

GAHC010044982023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1169/2023

ZIQUITZA HEALTH CARE LIMITED (ZHL)
HAVING ITS REGISTERED ADDRESS AT- SUNSHINE TOWER,
23RD FLOOR, SENAPATI BHAPAT MARG, DADAR WEST,
MUMBAI, MAHARASHTRA- 400013
THROUGH ITS AUTHORIZED SUMIT BASU, S/O- SWAPN KUMAR BASU,
AGED ABOUT 44 YEARS.

VERSUS

THE STATE OF ASSAM AND 8 ORS
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF ASSAM,
ANIMAL HUSBANDRY DEPARTMENT,
KHANAPARA, GUWAHATI, ASSAM.

2:THE DIRECTORATE OF ANIMAL HUSBANDRY VETERINARY
DEPARTMENT
CHENIKUTHI
GUWAHATI- 781003
ASSAM.

3:THE DIRECTOR
BID PROCESS MANAGEMENT COMMITTEE
ANIMAL HUSBANDRY AND VET. DEPTT.
DISPUR
GUWAHATI- 781006.

4:THE NODAL OFFICER ESVHD MOBILE VETERINARY UNIT
OFFICE OF THE DEPUTY DIRECTOR
ANIMAL HEALTH CENTER.

5:THE TENDER EVALUATION COMMITTEE
REPRESENTED BY THE NODAL OFFICERS

OFFICE OF THE DEPUTY DIRECTOR ANIMAL HEALTH CENTER.

6:EMRI GREEN HEALTH SERVICES
MRITYUNJOY 108
ASSAM

HEAD OFFICE LOKHRA CHARIALI

GUWAHATI- 781034
ASSAM

Linked Case : WP(C)/1842/2023

ZIQITZA HEALTH CARE LIMITED (ZHL)
HAVING ITS REGISTERED ADDRESS AT SUNSHINE TOWER
23RD FLOOR
SENAPATI BHAPAT MARG
DADAR WEST
MUMBAI
MAHARASHTRA-400013 THROUGH ITS AUTHORIZED REPRESENTATIVE
AMIT KHANDELWAL
AGED ABOUT 37 YEARS

VERSUS

THE STATE OF ASSAM AND 5 ORS
REPRESENTED BY THE SECRETARY GOVERNMENT OF ASSAM
ANIMAL HUSBANDRY DEPARTMENT
KHANAPARA
GUWAHATI
ASSAM

2:THE DIRECTORATE OF ANIMAL HUSBANDRY VETERINARY
DEPARTMENT
CHENIKUTHI
GUWAHATI-781003
ASSAM

3:THE DIRECTOR
BID PROCESS MANAGEMENT COMMITTEE
ANIMAL HUSBANDRY AND VETERINARY DEPARTMENT
DISPUR
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4:THE NODAL OFFICER
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OFFICE OF THE DEPUTY DIRECTOR ANIMAL HEALTH CENTER

5:THE TENDER EVALUATION COMMITTEE
REPRESENTED BY THE NODAL OFFICERS
OFFICE OF THE DEPUTY DIRECTOR ANIMAL HEALTH CENTER
6:EMRI GREEN HEALTH SERVICES
MRITYUNJOY 108
ASSAM HEAD OFFICE LOKHRA CHARIALI
GUWAHATI-781034
ASSAM

For the Petitioner : Mr. A.K. Bhattacharyya,
..... Senior Advocate
Ms. G. Goswami. .. Advocate

For the respondent nos.1 - 5 : Mr. D. Saikia, AG, Assam
Mr. B. Gogoi, Advocate.

For the respondent no.6 : Mr. D. Das,
..... Senior Advocate
Mr. B.D. Deka... Advocate

BEFORE

HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

JUDGMENT

Dates of hearing : 04.05.2023 & 11.05.2023
Date of Judgment : 06.06.2023

1. Heard Mr. AK Bhattacharyya, learned senior counsel assisted by Ms. G Goswami, learned counsel for the petitioner. Also heard Mr. D Saikia, learned

Advocate General, Assam assisted by Mr. B Gogoi, learned counsel for the respondent Nos. 1 to 5 and Mr. D Das, learned senior counsel assisted by Mr. BD Deka, learned counsel for the respondent No. 6.

2. The grievance of the petitioner relates to his disqualification at the time of opening of the technical bids in relation to an e-Tender Notice dated 16.12.2022 issued by the Directorate, Animal Husbandry & Veterinary Department, Assam, whereby 181 numbers of mobile veterinary units vehicles are to be put into operation for establishment of MVU-Call Centre under the centrally sponsored scheme ESVHD-MVU under Livestock Health and Disease Control Program.

3. The petitioner herein has filed 2 (two) writ petitions, i.e., WP(C) No. 1169/2023 and WP(C) No. 1842/2023 against the same respondents. The respondent Nos. 1 to 5 are the State respondents, while the respondent No. 6 is the private respondent, who had been allotted the contract work in pursuance to the e-Tender Notice dated 16.12.2022.

4. In WP(C) No. 1169/2023, the petitioner has made a challenge to the minutes of the meeting dated 14.02.2023 of the Bid Process Management Committee, whereby the technical bid of the petitioner has been declared unresponsive. He has also prayed to declare the private respondent ineligible to be considered for the contract. In WP(C) No. 1169/2023, this Court had on the first day of listing of the case, i.e. on 01.03.2023, given a stay order to the effect that no further process should be undertaken with regard to the e-Tender

Notice dated 16.12.2022 till the next returnable date. However, to the surprise of the petitioner, the contract had apparently been awarded to the respondent No. 6 earlier, vide order dated 28.02.2023 and as such, the same has been put to challenge in the later case i.e., WP(C) No. 1842/2023.

5. The petitioner's counsel submits that the minutes of the Bid Process Management Committee meeting held on 14.02.2023, for evaluation of the report of the technical bid opening, the prospective bidders were to secure a minimum of 80 marks, which was lowered to 65 marks out of 100 marks to qualify for opening the financial bids of the tenderers. The petitioner having secured 90 marks, the disqualification of the petitioner's bid at the stage of technical evaluation, by declaring the same as technically non responsive was not in consonance with the Clauses provided in the tender documents. He submits that the petitioner's technical bid was declared as unresponsive, just because the petitioner was involved in 790 litigations, which included litigations against the NHM Authority of Rajasthan, CBI, investigation by the Enforcement Directorate, besides the stopping of the petitioner's services relating to 144 Mobile Medical Units under the NHM, State Health Society, Madhya Pradesh, was unjustified and arbitrary, as the petitioner had secured the benchmark at the time of opening the technical bid.

6. The learned senior counsel for the petitioner submits that the petitioner's technical bid had been disqualified on the basis of Clause 3.2 of Section 1 (Instructions to Bidders) and Clause 4.7. He submits that the disqualification of bidders in terms of the amendment to Clause 3.2 of the Instructions to Bidders (in short "ITB") could only be made on account of blacklisting and for conviction

of an offence under the Prevention of Corruption Act, 1988, the Indian Penal Code or any other law for the time being enforced at the time of submission of the bids. In other words, the learned senior counsel submits that mere pendency of litigations cannot be a ground for disqualification under Clause 3.2 or Clause 4.7 of the ITB. The petitioner's counsel further submits that around 1,000 employees had filed various claims against the petitioner and the petitioner has secured favourable orders in more than 300 cases. He submits that in the CBI case, chargesheet has been filed. However, no charge has been framed till date. He submits that the case against the NHM, Rajasthan is with regard to non-payment of dues by the NHM, Rajasthan. He submits that though there was stoppage of Mobile Medical Units operated by the petitioner under the NHM, Madhya Pradesh, the petitioner has taken part in a subsequent tender process under the NHM, Madhya Pradesh.

7. The petitioner's counsel submits that the petitioner having disclosed all information that was required to be disclosed in terms of Clause 4.7 of the ITB, regarding the number of litigations involving the petitioner for the last 3 (three) years, there was no justification for disqualifying the petitioner's bid at the stage of opening the technical bid. He submits that the responsiveness of a bidder would have to be considered in terms of Clause 4.XXV "Bid Evaluation" of the ITB. As the petitioner's technical bid had been given the bench mark of 65 marks, by securing 90 marks out of 100 marks, and keeping in view Rule 23(16) (iv) of the Assam Public Procurement Rules, 2020, wherein it is provided that bidders securing the specified minimum percent of marks or having fulfilled specific minimum achieved norms as fixed may be considered as qualified, there was no justification for disqualifying the petitioner's technical bid. Further, Rule

23 (16) (iv) dealing with evaluation of technical bids stipulates that bidders securing the specified minimum percent of marks or having fulfilled specific minimum achievement norms, as fixed may be considered to be qualified.

8. The petitioner's counsel further submits that in terms of the Corrigendum dated 25.01.2023 issued by the Government of Assam, Directorate of Animal Husbandry & Veterinary, the parameters laid down for evaluation of marks at the stage of assessing the technical bids shows that no parameter has been laid down for reputation. As such, the disqualification of the petitioner's technical bid on the ground of it having 790 litigations, cannot be the basis for disqualifying the petitioner's technical bid. He submits that this is made clear from the Corrigendum dated 25.01.2023, wherein it is stated "*in the 2nd stage, the Bid Evaluation Committee shall open the financial bid for only those vendors, who are technically qualified and has secured 65 marks during technical evaluation*".

9. The petitioner's counsel submits that the Bid Process Management Committee has only looked into the number of litigations involving the petitioner, without considering the fact that the respondent No. 6 could not have passed scrutiny of the Bid Process Management Committee, as the respondent No. 6 was involved in insolvency proceedings in London. He submits that two companies i.e., GVK Industries Limited and GVK Power and Infrastructure Limited are presently undergoing insolvency proceedings and they are both related to EMRI Green Health Services Limited.

10. The learned senior counsel also submits that the manner in which the

contract was awarded to the respondent No. 6 on 28.02.2023 is suspect, as the minutes of the Bid Process Management Committee meeting held on 28.02.2023 shows that the financial proposal of the respondent No. 6 was moved to the office of the Principle Secretary to the Government of Assam, Animal Husbandry & Veterinary Department for perusal and necessary orders and actions. Thereafter, the Principle Secretary to the Government of Assam, Animal Husbandry & Veterinary Department instructed the Directorate, Animal Husbandry & Veterinary Department to negotiate the financial bid with the respondent No. 6. The same was apparently done by a telephonic conversation, consequent to which, the bid of the respondent No. 6 was placed before the Committee, who again had a discussion on the matter, which ultimately led to the contract being awarded to the respondent No. 6 on 28.02.2023 itself. The petitioner's counsel submits that on the date when the interim order was issued by this Court i.e., on 01.03.2023, the learned counsel for the State respondents addressed this Court on the merits of the dispute without making any mention that the contract had been awarded to the respondent No. 6. He accordingly submits that there is a serious apprehension that the award of the contract to the respondent No. 6 has been deliberately ante dated as 28.02.2023, in order to circumvent the interim order of this Court passed on 01.03.2023. The petitioner's counsel thus submits that the disqualification of the petitioner's technical bid has to be set aside and the petitioner's financial bid should be opened.

11. The learned Advocate General for the State of Assam submits that the petitioner's technical bid was not disqualified on the basis of Clause 3.2 of Section 1 of ITB. He submits that besides the parameters laid down for giving

marks to the bidders at the time of bid evaluation, other factors can be looked into by the Bid Process Management Committee, which includes Clause 4.7 of the ITB. He submits that the petitioner is involved in 790 litigations, besides having cases with the CBI and the NHM Rajasthan. The petitioner is also under investigation by the Enforcement Directorate. Further, the petitioner's services involving 144 Mobile Medical Units have been stopped by the NHM, Madhya Pradesh and it was also involved in violation of Employees Provident Fund Rules. He submits that the above factors were and can be looked into by the Bid Process Management Committee to ensure that the scheme of the State Government runs smoothly, as it is for the interest of general public. He submits that the disqualification of the petitioner's technical bid having been made on account of the above factors, which is in public interest, the decision of the Bid Process Management Committee should not be interfered with. The learned Advocate General also submits that the stopping of the mobile vehicle units of the petitioner by the NHM, Madhya Pradesh, was due to serious illegality and deficiencies found in the mobile hospital services of the petitioner. Though the same was apparently informed to the petitioner, no corrective action was taken for the same. In this regard, he has relied upon a letter dated 21.12.2020 issued by the Mission Conductor, NHM, Madhya Pradesh, Bhopal, which is annexed as Annexure-B to the affidavit-in-opposition filed by the respondent Nos. 1 to 5. He also submits that Clause 25 of the ITB, which pertains to examination of bids and determination of responsiveness, does not bar the Bid Process Management Committee from going into the other factors, besides the parameters laid down in Clause 25 of the ITB for deciding the responsiveness of a technical bid.

12. The learned Advocate General in support of his submissions, has relied

upon various judgments of the Apex Court, which are as follows:-

“(i) Siemens Public Communication Networks (P) Ltd. Vs. Union of India, reported in (2008) 16 SCC 215

(ii) Municipal Corporation, Ujjain and Another V. BVG India Limited and Others reported in (2018) 5 SCC 462

(iii) Afcons Infrastructure Ltd. V. Nagpur Metro Rail Corporation Ltd. reported in (2016) 16 SCC 818 and

(iv) Silppi Constructions Contractors V. Union of India reported in (2020) 16 SCC 489

13. The learned senior counsel for the respondent No. 6 submits that the Bid Process Management Committee has to not only evaluate the technical bids on the basis of parameters laid down in the ITB, but it would also have to see whether the tenderers are eligible, qualified and capable in all respects to perform the contract satisfactorily. Such determination will have to be based upon scrutiny and examination of all relevant data and details submitted by the tenderers in its/his tender as well as such other allied information as deemed appropriate by the procuring entity. He submits that the same has been clearly spelt out in the CVC Guidelines, particularly in Clause 5.5.1 of the Manual for Procurement of Works updated till June 2022 issued by the Government of India, Ministry of Finance, Department of Expenditure, which is as follows:-

“5.5.1 Evaluation of eligibility/qualification Criteria: Procuring Entity will determine, to its satisfaction, whether the tenderers are eligible, qualified and capable in all respects to perform the contract satisfactorily. Tenderers that do not meet the required eligibility/qualification criteria

prescribed will be treated as unresponsive and not considered further. This determination will, inter-alia, take into account the tenderer's financial technical and production capabilities for satisfying all of Procuring Entity's requirements as incorporated in the tender document. Such determination will be based upon scrutiny and examination of all relevant data and details submitted by the tenderer in its/his tender as well as such other allied information as deemed appropriate by Procuring Entity."

14. The learned counsel for the respondent No. 6 submits that the technical bids of the tenderers have to be considered on the basis of their responses as per the eligibility criteria also. The eligibility criteria would include Clause 4.7 of the ITB. As such, there is no infirmity with the disqualification of the petitioner's technical bid due to the hundreds of litigations that the petitioner is involved in, with various individuals and Authorities. He also submits that the satisfaction to be arrived at by the State respondents, as to whether the bidders satisfies the tender condition is primarily upon the authority inviting the bids. Further, as the petitioner has not taken any stand to the effect that the action of the Bid Process Management Committee was actuated by extraneous considerations or were malafide, the writ court should refrain itself from imposing its decision over the decision of the State respondents, as to whether or not to accept the technical bid of the tender. He also submits that the court does not have the expertise to examine the terms and conditions of present day economic activities of the State and this limitation should be kept in mind. In support of the above submission, the learned counsel for the respondent No. 6 has relied upon the judgment of the Apex Court in ***N.G. Projects Limited. v. Vinod Kumar Jain and Others***, reported in **2022 6 SCC 127**.

15. I have heard the learned counsels for the parties.

16. The Minutes of the Bid Process Management Committee meeting held on 14.02.2023, to evaluate the report of the technical bid opening committee shows that three bidders participated in the bidding process, pursuant to the e-tender notice dated 16.12.2022. The minimum score required for qualification in the evaluation of the technical bids of the tenderers was 65. One of the tenderers "Community Action Through Motivation Program (CAMP)" was given 75 marks during the evaluation of its technical bid. 'CAMP' was however considered technically unresponsive, as it had not submitted mandatory documents. The technical bid of the respondent No.6 was given 100 marks and was declared qualified. The petitioner who was given 90 marks, was declared technically unresponsive, due to having 790 litigations current or during the last three years, besides having litigation with the CBI, NHM authority of Rajasthan and was being investigated by the Enforcement Directorate. Further, the services of 144 mobile medical units had been stopped/suspended by the NHM, Madhya Pradesh and it was involved in violations of the Employees Provident Fund Rules. The operative portion of the Minutes of the Bid Process Management Committee meeting dated 14.02.2023 is reproduced as follows:

"Further, Committee also noted that the Bidder M/s Ziqitiza Healthcare Limited has submitted information on 790 litigations, current or during the last three years in which the bidder is involved along with the parties concerned and disputed amount out of which the information submitted were litigations against client NHM Authorities of Rajasthan to the cumulative tune of over Rs. 40 Crores, CBI and Enforcement Directorate investigation underway against the bidder and its earlier directors and also

involved in Employee Provident Fund Rules violation. Further, the bidder has also submitted information that the services of 144 Mobile Medical Unit have been stopped/suspended by the National Health Mission, State Health Society, Madhya Pradesh vide No/NHM/RT/2020-21/16695, dated 21/12/2020. The Committee therefore, unanimously decided that bidders namely, M/s Ziqitiza Healthcare Limited and M/s Commodity Action Through Motivation Programme "CAMP" are considered technically non-responsive."

The official records states that the decision not to open the financial bid of the petitioner is due to the petitioner having "serious errors" in the bidding documents, which pertains to the above reason.

17. As can be seen from the facts stated in the foregoing paragraphs, the issue to be decided boils down to whether the technical evaluation committee could have disqualified the petitioner's technical bid, on the ground that it had 790 litigations, even though the petitioner had been given 90 marks out of 100 i.e., beyond the bench mark of 65 marks. The further question that has to be answered is as to whether Clause 4.7 of the ITB can be a ground for disqualifying the petitioner's technical bid, though the same was not one of the parameters provided for awarding of marks during evaluation of the technical bids, vide the Corrigendum dated 25.01.2023, issued by the Govt. of Assam, Directorate of Animal Husbandry & Veterinary Department.

18. Before deciding the said issues, it would be helpful if the Clauses in the ITB relied upon by the parties is reproduced herein below. The amended Clause 3.2 of Section 1 of the ITB is reproduced below as follows:-

“Section 1, Clause 3.2: Bidder need to submit undertaking that he was not blacklisted and nor has been convicted of an offence under the Prevention of Corruption Act 1988, or the Indian Penal Code or any other law for the time being in force at the time of submission of Bid.”

19. Section 1 Clause 4 of the ITB, comprising of Sub-Clause 4.1 to 4.10 is reproduced below as follows:

“4.1 Copies of Original documents defining the constitution or legal status, place of registration, and principal place of business; written power of attorney of the signatory of the Bid to commit the bidder;

4.2 At least 1 year of experience in operation of mobile health units. The prospective bidders (as a prime agency) shall have satisfactorily completed/executed similar nature of work for the tenure of at least 1 year during last 3 Financial years.;

4.3 Reports on the financial standing of the Bidder, such as profit and loss statements and auditor's reports for the past three years;

4.4 Evidence of access to line (s) of credit and availability of other financial Resources facilities (10% of Contract Value), certified by the Bankers (Not more than 3 Months old);

4.5 Undertaking that the bidder will be able to invest a minimum cash of 35% of contract value of work, during implementation of the work;

4.6 Authority to seek references from the Bidder's Bankers;

4.7 Information regarding any litigation, current or during the last three years in which the Bidder is involved, the parties concerned, and disputed amount;

4.8 Bids from Joint ventures are not acceptable.

4.9 To qualify for award of the contract, each bidder in its name should have in the last three years as referred to in Appendix.

4.9. (a) Achieved an average financial turnover (defined as a billing for service in progress and completed over the last 3 years.

4.9. (b) Satisfactorily completed/ continuing at least one similar service of value not less than 25% of this bid value.

4.10. Made misleading or false representations in the forms, statements and attachments submitted in proof of the qualification requirements treated as disqualification for award of work."

20. Section 4, Clause XXI, XXV, XXVI and XXX are reproduced below:

“4.XXI.METHOD OF PREPARATION OF BID:

a. TECHNICAL BID is mainly focused on profile, competency, willingness, experience, financial soundness, reputation, using modern communication tools, Bank support etc. Bidder/s is/are requested to fill the required information and upload supporting document as and where required. Please upload only relevant documents as desired.

b. FINANCIAL BID: The bidder needs to quote wages, Statutory deductions and Administrative/Supervisory Charges as a package.

c. The Bidder will be required to unit wages as per statutory norm.

d. The bidder shall be responsible for providing all statutory benefit to the personnel employed by him like statutory deductions as applicable.

e. Any tender with conditions other than those specified in the tender document, is liable to be summarily rejected. No modification by the bidder in any of the conditions will be permitted after the tender is opened.

4.XXV. BID EVALUATION

Prior to the detailed evaluation of Technical and Financial bids the Tendering authority will determine the substantial responsiveness of each bid.

Substantially responsive bid is one which conforms to all the terms and conditions of bid document without material deviation. The determination of bid's responsiveness shall be based on the contents of the bid itself without recourse to extrinsic evidence.

A bid determined as substantially non-responsive will be rejected by the Tendering authority and shall not subsequent to the bid opening be made responsive by the bidder by correction of the non- conformity. However, the Tendering Authority may waive any minor infirmity or nonconformity or irregularity in a bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any bidder.

The financial bids of those bidders whose technical bid has been satisfactorily evaluated and found substantially responsive meeting all the eligibility criteria's and on the basis of acquiring minimum technical score of 80% will be opened subsequently after due notice.

4.XXVI. EVALUATION AND SELECTION PROCESS

a. *The Tendering authority will constitute a Tender Opening Committee to evaluate the responses of the Bidders.*

b. *The Tender Opening Committee shall evaluate the Technical Bids on the basis of their responsiveness as per the Eligibility criteria.*

c. *Only those bidders who qualify as per the Eligibility Criteria and technical evaluation (minimum 80 marks) will qualify for the financial evaluation.*

d. *A bid shall be rejected at this stage if minimum technical score 80% not fulfilled by bidder.*

e. *After opening of Financial Bid for per unit package cost including all statutory deductions as per Section IV and also the charges included in package against Other Administrative expenses will include technology cost, administrative cost, payroll processing and supervisory charges. If the Tender Opening Committee found under estimation of the other charges where charges included against other Administrative Expenses are found unjustifiable, the bid will be treated as non-responsive.*

f. *In case of more than one successful bidder the tender may be split proportionately among the successful bidders. The decision of the Tendering*

Authority in this regard shall be final and binding.

4.XXX. RIGHT TO ACCEPT OR REJECT ANY BID

Bid will be accepted and evaluated only those of the Bidder(s), who in the opinion of the Tendering Authority shall have capacity and resources to execute the services in the prescribed time as per the time schedule. The Tendering Authority reserves the right to accept or reject any bid and to annul the bidding process, and reject all or any bid at any time prior to award of contract, without assigning any reason thereof. Tendering Authority does not bind himself to accept the lowest tender and reserve the right to reject any or all tenders.

The right to accept any portion of the tender offered without assigning any reason and he can also reduce the period of contract without assigning any reason as per prevailing circumstances. The Tendering Authority may extend the contract for a period of 3 months at a time for a maximum of 6 months with mutual consent."

21. The amended Clause 3.2 of Section 1 of the ITB requires a bidder to submit an undertaking that he was not blacklisted nor convicted of an offence under the provision of Corruption Act, 1988 or the Indian Penal Code or any other law from the time being in force at the time of submission of Bid. The petitioner's case clearly does not attract the amended clause of Section 1 of the ITB and as such, the same could not be a ground to disqualify the petitioner's technical bid.

22. Section 1 Clause 4 speaks about the qualification of the bidder and the information and documents that have to be included by the tenderers in their bids. Clause 4.7 requires the bidders to submit information regarding litigation, current or during the last three years in which the tenderer is involved, the parties concerned and disputed amount. The information to be furnished by the bidders under Clause 4.7 of Section 1 of the ITB cannot be said to be immaterial

information which can be ignored, as that can have a bearing on the profile and reputation of a bidder. Clause 4.7 being a part of the information required from tenderers, which is relatable to the qualification of a bidder, the same, in the opinion of this Court can be considered by the technical evaluation committee, as the same relates to Clause 4.XXI(a) of the ITB. The said information cannot be ignored by authorities. The stand of the petitioner's counsel that the State respondents could not disqualify the petitioner's technical bid on the basis of Clause 4.7, so long as the bidder has supplied all the current information in terms of the said clause is not acceptable for various reasons. The same will have to be considered by the State respondents. For example, if litigation involving any of the bidders pertains to fraud, forgery, cheating etc., common sense would dictate that the same should be considered by the authorities, to decide as to whether it would be prudent for the authorities to qualify such a tenderer for giving a contract, which would be in public interest. Giving of information by a tenderer under Clause 4.7 does not lose its relevance on the submission of information regarding the various litigations involving the tenderer. The same has a practical purpose and can be deemed appropriate/used by the authorities to consider whether it would be prudent to allow the bid of such a tenderer to continue in the tender process. In the present case, there appears to be a valid apprehension with regard to the involvement of the respondent No. 6 in various litigations and actions with various authorities, as the same thing can befall them.

23. The parameters laid down by the Corrigendum dated 25.01.2023 for awarding marks to the technical bids of the tenderers is as follows:-

“Marks for evaluating Technical Proposal (Evaluation to be done only for pre-qualified bidders)”

Sl.	Parameter	Maximum Marks
1	Bidder should have experience of operating Mobile Veterinary/ Health units/ambulances in Public Private Partnership Projects up to 25 Mobile Veterinary/ Health units/ambulances - 5 marks 26-50 Mobile Veterinary/ Health units/ambulances 10 marks 51-75 Mobile Veterinary/ Health units/ambulances - 15 marks > 75 Mobile Veterinary/Health units/ambulances - 20 marks	20
2	Years of Expenence of operating minimum 25 Mobile Veterinary/ Health units/ambulances in Public Private Partnership Projects Up to 1 year - 05 marks 1-2 years – 10 marks 2-3 years – 15 marks 3-5 years – 20 marks >5 years – 25 marks	25
3	Experience of operating Veterinary / Health Call Center with Computer Aided Dispatch (CAD) and Caller Telephony/integration (CTI) Features (5 marks for each state operated up to maximum 20 marks) 1 state- 5 marks 2 state – 10 marks 3 state – 15 marks >3 state – 20 marks	20
4	Average Annual Turnover in Crore in of last three financial year. (I.e., FY 2020-21 2021-22 & 2021-22) Up to 30 cr – 5 Marks Above 30 cr – 10 Marks	10

5	Liquidity amount Up to 30.00 Cr. – 5 Marks	10
	Above 30.00 Cr. – 10 Marks	
6	ICT Based attendance system If owned – 5 marks	5
	Third Party – 2 Marks	
7	Experience in operation of Mobile health units 130 vehicles in any state -5 marks. For additional 50 Mobile each Max 5 marks	10
	Total Marks	100

24. A perusal of the parameters laid down for awarding marks in the Corrigendum dated 25.01.2023 shows that it does not have any parameter relating to reputation or litigation that a tenderer might be involved in. As such, it appears that no other parameter is to be considered except for the ones provided in the corrigendum. However, as Clause 4.7 requires tenderers to submit information regarding litigations involving them, it is natural for the technical evaluation committee to consider the said information. The issue is whether the said information provided in Clause 4.7 of the ITB can be applied for disqualifying the petitioner at the stage of opening of the technical bid. Clause 4.XXI (a) provides that technical bid is mainly focused on profile, competency, willingness, experience, financial soundness, reputation, using modern communication tools, bank support etc. Clause 4.XXV provides for determining substantial responsiveness of each bid, prior to the detailed evaluation of technical and financial bids. In other words, substantially responsive bid is one which conforms to all the terms and conditions of bid

document material deviation. Clause 4.XXVI provides that tender opening committee shall evaluate the technical bids on the basis of the responsiveness as per the eligibility criteria. Clause 4.XXX provides that the tendering authority at his sole discretion shall reserve the right to reject or cancel any bid without assigning any reason thereof. However, in the present case, the tendering authority has given reasons for rejection of the petitioner's technical bid.

25. Keeping in view Clause 4.XXI(a) of the ITB and the CVC guidelines, as spelt out in Clause 5.5.1 that the procuring entity will determine to its satisfaction whether tenderers are eligible, qualified and capable in all respects to perform their contracts satisfactorily, this Court is of the view that information provided under Clause 4.7 of Section 1 of the ITB can be considered by the respondents for declaring a bid to be unresponsive. The satisfaction required under Clause 5.5.1 relates to the satisfaction of the procuring entity and not the satisfaction of the supplying entity/contractor. Clause 5.5.1 also provides that the determination to be made by the procuring entity with regard to eligibility, qualification and capability of a tenderer should be based upon scrutiny and examination of all relevant data and details submitted by a tenderer, and as such other allied information as deemed appropriate by the procuring entity. Thus, in the view of this Court, even though the parameters for providing marks as per the Corrigendum dated 25.01.2023 does not have any parameter relating to reputation or litigation, the information provided under Clause 4.7 is an allied information which can be considered by the procuring entity, to determine the eligibility, capability and qualification of a tenderer.

26. The issue that arises is as to whether the said allied information regarding the number of litigations involving the petitioner can be considered at

the stage of opening of technical bids. The information provided under Clause 4.7 can be taken into consideration at the time of evaluation of the technical bid or at the stage of the opening of the financial bid or even thereafter i.e., during the final selection of the successful tenderer. Assuming the said information cannot be considered at the stage of opening the technical bids due to there being no parameter provided for the same, the tenderer would then take a stand that at the time of opening the financial bid, only the financial aspect of the bid has to be considered. Thereafter, the tenderer would take the stand that the selection has to be done only on the basis of the evaluation made at the time of opening of the technical and financial bids. In that eventuality, the State would not have the occasion to consider any allied information, not provided in the parameters. This, in the opinion of the Court would render any information provided under Clause 4.7 redundant. The same could not have been the object of Clause 4.7, which relates to Clause 4.XXI(a). Thus, on considering the above facts, this Court is of the view that there is no infirmity with the Bid Process Management Committee in deciding the technical bid of the petitioner on the basis of the parameters laid down in the Corrigendum dated 25.01.2023 and the said allied information provided in terms of Clause 4.7 of the ITB.

27. The Scheme being made in public interest, it is of no surprise that the involvement of the petitioner in the sheer number of litigations has made the Bid Process Management Committee baulk in having any dealing with them. The State respondents have every right to worry and have apprehensions with regard to the above. The petitioner in his pleadings has stated that chargesheet has been filed by the CBI by trying to criminalized contractual matter and that chargesheet has not been framed till date. Further, two execution petitions have been filed against the NHM, Rajasthan to the tune of Rs. 18.18 Crores based on

the arbitration award and that the arbitration proceeding is being initiated by the petitioner to the tune of Rs. 35 Crores against the NHM, Rajasthan. Further, the case of the petitioner is that though enforcement directorate vide provisional order dated 31.03.2017 had attached the immovable property of the petitioner and fixed deposits, totalling an amount of Rs. 11.5 crores, the appellate tribunal (under PMLA) on 12.09.2019 had released all attachments and directed to secure to the extent of Rs. 62.75 lakhs equal to the amount mentioned in the CBI chargesheet. In compliance of the order of the appellate tribunal, the petitioner has deposited a fixed deposit of Rs. 62.75 lakhs with the enforcement director.

28. With regard to the petitioner's apprehension that the award of the contract to the respondent No. 6 had been ante dated, the same is speculative and needs to be proved. With regard to the petitioners stand that there are insolvency proceedings in relation to GVK Industries Limited and GVK Power and Infrastructure Limited, which are related to the respondent No. 6, this Court is of the view that the respondent No. 6, which is EMRI Green Health Services Limited, being a different entity altogether from the above two companies, there is no infirmity in the State respondents not taking any decision against the respondent No. 6. Besides, Clause 2.1.2 states that a bidder must be a firm vis Private Limited Company, Public Limited Company, Unlimited Company, Limited Liability Partnership, Sole Proprietorship, Trust, NGO etc. As such, even if a Director of the petitioner company had been a director in the other two companies mentioned above, there was no infirmity with the petitioner submitting its tender. Though the petitioner's counsel has tried to justify the various litigations that it is involved in, the fact remains that there are a huge number of litigations that the petitioner is involved in and due to which there

appears to be an apprehension on the part of the State respondents that it would be involved in litigation if the contract is ultimately awarded to the petitioner.

29. Rule 23(16)(iv) of the Assam Public Procurement Act, 2020 (hereinafter referred to as the "2020 Act") is reproduced herein below:-

“Bidders securing the specified minimum percent of marks or having fulfilled specific minimum achievement norms as fixed may be considered as qualified”.

As stated earlier, the petitioner had secured more marks than the bench mark of 65, at the stage of opening the technical bids, as per the parameters laid down in the Corrigendum dated 25.01.2023. However, the said clause has used the word “may”, which in the opinion of the Court does not bar the State respondents from looking into and considering other allied information asked for from all the tenderers for considering whether a technical bid of a tenderer should be declared as responsive or unresponsive.

In the case of ***Siemens Public Communication Networks (P) Ltd. Vs. Union of India*** (supra) the Apex Court has held that when the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bonafide and is in public interest, Courts will 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.

In the case of ***Municipal Corporation, Ujjain and Another V. BVG India Limited and Others*** (supra) the Apex Court has held that the power of judicial review will not be permitted to be invoked to protect private interest by ignoring public interest. The exercise of the power of judicial review should be avoided if there is no irrationality or arbitrariness.

In the case of ***Afcons Infrastructure Ltd. V. Nagpur Metro Rail Corporation Ltd.*** (supra) the Apex Court has held that a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met, before the constitutional Court interferes with the decision making process or the decision. In the above case, the Apex Court has held that the owner or the employer of a project, having authored the tendered documents, is the best person to understand and appreciate it's requirements and interpret it's documents. The Constitutional Courts must defer to this understanding and appreciation of the tendered documents, unless there is malafide or perversity in the understanding or appreciation or in the application of the terms of the tendered documents.

30. In the case of ***Silppi Constructions Contractors V. Union of India*** (supra), the Apex Court has held that while rejecting the tender, the authority inviting the tenders is not required to give reasons even if it be a state within the meaning of [Article 12](#) of the Constitution. These decisions are neither judicial nor quasijudicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must

be given sufficient leeway in this regard. The Apex Court further stated that essence of the law laid down in various judgments of the Apex Courts is the exercise of restraint and caution and the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities. The courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable. It further held that the Court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

31. In the case of ***N.G. Projects Limited. v. Vinod Kumar Jain And Others*** (supra), the Apex Court has held that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the bids.

32. On perusing the terms and conditions of the tender notice, there is nothing to show that the same has been tailor made to suit a particular tender. The authority selecting the successful tenderer would require to see whether the tenderers have the capacity in all respects, to perform the tender requirements with integrity and reliability, in terms of the various clauses enumerated in the tender notice. In effect, the authority would have to satisfy itself that the selected entity would ensure that there is good performance of

the contract work in question. In this particular case, the State respondents appear to have an apprehension that the contract will not be performed satisfactory by the petitioner and instead will be saddled with litigation/s, due to various litigations that the petitioner is involved in. Though the minimum requirements for consideration in the Corrigendum dated 25.01.2023 appear to have been met by the petitioner, the same in the opinion of this Court, does not restrict the State respondents from considering the information provided in Clause 4.7 of the ITB at the stage of opening of the technical bid, as the same can also be a determinative factor to be considered by the State respondents. In the case of ***Ramana Dayaram Shetty vs. International Airport Authority of India***, reported in ***(1979) 3 SCC 489***, the Apex Court has held that the terms of an NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance.

33. In the Case of ***Tata Cellular vs. Union of India***, reported in ***(1994) 6 SCC 651***, the Apex Court has held that there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned, but the decision-making process can certainly be subject to judicial review.

34. In the cases of ***Jagdish Mandal vs. State of Orissa***, reported in ***(2007) 14 SCC 517*** and ***Michigan Rubber (India) Limited vs. State of Karnataka***, reported in ***(2012) 8 SCC 216***, the Apex Court has held that the soundness of the decision may be questioned, if it is irrational or malafide or intended to favour someone or a decision that no responsible authority acting reasonably and in accordance with relevant law could have reached.

35. In ***Jagdish Mandal (supra)***, the Apex Court further held that

evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bonafide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest. It further held that the Court before interfering in tender matters in exercise of power of judicial review, should pose to itself the following questions:

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

or

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

(ii) Whether public interest is affected.

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

36 On considering the facts of this case, this Court is of the view that there was no malafides involved or intention to favour the respondent no.6 with the contract. Further, public interest has not been affected by the impugned decision of the State respondents. In view of the reasons given in the foregoing paragraphs, this Court does not find any irrationality, arbitrariness, malafides or perversity in disqualifying the petitioner’s technical bid on the ground of the huge number of litigations that the petitioner is involved in. Thus, keeping in

view the judgments of the Apex Court referred to above and the reasons given in the foregoing paragraphs, this Court is not inclined to interfere with the disqualification of the petitioner's technical bid. The writ petitions are accordingly dismissed.

JUDGE

Comparing Assistant