
Before S.S. Saron, J

M/S KALTHIA ENGINEERING &
CONSTRUCTION LTD.,—*Petitioner*

versus

STATE OF PUNJAB AND OTHERS,—*Respondents*

Civil Writ Petition No. 14035 OF 2005

31st May, 2006

Constitution of India, 1950—Art.226—Request for proposal Document—S.3(2.3)—Punjab Infrastructure (Development & Regulation) Act, 2002—S.20(2)(b)—Govt. seeking to involve private sector for operation & maintenance of roads on a commercial format—Govt. setting up a Board—Board issuing advertisement regarding notice inviting proposal for operation & maintenance—Preferred bidder—Para 2.3 of the RFP document gives preference to respondent No. 5 as it is the preferred bidder in the earlier bidding process & shall be provided the right to match the bidder quoting the highest net toll—Earlier bidding process terminated in favour of respondent No. 5—Petitioner lowest bidder—Highest bidder raising no objection with regard to offending clause 2.3 providing preferential treatment—No prejudice caused to petitioner—Decision of the Govt is not in any manner unfair, unreasonable or perverse—Petition liable to be dismissed.

Held, that the highest bidder in the case is M/s P.D. Agrawal Infrastructure and the petitioner is the lowest. Respondent No. 5 have exercised their preferential right to match the highest bid made by M/s P.D. Agrawal and the latter has not raised any objection with regard to the offending clause 2.3 of Section 3 of the RFP document. Therefore, in the circumstances it cannot be said that any prejudice has been caused to the petitioner as at the time when he submitted the RFP including technical and financial bid on 12th September, 2005 he had the order of this Court that the bids would not be finalized till the adjourned date. The petitioner being one of the contenders and bidders for the project in question, therefore, at this stage cannot have any grouse with regard to the award of tender to respondent No. 5 by exercising their preferential right in terms of the advertisement dated 21st June, 2005 and the conditions of the RFP document. The ultimate test which is to be seen is one of prejudice and it is to be

ascertained whether any prejudice has been caused to the petitioner. If it is found that a prejudice has been caused to it, the same would be required to be remedied by even setting aside the action of the respondents. However, if no prejudice has been caused or the petitioner has waived whatever right he had then the action of the official respondents is not liable to be invalidated or nullified at the behest of the petitioner merely because the offending clause is as per his perspective not in the public interest.

(Para 17)

Further held, that the dispute being between two contesting bidders, it would be inappropriate to consider or treat the present petition as if it was a public interest litigation and that too when nothing has been pointed out that the bid for the tender has been unfair or any prejudice has been caused to the petitioner. The petitioner has not shown by way of any material that had it not been for the offending clause, it would have been in a position to raise a much higher bid and even above that quoted by M/s P.D. Agrawal Infrastructure Limited who is the highest bidder.

(Para 18)

Further held, that the State having undertaken an exercise of avoiding litigation with its earlier bidder respondent No. 5 in view of the earlier acceptance of their bid on 16th September, 2003 and in consequence thereof accepting the bank guarantee of Rs. 100 lacs submitted on 1st October, 2003 and at the same time implement and enforce the new Toll Policy as determined by the State Government by its decision conveyed,—*vide* letter dated 2nd March, 2004 it cannot be said that there has been any unfairness or arbitrariness on its part. The State can choose its own method to arrive at a decision. Besides, the decision as taken is shown to be reasonable and is not in any manner unfair, unreasonable or perverse which may have impelled this Court to exercise its power of judicial review to invalidate the action.

(Para 19)

Anmol Rattan Sidhu, Advocate and R.K. Chugh, Advocate for the petitioner.

G.S. Cheema, Senior Deputy Advocate General, Punjab for respondents No. 1 and 2.

Puneet Bali, Advocate, for respondents No. 3 and 4.

Akshay Bhan, Advocate, for respondent No. 5.

JUDGMENT**S.S. SARON, J.**

(1) The petitioner in this petition under Articles 226/227 of the Constitution of India seeks quashing of the sub-section 2.3 of Section 3 of the Request for Proposal Document ('RFP Document'-for short) Annexure-P.1) for selection of Private Sector Participants (PSP) whereby preferential treatment has been given to M/s Rohan & Rajdeep Infrastructure, Ahmednagar (respondent No. 5) in the bidding process for the Ropar-Phagwara road as also for quashing the said preferential condition as mentioned in the advertisement dated 21st June, 2005 (Annexure-P.2). A further prayer has been made for directing respondents No. 1 to 4 to hold the bidding procedure as per the other provisions of the RFP Document and the provisions of the Punjab Infrastructure (Development and Regulation) Act, 2002 ('the Act'-for short). Besides, a direction is also sought for prohibiting respondents No. 1 to 4 from proceeding further and initiating any step as per sub-section 2.3, of Section 3 of the RFP document (Annexure-P.1).

(2) The State of Punjab with the avowed purpose of improving the road infrastructure in the State and with a view to operate and maintain the road infrastructure is seeking to involve the private sector for operation and maintenance of roads on a commercial format. The Act has been framed to provide for the partnership of private sector and public sector, participation of private sector in the development, operation and maintenance of infrastructure facilities and development and maintenance of infrastructure facilities through financial sources other than those provided by the State budget by following modern project management system and for matters connected therein or incidental therewith. In terms of the Act, the Punjab Infrastructure Development Board ('the Board'-for short) (respondent No. 3) has been set up. The Board is a nodal agency for development of infrastructure by attracting private sector investment. The key objectives of the Board are :—

- (i) Accelerate the process of infrastructure development and privatization;
- (ii) Develop a shelf of investible projects through project identification and development;

- (iii) Create a superior model for the privatization process;
- (iv) Channelise international experience in project definition;
- (v) Set objective/transparent criteria.”

(3) The Board has undertaken some road projects for developing a performance and toll base operation and maintenance strategy. The IL & FS Infrastructure Development Corporation (‘the Corporation’ for short) (respondent No. 4) is the Project Development Arm and is currently assisting the State Government for development infrastructure projects of Public Private Partnership firms (PPP) and accordingly, the Board has signed with the Corporation for the project, development and promotion partnership arrangements. Amongst the roads that have been identified for construction and maintenance are the Ropar-Phagwara road and Jagraon-Nakodar road with high level bridges across river Sutlej. The private sector parties are to undertake operation and maintenance activities and they have been allowed to recover the investment in operation and maintenance of the facilities through levy and toll collection at the rates as specified by the Punjab Government. The Board issued an advertisement dated 21st June, 2005 (Annexure-P.2) regarding notice inviting proposal. It was indicated that the Board a nodal agency set up by the Government of Punjab for infrastructure development in the State on behalf of the Department of Public Works (B&R) (respondent No. 2) invites proposals for operation and maintenance concessions for Ropar-Balachaur-Nawanshahr-Phagwara 80.7 kms. and Jagraon-Nakodar 38.2 kms. roads with high level bridges over Sutlej river. The offending clause in the said advertisement dated 21st June, 2005 (Annexure-P.2) is that M/s Rohan & Rajdeep Infrastructure (respondent No. 5) has been mentioned as a preferred bidder and it is indicated that the preferred bidder in the earlier bidding process shall be provided the right to match the bidder quoting the highest net toll. Besides, the earlier bidding process stands terminated. The petitioner M/s Kalthia Engineering and Construction Limited, Bhavnagar being interested to join the project applied for the RFP document for the above captioned project. The Board,—*vide* its letter dated 29th July, 2005 (Annexure-P.3) supplied the RFP Document and also intimated that the last date for submission of the proposal was 2nd September, 2005 which had been extended to 12th September, 2005. Section 3 of the RFP Document that has been supplied relates to; “Instructions to Bidders”. Para-2

provides for the 'Bidding Process' and para 2.3 is the offending clause of the RFP Document which gives preference to M/s Rohan & Rajdeep Infrastructure (respondent No. 5) and it is mentioned that it is the preferred bidder in the earlier bidding process. It is to submit a fresh proposal in response to the RFP. Besides, it has been mentioned that it shall be provided the right to match the proposal of the bidder quoting the highest net toll and if it chooses to do so, their proposal shall be accepted and the award made in accordance with the provisions of RFP Document. In such event M/s Rohan & Rajdeep Infrastructure (respondent No. 5) are to deposit a sum of Rs. 10 lacs only with the Board (respondent No. 3) which will be paid by the Board to the bidder whose toll of higher net toll was matched. The grievance of the petitioner is to the said offending clause in the RFP document and also in the advertisement dated 21st June, 2005 (Annexure-P.2). It is submitted that from a reading of sub-section 2.1 it is clear that the earlier bidding process has been annulled and from sub-section 2.3 it is clear that the prescribed bid is in favour of M/s Rohan & Rajdeep Infrastructure (respondent No. 5) who is considered as the preferred bidder. The said conditions, it is stated, are in total violation of the spirit and provision of the Act as well as Article 14 of the Constitution of India and thus liable to be set aside being arbitrary, discriminatory, illegal, non est in the eye of law and against the principles of natural justice.

(4) The case initially came up for hearing on 8th September, 2005 before a Division Bench of this Court and the State counsel was asked to obtain instructions with regard to the scope and ambit of Clause 2.3 of the Instructions to Bidders contained in Section 3 of the RFP Document (Annexure-P.1) issued for selection of private sector participants for Toll Based Operation and Maintenance Concessions for Ropar-Phagwara Road Project. The case was adjourned to 13th September, 2005 and till the adjourned date it was ordered that the tenders received pursuant to the subject-NIT shall not be finalized.

(5) Notice of motion was issued in the case on 13th September, 2005. Ms. Nirmaljit Kaur, learned Additional Advocate General, Punjab accepted notice on behalf of respondents No. 1 and 2. Mr. Puneet Bali, Advocate appearing for respondents No. 3 and 4 accepted notices on their behalf and stated that till the next date, the subject tender shall not be awarded to any bidder. The Court, however, permitted the

official respondents to evaluate the bids and award the work to the highest bidder. Mr. Akshay Bhan, Advocate accepted notice on behalf of respondent No. 5. The case was admitted on 5th October, 2005 and interim order dated 8th September, 2005 was modified to the extent that the Board (respondent No. 3) would be free to award the tender to the highest bidder which of course would be subject to final outcome of the petition. The Board (respondent No. 3) filed written statement. M/s Rohan and Rajdeep Infrastructure (respondent No. 5) filed their separate written statement. In the written statement filed by respondent No. 3 it is stated that the present writ petition is not maintainable in view of the law laid down by the Hon'ble Supreme Court that term invitation to tender, are not open to judicial scrutiny because invitation to tender is in the realm of contract. It is stated that the preferential treatment given to M/s Rohan and Rajdeep Infrastructure (respondent No. 5) is with full transparency and keeping in mind the interest of the public exchequer. It is also stated that the writ petition is liable to be dismissed on the principle of estoppel inasmuch as the petitioner was fully aware of the bidding process and that M/s Rohan and Rajdeep Infrastructure (respondent No. 5) are the preferred bidders and had been given the right to match the bidder quoting the highest net toll. It is stated that in response to the advertisement issued on 21st June, 2005 the petitioner applied for the RFP document package, which was supplied to the petitioner for the project i.e. 'Toll Base Operation and Maintenance Concession for Ropar-Phagwara Road Project'. On 19th July, 2005, itself the Board (respondent No.3) alongwith the Corporation (respondent No. 4) conducted a pre-proposal conference in which the petitioner participated. In the said conference, the terms of RFP alongwith the notice inviting tenders (NIT) were explained to all the bidders which were accepted by the bidders including the petitioner. No protest whatsoever, it is stated, was made by the petitioner and he allowed the tendering process to continue in terms of the NIT and the advertisement dated 21st June, 2005 (Annexure-P.2). Another project meeting was held at the Punjab Bhawan, New Delhi on 22nd August, 2005 which the petitioner though attended but he refused to sign the attendance sheet. On account of the said circumstances, it is stated that it was clear that right from the issuance of advertisement dated 21st June, 2005 (Annexure-P.2), the petitioner knew that M/s Rohan and Rajdeep Infrastructure (respondent No. 5) was going to be a preferential bidder in the bidding process and at that time, the petitioner had no grievance.

The conditions in the advertisement being known to the petitioner, he applied for the RFP document. In case the petitioner wanted to approach this Court he could have done so after issuance of advertisement dated 21st June, 2005 because in terms of the said advertisement he had applied for the RFP document. Therefore, it is submitted that once the petitioner has participated in the bidding process by accepting the terms of advertisement, applying the RFP document and attending pre-proposal conferences it is estopped from challenging the conditions of the RFP document which are mentioned in the advertisement dated 21st June, 2005. The other circumstances showing the participation of the petitioner have also been mentioned. A mention has been made of the various dates in which the petitioner had participated before the submission and tender of documents to contend that in fact the petitioner was all along aware of the preferential right of M/s Rohan and Rajdeep Infrastructure (respondent No. 5). Besides, the circumstance in respect of which M/s Rohan and Rajdeep Infrastructure (respondent No. 5) have been given preferential bid are mentioned. On account of the facts as stated it is submitted that a complete transparent process was followed by the Board (respondent No. 3) and the Corporation (respondent No. 4) in relation to the projects in question inasmuch as M/s Rohan and Rajdeep Infrastructure (respondent No. 5) had a prior accrued right in relation to the said project which it had waived off in case it was treated as a preferential bidder to match the highest bid in the second tendering process for the same projects and while doing so its rights, as it was a bidder in the first tendering process, was kept alive and on the other hand the Board (respondent No. 3) also made it sure that no loss was caused to the public exchequer. The step was taken after prolonged deliberations and discussions which were held by the office bearers of the Board (respondent No. 3) in which it was categorically pointed out that legal rights had accrued in favour of M/s Rohan and Rajdeep Infrastructure (respondent No. 5) and if it had approached the Court, the entire project which had a larger public purpose behind the same, could be defeated as the Government may be involved in legal wrangles. Therefore, to balance equities and rights of all concerned including that of respondent No. 5 it was decided to accept the offer of respondent No. 5 in terms of which it decided to waive off its rights in respect of the first tendering process provided it was accepted as a preferential bidder in the second tendering process. It is for the reason that an

advertisement dated 21st June, 2005 (Annexure-P.2) was issued in which it had been mentioned that the earlier bidding process stands terminated. However, it was clarified that the earlier bidding process had been terminated only on the condition that in the second bidding process respondent No. 5 is the preferential bidder.

(6) In the written statement filed by M/s Rohan and Rajdeep Infrastructure (respondent No. 5), it is stated that the writ petition is not maintainable in as much as no cause of action has arisen to the petitioner to approach this Court. The RFP document has been issued by the Board (respondent No. 3) which is only an invitation to participate in the tendering process which is in the realm of contract. It is also submitted that the writ petition merits dismissal as all facts were duly disclosed in the RFP document as well as in the advertisement. The petitioner knowingly and with full understanding of all the conditions prescribed sought to enter into the tendering process for which he further participated in the pre-bid meetings in which clarifications could have been sought qua all the conditions mentioned in the RFP. In the said meeting no objection was taken by the petitioner. Thus, the petitioner, it is stated, has not disclosed all the facts in their correct perspective before this Court while impugning sub-clause 2.3 of clause 3 mentioned in the advertisement dated 21st June, 2005 as well as in the RFP document. It is also stated that the letter of intent issued to respondent No. 5 had never been cancelled till date and the amount of performance guarantee that was given has never been refunded and it is only subsequent to the agreement between the Board (respondent No. 3) and M/s Rohan and Rajdeep Infrastructure (respondent No. 5) wherein the right of first refusal was accorded that the answering respondent agreed to go in for fresh quotation so as not to let the State loose monetarily on account of its revised Toll Policy which came into being only subsequent to the petitioner being successful in the initial tendering process. It is further submitted that respondent No. 5 was successful in the RFP document dated April 2003 with regard to the operation and maintenance of Ropar-Phagwara Road Project and Jagraon-Nakodar Road Project and in this regard in terms of letter of reference dated 26th September, 2003, it confirmed the said offer to the Board (respondent No. 3). In this regard the essential facts necessary for adjudication of the present case have been detailed which *inter alia* are that on 19th November, 2002 an invitation for pre-qualification

for tender was advertised to maintain and operate the newly upgraded widened and strengthened Ropar, Balachaur, Nawanshahr and Phagwara Highway and Jagraon-Nakodar road with high level bridges over Sutlej river. Thereafter, on 10th December, 2002 a project briefing meeting/conference was held for the above mentioned project in the conference room in the office of the Board at Sector 34, Chandigarh where eight bidders participated. On 16th September, 2003 respondent No. 5 was issued letter dated 26th April, 2003 that its proposal had been accepted and in this regard performance guarantee be submitted, which was submitted on 1st October, 2003. Thereafter, on 17th October, 2003, respondent No. 5 wrote to the Secretary, PWD (B&R) (respondent No. 2) reminding them that concession agreement be signed which had not been signed as stipulated. Another reminder was also sent on 29th February, 2003 followed by subsequent reminders that were sent. Later on the toll rates were sought to be raised and a new Toll Policy was sought to be incorporated by the Council of Ministers. In this regard there was exchange of correspondence between the State as well as the Board (respondent No. 3). Various discussions, it is stated, were also held in this regard with M/s Rohan and Rajdeep Infrastructure (respondent No. 5). The letter in order to show its *bona fide* wrote a letter dated 21st March, 2005 wherein it was conveyed that it was for an amicable settlement with the rider of first right of refusal in case fresh bidding process is held for the Operation and Maintenance of Ropar-Phagwara Project and Jagraon-Nakodar Project. The said representation has been accepted by the official respondents. It was in pursuance thereof that a fresh advertisement was issued wherein the terms and conditions were duly highlighted. It is in the said backdrop of circumstances that the clause of first right for refusal came to be incorporated which in no way run contrary to the objects enshrined in the Act. It is also stated that the stand that Sections 2.1 and 2.3 are anti-thesis of Section 2.4 of the RFP is based on an erroneous presumption that the said provision could be read in isolation without taking into account the entire gamut of the documents itself. It is stated that once there was complete transparency, respondent No. 5 accorded its assent as regard the re-tendering. This was done only after a binding agreement was entered into with the official respondents carrying right of first refusal. Therefore, the same cannot be challenged before this Court.

(7) Mr Anmol Rattan Sidhu, Advocate, learned counsel appearing for the petitioner has vehemently contended that the provisions of the Act have been grossly violated in as much as in the functioning of the Board it is provided in terms of Section 20(2)(b) of the Act that the Board shall promote competitiveness and progressively involve private participation while ensuring fair deal to the consumers. Besides, in terms of Section 20(v) the Board is to recommend the grant of concession to a public infrastructure agency in accordance with the provisions of the Act, the rules and regulations made thereunder. It is contended that when the earlier bidding process had been annulled, the action of the official respondents to pre-decide the bid in favour of M/s Rohan and Rajdeep Infrastructure (respondent No. 5) is clearly illegal and arbitrary and does not provide for fair competition amongst the bidders. It is contended that in fact the manner in the conduct of allotting the work to respondent No. 5 is not a bid but rather a contract which has been given to it. It is contended that instructions to the bidders in sub-section 2.3 of the RFP document is in total violation of the provisions of the Act as well as Article 14 of the Constitution of India. In the circumstances, it is contended that in view of an unfair competitive and pre-determined bid in favour of M/s Rohan and Rajdeep Infrastructure (respondent No. 5) the entire action of the official respondents stands vitiated.

(8) In response, Mr. G. S. Cheema, learned Senior Deputy Advocate General, Punjab appearing for the respondents No. 1 and 2 has submitted that the award of tender of work has been undertaken by the Board (respondent No. 3) and it has acted in accordance with law. It is submitted that the Government had adopted new Toll Policy and with a view to implement the same, fresh tenders were invited which contained the preferential clause in respect of respondent No.5. The same, it is contended, is legal and it, having resulted in no prejudice to the petitioner, is liable to be sustained.

(9) Mr. Puneet Bali, Advocate, learned counsel appearing for the Board (respondent No. 3) and the Corporation (respondent No. 4) has vehemently argued that the Board has acted in an utmost transparent manner and has at the very initial stage i.e. at the time of issuing the advertisement on 21st June, 2005 (Annexure-P.2) indicated all its terms and conditions. It was clearly provided that M/s Rohan and Rajdeep Infrastructure (respondent No. 5), the preferred

bidders in the earlier bidding process, shall be provided the right to match the bidder quoting the highest net toll and that the earlier bidding process stands terminated. It is contended that the same having been duly indicated resulted in no prejudice to the petitioner. It is also contended that after the bidding process, the tenders have been opened and the petitioner in any case is not the highest bidder for the work in question. In the bidding process the petitioner is at serial No. 5. The highest bid has been given by one M/s P. D. Agrawal Infrastructure Limited of annual net toll of Rs. 1152.00 lacs. The petitioner made a bid of Rs. 420.00 lacs and he is the lowest bidder. It is contended that on 18th November, 2005, M/s Rohan and Rajdeep Infrastructure (respondent No. 5) confirmed its willingness to match the financial proposal of M/s P. D. Agrawal Infrastructure. The latter has, in no way, objected to the acceptance of willingness of M/s Rohan and Rajdeep Infrastructure (respondent No. 5). Therefore, in purely contractual matters, it is contended that the petitioner has no right whatsoever. It is also contended that the petitioner cannot be said to have been prejudiced in making a bid for the tender inasmuch as he had filed the present petition on 5th September, 2005 and on 8th September, 2005 this Court while asking the State counsel to seek instructions had directed that till the next date tenders received pursuant to the subject NIT shall not be finalized. Therefore, the petitioner having approached this Court and also having obtained an order regarding finalization of the tender till the next date, was not under any sort of constraint to make a bid freely. It is also contended that the State of Punjab and the Board (respondent No. 3) are continuously loosing the concession fee of approximately Rs. 1.00 crore per month on account of non-finalization of the two operations and maintenance contract thus resulting in loss to the public exchequer besides, resulting in deterioration of the road. It is contended that the dispute is purely between two tenderers without any public interest element and, therefore, the writ petition is liable to be dismissed.

(10) Mr. Akshay Bhan, Advocate appearing for M/s Rohan and Rajdeep Infrastructure (respondent No. 5) has contended that respondent No. 5 has rightly been made the preferential bidder in view of the earlier contract between it and the Board (respondent No. 3). It is contended that on account of the change of Toll Policy, the earlier bid had to be stalled by making fresh bids for which respondent No. 5 fully co-operated and agreed for fresh bidding provided it is

given a preferential right. It is contended that the objection, if any, which can be had with regard to the bidding process can be M/s P. D. Agarwal Infrastructure Limited, which is the highest bidder and it having not raised any objection, it does not lie for a co-bidder who is even otherwise unsuccessful in the bidding process to contend that respondent No. 5 ought not to be given a preferential right. Therefore, it is contended that the writ petition merits dismissal.

(11) I have given my thoughtful consideration to the contentions of the learned counsel appearing for the parties. It may be noticed that the advertisement dated 21st June, 2005 (Annexure-P.2) issued notice inviting proposals for Toll Base Operations and Maintenance Concession for Ropar-Nawanshahr-Phagwara Highway and Jagraon-Nakodar road with high level bridges over river Sutlej. In the present case the dispute is with regard to the Ropar-Phagwara Highway. In respect of the said bidding process it was provided as follows :—

“M/s Rohan and Rajdeep Infrastructure, Ahmednagar, the preferred bidder in the earlier bidding process shall be provided the right to match the bidder quoting the highest net Toll. The earlier bidding process stands terminated.”

(12) Section 3 of the RFP document relates to ‘Instructions of Bidders’. Thereafter, is the information and instructions to bidders. It provides for general conditions and sub-section (1) relates to introduction whereas sub-section (2) relates to bidding process. Sections 2.1, 2.3 and 2.4 of the RFP document read as under :—

“2.1 Termination of Earlier Bidding Process. M/s Rohan and Rajdeep Infrastructure, Ahmednagar was the preferred bidder in the earlier bidding process. “The Government of Punjab (GOP) has notified a Toll Policy, which is applicable to all road projects to be taken up on commercial format in the state. Consequently, the earlier bidding process was annulled and PIDB is inviting proposals from interested bidders for Toll Based Operation and Maintenance Concession for Ropar-Phagwara Road Project.

2.3 M/s Rohan and Rajdeep Infrastructure Ahmednagar, the preferred bidder in the earlier bidding process shall submit a fresh proposal in response to this Request for Proposal (RFP). M/s Rohan and Rajdeep Infrastructure shall be provided the right to match the proposal of the bidder quoting the highest Net Toll and if it chooses to do so, his/their proposal shall be accepted and the award made in accordance with the provisions of this RFP. In such an event, M/s Rohan and Rajdeep Infrastructure, Ahmednagar, will deposit a sum of Rupees Ten Lakhs only with PIDB, which will be paid by PIDB to the bidder whose quote of highest Net Toll was matched by it.

2.4 PIDB on its part is ensuring that the terms and conditions of the bidding process for the project are followed and applied uniformly to all interested bidders in a non-discriminatory, transparent and objective manner. PIDB or its authorized agency shall not provide to any bidder, any such information with regard to the project or bidding process, which may have the effect of restricting competition.”

(13) The contention of the learned counsel for the petitioner is that the provisions of Sections 2.1 and 2.3 of the RFP document are anti-thesis of Section 2.4. Though at first blush this may seem so, however, when closely examined it is not made out to be as such. It is to be noted that the present petition is not a public interest litigation where the petitioner can be said to espousing a public cause. The petitioner itself is a bidder in the bidding process of the work relating to Toll Based Operation and Maintenance Concession for Ropar-Phagwara Highway. It may be noticed that earlier on 19th November, 2002 invitation for pre-qualification for tenders was advertised by the Board (respondent No. 3). In that bidding process project briefing meeting/conference was held in the office of the Board at Chandigarh on 10th December, 2002 and eight bidders participated. The proceedings of the meeting were forwarded by the Board (respondent No. 3) to the Corporation (respondent No. 4) on 13th December, 2002 (Annexure-R.3/5). On 17th January, 2003, a meeting of the pre-qualified bidders was held in which various bidders including M/s Rohan and Rajdeep Infrastructure (respondent No. 5) participated.

On the finalization of the bid a letter dated 6th March, 2003 (Annexure-R.3/6) was issued to M/s Rohan and Rajdeep Infrastructure (respondent No. 5) by the Board (respondent No. 3) informing them that it has been pre-qualified for participating in the second stage of the procurement process for selection of a Private Sector Participant (PSP) for award of a Concession Agreement with respect to Toll Based Operation and Maintenance Concession for Ropar-Phagwara Road Project and the Jagraon-Nakodar Road Project. In terms of the said letter a pre-proposal conference was to be held to provide clarifications on the written queries received from the pre-qualified bidders. On 26th April, 2003 (Annexure-R.3/10), M/s Rohan and Rajdeep Infrastructure (respondent No. 5) submitted proposal for the project and the proposal was submitted only by it. The proposal of M/s Rohan and Rajdeep Infrastructure (respondent No. 5) was accepted by the Board (respondent No. 3) on 16th September, 2003 (Annexure-R.3/11). Accordingly, respondent No. 5 was to provide performance guarantee of Rs. 100 Lacs in the form of public guarantee from a scheduled or nationalized bank approved by the grantor i.e. Department of Public Works (B&R), Punjab (respondent No. 2) within 30 days from the receipt of notice of award as per the terms of RFP document. It was also to sign Concession Agreement in the prescribed manner and in the form provided to it by the grantor. M/s Rohan and Rajdeep Infrastructure (respondent No. 5) had quoted a net toll annuity of Rs. 401.00 Lacs for the 5 years concession order of the project road. The High Powered Committee in its meeting held on 8th May, 2003 approved the selection of respondent No. 5 and the signing of the concession agreement. This was also approved by the Executive Committee and the Council of Ministers. In terms of the award of concession to respondent No. 5 in addition to the annuity of Rs. 401.00 Lacs to be paid per annum for the concession period, was also required to furnish a performance security of Rs. 100 lakhs in the form of a Bank Guarantee within 30 days from date of notice of award. Besides, a project development fee of Rs. 40 Lacs was also to be paid by them on or before the date of signing. Respondent No. 5 on 1st October, 2003 (Annexure-R.3/13) submitted performance security of Rs. 100 Lacs in the form of bank gurantee issued by the ICICI Bank and with the fulfilment of this they were ready to sign the Concession Agreement. Respondent No. 5 wrote another letter dated 17th October, 2003 (Annexure-R.3/14) requesting for signing

of the Concession Agreement at the earliest. This was followed by another letter dated 29th December, 2003 (Annexure-R.3/15). Thereafter, the Government of Punjab in the Department of Public Works (B&R-III Branch) (respondent No. 2) wrote a letter dated 2nd March, 2004 (Annexure-R.3/16) relating to the Operation and Maintenance of Ropar-Phagwara and Jagraon-Nakodar road. In the said letter, it was stated that the Toll Rates as provided in the Concession Agreement for the work of "Operation and Maintenance of Ropar-Phagwara Road and Jagraon-Nakodar Road" were different from that as provided in the Toll Policy approved by the Council of Ministers. The issue of having uniform toll rates at these corridors had also come up in a meeting held on 22nd September, 2003 at New Delhi under the Chairmanship of the Public Works Minister and also in the meeting held by the Chief Secretary on Model Concession Agreement on 11th February, 2004 wherein it had been agreed in principle to adopt the toll rates as per the Toll Policy approved by the Council of Ministers and which was being notified. The draft of the proposed notification was attached. The Board (respondent No. 3) was accordingly requested to amend its proposal as per the rates specified in the Toll Policy. In terms of the draft notification, the revised rates for toll/fee for upgraded two lane roads falling under category of State Highways/MDRs and ODR as effective from 1st January, 2004 was indicated to be as per the table mentioned therein subject to minimum charges also specified therein. The revised rates for toll/fee per km. and minimum toll/fee per km. and minimum toll/fee per trip for various kinds of vehicles was indicated. The Board (respondent No. 3) in view of the letter received from respondent No. 2 wrote to the Corporation (respondent No. 4) on 21st April, 2004 (Annexure-R.3/17) with the request to take necessary action in the matter on an immediate basis under intimation to the Board (respondent No. 3) and the Department of Public Works (B&R) (respondent No. 2). A copy was also sent to Chief Engineer, Punjab P.W.D. (B&R), Chandigarh. The Corporation (respondent No.4),—*vide* Annexure-R.3/18 enclosed a note of their assessment of the impact of the Toll Policy on Ropar-Phagwara Road and Jagraon-Nakodar Road. A detailed study of the impact of the Toll Policy for Ropar-Phagwara and Jagraon-Nakodar roads were carried out by the Corporation (respondent No. 4) in terms of Annexure-R.3.18. The Board (respondent No. 3) also wrote to the Department of Public Works (B&R) (respondent No. 2) on 24th March, 2005

(Annexure-R.3/19) indicating that in view of the changed policy, M/s Rohan and Rajdeep Infrastructure (respondent No. 5) had made an offer for an amicable settlement. In terms of the same they sought the first right of refusal in the fresh bidding process. The Chief Legal Adviser of the Board (respondent No. 3) recorded that pursuant to the examination of the matter, it had been observed that in order to avoid litigation, Court interference which may in turn adversely affect the fresh bidding process, the offer of M/s Rohan and Rajdeep Infrastructure (respondent No. 5) should be seriously considered. It was recorded that it is considered in the interest of the two road projects and the financial interest of the State that subject to approval of the Executive Committee of the Board (respondent No. 3), the first right of refusal i.e. opportunity of matching the financial bid of the highest bidder may be given to M/s Rohan and Rajdeep Infrastructure (respondent No. 5) in lieu of full and final settlement undertaking which may be sought from them. The Department of Public Works (B&R) (respondent No. 2) was requested to convey its comments in this regard.

(14) Keeping in view the afore-noticed changed circumstances, the Corporation (respondent No. 4) sent a draft advertisement (Annexure-R.3/22) for issuance of Expression of Interest for the Operation and Maintenance of Ropar-Phagwara Road and Jagraon-Nakodar Road. It was indicated that M/s Rohan and Rajdeep Infrastructure (respondent No. 5) the successful bidder in the earlier bidding process shall be provided the right to match the bid quoting the highest Net Toll. A meeting of the Board (respondent No. 3) was held on 29th April, 2005 under the Chairmanship of the Chief Minister, Punjab and decision on the same was communicated by the Board (respondent No. 3) to the Corporation (respondent No. 4),—*vide* letter dated 24th May, 2005 (Annexure-R.3/23) mentioning therein that the latter has been mandated for carrying out project development activities for re-bidding of Operation and Maintenance of Ropar-Phagwara Road and Jagraon-Nakodar Road with the time line of three months. Accordingly, steps were taken for issuance of advertisement with regard to Notice Inviting Proposals for Toll Based Operation and Maintenance Concession for Ropar-Phagwara Highway and Jagraon-Nakodar Road Project with high level bridges over Sutlej. The advertisement appeared in the Economic Times (Delhi and Mumbai editions), Hindustan Times (Chandigarh, Delhi and Mumbai editions),

Business Standard (Delhi and Chandigarh editions). In the advertisements that were issued, it was mentioned that M/s Rohan and Rajdeep Infrastructure (respondent No. 5), the preferred bidder in the earlier bidding process, shall be provided the right to match the bidder quoting the highest Net Toll. On the basis of the advertisement issued M/s Rohan and Rajdeep Infrastructure (respondent No. 5) requested for issuance of tenders for the said two roads on 27th June, 2005 (Annexure-R.3/25) alongwith necessary cash order of Rs. 5,000. The petitioner also applied for the tender and on 5th August, 2005 (Annexure-R.3/28) the Corporation (respondent No. 4) informed the petitioner that there was a proposal to organize a meeting to be held on 18th August, 2005 at New Delhi. The petitioner was requested to confirm its availability for the meeting. Besides, it was requested that any queries/comments on the RFP document package may be sent to the Corporation (respondent No. 4) and the Board (respondent No. 3) in the form of a soft and a hard copy. The petitioner on 8th August, 2005 (Annexure-R.3/29) acknowledged the RFP documents from the Board (respondent No. 3) and also gave notice of its intent to submit the proposal for the Toll Based Operation and Maintenance Concession for Ropar-Phagwara Road Project. The Corporation (respondent No. 4) on 13th August, 2005 (Annexure-R.3.30) issued a letter to the petitioner requesting for sending a hard copy and a soft copy regarding its queries pertaining to the RFP documents of the respective projects by 17th August, 2005 in order to enable the Corporation (respondent No. 4) to clarify the same during the pre-bid meeting proposed to be held on 22nd August, 2005 at New Delhi. The Corporation on 31st August, 2005 (Annexure-R.3/31) addressed a letter to all the pre-qualified interested bidder regarding various queries made by them in relation to RFP documents. Query No. 22 was in relation to the preferential treatment being given to M/s Rohan and Rajdeep Infrastructure (respondent No. 5). The objection was to the effect that with the due change in Toll Policy of Punjab Government, the bid of M/s Rohan and Rajdeep Infrastructure (respondent No. 5) had been rejected there should be no question of giving them the option on matching the offer of the highest bidder. It was further stated by way of objection that the efforts involved in preparing and submitting proposals for the work are tremendous and time consuming and, therefore, the offer to M/s Rohan and Rajdeep Infrastructure (respondent No. 5) may be withdrawn to encourage fair competition.

The clarification that was given against this was that this cannot be done as per RFP document.

(15) The admitted position is that the petitioner participated in the pre-proposal conference on 19th July, 2005 in which the terms of the RFP alongwith Notice Inviting Tender were explained to all the bidders. In those proceedings the petitioner did not raise any protest and he allowed the tendering process to continue in accordance with the terms of the advertisement dated 21st June, 2005 (Annexure-P.2). The participation of the petitioner is evident from the proceedings (Annexure-R.3/3). In the conference that was held at Delhi on 22nd August, 2005, the petitioner though attended the conference but it refused to sign the attendance sheet. After the disposal of the queries by making clarifications on 31st August, 2005 (Annexure-R.3/31), the bidding process was to start and on 5th September, 2005 which was adjourned to 8th September, 2005. On the said date i.e. 8th September, 2005 the present writ petition was taken up for hearing and a copy of the petition was supplied to the Additional Advocate General, Punjab to obtain instructions with regard to the scope and ambit of clause 2.3 of instructions to bidders contained in Section 3 of the proposal document issued for selection of private sector participant for Toll Based Operation and Maintenance Concession for Ropar-Phagwara Road Project. Besides, till the next date it was ordered that tenders received pursuant to the subject-NIT shall not be finalized. The petitioner, however, submitted the RFP including technical and financial bid without any protest with respect to the impugned clause of 12th September, 2005. On 13th September, 2005, notice of motion was issued in the case which was accepted by the respective counsel for the parties in Court. As regards the interim relief learned counsel appearing for the Board (respondent No. 3) and the Corporation (respondent No. 4) on instructions stated that till the next date, the subject tender shall not be awarded to any bidder. However, this Court permitted the official respondents to evaluate the bids and award the work to the highest bidder. The case was admitted on 5th October, 2005 and the interim order dated 8th September, 2005 was modified to the extend that the Board (respondent No. 3) shall be free to award the tender to the highest bidder which would of course be subject to the final outcome of the present petition. The Board (respondent No. 3) filed a miscellaneous application for vacating the stay which was dismissed on 21st March, 2006.

(16) During this time the result of the ranking of the bidders who had made their bid for the work in question was not available. However, the bidding process was allowed to continue and this Court had put no restriction on the award of the work to the highest bidder. In any case, the position that has come on record after the bidding process was over is the ranking of the various bidders for the two road projects. Insofar as Ropar-Phagwara Road is concerned, which is in dispute in this case and for which the petitioner had made his bid, the ranking of the bidders is as follows :—

“Ropar-Phagwara Road Project :

Sr. No.	Name of Bidder	Annual Net Toll (Rs. In lakhs)	Rank
1	M/s P. D. Agrawal Infrastructure Ltd.	1152.00	1
2	Apex International Constructions	843.00	2
3	M/s Vadii Expressway Engineers Limited CEIGAL (JV)	562.8	3
4	M/s Rohan and Rajdeep Infrastructure	501.00	4
5	M/s Kalthia Engineering and Construction Ltd.”	420.00	5

(17) The highest bidder in the case, therefore, is M/s P. D. Agrawal Infrastructure and the petitioner is the lowest. M/s Rohan and Rajdeep Infrastructure (respondent No. 5) have exercised their preferential right to match the highest bid made by M/s P. D. Agrawal and the latter has not raised any objection with regard to the offending clause 2.3 of Section 3 of the RFP document. Therefore, in the circumstances it cannot be said that any prejudice has been caused to the petitioner as at the time when he submitted the RFP including technical and financial bid on 12th September, 2005 he had the order of this Court that the bids would not be finalized till the adjourned date. The petitioner being one of the contenders and bidders for the

project in question, therefore, at this stage cannot have any grouse with regard to the award of tender of M/s Rohan and Rajdeep Infrastructure (respondent No. 5) by exercising their preferential right in terms of the advertisement dated 21st June, 2005 (Annexure-P.2) and the conditions of the RFP document. The ultimate test which is to be seen is one of prejudice and it is to be ascertained whether any prejudice has been caused to the petitioner. If it is found that a prejudice has been caused to it, the same would be required to be remedied by even setting aside the action of the respondents. However, if no prejudice has been caused or the petitioner has waived whatever right he had then the action of the official respondents is not liable to be invalidated or nullified at the behest of the petitioner, merely because the offending clause is as per his perspective not in the public interest. The work in the case which has to be given is in the nature of a commercial transaction and in the realm of a contract. The scope of exercise of jurisdiction by way of judicial review of this Court is limited in such cases. In sequence of the events as have been enumerated would show that it is due to the change in the Toll Policy that fresh tenders were required to be issued for which to save the interest of the earlier tenderer a preferential clause was provided. In case anyone was to have any grievance to the same it was M/s P. D. Agrawal Infrastructure Limited who was the highest bidder. However, it has not come forward to assail the action of the respondents. Therefore, to entertain the petition at the behest of a tenderer who is amongst the last bidder would be inappropriate specially when there is no *mala fide* or ill-intention on the part of the official respondents and neither has any been pointed out. In **Raunaq International Limited versus I.V.R. Construction Ltd. and others, (1)**, it was observed by the Supreme Court as follows :—

“When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by two tenderers may or may not be decisive in deciding whether any public interest is involved

in intervening is such a commercial transaction. It is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into *mala fide*, the Court should not intervene under Article 226 in disputes between two rival tenderers."

(18) The dispute, therefore, being between two contesting bidders, it would be inappropriate to consider or treat the present petition as if it was a public interest litigation and that too when nothing has been pointed out that the bid for the tender has been unfair or any prejudice has been caused to the petitioner. The petitioner has not shown by way of any material that had it not been for the offending clause, it would have been in a position to raise a much higher bid and even above that quoted by M/s P. D. Agrawal Infrastructure Limited who is the highest bidder. In **Air India Limited versus Cochin International Airport Ltd. and others, (2)**, after referring to various earlier judgments, it was observed by the Supreme Court as follows :—

"The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method or arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation for *bona fide* reasons, if the tender conditions permit such a relaxation."

(19) Therefore, the State having undertaken an exercise of avoiding litigation with its earlier bidder M/s Rohan and Rajdeep Infrastructure (respondent No. 5) in view of the earlier acceptance of their bid on 16th September, 2003 (Annexure-R.3/11) and in

consequence thereof accepting the bank guarantee of Rs. 100 Lacs submitted on 1st October, 2003 (Annexure-R.3/13) and at the same time implement and enforce the new Toll Policy as determined by the State Government by its decision conveyed,—*vide* letter dated 2nd March, 2004 (Annexure-R.3/16) it cannot be said that there has been any unfairness or arbitrariness on its part. The State can choose its own method to arrive at a decision. Besides, the decision as taken is shown to be reasonable and is not in any manner unfair, unreasonable or perverse which may have impelled this Court to exercise its power of judicial review to invalidate the action. In the circumstances, the contention of the learned counsel for the petitioner that public element or interest is involved which needs to be corrected by this Court in exercise of its supervisory jurisdiction under Article 226 of the Constitution of India is clearly without any basis as it has been found that the respondents have acted fairly and had indicted its intention in the terms and conditions of the advertisement dated 21st June, 2005 (Annexure-P.2) and in the RFP document for providing preferential treatment, which in the circumstances is for sound reasons. Therefore, no interference of this Court in exercise of its supervisory jurisdiction under Article 226 of the Constitution of India is warranted.

(20) For the foregoing reasons, there is no merit in this petition and the same is accordingly dismissed.

R.N.R.