

GAHC010080092023



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

Case No. : WP(C)/2049/2023

HINDUSTAN LATEX FAMILY PLANNING PROMOTION TRUST
THROUGH ITS AUTHORIZED SIGNATORY AWANISH AWASTHI, HAVING ITS
CORPORATE OFFICE AT B-14A, IIND FLOOR, SECTOR-62, NOIDA- 201307,
UTTAR PRADESH.

VERSUS

THE STATE OF ASSAM AND 3 ORS.
THROUGH HEALTH AND FAMILY WELFARE DEPARTMENT, GOVERNMENT
OF ASSAM, DISPUR, GUWAHATI-781006.

2:THE NATIONAL HEALTH MISSION
ASSAM
REPRESENTED BY THE MISSION DIRECTOR
HAVING ITS OFFICE AT SAIKIA COMMERCIAL COMPLEX
SRI NAGAR PATH
NEAR POST OFFICE BUS STAND
G.S. ROAD
CHRISTIANBASTI
GUWAHATI-781005.

3:THE MISSION DIRECTOR

NATIONAL HEALTH MISSION (NHM)
OFFICE OF THE MISSION DIRECTOR
SAIKIA COMMERCIAL COMPLEX
SRINAGAR PATH
CHRISTIANBASTI
G.S. ROAD
GUWAHATI-781005
ASSAM

4:THE COMMUNITY ACTION THROUGH MOTIVATION PROGRAMME-
CAMP

REPRESENTED BY ITS PRESIDENT
F-106
GARDEN RESIDENCY
CHUNA BHATTI
BHOPAL
MADHYA PRADESH-462016

Advocate for the Petitioner : MR. B D KONWAR SR. ADV.

Advocate for the Respondent : SC, HEALTH

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

04.05.2023.

Judgment & Order

The extraordinary jurisdiction of this Court, conferred by Article 226 of the Constitution of India, is sought to be invoked by the petitioner, who has put to challenge the decision of the authorities pertaining to a tender process for operation of Mobile Medical Units (MMU) in the State of Assam. The challenge is with regard to the eligibility of the private respondent No. 4 as well as on the ground that the difference in price is minimal and taking into account the past experience of the petitioner, the petitioner should be given preference.

2. Before going to issue which is required to be adjudicated, the brief facts of the case can be put in the following manner.

3. The petitioner is a Health Services Organization which is registered under the Societies Registration Act. The petitioner claims to be promoted by HLL Life Care Limited which is a mini Ratna PSU under the Ministry of Health and Family Welfare, Government of India. The petitioner claims to be operating as a non-profit making unit

at the national level and is actively providing primary and selective secondary healthcare services in the various districts of Assam.

4. The petitioner has projected that on 07.01.2017, a Service Level Agreement was entered into between the petitioner and the respondent no. 2 to operate Mobile Medical Units (MMU). Such units were to act as mobile clinics to provide primary and selected secondary healthcare services in the entire State. The period for the services was five years which was to expire on 06.01.2022. However, there was a clause for extension for another period of three years which, according to the petitioners, would be up to 06.01.2025.

5. In terms of the clause for extension of the contract, which was entered into with the petitioner, a communication was issued on 09.09.2022 by the respondent no. 2 informing the petitioner that the agreement was extended by one year starting from 07.01.2022, to 06.01.2023, as per Clause 17.1 of the Service Level Agreement. Subsequent to such communication, an Addendum MOU was signed between the parties.

6. It is the case of the petitioner that while such agreement was in force, on 01.10.2022, the respondent no. 2 had issued a notice, inviting Tender to maintain and operate Mobile Medical Units in the State of Assam to provide primary and selected secondary healthcare services.

Though the aforesaid action was not acceptable to the petitioner, the petitioner decided to participate in the Tender process pursuant to the aforesaid notice dated 01.10.2022. Meanwhile, the petitioner continued to provide the services in terms of the Addendum MOU and communication dated 09.09.2022. In fact, the petitioner had issued communications dated 12.10.2022 and 28.10.2022 to the respondent no. 2 for further extension of one year as the MOU was to expire on 07.01.2023. In response to the aforesaid communication, the petitioner claims that vide communication dated

27.12.2022, the respondent no. 2 had extended the Service Level Agreement till 31.03.2023, which was further extended till 30.06.2023 vide letter dated 23.03.2023.

7. The technical bids were evaluated by the respondent no.2 on 07.01.2023 wherein, three bidders, including the petitioner and the respondent no. 4 was found to be eligible. On 10.01.2023, the financial bids were evaluated and the respondent no. 4 had emerged as the lowest bidder (L1).

8. It is the case of the petitioner that the respondent no. 4 could not have been declared to be eligible in the technical evaluation itself, inasmuch as, it did not have the required experience and qualification as stated in Sections III and IV of the Tender documents. The petitioner contends that since the respondent no. 4 was not eligible as it did not fulfill the requisite criteria, the respondent authorities ought not to have gone ahead with the financial bid of the said respondent no. 4.

The petitioner further submits that if the petitioner is not allotted the job in question, it will suffer huge loss of approximately Rs.60 crores.

9. On the other hand, as per the respondent authorities, the entire basis of the challenge is a non-existing one and is based on surmises and conjectures. It is projected that the challenge is based on the presumption that the respondent no. 4 did not meet certain eligibility criteria which, actually is a wrong presumption. As per the respondent authorities, all the eligibility criteria were fulfilled by the respondent no. 4 before making it eligible to be considered for financial evaluation in which the respondent no. 4 stole a march over the bid of the petitioner. It has further been contended on behalf of the authorities that though the projection has been made that the difference between the bid of the petitioner and the respondent no. 4 is minimal, the said projection is also not correct as the difference is shown on a monthly basis whereas the contract is for a period of five years and the difference would be a huge one amounting to more than Rs.3 crores.

10. I have heard Sri BD Konwar, learned Senior Counsel assisted by Shri J Singh, learned counsel for the petitioner. I have also heard Shri B Gogoi, the Standing Counsel, National Health Mission (NHM) for the respondent authorities whereas Ms. A Verma and Shri KP Pathak, learned counsel have appeared for the respondent no. 4. Shri Gogoi, the learned counsel for the NHM has also produced the records of the case in original which have been duly perused.

11. Shri Konwar, learned Senior Counsel for the petitioner submits that the entire decision to go for a fresh Tender process during the subsistence of the earlier contract with the petitioner is itself unsustainable in law, as the same has infringed the right of the petitioner to complete the term, more so when there was no complaint in the performance of the petitioner in providing the services of MMU. The learned Senior Counsel submits that in the meeting of the State Level Steering Committee for review of MMU performance held on 08.11.2021, a proposal was given for extension of the ongoing contract with the petitioner by three years. In fact on 04.02.2022, a meeting was held between the authorities and the petitioner on the issue of extension. By referring to the communication vide email dated 23.02.2022, the aforesaid decision was conveyed to the petitioner. On 24.02.2022, the proposal was accepted by the petitioner. Shri Konwar, learned Senior Counsel, however, submits that the pattern of extension was altered to the effect that the extension would initially be for one year from 07.01.2020 to 06.01.2023 as per clause 17.1 of the previous Service Level Agreement which was conveyed vide letter dated 09.09.2022. Thereafter, an Addendum MOU was entered into by the parties on the issue of the extension up to 06.01.2023.

12. The learned Senior Counsel for the petitioner, Shri Konwar, however, projects that while the aforesaid arrangement was in subsistence, a Notice Inviting Tender (e-Tender) was published on 01.10.2022. Shri Konwar, learned Senior Counsel submits that though the decision was against the interest of the petitioner, it had decided to

participate in the said tender process. By drawing the attention of this court to Section III of the Tender document, the learned Senior for the petitioner has submitted that the said provision is in connection with the procedures of evaluation of bids. He submits that the eligibility criteria were mentioned in Section V and a bidder must obtain 15 marks on the given technical criteria which were three in numbers. The first criterion was with regard to experience of the bidders in implementing similar project of MMU/ambulance service at community level. The second criterion was with regard to the numbers of MMU/ambulances being operated in States in the last five years. The third criterion was with regard to the quality of skilled human resources in the provided MMU/ambulance service. Reference has also been made to Section V of the Tender document with regard to the eligibility criteria. Amongst others, the bidder was required to have at least three years experience in providing medical care at community level.

13. Drawing the attention of this court to Appendix A, which is a format of the appendices pertaining to the respondent no. 4, the learned Senior Counsel for the petitioner has submitted that the same would reveal that the said respondent no. 4 had 25 numbers of MMU in Operation and Management of Mobile Medical Unit with regard to an order dated 05.07.2018 pertaining to the State of Orissa and another 7 numbers of MMU pertaining to an order dated 29.03.2017 again for the State of Orissa. Though in Sl. No. 8, 17 numbers of MMU have been mentioned, those are pertaining to a project which has been already completed, and therefore, as per the petitioner, the said numbers of MMUs are not liable to be counted. He submits that even if the numbers of MMUs of the completed project are taken into account, the total number of MMUs of the respondent no. 4 is 49 whereas the requirement is 130 MMUs.

14. The learned Senior Counsel for the petitioner has also referred to certain clarifications given with regard to the eligibility criterion no. 6 under Section V in

which, it has been stated that there is no requirement of the experience of ambulance service. The aforesaid submission has been made to buttress the submission that the requirement is of MMUs and therefore the experience has to be in connection with such MMUs.

The learned Senior Counsel has also referred to the evaluation sheet regarding to the technical bids and has submitted that while the petitioner had scored 30 marks, the respondent no. 4 has secured 24 marks. He submits that the petitioner has 130 nos. of MMUs whereas the respondent no. 4 has got 49 nos. of MMUs which is much below the requirement and this aspect of this matter has been totally overlooked by the respondent authorities.

15. The learned Senior Counsel for the petitioner submits that even in the price bid, while the rate quoted by the petitioner is Rs.13,750/-, the rate of the respondent no. 4 is Rs.13,485/- which has been declared as L1. He submits that that the difference of price being minimal, it is the experience and fulfillment of all the criteria by the petitioner which has to be taken into consideration and selecting the respondent no. 4 to be eligible is against the conditions of the Tender. The learned Senior Counsel for the petitioner, accordingly submits that this Court in exercise of powers under Article 226 of the Constitution of India should interfere and direct consideration of the case of the petitioner for allotment of the work in question. The probable loss which could be caused to the petitioner in case of non-allotment of the work and also discontinuation of earlier contract has also been highlighted.

16. On the other hand, Shri D Gogoi, learned Standing Counsel NHM questions the maintainability of this writ petition. He submits that in paragraph 45 of the writ petition, the petitioner has admitted regarding the award of the contract in hand. The learned Standing Counsel has also drawn the attention of this Court to the prayer made in the writ petition and submits that the prayers are only with regard to quashing of the Tender process and to grant extension. He submits that there is no

specific challenge to the Letter of Acceptance awarded in favour of the respondent no. 4. He submits that in view of such facts and circumstances, the present is not a fit case even for consideration and on the ground of maintainability itself, the writ petition is liable to be dismissed.

17. Shri Gogoi, learned Standing Counsel further submits that even on merits, the projection made by the petitioner and the grounds of challenge are absolutely untenable in law. By drawing attention of this Court to the chart which has been prepared for technical evaluation, the learned Standing Counsel submits that the marks secured by respondent no. 4 is 24 which is more than the qualifying marks and therefore, there is no reason as to why the respondent no. 4 should not be declared to be technically qualified. He submits that the very basis on the part of the petitioner in asserting that the requirement is in terms of possessing MMU, which, as per the petitioner, is 80 or more, is absolutely without any basis as there is no such term in the NIT. By drawing the attention of this Court to Section V of the Tender document, he submits that the eligibility criteria has been laid down in the said Section, as per which, the projection made by the petitioner with regard to possessing certain numbers of MMU is not at all there in the said criteria. On the other hand, the primary criterion is to have at least three years experience in providing medical care at community level. The other criteria are also fulfilled by the respondent no. 4 and therefore, the bid of the respondent no. 4 was taken up for consideration at the level of financial evaluation. He further submits that the projection made with regard to the minimal difference in the price quoted is also not correct, inasmuch as the price projected by the petitioner is on a monthly basis whereas the actual difference would be about Rs. 3 crores. He, therefore, submits that the interest of public is also against the petitioner. Shri Gogoi, the learned Standing Counsel, however, submits that though the Letter of Acceptance was already issued prior to any orders passed by this Court, honouring the Court's order, though the petitioner has submitted the filled up agreement, the same is yet to be executed by the authorities.

18. Shri Pathak, learned counsel for the respondent no. 4 also raises a preliminary issue questioning the maintainability of the writ petition. Endorsing the submission made by the learned Standing Counsel, NHM, Shri Pathak, learned counsel submits that the present challenge is a belated one and admittedly, the LOA has already been issued and the performance guarantee has also been given in the meantime, by the respondent no. 4. Shri Pathak, learned counsel for the respondent no. 4 submits that the projection regarding the number of MMUs is absolutely without any basis and reference to the queries and the clarification made are also not pertaining to the petitioner. Drawing the attention of this Court to the clarification, which has been relied upon by the petitioner, Shri Pathak, learned counsel submits that the requirement of 130 numbers of MMUs has been replied to on a query made by another bidder. He submits that in any case, the same requirement is not a part of the eligibility criterion. Similarly, he submits that the contention made regarding the experience of ambulance service is also on a query made by another bidder, namely Modern Emergency Services. It is the submission of the learned counsel for the respondent no. 4 that though certain clauses have been modified, the same do not touch the eligibility criterion and therefore, the modification has got nothing to do with the merits of the present challenge. He submits that as per Corrigendum 2, the only change in Section VI of the Tender document is removal of the requirement of performance security. He submits that the challenge has been made only after opening of the financial bids and on realizing that the petitioner was the L1. He submits that the petitioner took a chance and therefore, his challenge made, at this stage, is not liable to be considered.

19. With regard to the so-called minimal difference, as projected on behalf of the petitioner, as Rs. 265/-, the same is not correct, as the difference is being calculated on a monthly basis and as has been pointed above, the actual difference would be more than Rs.3,00,00,000/-.

The learned counsel for the respondent no. 4, Shri Pathak, accordingly submits that the present challenge is absolutely untenable in law and accordingly, the writ petition is liable to be dismissed.

20. Rejoining his submission, Shri Konwar, learned Senior Counsel for the petitioner submits that though the respondent no. 4 may be possessing ambulances, there is a huge difference between MMU and ambulance. He submits that while an ambulance is meant to bring the patient to the hospital, the function of an MMU used to reach out to the patient and administer the treatment. In other words, the MMU is a kind of a mini hospital which is mobile in nature. The learned Senior Counsel highlights on the requirement of staff composition, including the types of services to be provided. With regard to the prayers made in the writ petition, the learned Senior Counsel submits that the powers under Article 226 of the Constitution of India are wide enough so that the relief prayed can be moulded suitably.

21. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court, including the records in original, have been carefully perused.

22. The projection made on behalf of the petitioner to substantiate the challenge is that the respondent no. 4 has not met the eligibility criteria and therefore could not have been considered in the financial evaluation. However, prior to that, the question of maintainability of the writ petition, as raised by the learned counsel for the respondents is liable to be dealt with. The preliminary objection is with regard to the maintainability of the writ petition in the present form on the ground that the petitioner himself has admitted that the LOA was already issued before the writ petition was filed which is not under challenge. It has further been pointed out that knowing fully well of the facts and circumstances, the petitioner took a chance till opening of the financial bid and therefore, he should not be allowed to turn around

and challenge the process.

23. To appreciate the preliminary ground questioning the maintainability of the writ petition, the main prayer made in the writ petition is liable to be looked into which is extracted herein below:

“1) to quash and set aside the entire tender process initiated in terms of e-tender to maintain and operate “Mobile Medical Units” Operation dated 01.10.2022 (Annexure-8) [Tender No. 11021/16-2022-Maternal Health-NHM/36] issued by the respondent no. 2;

2) to grant extension to the petitioner up to 06.01.2025 in terms of Clause 17.1 of the Service Level Agreement dated 07.01.2017 (Annexure-2) taking into consideration minutes of the State Level Steering Committee Meeting dated 30.11.2021 and minutes of the meeting dated 23.02.2022 (Annexure-5) passed by respondent no. 2.

-AND-

On perusal of the records and on hearing such cause or causes as may be shown by the respondents, this Hon’ble Court may be pleased to make the Rule absolute. And/or may be pleased to pass such or further orders as this Hon’ble Court may deem fit and proper.”

24. From a reading of the aforesaid prayer, it is clear that the challenge is only with regard to setting aside and quashing the entire Tender process and to grant extension to the petitioner up to 06.01.2025. Let us deal with the second prayer first. The second prayer is with regard to granting of extension to the petitioner up to 06.01.2015 in terms of Clause 17.1 of the Service Level Agreement dated 07.01.2017.

The said prayer cannot be considered, inasmuch as the petitioner has chosen to participate in the Tender process. In any case, the initial period of five years was over and presently the earlier agreement was only on an extended period and therefore, the petitioner cannot have an indefensible right to claim for extension. As regards the first prayer to quash and set aside the entire Tender process, the said prayer, if granted, would also not be beneficial to the petitioner and cannot be said to be in the interest of public service. The prayer is also not consistent with the grounds of challenge wherein the petitioner has only questioned the eligibility of the respondent no. 4. Therefore, on the preliminary ground itself, on the issue of maintainability of the writ petition, the writ petition can be dismissed. This Court, however, is of the opinion that even on the merits, the petitioner has not been able to make out a case for interference. The reason for coming to the said conclusion is elaborated as hereunder.

25. The entire challenge projected by the petitioner is on the ground that the respondent no. 4 has not met the eligibility criteria. The eligibility criteria have been laid down in Section V of the Tender document. The primary requirement is that the participant is required to have at least three years experience in providing medical care at community level. There are also other requirements, namely, that the bidder should not be blacklisted by MMUSPA or any government agencies, to provide balance sheet for the last three years and to have a certain annual turnover for the last three financial years. It is not the case of the petitioner that any of the aforesaid eligibility criteria have not been fulfilled by the respondent no. 4. The projection has been made on the number of MMUs which, however, is not a part of the requirement under the eligibility criteria. In any case, marks were allotted in the technical evaluation and the NIT stipulated that if a bidder secures a certain minimum marks, the said bidder would be eligible for financial evaluation. In the instant case, the respondent no. 4 had secured 24 marks out of total 30 which is more than the minimum prescribed and therefore, was eligible for the financial evaluation. Since this Court has already come to a finding that the eligibility criteria do not lay down any requirement with the

numbers of MMUs, a challenge made on the ground of possessing certain numbers of MMUs is not tenable, either on facts or in law. With regard to the second submission of there being minimal difference in the price, the said submission is also factually incorrect, as the difference has been shown only on a monthly basis whereas the actual difference in the total price would be more than Rs.3,00,00,000/-. Therefore, there is immense public interest involved in the process and in fact, public interest is being protected by the decision taken by the respondent authorities.

26. That as regards the submission made that the petitioner would suffer immense loss, the same ground is not a tenable ground at all as there cannot be a system of allowing only one party to get the benefit of the distribution of State largesse in perpetuity. In fact, such submission would be against the concept of equality and equitable distribution.

27. In view of the aforesaid facts and circumstances and the discussions made, this Court is of the unhesitant opinion that the present writ petition lacks merit and accordingly, the same is dismissed. Consequently, the interim order is vacated and the authorities are at liberty to go ahead with the finalization of the Tender process with the respondent no. 4 which has been found to be suitable in the process.

28. Records produced are returned back to the learned Standing Counsel, NHM.

29. No orders to cost.

JUDGE

Comparing Assistant