10 shall be disqualified. The court had also relied upon the contention of Solicitor General who told that there were three components of parameters for evaluation as:

1. The number of subscribers.
2. The number of countries.
3. GSM experience.

After taking into consideration these points the Court opted the view that these criteria were not tailor-made to suit some other bidders and knock off the others. Therefore, it cannot be made out any undue preference had been given to some companies.

While as regard to other hidden criteria i.e. about the same foreign collaborators where the attack had been made upon the BPL system as its foreign collaborator came to be changed in middle at the second stage of financial bid and yet it was not valid according to chapter II clause 7 of the notice (No Change can be made in the Indian or foreign partners already indicated in the first stage). The Court upheld that deficiencies in tender condition could be condoned by paying its reliance upon the Judgment of the Supreme Court in *GJ Fernandez v. State of Karnataka*¹⁶¹ and *Poddar steels Corporation v. Ganesh Engineering works*¹⁶² the Court stated that the condition related to change does not include the dropping out one condition of 2 or 3 collaborators and therefore, it is not fit for the Courts to go into each and every deficiency of the tender documents as it would amount to unwanted interference in the shoe of the executive wings.

Judgment/ Findings

After hearing all the parties the Court came to the following conclusion that-

1. There is a need for judicial interference on the ground of arbitrariness and violation of the principle of natural justice with the permissible parameters in the matter of Tata Cellular (whose appeal is allowed)

¹⁶¹ MANU/SC/0175/1990.

¹⁶² MANU/SC/0363/1991.

who was originally selected for the Delhi but due to the judgment of the High Court, it had been left out. Therefore, the court was of the view that Tata Cellular ought to have been given an opportunity to be heard before putting out his name from the shortlist. As it can be found that Tata Cellular had the two distinctive qualifications which were required to be heard as:

- a. It had no borrowing from any commercial bank.
 - b. It had an annual turnover of Rs. 12,000 crores from Indian parameters and from the side of foreign parameters of Rs. 51,000 crores. Which the other companies in comparison to it do not have and yet it had been awarded low marks with regards to other.
2. No fault had been found on the part of the administrative authorities in case omitting Indian Telecom as it had limited experience and secondly, its foreign collaborator i.e. Telecom Malaysia was already selected as the partner of M/s. Usha Martin ICC Calcutta.
 3. Bharti Cellular cannot claim the experience of the Talkland and its experience is required to be excluded. The matter is required to consider on the factual basis of 20.1. 1992. It was also stated by the Supreme court that this decision has been taken on the basis of the permissible scope of judicial review.
 4. In the matter of M/s Ashok Leyland and M/s Vam Organic Chemical Ltd., it was stated that no joint venture company had been as formed as stipulated in the tender and there was no indication of the equity structure or the extent of participation of the foreign collaborators. Thus, the Court cannot interfere with the discretion of the Committee.
 5. Other selection would not be disturbed by the power of judicial review since judicial review is not an appellate power. Secondly, the quashing of selections may involve a heavy administrative burden and can lead to delay and unwanted expenditure.

Ratio Decidendi

A party must be heard before taking of any action against it.

Analysis of the Principles deduced from the landmark Judgments:

After going through the principles stated in the landmark judgments by the Supreme Court in tender matter, the researcher had analyzed its impact under Article 141¹⁶³ of the Constitution to observe what role judiciary had played in framing and developing the law of tender in India.

Before examining the legal approach towards tender process let us initially discuss the tender process from the jurisprudential perspective. Almost certainly it is especially evident that procurement includes budgetary issue as it manages the speculation of public money for developmental works of which the Government is the care taker. Therefore, it is the obligation of the administrative authorities not to make a profit or benefit from it i.e. public money and if any of the authorities make any such unwanted gain then he ought to be entirely at risk for it. As in the matter of finance perspectives of Analytical School of jurisprudence apply i.e. there should be a strict compliance of the law and in case of its non-compliance penalty to be imposed upon such individual who is in default. It is the duty of every authority that has been assigned with the financial powers of procuring goods & services in public interest. That should be responsible and accountable for it in order to ensure efficiency, economy, and transparency in tender matters and also for the fair and equitable dealing with suppliers and for the enhancement of competition in bid system.¹⁶⁴

John Austin had characterized law “As a command of a definite political superior enforced by a sanction which obliges intelligent human beings to acts or forbearance of a class.” This View was upheld by the Calcutta High Court in Asoke Kumar Mitra v. The West Bengal State Electricity Board and Ors.¹⁶⁵

While dismissing the writ petition that an authority of the public institution dealing with public money is under the obligation to discharge his duty with utmost care, honesty, and integrity. As it is a position of trust that he holds and under no circumstance is a breach of trust on his part is adequate. If while holding his position as a custodian of public money any Government agent, indulges in an act of misappropriation or defalcation of public funds. Then such person must be dealt with strictly as the same amounts to a heinous act of

¹⁶³ Art. 141 Law declared by Supreme Court to be binding on all courts: The law declared by the Supreme Court shall be binding on all courts within the territory of India.

¹⁶⁴ Rule 144 GFR, 2017.

¹⁶⁵ MANU/WB/0218/2016.

corruption both morally and legally. In such case, there would be a no scope for showing leniency or sympathy to such persons provided his guilt is proved. It is very much necessary in order to preserve public faith and to restrain erosion of trust and confidence in the public officer and also to deter another similarly situated person from committing such wrongful act.

In this way the Government authorities are under the obligations to follow the fair and uncorrupt tender or procurement process for goods, services, and infrastructure while complying with the Article 14 and 299 of the Constitution of Indian along with other statutes like CVC guidelines, General Financial Rules and other such direction of the Government given from time to time. As according to Analytical school law is the command of sovereign and force is the essence of law i.e. what cannot be enforced is not a law. In *Patel Engineering Ltd. v. Union of India and another*¹⁶⁶ it was observed by the Court that any Government is a Government of laws and not of men thus, every activity of a Government has a public element, so it must be fair and transparent. While talking about procurement process from the jurisprudential view point it would be important here to discuss the famous 2G spectrum Scam case *Centre for Public Interest Litigation v. Union of India*¹⁶⁷ where the Supreme Court had observed while quashing the licenses granted to the telecom companies which was allotted by the Government on first come first serve basis. At previous rate of year 2001 that this policy of first come first serve basis had resulted in a windfall of billions of rupees to successful companies and the Telecom Minister A. Raja and his officials had committed a fraud, corruption and breach of public trust. Consequently as spectrum is a natural resource thus its distribution should be in order to promote public good against the private gain. It likewise observed that an auction held fairly and impartially is the best method for the state to allocate public or natural resources. In this manner, it can be seen that the procurement process due follow the principle of positive law as it is a legitimate method to control the spending of the public funds in an unwanted way.

As in the preceding chapter the regulatory measures adopted by the Government in order to ensure fairness and transparency in the tender process

¹⁶⁶ MANU/SC/0438/2012.

¹⁶⁷ 2012 (3) SCC 1.

had already been discussed. So, now hereby in this chapter the role of judiciary in filling the lacunas or gaps unanticipated by the regulatory measures adopted by the Government and how the law of tender through judicial approach has been developed will be discussed.

In the absence of any comprehensive legislation on procurement, the judicial approach had given a right direction to the tender process in India and had also made a check and balance from time to time upon the inefficient tender process by developing the several principles on public procurement through its judgment.

Judiciary had developed the law of tender through its approach in three perspectives. Firstly, maintaining status- quo of the right and power of the executive authorities to take healthy policy decision by restraining the private individuals from interfering in policy decision of the Government agencies based upon the unwanted and personal gain reason and by establishing that the no individual the right to contract with Government. Secondly, by protecting the rights of private individuals to be not discriminated while contracting with the Governments and by ensuring their right to trade and thirdly, by restraining its power of judicial review in administrative action of procurement process.

From the perspective of Executive Agencies-

On the first had judiciary had accepted that the Government had superlative power in the matter of policy making as it is directly connected with the citizens and are the representatives of it and they have certain concessional power with them in contractual matter in order to find the correct match irrespective of the highest or the lowest bid if it find it suitable for the public interest at large.

As in *M/s. Poddar Steel Corporation v. M/s. Ganesh Engineering Works and others*¹⁶⁸ it was held by the Supreme Court that the requirements in a tender notice could be classified into two categories-those which lays down the essentials for eligibility and the others which remain mere ancillary or subsidiary with the main objective to be obtained by the condition. In the first case, the authority advertising the tender may be required to enforce them rigidly. In the other case, it must be open to the authority to differ from and not to insist upon the strict literal agreement of the condition in appropriate cases by paying

¹⁶⁸ MANU/SC/0363/1991.

reliance upon the GJ Fernandez v. State of Karnataka and Ors.¹⁶⁹ in which it was observed that the object of tender in most matters like this is to satisfy the authority that the person who undertakes to execute the work or the person who offers the tender would be really worth and then he would perform to the best of his ability and to the requirement of the person who wants to have the contract. It is extremely outstanding that our judiciary is the guardian of the Indian Constitution hence it at every single step assumes an exceptionally crucial part in securing the objectivities revered in our Constitution. As in Sapna Singh v. State of Bihar and another¹⁷⁰ the Bihar High Court had made a great initiative in ensuring socialist object as enshrined in the preamble of our Constitution. The High Court had upheld the validity of the two Government Resolution passed by the Bihar Government. A Resolution no. 5676 passed by Government amended the Rule 159 (k) (i) of the Bihar Public Work Code whereby the publication of the tender notice in the newspaper and on the internet for the public work contract of an estimated value of Rs. 15 lac or less was made inapplicable. While Resolution no. 5931 amended the Rule 159 (kh) of the Bihar Public Work Code by which 50% of the public work contract of an estimated value up to Rs. 15 Lac or less had been reserved for the SC/ST, BC and women's. The Court had observed the legitimacy of these two resolutions and their non-violative nature of Article 14, 19 (1) (g) & 38 of the Constitution it was said by the Court that law of contract could be utilized as an instrument of distributive justice¹⁷¹ by paying reliance upon the article written by Cronman "Contract Law & Distributive Justice" where it was said by the author that distributive fairness could only be achieved by taxation or by contractual obligation at some forfeit in individual liberty. In this case, the reservation in matter of tender allotment is upheld to be legitimate by the Court on premise of distributive justice concept other than this the Court had likewise regarded the progression received by the state legislative body by observing the principle of initial presumption of legitimacy by relying upon the judgment of Supreme Court in Ashutosh Gupta v.

¹⁶⁹ MANU/SC/0175/1990.

¹⁷⁰ AIR 2017 Pat 129 (C).

¹⁷¹ Distributive Justice is a concept of social justice in the allocation of goods to the public. It deals with quantities of goods available, the process through which it has to be distributed, and the result allocation of the goods to the member of the society.

State of Rajasthan & Ors.¹⁷² where it was explained that the initial presumption is in favor of the validity of law, hence if the person who seeks to impeach the validity of law. But fails to adduce sufficient evidence in support of his challenge to the law in question, his plea of the law in question is violative of Article 14 also cannot be entertained.

The part of the judiciary in getting distributive justice through procurement process can be again seen in Reliance Telecom Ltd. & another v. Union of India and another¹⁷³ in this case the Government authorities have made a restriction upon the some big/ large operators from acquiring large amount of spectrum the court upheld the decision of the Government authorities and held that putting a cap and making a classification by not allowing certain entities to bid is not an arbitrary action on the part of the Government. As it is acceptable rationale of serving the cause of public interest as it allows the new participants in the market giving them also the opportunity to trade with Government and to make profit from it and furthermore promotes or advances the competition in the market.

The concept of value for money in the tender process had also been very carefully preserved by the Judiciary through its decision in Haryana Urban Development Authority v. Orchid Infrastructure Developers Pvt. Ltd.¹⁷⁴ It was upheld by the Supreme Court that it is a very much settled principle of law. That the highest bidder has no vested right to have the auction concluded in his favor. As the Government has the discretionary power to accept or to reject the highest or the lowest bid in the interest of public revenue and the bidder either highest or lowest cannot take it as a right to get accepted his bid by paying reliance upon Merrut Developing Authority v. Association of management studies and another¹⁷⁵. In this case it was explained that a bidder has no right in the matter of bid except fair treatment in the matter and he cannot insist for further negotiations and the authorities have the right to reject the highest bid as the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiation unless the terms and condition of notice so provided for it.

¹⁷² (2002) 4 SCC 34.

¹⁷³ AIR 2017 SC 337.

¹⁷⁴ AIR 2017 SC 882.

¹⁷⁵ (2009) 6 SCC 271.

In *JSW Infrastructure Ltd v. Kakinada Seaports Ltd.*¹⁷⁶ where the issue involved was that the Paradip Port Trust asked for the Request for Qualification inviting global invitation for mechanization of berth at paradip port trust. On BOT basis under PPP mode for concession period of thirty years, RFQ was submitted by 4 participants and every one of the four were qualified and were asked to submit request for proposal. However, just two have submitted RFP and out of which one was the highest bidder. So his proposal was recommended for the acceptance of the tender yet objection was raised by the second consortium on the ground that the terms of the tender policy is against the creation of the monopoly and the appellants were not qualified to take part in the entire bidding process. As they have been as of now working up on one berth for dry cargo. By allowing the leave to the appellants, it was upheld by the Supreme Court that the tender documents and the stipulation have to be construed in the context of their background and moreover no condition should be dealt with as repetitive or pointless and had likewise held that the decision taken by the Paradip port trust was not arbitrary, perverse or mala-fide. As there was not only single private operator operating a single berth, yet there was more than one.

In a very recent case *Pradipta Kumar Rout v. State of Odisha and Ors.*¹⁷⁷ where a writ petition under Article 226 was filed before the High Court for quashing a fresh issued tender notice and issued the writ in the nature of Mandamus in which the issue involved was as a tender notice was issued by the opposite party for the performance of some contract work under the scheme of PMGSY (Pradhan Mantri Gram Sadak Yojana) to which no bid was submitted. While a instruction was issued by the Ministry of Rural Development, Department of Rural Development, Government of India wherein it was stated that in condition where no response is received to the tender notice then in such situation a District Level Committee headed by collector may decide the awarding of contract. In such circumstances the petitioner has submitted his offer to the District level committee for carrying out the work and his offer was accepted. The work was required to be accomplished within 12 months according to the contract entered between the petitioner and opposite party. But the petitioner could not furnish the requisite security amount within the stipulated time due to

¹⁷⁶ MANU/SC/0221/2017.

¹⁷⁷ AIR 2018 Ori 29.

threat of the Naxalites and Maoist attack. Latter the petitioner made representation for allowing him to furnish the security before the District Level Committee but it was rejected by the committee. On the other hand petitioner had also made a representation before the joint grievance cell of the collector which has considered the representation of the petitioner and it was communicated to the Executive Engineer by Asst. Collector. In the meantime a fresh notice inviting tender was issued being aggrieved by this petitioner had filed the writ.

The Court while deciding the issued upheld that the acceptance of the offer by the District level Committee for the execution of the work was in accordance with the instruction issued by the Ministry of Rural Development. And it is admitted here that the petitioner had not complied with the terms and the time granted for the accomplishment of the work. Secondly, his prayer for the extension of the time was rejected by the District Level Committee and it was communicated to the petitioner thus, the subsequent order of the Collector passed in joint grievance cell is of no relevancy as it is for the join grievance cell to look into the matter but it was for the District level Committee to take decision and it had already rejected the prayer of the petitioner and once the committee headed by Collector had already rejected the prayer the same cannot be accepted by the another committee with this findings the Court had dismissed the petition and recognized the action of the executive agency.

Subsequently, it can be analyzed that the judiciary had restrained the private person undesirable impedance in smooth and diligent working of the public duty by the Government agencies for public welfare at large in order to promote social welfare.

From the perspective of Private Participants-

As procurement process involves the expenditure from the public exchequers for the hire and purchase of services and goods for the public welfare and this activity is carried out by the Government. Thus, imposing an obligation upon the Government to provide equal opportunity to every desirable individual willing to contract with the Government, yet at the same time there are numerous events where the Government authorities are at fault. To ensure this obligation, in such cases again the judiciary being the guardian of the citizen of India plays a vital role in ensuring the objectives enshrined Article 14 of the Constitution through

its judicial approach as it can be witnessed from the observation made by the Calcutta High Court in *AKA Logistic Pvt. Ltd. v. The Durgapur Projects Limited & Ors*¹⁷⁸ where the petition was filed by the petitioner under Article 226 of the Constitution for challenging the certain terms and conditions of the tender notice issued by the Durgapur Projects Limited. From the prospective bidders for liaisoning, supervision & materialization of quantity and quality control of raw coal rakes. The qualifying requirements indicated in clause 2 (ii) (h) of the notice which says that “the party will have to give an undertaking that they have not initiated any legal proceeding against any government or public sector undertakings relating to handling of coal in West Bengal for a period of three years” which was challenged on the ground of violation of Articles 14, 19 (1) (g) and 21 of the Constitution by the petitioner who had instituted a writ petition before the Calcutta High Court against the West Bengal Power Development Corporation.

The Court while deciding the issue observed that by and large the Courts of law are opposed to entertain difficulties to the terms and conditions of the tender notice. As they are the domain of contract however, if it appears to the Court that the terms and condition are framed in such a way to favour a particular bidder or is so grossly arbitrary. That no person of ordinary prudence could have reached it or moreover, it is against the public interest. Then it is the duty of the Court to meddle to set right the wrong. In the present case the Court had declared the clause 2 (ii) (h) of the tender notice to be unconstitutional, arbitrary and is in violation of Article 14 of the Constitution. Besides this such unwanted conditions keeps the imminent bidders, from being permitted to the court for the preservation, protection and enforcement of their rights from being allowed to take further part in the tender process and it is an slur to the judicial process. Through which the Courts endeavor to secure justice for the affected party. As it is a fundamental right of a person to move to the Supreme Court under Article 32 and to High Court under Article 226 of the Constitution. The constitutional right to invoke the writ jurisdiction of the High Court or the right guaranteed by the Code of Civil Procedure to institute civil proceedings, if exercised, thus such

¹⁷⁸ MANU/WB/1000/2012.

condition cannot operate as a disqualification ground for the bidder to participate in a tender process.

The Court had likewise denoted the restriction upon the arbitrary power of Government agencies in blacklisting the bidders through its observation made in some of the cases like in *M/s Trishul Construction v. State of M.P.*¹⁷⁹ where the petitioner was the partnership firm dealing with the business of construction who have got the tender for the construction of the earthen dam & canal by the Water Resource Department of Sagar, M.P. petitioner had completed the work of construction and handed over the charge to the authorities but payment was not made, due to heavy rainfall some portion of the dam was damaged and it was asked by the petitioners to repair. That part of the damage and the petitioner agreed to repair it. Yet besides this a show- cause notice was issued to the petitioner by Chief Engineer, Sagar. His work was of inferior quality and not according to the norms of contract and if the reply to this show cause notice is not as indicated to be satisfactory the petitioner will be blacklisted. In return for this petitioner had filed a writ petition under Article 226 of the Constitution before the M.P. High Court where the first objection was raised about the maintainability of the writ petition against the show- cause notice. Yet the Court had struck down such objection by paying its reliance upon *Siemens Ltd. v. State of Maharashtra and others*¹⁸⁰ where it was held that under certain circumstances, the writ petition against the show- cause notice is maintainable. Where it appears that such notice has been issued without any authority, it is non-speaking or issued with the predetermined mind. The Court had quashed the impugned order of blacklisting and asked the respondent to follow the principle of *Audi Alteram Partem* in case of blacklisting the bidders by paying its reliance upon the Supreme Court ruling on *M/s Erusian Equipments & Chemicals Ltd. v. State of West Bengal and another*¹⁸¹ where it was observed by the Court that blacklisting has the serious effect of preventing a person from the privilege and advantage of entering into a lawful relationship with the Government for the purposes of gaining profit. Inability made by order of blacklisting must have an objective fulfillment of the authority. The fundamentals

¹⁷⁹ AIR 2017 MP 138.

¹⁸⁰ (2006) 12 SCC 33.

¹⁸¹ AIR 1975 SC 266.

of fair play require that the individual concern must be given an opportunity to represent his case before he is put on the blacklist.

Likewise in a recent judgment of *Jan Jagran Kendra v. State of Jharkhand & others*¹⁸² it was observed by the High Court by the relying upon the above stated principles as stated by the Supreme Court that blacklisting of the bidders for a definite period of time suffers on the ground of proportionality and would amount the violation of fundamental rights guaranteed under Article 19 (1) (g). As blacklisting of a bidder is an administrative action so it would be important here to discuss some of the principle of administrative law like the principle of proportionality. This principle was first observed by the Justice Lord Diplock in *R v. Goldsmith*¹⁸³ where he said that "you must not use a steam hammer to crack a nut if a nutcracker would do". It means that the government action must be not more than intrusive than it is necessary to meet an important public purpose. Other than this, there is two fundamental principle of natural justice which is also a part of administrative law. First, is the principle of *Nemo in propria causa judex, esse debet* i.e. No one should be made a judge in his own case it is generally a rule against bias. Second, is the principle of *Audi alteram partem* i.e. the rule of fair hearing or in another term that no one should be condemned unheard. Therefore, every action of the government agencies is required to follow these principles before making any order of blacklisting.

Judiciary had also made an effort in explaining the term process in the tender as in *A.G. v. Sillem*¹⁸⁴ the term process has been illustrated by the court as:

It would premise that procedure in a suit includes the whole course of practice i.e. from the issuing of the first process by which the suitors are brought before the court to the execution of the last process on the final judgment, and the term procedure is used equivalently to the term process, practice and mode of pleadings.

Thus, in the case of tender also the process embraces the entire process of the tender and the way in which it was dealt with by the employer up to the point of acceptance or relinquishment.

¹⁸² AIR 2017 JHAR 110.

¹⁸³ (1983) 1 WLR 151.

¹⁸⁴ (1863) 2 H&C 431.

The principle of fiduciary duty i.e. the officers engaged in public procurement need to perform fiduciary duty. It has been also been observed by the Supreme Court in *Delhi Science forum and others v. Union of India and another*¹⁸⁵ where the power of the Central Government in granting the license to the different non-government companies in establishing or maintaining the telecommunication system in the country and the validity of the procedure adopted by the Government was challenged. In this case a tender was invited from the different private participants for different circles in accordance with the National Telecom Policy 1994. Whose question was to supplement the efforts of Department of Telecommunication in giving telecommunication services. Yet before the licenses could be allowed by the Central Government it was challenged before the Court. In this case, the objection has also been raised upon the National Telecom Policy 1994. However, it was denied by the Court by paying its reliance upon the *Morey v. Dond*¹⁸⁶ in which Frankfurter, J has said that:

In cases of utility, taxes and economic regulation, there is a good reason for judicial self-restraint if there is no judicial honor for legislative decision. Eventually, the legislature is a positive responsible body. The Courts only have the power to destroy, not to rebuild. When these are added to the complexity of economic regulation, the uncertainty, the liability of error, the conflict between experts and the number of surrenders of events by the judges-self-limitation can be seen as the path of judicial knowledge and institutional status and stability.

Besides this, the reliance was also paid by the court upon the Constitutional Bench judgment of *R.K. Garg Etc. v. Union of India and Ors.*¹⁸⁷ In which it was observed by the court that another rule of equal importance is that the laws related to economic activities ought to be seen with more prominent scope. Then the laws related to civil rights like freedom of speech, religion and so on by entrusting upon the wording of Justice Holmes who said that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight

¹⁸⁵ MANU/SC/0360/1996.

¹⁸⁶ 354 US 457.

¹⁸⁷ (1982) S.C.R. 947.

Jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.

Another ground of objection, in this case, was Section 4 of the Indian Telegraph Act, 1885. Where the objection was raised by the petitioners who itself is a Government agency and have been able to participate in bidding process on account of the policy decision of the Central Government which have invited only the private player. Section 4 of the Act provides the exclusive privilege to the Central Government for establishing, maintaining and working of telegraphs. It shall include telephones and have no authority to part with such privilege to non-government companies for the consideration to be paid by private companies on the basis of tenders submitted by them. But this objection was again denied by the Court upon the reason that the power and authority of the Government in matter of granting licences to private players subject to the conditions and consideration of payments is not in violation of Section 4 (1) of the Indian Telegraph Act. As this section on its plain reading vests such privilege and right upon the Central Government to grant license. Upon such condition and consideration as it deems fit by any authority also other than Government which is State within the meaning of Article 12 of the Constitution. But on the other hand it was also upheld by the Court that the procedure adopted for such grant should be reasonable, rational and as in consonance with the conditions which had been announced. As statutory authorities have to sometime use their discretionary power to confer social and economic benefits upon a particular section of the society. Thus, this misconception that the power to be exercised as it "deems fit" under the Telegraph Act shall not be mistaken. As such provisions, while vesting powers upon the Government also enjoins the fiduciary duty upon the Government and its agencies to act with due diligence in order to avoid misplaced philanthropy or ideology. Thus, the Government cannot exercise the power in such a manner which can be held unlawful. It is expected to put such conditions while granting licences, which shall safeguard the public interest and the interest of the nation and shall not be against the Principle of

Wednesbury¹⁸⁸ of administrative law which was stated in Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.¹⁸⁹ as this principle is applicable where it is found that the authority exercising the discretion has taken a decision which is devoid of any plausible justification.

Though, in Ram and Shyam Company v. State of Haryana and Ors.¹⁹⁰ it was expressed by the Supreme Court that Authority must act fairly in accordance with the principle of Natural Justice of fair play in action. In the present case the appellant had submitted the highest bidder for the plot which was auctioned by the Government agency. The presiding officer while conducting the auction had accepted the bid. But the State Government did not give confirmation to it and later a notice of fresh auction was notified again. The appellant have submitted the highest bid and it was accepted by the presiding officer by the State Government declined to confirm the same. Later a very undemocratic incident has occurred. A letter was addressed to the Chief Minister of the Haryana State which is a opposite party in this case by another respondent in this case the letter contained the offer of highest price than stipulated in two earlier auctions by the appellants. If the contract was given to the respondent for the plot promptly this offer was accepted by the Chief Minister. Hence, the appellant had challenged the action of the Chief Minister on the ground of denial of the right to equality and non- observation of principle of natural justice. By not providing the bidder the reasonable opportunity of being heard that his price quoted is not meeting the market price.

The Court had quashed the order of Chief Minister of granting contract to respondent no. 4 in the present case. By giving a reason that the application of the minimum principle of natural justice must be read in the statute and further more so, it is obligatory in nature for every administrative action the authority must act fairly. Awarding Government contract through auction or bid is an order to ensure transparency and fairness in public procurement process. To develop economy and efficiency, to promote competition and to provide fair and equal treatment to all as it is essentially required under Article 14 of the Constitution. The court had relied upon the observation of Bhagwati, J in

¹⁸⁸ It describes the principle of being so unreasonable that no reasonable authority could have acted reasonably have made it or have taken such futile and biased decision.

¹⁸⁹ (1947) 2 ALL E.R. 680.

¹⁹⁰ MANU/SC/0017/1985.

Ramana Dayaram Shetty v. The International Airport Authority of India¹⁹¹ where he stated that:

It must, therefore, be taken to be the law that where the Government is dealing with the public, whether, by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. In case of large-scale grants including award for jobs, contracts, quota, license etc., the power or discretion of the Government should be protected and structured by the rational, relevant and non-discriminatory standards. If any decision of the authority is found to be inadequate against those standards, then such action of the Government is liable to be struck off, unless it is proved by the Government agencies that the action taken was not arbitrary, but was founded upon some valid principle which in itself was not irrational, unreasonable or discriminatory.

Reliance was also paid upon the judgment of Kasturi Lai Lakshmi Reddy v. State of Jammu & Kashmir and Another¹⁹² in which it was stated that:

Where any Governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be

¹⁹¹ MANU/SC/0048/1979.

¹⁹² MANU/SC/0079/1980.

obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so.

In *Association of Registration Plates v. Union of India*¹⁹³ it was examined by Court that Article 14 of the Constitution restrain government from arbitrarily choosing a contractor at its sweet- way and desire. It has to act rationally, logically, fairly and in common interest while making contracts.

While in *M/s. Indian Railway Catering & Tourism Corporation Limited & Anr. v. M/s Doshion Veolia Water Solutions (P) Limited and Ors*¹⁹⁴ the Court stated that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice and the consideration of tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open.

Therefore, it can be observed that while recognizing the rights of the Government agencies in policy matters on side the judiciary had also put a certain restrain over it to not to exercise that power in an arbitrary manner and thereby had also protected the interest of the private individuals on the other side to trade with the Government.

From the perspective of restrain in judicial review

In order to ensure the separation of power as enshrined in our Constitution, the judiciary has itself restrained its power of judicial review in procurement process too as it had restrained in other administrative and legislative actions of the Government through its judicial approach.

The foundational proclamation of restrain in judicial review in the Government exercise of power in procurement matter had came from the decision of Supreme Court in *Tata Cellular v. Union of India*.¹⁹⁵ In this case the Court upheld that in the matter of tender process judiciary must impound itself to the issue of legality. Its concern should be:

¹⁹³ 2005 (1) SCC 679.

¹⁹⁴ 2010 SC 817.

¹⁹⁵ (1994) 6 SCC 651.

1. To check the exceeding power of the decision-making authority.
2. To check the error of law.
3. To check the violation of principle of Natural Justice.
4. To conclude a decision which has no rational tribunal which would have concluded; or
5. Abused its power.

Besides this the Court had also observed the ground on which an administrative action is subject to control by judicial review as-

1. Illegality: In case where the decision maker had in-correctly understood and applied the law which regulates its action and gives effect to it.
2. Irrationality: it is also called as principle of reasonableness it is concerned to examine whether the administrative action has some arguably rational basis or not and if it has then whether it is acceptable or not.
3. Infirmary in decision making process or procedural impropriety.

In case of breach of any of the above conditions, the Court has the power to examine its legitimacy and fairness. Reliance was paid upon the judgment of *Sterling Computers Ltd v. M & N Publications Ltd.*¹⁹⁶ where it was upheld by the Supreme Court that the power of judicial review in respect of contracts entered into on behalf of the state, the Court has the power to identify. Whether there has been any infirmity in the decision-making process and was it reasonable, rational and non- arbitrary and non- violative of Article 14 of the Constitution but it does not have the power to judicial review in the terms of the contract which have entered into by the public bodies if they have been made without ignoring the procedure which are basic in nature and after an objective consideration of different options available and taking into consideration the interest of the state and public.

¹⁹⁶ 1993 (1) SCC 445.

Later on this judgment of the Supreme Court has been consistently relied upon by the Courts in various cases coming before them related to judicial interference in Government power in tender matters.

Likewise as in *Jagdish Mandal v. State of Orissa & Ors*¹⁹⁷ the Court observed that the scope of judicial examination of tender process and award of contracts is confined only to cases. Where there is the material violation of the terms relating to scrutiny and acceptance of tenders or where the decision is vitiated either by arbitrariness/irrationality or by mala-fides/ favouritism. Therefore, the Court before interfering in tender or contractual matters while exercising the power of judicial review should take into account following factors:

- i. Dose the method adopted or decision taken by the authority is mala- fide or intended to favour someone; or
- ii. 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 the relevant law could have reached";
- iii. Whether public interest is affected.

Now, it is a settled principle of law that whenever the power of judicial review is invoked in the matters of tenders of awarding of contract certain special features are required to be considered as a contract is a commercial transaction and evaluating tenders and awarding contracts are the essential commercial function of the Government hence in such cases the principle of equity and natural justice stays at a distance. If the decision of the authorities are bona-fide and is in public interest, the Court would not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna as stated by the Supreme Court in *Siemens Public Communication Networks Pvt. Ltd. & Anr. v. Union of India & Ors.*¹⁹⁸ the brief fact of which were that one M/s Bharat Electronic Ltd. who is respondent no. 2 in this case was nominated by respondent no. 1 i.e. Ministry of Defence, Government of India, as the prime contractor for Indian Army's modernization plan for Technical Communication System. Respondent no. 2 had floated a

¹⁹⁷ (2007) 14 SCC 517.

¹⁹⁸ MANU/SC/8245/2008.

RFP for procurement of the Digital Radio Trunking System popularly known as Terrestrial Trunked Radio Petitioner emerged as lowest bidder entitled to be intimated result of tender dated on 27.2.2007 response was received from respondent no. 2 acknowledging representation but remained silent on outcome of tender- Respondent no. 2 made petitioner apprehensive that his bid was rejected and it was awarded to respondent no. 3. Being aggrieved by this decision petitioner had first filed the petition in Delhi High Court but it was dismissed there and latter he filed an appeal before the Supreme court in the form of Special Leave Petition under Article 136 of the Constitution where while dismissing the appeal filed against the order of division bench of Delhi High Court the Supreme Court had observed that “whenever it is seemed that two views are possible and no mala-fides or arbitrariness is alleged or shown, there would be no scope for judicial interference with the decision taken by the procuring authorities” by relying upon the decision of Reliance Airport Developers (p) Ltd. v. Airport Authority of India and Ors.¹⁹⁹ Other than this the Court had also deduced the principles after going through the various judgement of the Supreme Court related to restrain in judicial review in administrative action as:

1. The modern development point to restraint of judicial review 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 judiciary doesn't have the proficiency to review the Executives decision. If the evaluation of such decision is allowed, it will lead to replacement of its own decision by the Court, without having the necessary proficiency which may itself be unsound.
4. The essential terms & condition of bid notice is not open for judicial scrutiny, as the invitation of bid is within the purview of the contract. Generally, the conclusion to accept or reject a bid or contract is taken after going through the numerous steps of negotiation process. Frequently, these decisions are taken qualitatively by professional.

¹⁹⁹ MANU/SC/4912/2006.

5. The Government shall have the liberty to enter into contract of its own choice. In other words, a clean game in joints is an essential combination for an administrative body in administrative or semi-administrative areas. However, the actions of the government shall not only be scrutinize by the trial of the rationality of the Wednesbury theory (including the other facts mentioned above), but should be influenced by bias or should not be acting by garland fly.
6. Quashing actions of the administrative authorities may impose a grave administrative load on the administration and can lead to amplified and unbudgeted disbursement.

Moving on the same footpath the Supreme Court had in its judgment of Michigan Rubber (India) Limited v. State of Karnataka and others²⁰⁰ had dealt with the issue of judicial approach towards the award of contracts and tenders and it observed that:

- 1 The interference of the Court is unwarranted in the matter of tenders and in granting of contracts except where the action of tendering entities is mala-fide and prima facie abuse of statutory power appears.
- 2 There is a very limited scope of judicial interference, where the action of the state is reasonable, fair and is in public interest in the matter of tenders and award of contracts.
- 3 It is not a fundamental right of any person given by our Constitution to do business with the state and its organizations.
- 4 The Government and its institutions have a free hand in the matter of deciding Notice Inviting Tenders (NIT)/Tender Conditions/Eligibility/RFP Conditions–Eligibility Criteria for tenders and the scope of judicial review arises only when these things are done in an arbitrary, discriminatory, mala fide, or activated base.
- 5 Judicial review cannot stand rejected in contractual matters or matters in which the Government exercises its contractual powers.

²⁰⁰ (2012) 8 SCC 216, available at: http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=24825 (Visited on October 17, 2017).

Such study is intended to prevent arbitrariness and must remain in broader public interest.

In a very recent Judgement of M/s Sam Built well Pvt. Ltd. v. Deepak Builders & Ors.²⁰¹ where a SLP under Article 136 was filed before the Supreme Court against the judgment of the division bench of the High Court which has set aside the order of single judge of High Court. The facts involves in this case was a notice inviting tender dated 16th March, 2017 was issued by Director, Institute of Nano Science & Technology, Mohali inviting percentage rate composite bids from eligible bidders for the construction of the Institute of Nano 1 Science & technology campus at knowledge city. The estimated cost of project was Rs. 162.18 crores, with earnest money payable being Rs. 1.72 crores. Clause 8 of the tender notice contained eligibility criteria to apply as-

Bidder must have satisfactorily completed the works as mentioned below during the last date of submission of bids-

1. Three similar completed works each consisting not less than Rs. 64.9 crores, or
2. Two similar completed works each consisting not less than Rs. 97.3 crores, or
3. One similar completed work of aggregate cost not less than Rs. 129.7 crores.

Here the term similar construction was meant work of “construction of institutional/ educational buildings campus with minimum five storeys RCC framed structure building including electrical, plumbing, fire extinguishers in India in as single contract. 16 bids were submitted in response to such notice and out of them 5 have participated after the pre-bidding meeting while after the technical evaluation it was stated by the procuring authorities that the respondent no. 1 did not fulfill the criteria as mentioned in clause 8 aggrieved by this decision respondent no. 1 move to the High Court challenging this decision of the Court.

In an special leave petition it was contended on behalf of the appellant that it would be incorrect to state that the national building Code of India, 2016, which

²⁰¹ Civil Appeal No. 21858/ 2017.

is framed by the Bureau of Industrial Costs and Prices, does not apply to the facts of the present case as the clause 8 of the tender notice contains the very much special condition as stipulated in the code and therefore, the expert committee report cannot be interfered. It was also contended that in the matters of tenders judicial review is very limited and that the division bench had while setting aside the order of the single judge did not considered the parameters of judicial review in tender matters.

While on behalf of the respondent no. 1 side it was contained that the National Building Code was only made applicable in so far as safety aspects of the building was concerned therefore the expert committee report must have not relied upon it. Secondly, it was also stated that the respondent no. 1 had carried out three projects which consist of buildings which have basement plus 5 or more storeys and they all were similar type of work as stated in clause 8 of the tender notice.

After hearing both the sides it was stated by the Court that it is important to set out the parameters for judicial review by paying its reliance upon the judgment of the Supreme Court in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*²⁰² in which the Court observed that “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 any mala-fide, corrupt or perversity appears in the terms of the tender conditions. It is possible that the project owner may construct the tender document which will not be acceptable to Constitutional Courts but it is not the reason for interfering with the interpretation itself.”

The Court said that the setting aside the judgment of the single judge and coming to the conclusion that the tender of respondent no. 1 was clearly eligible, is very much directly contrary to the judgment when not having found any mala-fide or perversity in the technical experts report, the principle of judicial restraint kicks in, and any appreciation by the Court itself of technical

²⁰² (2016) 16 SCC 818.

evaluation, best left to technical experts, would be outside its Ken. Therefore, the Court had allowed the appeal with this finding.

Again in *Montecarlo Ltd. v. National Thermal Power Corporation Ltd.*²⁰³ it was restated by the Apex Court that the command of judicial review would be invoked, if the approach adopted by the Government authorities is arbitrary or mala-fide or where the procedure adopted is meant to favour someone. The decision-making process should clearly show that the maladies are kept at recess.

Therefore, it can be concluded now that the Court is not to consider that whether a particular policy or decision taken in fulfillment of a plan is fair or not, it has to only consider with the way in which such decisions have been made by the government instrumentalities as in *Air India Ltd. v. Cochin Int. Airport Ltd. & Ors.*²⁰⁴ It was stated by the Court that the State could choose its method to arrive at a decision. It can fix its terms of the invitation to tender, and that is also not open to legal scrutiny. It can enter into agreements before finally settling to admit one of the offers given to it. The price need not always be the sole standard for awarding a contract. It is free to grant any relaxation, for bona fide reasons. However, the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State corporations and its agencies are bound to adhere to the norms, standards, and procedures as laid down by them and it cannot arbitrarily deviate from them. Though, the decision is not amenable to judicial review.

The Court can examine the decision-making process and interfere if it is found vitiated by mala- fide, unreasonableness and arbitrariness. The State's corporations and agencies have the public duty to be fair to all concerned. But yet it a concern point that even in cases where fault is present in the decision-making of the Executive agencies, the court must use its discretionary power under Article 226 with a great care and shall exercise it only for the advancement of public interest and not to just establishing the law points.

Judiciary must always take into consideration the wider public interest in order to determine its extent of interference. The Court has to come forward where the public interest overrides. Accordingly, the Court has to play a very

²⁰³ 2016 (15) SCC 272.

²⁰⁴ MANU/SC/0055/2000.

indispensable part in monitoring the use of jurisdiction, powers in the matters involving public procurement.

Besides, identifying the role of judiciary in interfering within a prescribed limit in actions taken by the executive agencies in commercial matter, the judiciary had also recognized the role and action of the other government regulatory bodies to put a check and balance upon the action Executive authorities under the realm of separation of power. As the functioning of the government is controlled by the Government, laws of the land, legislature and Comptroller and Auditor General of India (CAG)²⁰⁵ as it was observed was by Supreme Court in Excel Crop. Care Limited v. Competition Commission of India²⁰⁶ where the question of raised was regarding extent of jurisdiction of the Competition of India (herein as CCI) under Section 3 of the Competition Act. The facts of this case were a letter to CCI was addressed by FCI a government instrumentality and it was alleged that four manufactures of APT had formed a cartel among themselves and on that basis they had been their bids since last eight years by quoting identical rates in the tenders invited by the FCI for the purchase of APT. CCI had after receiving the letter assigned the inquiry to DG and DG had after inquiring submitted its report and found the of presence of bid rigging. As a result of which CCI took up the report of the DG for consideration and sent a copy of notice to all the manufactures and after listening to all them CCI found guilt all the four accused of offence under sec. 3 of the Competition Act and imposed the penalty at 9% of the average 3 years turnover. Aggrieved by this Civil Appeal was filed before the Supreme Court by the appellants.

The issues raised in this case were as first, applicability of Section 3 of the Competition Act in respect of the notice inviting tender dated 28th March, 2009 as it was contended before the Court that the Section 3 of the Act came into operation on 20th May, 2009 while the last date of submitting the bid was 8th May, 2009 thus, on reason of retrospective effect CCI cannot inquire into the matters. But this contention of the appellants was rejected by the Court on the ground that principle of retroactivity is to be applied in such cases as by the time when Section 3 came into operation no tender was allotted thus, CCI was absolutely correct in holding inquiry under Section 3 of the Act as it was in

²⁰⁵ S. Subramaniam Balaji v. State of Tamil Nadu and Ors. MANU/SC/0668/2013.
²⁰⁶ MANU/SC/0588/2017.

general interest of the public at large and also for the economic efficiency, economic growth and development and consumer welfare by relying upon the judgment of R.Rajagopal Reddy (dead) by L.Rs and Ors. v. Padmini Chandrasekharan (dead) by L.Rs.²⁰⁷ while the second issue raised was about the jurisdiction of the DG/ CCI to investigate into the boycott of 2011 FCI tender. Regarding this it was argued on behalf of the FCI that since FCI had not mentioned about the 2011 tender in his letter made to CCI, and which was even floated after the letter was sent to the Commission, therefore, there could be no investigation in respect of this tender. But it was again denied by the court on the ground that as Section 18 of the Competition Act imposes obligation upon the Commission to eliminate practices causing adverse effect on competition and to sustain competition in the market whereas Section 28 of the Act says that DG has the power and duty to investigate upon the order passed by the Commission under Section 26 (1) of the Act. Thus, under the realm of it commission was justified in inquiring the boycotted tender of 2011.

The above decision of the Supreme Court can be seen on the same foot path of the decision by this court in Tata Power Company Ltd. v. Maharashtra Electricity Regulatory Commission²⁰⁸ where it was upheld by the court that the Regulatory bodies such like Commission are empowered to regulate the procurement process of distribution licensees.

Thus, it can be viewed that judiciary had also recognized the role of other Government bodies in keeping a check and balance in public procurement process.

Analysis

On analyzing the judgments referred in this research work, the researcher found that the judiciary had acted as a facilitator and had played a very vital role in social engineering the complexities arising between the individuals, community and the state. The concept of social engineering was given by Roscoe Pound who called law as a social institution to satisfy the social want through social engineering. The main object of social engineering principle is to satisfy the maximum wants at less sacrifice by balancing the conflict of interest present in the society. Judiciary had played a key role in this as it is a last resort where the

²⁰⁷ MANU/SC/0061/1996.

²⁰⁸ MANU/SC/0932/2009.

society put faith to access justice and to protect their interest when they get no remedy from the other institutions.²⁰⁹

In the present work, the researcher finds that in the matter procurement process there is a conflict of interest between the individuals and the community i.e. procuring authorities who act on behalf of the community. And on the other side, there is a conflict between the two governing organs of the state i.e. between the executive and judicial wing regarding the dimension of their work area and limit of interference in it. This conflict of interest has been very well sought out by the judicial approach by balancing the interest of all through its judgments.

Likewise, it can be viewed through the four landmark judgment given by the Supreme Court of India which has been progressively followed as precedent under Article 141²¹⁰ of the Indian Constitution for resolving the disputes related to the procurement process. These principle formulating judgments can be viewed from the three perspectives where it had sought out the conflict of interest in the society as:

1. From the perspective of conflict of interest between the judiciary and executive or administrative wing related to their area of work: Judgment of Tata Cellular v. Union of India²¹¹ had solved this dispute where judiciary had self-restrained itself to interfere within a permissible limit only in the working and decision making of the administrative agencies. Thereby, balanced the interest between itself and the administrative wing.
2. From the perspective of Individuals: Judiciary had played an important role in protecting the interest of private individual too in procurement matter and had restrained the arbitrary exercise of discretionary power by the administrative agents. Ramana Dayaram Shetty v. The Airport Authority of India²¹² is a landmark judgment on it which stated the principle that every action of the government must be reasonable and must comply to Article 14

²⁰⁹ “CJI: Judiciary Key to Social Engineering”, The Times of India, Aug 16, 2007, available at : <https://timesofindia.indiatimes.com/india/CJI-Judiciary-key-to-social-engineering/articleshow/2283755.cms> (Visited on March 14, 2018).

²¹⁰ Supra note 162.

²¹¹ MANU/SC/0002/1996.

²¹² MANU/SC/0048/1979.

and 19 (1) (g) of the constitution so that every individual may get equal opportunity to contract with the government.

3. From the perspective of community i.e. procuring authorities who act on behalf of the community: Two judgments i.e. Michigan Rubber (India) Ltd. v. State of Karnataka & Ors. and M/s G.J Fernandez v. State of Karnataka²¹³ and others had set up the principle that No person can claim as a fundamental right to carry on business with the government and Deficiencies in tender conditions could be condoned. And thereby, restrained the private person unwanted interference in the action of administrative agents by recognizing its extreme power in the policy matter and giving more concessional power in the contractual matters in order to find suitable person for the work as administrative agents are the representative of the community at large and their every action is taken while keeping the benefit of public at large in mind. Thus, judiciary recognized and the protected the interest of the community too and thereby maintained the balance between the individual interest and the community interest.

²¹³ 1990 AIR 958.

Chapter V

Conclusion & Suggestions

Conclusion

Salus populi suprema lex esto i.e. the welfare of the people shall be the supreme law. The process of public procurement seems to be evolved or based upon this Latin maxim. As it implies that the action of state however, must be right, just and fair. A sound public procurement system is not only an ethical requirement but also an economic and social too. As a public procurement process involves the expenditure of the public money for the public welfare at large. It also gives a vital contribution in the GDP of the State. It is a process through which the government agencies purchased goods and services from the private vendors for the public welfare at large.

A proficient procurement system appears as a strong element of the public expenditure management systems by helping an entity in taking appropriate budgetary decision and identifying the required investment opportunities.²¹⁴

In case of India, it is well known that our procurement system is quite complex due to federal framework of the country for public service delivery such complexity had become more complex due to absence of the comprehensive public procurement law to make the system sound. Currently, Indian's public procurement system in India is being carried out under the following patterns as:

1. Constitutional Frameworks- Articles 288, 298, 299, 300 & 300A which authorizes the government to contract for goods and service. Article 14 imposes the obligation upon the Executive machineries to ensure equality while entering into contract with the individuals. While Article 282 determines the financial autonomy of the government in public spending.

²¹⁴ Robert R Hunja, "Obstacles to Public Procurement Reform in Developing Countries", available at: https://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz.../hunja2_a2_e.doc (Visited on April 29, 2018).

2. Legislative Frameworks- Indian Contract Act, 1872; Procurement Act at state level; Prevention of Corruption Act, 1988; Central Vigilance Commission Act, 2003; Competition Act, 2002.
3. Administrative Guidelines- GFRs 2017, Delegation of Financial Power Rules, 1978; GeM, etc.
4. Regulatory Bodies- CVC, CAG, CCI, CBI, CPPP (Central Public Procurement Portal) and Procurement Policy Division (PPD). While CAG and CVC are concerned with the probity issues, on the other hand CCI is concerned with anti-competitive issue. PPD undertakes to make reform in the procurement policy of the country. But it didn't advocated till yet for the centralization of the procurement activities neither indulges itself in it.

Besides, having these frameworks for governing the tender process in India, there are many loop holes present, which leads to an unfair, corrupt and mala practices in tender process in India. Like Executive agencies of the Government many time violates the basic provision i.e. Article 14 & 19 (1) (g) of the Constitution at the same time while following the other provision of the Constitution like contract making power, executive, and financial autonomy power while dealing with public procurement policies, principles and process. While on the other hand CVC & CAG do not have the power to prosecute and to take disciplinary action against the procurement irregularities and can only advice in such condition. Secondly, the guidelines issued by them are advisory in nature. Due to this much complexities had arisen in the procurement system to be resolved and for the resolving it judicial interference have been required and the judiciary had played a vital role in resolving these complexities and had also settled up many principle related procurement process in India.

Judicial approach had developed the tender law from three perspectives i.e. First by protecting the interest and right of the private individuals, second by maintaining the right of executive to contract with the person according to its choice and analysis, third by the ensuring the separation of power and accepting its limitations from interfering in the jurisdiction of executive wings. The impact judicial decision in the society can be viewed as:

1. It recognized the right of the individual (bidders) in procurement process in those cases where he is found to be violation of Article 14 & 19 of the Constitution as every person has the right to equality before the law and right to trade, practice and profession business. While first right is available to every person including citizens and non-citizens both while latter right is available to only citizen and is also subject to certain restriction.
2. It has very well settled the imposition that government is the custodian of the public money and is under the fiduciary duty to expend it in a right and fair manner and no expenditure from the public account could be made without the approval of the Parliament. Judiciary had also recognized the role of CAG which is the guardian of the public purse and it is its duty to put a check upon each and every department dealing with public money.
3. It has casts an obligation upon the Bureaucratic agencies to frame such procurement policies and terms and conditions whose object would be to promote competition in the market and to achieve value for money without prejudicing any ones right. It had also recognized and appreciated the duty and right of one bureaucratic institution to keep a check and balance upon the other institutions in order to prevent corrupt practices. It had adhered, the restriction upon the Bureaucratic agencies to take decision on the basis rationality, fairness and reasonableness.
4. It had safeguarded the social development of the common man as every procurement activity had direct impact upon the social development and advancement of the society. It is the society only which is a major stakeholder of the tender activity as they are both the investors and the beneficiaries in the public procurement system. Thus, judiciary by imposing obligation upon the procuring entities on one side and on the other by applauding their action for the promotion of competition and enhancement of the value for money rather than indulging in having and providing personal gain on account of public money.

Judiciary had filled the lacunas present in the procurement process in order to regulate it and function it fairly and transparently in order to protect and promote

the interest of public at large. Since public procurement process is an administrative action performed by the government officials. Thus, there a need had arisen to keep a check and balance upon them in order to ensure transparency and fairness in their work. Judiciary had played a vital role in keeping check and balance upon the government agencies on one side. On the other side it had also restrain itself from interfering with policy decision matter of the government agents.

Suggestions

“Just as it is impossible to know when a fish moving in water is drinking it, so it is impossible to find out when the government servant in charge of under takings misappropriate money”
- Kautilya

1. A provision shall be made for the withdrawal of the work from the contractor and rescind the contract; or to execute it at the expense of the contractor only by the government authorities without prejudicing the right of the government authority to claim compensation for the damages in the following cases:
 - a. Where the Contractors attempts to bribe either by himself or through others, directly or indirectly to an employee or where a contract has been procured by way of bribery.
 - b. Where delays is made by the contractor in commencement of the work, procrastinate in its execution or is in breach of any of the terms of the contract and fails to rectify the situations within a fixed time period from the date of serving him notice.
2. A new Article in Chapter IV of the Constitution is required to be inserted focusing on adoption of such means and measure by the Government which would promote transparency, accountability, fairness and competition in tender system.
3. A penalty provision is required to be made in case where bidder or tenderer delays the execution of the contract beyond a fixed period of time.

4. A regulatory body is required to be specially constituted for the purposes of working as the watch dog in each and every tenders invited by any government agencies. A copy of each and every tender (Open and Limited) shall be given to that regulatory for its evaluation prior to inviting tender by procuring authority and if any suggestion or recommendation is made by the body adherence must be give to it. Whereas, if any fraud and corrupt practice regulatory body found prima facie at any stage. It shall have the power to impose monetary penalty and imprisonment to the person in fault as well the institution. Besides this, it shall collect all the information about the market suppliers and service providers and variety of goods and service available in the market and the corrupt tactic involved in the markets like bid- rigging in order to give valuable suggestions to the procuring authorities.
5. An adequate training programme shall be conducted from time to time for the procurement officers and also vacancy of procurement staff is required to be created in departments.
6. A Central Public Procurement Act is required to be adopted which shall contain the provisions for the establishment of a procurement regulatory body, methods of procurement, penalty clauses, eligibility and qualification of the persons who can act as a procuring officer, blacklist condition provision of bidders and also appeal provision to it, procurement process advocacy, etc.
7. In order to maintain the balance a provision of damages clause to the bidder shall also be made on account of loss suffered by the bidder in case of tender award by way of corrupt practice by the government agencies.
8. A specialized institution is required to be set-up for imparting education on procurement system as like institutions of CS, CA.

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