



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

WRIT PETITION (C) NO. 2477/2023

M/s Medicit Healthcare Services Pvt. Ltd. [A Private Limited Company registered under the Indian Companies Act, 1956].

Having its registered office at :

6-3-347/17/5, 4th Floor, 'B' Building, Dwarkapuri Colony, Punjagutta, Hyderabad, Telangana-500082, represented by its Manager, namely, Sri Prashanth Cheguri, aged about 30 years, son of Ch. Yadaiah.

.....Petitioner

-Versus-

1. The State of Assam

Represented by the Commissioner and Secretary, Ministry of Health and Family Welfare, Government of Assam, Dispur, Guwahati- 781006.

2. The National Health Mission, Assam,

Saikia Commercial Complex, Christian Basti, G.S. Road, Guwahati-781005, Represented by its Director.

3. The Mission Director, the National Health Mission, Assam, Saikia Commercial Complex, Christian Basti, G.S. Road, Guwahati-781005.

4. The Executive Director, National Health Mission Assam-cum-Head of Tender Evaluation Committee, Saikia Commercial Complex, Christian Basti, G.S. Road, Guwahati- 781005.

5. M/s AOV International LLP Corporate Office- C-22/25 Sector 57, Noida U.P., Pin-201301.

.....Respondents

Advocates :

Petitioner : Mr. M.K. Choudhury, Senior Advocate; Mr. M. Biswas, Advocate; and Mr. K. Arouh, Advocate

Respondent nos. 1 - 4 : Mr. D. Saikia, Advocate General, Assam; Mr. B. Gogoi, Standing Counsel, Health & Family Welfare Department, Government of Assam & National Health Mission [NHM]

Respondent no. 5 : Mr. T.J. Mahanta, Senior Advocate; Mr. P.P. Dutta, Advocate

Date of Hearing : 29.08.2023 & 14.09.2023

Date Judgment & Order : 10.11.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER

Rejection of both the Technical Bids submitted by the petitioner in response to an e-Tender Notice dated 13.10.2022 for Tender no. : NHM-18016/8/2022-Procurement-NHM-55-P and another e-Tender Notice dated 18.10.2022 for Tender no. : NHM-18016/8/2022-Procurement-NHM-83-P respectively by decisions taken by the Bid Evaluation Committee in its Meeting, held on 05.04.2023, have led the petitioner to institute the writ petition under Article 226 of the Constitution of India seeking setting aside of that decisions contained in the Minutes of the Bid Evaluation Committee dated 05.04.2023. Seeking a further direction in the nature of mandamus to the State respondent authorities to declare the petitioner's both the Technical Bids submitted in response to the e-Tender Notice dated 13.10.2022

and the e-Tender Notice dated 18.10.2022 as responsive, the petitioner has also sought for a direction in the nature of mandamus to the State respondent authorities to declare both the Technical Bids submitted by the respondent no. 5 in response to the e-Tender Notice dated 13.10.2022 and the e-Tender Notice dated 18.10.2022 as non-responsive as the said two Technical Bids submitted the respondent no. 5 have been declared to be responsive ones by the Bid Evaluation Committee amongst the decisions taken in its Meeting, held on 05.04.2023.

2. In order to understand the nature of challenges made and prayers sought for by the petitioner, it is necessary to exposit the background facts as their genesis are traceable to two National Competitive Bidding processes initiated by the e-Tender Notice dated 13.10.2022 and the e-Tender Notice dated 18.10.2022.
 - 2.1. By the e-Tender Notice dated 13.10.2022 for Tender no. : NHM-18016/8/2022-Procurement-NHM-55-P, the Mission Director, National Health Mission, Assam [the respondent no. 3] invited e-Tenders in two-Bid System from reputed agencies for a contract work :- 'For Hiring of Service Providers for Biomedical Equipment Maintenance and Management Programme [BEMMP] in the Medical Colleges of the State'. The last date/time of uploading of the Tenders on-line was originally, fixed up-to 02-00 p.m., 03.11.2022. Later on, the last date/time of uploading of the Tenders was extended up-to 06-00 p.m., 03.12.2022 vide a Notice of Extension of Bid Submission End Date dated 02.11.2022. Finally, by another Corrigendum being Corrigendum no. 1 dated 23.11.2022, the last date/time of uploading the Tenders was extended till 02-00 p.m., 08.12.2022.
 - 2.2. By the e-Tender Notice dated 18.10.2022 for Tender no. : NHM-18016/8/2022-Procurement-NHM-83-P, the Mission Director, National Health Mission, Assam [the respondent no. 3] invited e-Tenders in two-Bid System from reputed agencies for another contract-work :- 'For Hiring of Service Providers for Biomedical Equipment Maintenance and Management Programme [BEMMP] from the level of DH [District Hospital] to PHC [Primary Health Centre]'. The last date/time of uploading of the Tenders on-line was originally, fixed up-to 02-00 p.m., 11.11.2022. Later on, the last date/time of uploading of the Tenders was extended up-to 06-00 p.m., 03.12.2022 vide a Notice of Extension of Bid Submission End Date dated 02.11.2022. Finally, by another Corrigendum being

Corrigendum no. 1 dated 23.11.2022, the last date/time of uploading the Tenders was extended till 02-00 p.m., 08.12.2022.

- 2.3. By the two Corrigenda, both dated 23.11.2022, the time/date of Bid Opening of the Technical Bids was scheduled at 05-00 p.m. on 09.12.2022 in respect of both the Tender Processes.
- 2.4. The Tender Inviting Authority is the National Health Mission [NHM], Assam, who on behalf of the User Institutions/Government or the Funding Agencies, has called for the e-tenders. The User Institutions in respect of the e-Tender Notice dated 13.10.2022 for Tender no. : NHM-18016/8/2022-Procurement-NHM-55-P [hereinafter also referred to as 'the 1st Tender Process', at places, for the sake of convenience] are the Medical Colleges under the Government of Assam. The User Institutions in respect of e-Tender Notice dated 18.10.2022 for Tender no. : NHM-18016/8/2022-Procurement-NHM-83-P [hereinafter also referred to as 'the 2nd Tender Process', at places, for the sake of convenience] are the Health Care Institutions from the District Hospital Level down to the level of Primary Health Centres [PHCs] under the Government of Assam.
- 2.5. By the e-Tender Notice dated 13.10.2022 and the e-Tender Notice dated 18.10.2022, the Tender Inviting Authority, on behalf of the Government of Assam, has inter alia sought to engage Service Provider[s] each for the Maintenance of Biomedical Equipments with an aim to maintain Biomedical Equipments in all the Medical Colleges and in all Public Health Care facilities from District Hospitals [DHs] up-to the PHC level supported by 24 X 7 Call Centre, that is accessible through a centralized toll-free number.
- 2.6. On publication of the e-Tender Notice dated 13.10.2022 and the e-Tender Notice dated 18.10.2022, the petitioner, M/s Medici Health Care Services Private Limited submitted its Tenders for both the Tender Processes on-line in the portal – <http://assamtenders.gov.in> within the stipulated bid submission time. Two other bidders viz. [i] M/s AOV International LLP [the respondent no. 5] and [ii] M/s TBS India Telematic and Biomedical Services Private Limited had also responded to both the e-Tender Notices by submitting their Tenders on-line.

- 2.7. After receipt of the Tenders from the 3 [three] participant bidders, the Bid Evaluation Committee constituted for the purpose of evaluating the Tenders of the participant bidders for both the Tender Processes, held one of its Meetings, on 19.01.2023, to consider finalization of suitable bidders for the two Tender Processes. After going through the Technical Bids of the 3 [three] participant bidders, the Bid Evaluation Committee was of the view that before finalization of the Tender Processes, certain clarifications would be required from all the 3 [three] participant bidders. After recording the points on which clarifications would be required, all the 3 [three] participant bidders were informed to provide clarifications on those points. On receipt of communications from the Tender Inviting Authority indicating the points in respect of which clarifications were required from them, all the 3 [three] participant bidders sent their clarifications to the Tender Inviting Authority/Bid Evaluation Committee.
- 2.8. On receipt of the clarifications along with the documents furnished in that connection from the 3 [three] participant bidders, the Bid Evaluation Committee had convened another of its Meetings on 05.04.2023. After considering the Technical Bids with the documents submitted therewith and the clarifications provided by the 3 [three] participant bidders for the two Tender Processes, the Bid Evaluation Committee had found the Technical Bids submitted by the respondent no. 5 as responsive ones. The Bid Evaluation Committee had, on the other hand, found the Technical Bids of the other 2 [two] participant bidders, that is, [i] the petitioner, and [ii] M/s TBS India Telematic and Biomedical Services Private Limited, as non-responsive. Such decisions made in respect of the Technical Bids of the 3 [three] participant bidders have been recorded by the Bid Evaluation Committee in the Minutes of the said Meeting, held on 05.04.2023. Consequent thereto, the writ petition has been preferred.
3. I have heard Mr. M.K. Choudhury, learned senior counsel assisted by Mr. M. Biswas and Mr. K. Arouh, learned counsel for the petitioner; Mr. D. Saikia, learned Advocate General, Assam assisted by Mr. B. Gogoi, learned Standing Counsel, Health & Family Welfare Department, Government of Assam & National Health Mission [NHM] for the respondent nos. 1 – 4; and Mr. T.J. Mahanta, learned senior counsel assisted by Mr. P.P. Dutta, learned counsel for the respondent no. 5.

4. Mr. Choudhury, learned senior counsel appearing for the petitioner has submitted that the identical ground of rejection of the Technical Bids of the petitioner, submitted for the 1st Tender Process and the 2nd Tender Process, that the petitioner does not have minimum 100 nos. of experienced Biomedical Engineers on its Payroll is arbitrary and irrational. He has contended that from a combined reading of Clause 4.2.7 and Clause 4.2.9 of Section IV : Specific Conditions of Contract of the Bid Document, it is clearly decipherable that the bidder as the Service Provider has the freedom to employ the requisite human resources including the requisite nos. of Biomedical Engineers even at a later point of time. The responsibility of works between the Tendering Authority and the Service Provider under the comprehensive equipment maintenance outsource model have been clearly outlined in Clause 4.2.13 and as per Clause 4.2.13, it would be the responsibility of the Service Provider to hire the trained human resource at a later point of time. Sub-clause [d] of Clause 4.2.18.9 which has provided for 'the General Terms & Conditions', has inter alia mentioned that the Service Provider would be responsible for procuring all the necessary manpower required for the satisfactory completion of the contract. He has drawn attention to Clause 5 : Pre-Qualification of Tenderer contained in Section V of the Bid Document and, more particularly, sub-clause [e] of Clause 5.1 thereof, to contend that mention has been made therein only to the effect that the bidder must equip the trained Biomedical Engineering human resources with required vehicles and the purpose behind is to reach out to sites at the earliest point of time.
- 4.1. It has been contended that as the contract period would be valid for 3 [three] years, subsequently mentioned as 5 [five] years, from the date of approval, as per Clause 4.2.18, the same is a clear pointer to the fact that the necessary trained human resources can be hired by the successful bidder and it is not a pre-requisite that all the trained human resources should be available with the bidder at the time of submission of the bid. It is his contention that nowhere in Clause 5 : Bid Qualification of Tenderers has mentioned about requirement of 100 Biomedical Engineers on its Payroll. It is, thus, clear that non-availability of 100 Biomedical Engineers on its Payroll on the date of submission of the bid does not entail rejection of the Technical Bid of a bidder either at the pre-qualification stage or at the Technical Bid evaluation stage.
- 4.2. Attention has been drawn to the Evaluation Parameters laid down in Clause 6.17 which is part of Clause 6 : General Conditions of Contract of Section VI of the Bid Document. The

Evaluation Parameters were amended by the Corrigenda being Corrigendum no. 1 dated 23.11.2022 for the 1st Tender Process and Corrigendum no. 1 dated 23.11.2022 for the 2nd Tender Process. As per the Evaluation Parameters, the selection of the successful bidder is to be based on Quality-cum-Cost Based Selection [QCBS] Criteria, wherein 50% weightage with minimum passing marks of 70, has been earmarked to technical evaluation score based on the technical proposals submitted by the agency/bidder. Clause 6.18 has provided for the methodology for Technical Evaluation and as per the Technical Evaluation criterion, a bidder whose technical evaluation score is 70 and above, gets qualified further for the opening of its Financial Proposal. He has contended that even if a bidder gets '0' mark for not having 100 Biomedical Engineers on its Payroll, the Technical Bid of such a bidder could not have been rejected if the bidder scores the minimum passing marks, that is, 70 marks as only 10 marks have been earmarked against 100 and above Biomedical Engineers.

- 4.3. When clarifications were sought by the Bid Evaluation Committee after its Meeting, held on 19.01.2023, the petitioner had provided the clarifications to the Tender Inviting Authority vide its Letter dated 21.01.2023. It was informed that the petitioner company was having service agreements with 3 [three] nos. of companies for supply of manpower and had also furnished the copies of the Service Agreements entered into by the petitioner company with the said 3 [three] nos. of companies. The petitioner company had thereby, informed the Tendering Authority that it can, by virtue of the Service Agreements, avail the services of 188 nos. of Biomedical Engineers having more than 3 [three] years of experience and the necessary documents evidencing payments towards PF and ESI were also provided to the Tendering Authority. By submitting two affidavits dated 21.01.2023 – one for the 1st Tender Process and the other for the 2nd Tender Process - it was certified that the petitioner company had been deploying employees in the BEMMP State projects through its outsourcing contractors and their salaries, perks, PF, ESI, etc. were being paid regularly as per statutory norms. Two more affidavits dated 23.01.2023 - one for the 1st Tender Process and the other for the 2nd Tender Process – were also submitted undertaking that the petitioner company would recruit technical employees and eligible local Biomedical Engineers, once the contracts would be awarded to it.
- 4.4. As regards the decision of the Bid Evaluation Committee to accept the Technical Bids of the respondent no. 5 as a responsive ones, Mr. Choudhury has contended that the said

decision is ex-facie erroneous. He has referred to amended Clause 3.1 of Section III of the Bid Document which has provided for 'Technical Capacity'. As per amended Clause 3.1, a bidder has to participate as a sole bidder and also, at the same time, should have at least 4 [four] Financial Years of experience in the BEMMP in at least 2 [two] States maintaining all Biomedical Equipments. As by the said amended Clause 3.1 itself, Consortium has been disallowed deleting all clauses in connection to Consortium from the Bid Document, the only meaning emerges therefrom is that any prior experience of a bidder if to be counted, must be experience as a sole bidder only and any experience gained either as a member of a consortium or in a joint venture or as a sub-contractor to the Service Provider in the BEMMP in any other State is not to be counted for the purpose of fulfilling 4 [four] Financial Years of experience in the BEMMP. As the respondent no. 5 does not have 4 [four] Financial Years of experience in the BEMMP as a sole bidder in any other State, the Technical Bids of the respondent no. 5 could not have been declared as responsive ones for the two Tender Processes. From the Minutes of the Meeting of the Bid Evaluation Committee, held on 05.04.2023, it has clearly emerged that the respondent no. 5 had only gained experience as a sub-contractor in the State of West Bengal and, that too, only in two districts and such experience cannot be accepted as experience in the BEMMP in that particular State. The fact that the respondent no. 5 does not have such experience is clearly borne out from the Minutes of the Meeting of the Bid Evaluation Committee, held on 05.04.2023. The concession given to the respondent no. 5 by declaring its Technical Bids as responsive, thereby, departing from the norms and standards set forth in the Bid Document has made the decision-making process arbitrary and irrational. In such view of the matter, the decisions recorded by the Bid Evaluation Committee in the Minutes of the Meeting, held on 05.04.2023, as regards non-responsiveness of the Technical Bids of the petitioner and responsiveness of the Technical Bids of the respondent no. 5 are liable to be interfered with.

5. Mr. Saikia, learned Advocate General, Assam has objected to the submissions made as regards responsiveness of the Technical Bids of the petitioner. Referring to the part, 'Eligibility to Bid' contained in Clause 3.1 : Details of Tender in Section III of the Bid Document, he has contended that the Technical Capacity criterion that the bidder should have at least 4 [four] Financial Years of experience [till the date of bidding] maintaining all Biomedical Equipments is an essential condition for eligibility. Such essential condition of eligibility has not been diluted at any point of time. The Corrigenda issued subsequently

have also not diluted such essential condition of eligibility. By referring to the Corrigenda, both dated 23.11.2022, Mr. Saikia has contended that it is the experience of 4 [four] Financial Years in the BEMMP in at least two States which is essential and it is not the requirement of the Bid Document that such experience one has to gain as a sole bidder only.

- 5.1. Rebutting the contention made by the petitioner side as regards amended Clause 3.1, it is contended that the interpretation sought to be given to amended Clause 3.1 is misconceived. He has canvassed that amended Clause 3.1 has to be read in two parts, firstly, the bidder has to participate in the 1st Tender Process and also in the 2nd Tender Process as a sole bidder; and secondly, the bidder should have 4 [four] Financial Years of experience in BEMMP in at least two States maintaining all Biomedical Equipments and such experience of 4 [four] Financial Years need not be continuous and need not be as a sole bidder. Experience gained in the BEMMP in other States as a part of a consortium or as a joint venture or as a sub-contractor has been accepted by the Bid Evaluation Committee towards fulfillment of Technical Capacity criterion set forth in Clause 3.1 of the Bid Document and such decision of the Bid Evaluation Committee/Tendering Authority is to be accepted as the decision is neither an arbitrary one nor an irrational one.
- 5.2. Mr. Saikia has further contended that the condition that the bidder must have minimum 100 nos. of experienced Biomedical Engineers on its Payroll is not capable of any different interpretation, as sought to be made by the petitioner side on the basis of the few clauses in the Bid Document. It is evidently clear from the case of the petitioner itself that it did not have 100 nos. experienced Biomedical Engineers on its Payroll on the last date of submission of bids. Such essential condition cannot be satisfied by a bidder on the basis of Service Agreements entered into by it with certain other entities, like the ones entered into by the petitioner herein.
- 5.3. Mr. Saikia has pointed out that Clause 6.11 of the Bid Document had provided for a Pre-Tender Meeting. As per Clause 6.11.1, such Pre-Tender Meeting was convened to clarify the doubts of the prospective bidders and it was mentioned that the Tendering Authority might or might not amend the terms and conditions as well as scope of services of the Bid Document after the Pre-Tender Meeting on the basis of feedback obtained during such meeting with a view to obtain maximum number of competitive bids. Clause 6.11.3 of the

Bid Document had provided that the Pre-Tender Meeting would be called by the Tendering Authority to explain about the requirements as well as the terms and conditions of the Bid Document and to get the views of the prospective bidders, as part of ensuring transparency in the Tender Processes. Thus, as per Clause 6.11.4, it was an opportunity for a prospective bidder to obtain all the details about the tendered items, conditions governing the bids and to get explanation of any ambiguous condition that might be present in the Bid Document. All the amendments to the Bid Document were duly published by way of Corrigenda in the e-Tender Portal prior to the deadline for submission of tenders. The petitioner had never, at any time prior to the deadline for submission of bids, sought for any kind of clarification with regard to the condition regarding having minimum 100 nos. of experienced Biomedical Engineers on its Payroll. With the Bid Document leaving no scope for any ambiguity and the petitioner having no doubt about the condition of the bidder having minimum 100 nos. of experienced Biomedical Engineers on its Payroll and the meaning of Payroll is not capable of having two interpretations, it is not open for the petitioner to maintain the present writ petition on such ground making attempt to give an interpretation of a term in the Bid Document according to its convenience.

- 5.4. He has further submitted that Clause 6.13 required the bidders to submit documents to prove that the bidders had adequate skilled Biomedical Engineering human resource to meet the workload. He has drawn specific attention to few of the documents required to be submitted at the time of submission of the bids. The clause had further made clear it that there should be an undertaking from the bidder to equip its trained Biomedical Engineering human resource with required vehicles to reach to sites as well as vehicles to carry tools and equipments to and from the site. He has, thus, contended that the submission advanced on behalf of the petitioner that the bidder as the Service Provider had the freedom to hire the requisite number of Biomedical Engineering human resources even at a later point of time does not have any basis. He has further referred to the affidavits, dated 23.01.2023, submitted by the petitioner wherein the petitioner had made the statement that it would recruit technical employees and eligible local Biomedical Engineers once the contracts of the BEMMP in Assam would be awarded to it.
- 5.5. The learned Advocate General has also referred to the Minutes of the Meetings of the Bid Evaluation Committee, held on 19.01.2023 & on 05.04.2023, to contend that the decision-

making process has not suffered from any kind of infirmity, arbitrariness and irrationality and as such, the decisions arrived at by the Bid Evaluation Committee and the Tendering Authority in rejecting the Technical Bids of the petitioner does not call for any interference.

- 5.6. He has referred to a decision of the Hon'ble Supreme Court of India in **Civil Appeal no. 3897 of 2023 [TATA Motors Limited vs. The Brihan Mumbai Electric Supply & Transport Undertaking [BEST] and others]**, decided on 19.05.2023, to urge the point that grant of judicial relief at the instance of a party which does not fulfill the requisite criteria is something which could be termed as misplaced and the discretionary powers under Article 226 is to be exercised only in furtherance of public interest and not merely on the making out of a legal point. To buttress his submissions, he has also referred to the decisions in **Ramana Dayaram Shetty vs. International Airport Authority of India and others**, reported in [1979] 3 SCC 489; **New Horizons Limited and another vs. Union of India and others**, reported in [1995] 1 SCC 478; **Central Coalfields Limited and another vs. SLL-SML [Joint Venture Consortium] and others**, reported in [2016] 8 SCC 622; & **Silppi Constructions Contractors vs. Union of India and another**, reported in [2020] 16 SCC 489.
6. Mr. Mahanta, learned Senior Counsel appearing for the respondent no. 5 has referred to the eligibility criteria set forth in Clause 3.1 : Details of Tender contained in Section III of the Bid Document to contend that the petitioner did not meet such eligibility criteria whereas the respondent no. 5 had fulfilled such eligibility criteria. He has contended that it had been clearly set forth in Clause 3.1 that a bidder must have minimum 100 nos. of experienced Biomedical Engineers on its Payroll and for that purpose, the bidder had to furnish evidence of payments deposited in respect of such employees towards Provident Fund Organisation and Employees State Insurance [ESI] Corporation. The said eligibility criterion has not been relaxed at any point of time by any of the Corrigenda issued subsequent to the e-Tender Notice dated 13.10.2022 and the e-Tender Notice dated 18.10.2022 and hence, the bidder was required to fulfill the said eligibility criterion on the last date of uploading of the Tenders, 09.12.2022 for the 1st Tender Process as well as for the 2nd Tender Process. It is his contention that the fact of non-availability of the requisite nos. of experienced Biomedical Engineers on its Payroll has also been admitted by the petitioner in their affidavits submitted before the Tendering Authority wherein the petitioner has stated that the petitioner company would recruit such employees if the contracts would be awarded in its favour.

- 6.1. Repelling the contention of the petitioner that the respondent no. 5 did not fulfill the amended condition stipulated vide the Corrigenda dated 23.11.2022 and the Clarificatory Corrigenda dated 29.11.2022, Mr. Mahanta has submitted that by the e-Tender Notices, dated 13.10.2022 & dated 18.10.2022, Corrigenda dated 23.11.2022 and the Clarificatory Corrigenda dated 29.11.2022, it had been provided that firstly, the bidder shall have to participate as a sole bidder and there could not be any consortium bidding; and secondly, the bidder should have total 4 [four] Financial Years of experience in the BEMMP and should have worked at least in two States maintaining all Bio-Medical Equipments. The respondent no. 5 has participated in the 1st Tender Process and also in the 2nd Tender Process as a sole bidder in conformity with the said condition.
- 6.2. Mr. Mahanta has further contended that in so far as the criterion regarding total 4 [four] Financial Years of experience in the BEMMP is concerned, the respondent no. 5 has submitted the Work Experience Certificates in the BEMMP Programme from the States of Madhya Pradesh and West Bengal. The Work Experience Certificates furnished by the respondent no. 5 would clearly go to show that it had the requisite years of experience in the BEMMP Programme in at least two States, on the last date of bid submission. He has further contended that there is no mention in the Bid Document of the present two Tender Processes that a bidder had to have such experience in two States as a sole bidder. It has been contended that the petitioner did not have the requisite years of experience on the last date of submission of bids. He has, thus, contended that the Tendering Authority has reached its decision after due consideration of the bids submitted by all the 3 [three] participant bidders including petitioner and the respondent no. 5, on their own merits. He has submitted that since the Bid Evaluation Committee consisting of experts after due deliberation on the aspects of responsiveness or otherwise of the technical bids qua the purpose and object of the Tender Processes, had reached the decisions to declare the technical bids of the petitioner as non-responsive, no interference is called for as the decision is manifestly in conformity with the terms and conditions of the Bid Document.
7. In reply, Mr. Choudhury has submitted that the respondent no. 5 did not have any prior experience in maintaining Bio-medical Equipments in two States as a sole bidder as it has merely worked either in a consortium or as a sub-contractor. He has reiterated that in the State of West Bengal, the respondent no. 5 had worked in only two of its districts. Thus,

the respondent no. 5 did not have the requisite experience in terms of Clause 3.1 of the Bid Document. On the aspect of Payroll, he has submitted that only 10 marks have been assigned for it in the Technical Evaluation Matrices under Clause 6.18 of the Evaluation Parameters. Even if the said 10 marks earmarked for Payroll is left aside out of the total 100 marks, the Bid Evaluation Committee ought to have considered the Technical Bids of the petitioner on the basis of the remaining 90 marks. He has contended that since the weightages ascribed to the Technical Proposal and the Financial Proposal are on 50 : 50 basis, non-consideration of the bids of the petitioner by assigning the combined technical score and financial score is clearly arbitrary. On the aspect of non-fulfillment of the eligibility criterion on Payroll, he has submitted that outsourcing is the order of the day and a meaningful reading of the Bid Document clearly goes to show that outsourcing on the aspect of Payroll is intended therein.

- 7.1. It has been contended that reliance of the learned Advocate General, Assam in the decision in **New Horizons Limited** [supra] is misplaced and to controvert the same, he has placed reliance in the decision titled **Municipal Corporation, Ujjain and another vs. BVG India and others**, reported in [2018] 5 SCC 462. He has also referred to a decision of the Punjab and Haryana High Court rendered in C.W.P. no. 20130 of 2020 [M/s A.G. Construction Co. vs. Food Corporation of India and others], decided on 10.02.2021.
8. I have given consideration to the submissions made by the learned counsel for the parties and have also gone through the materials brought on record by the parties through their pleadings. I have also gone through the decisions cited at the Bar.
9. The Tendering Authority in both the Tender Processes herein is the National Health Mission [NHM], Assam, which provides services to the various health care institutions under the Department of Health & Family Welfare, Assam. In the Introduction part of the Bid Document, it has been mentioned that over the last decade, several equipments have been procured and installed in the various health care facilities under different projects, programmes and schemes. It is mentioned that one of the major problems encountered is the timely maintenance and calibration of these equipments. The maintenance done by the user or by other means could not produce sustainable solution. It is in order to strengthen the service/maintenance of the Biomedical Equipments in the Hospitals, a model has been conceived on the lines of Public Private Partnership [PPP] under the guidance of the

Government of India. In the Bid Document, several definitions have been provided. **Health Technology/Healthcare Technology** means the application of organized knowledge and skills in the form of equipments, medicines, vaccines, procedures and systems developed to solve a health problem and improve quality of life. **Medical Device** means an article, instrument, apparatus or machine that is used in the prevention, diagnosis or treatment of illness or disease or for detecting, measuring, restoring, correcting, or modifying the structure or function of the body for some health purpose. It is mentioned that **Medical Equipment** requires calibration, maintenance, repair, user training, and decommissioning – activities usually managed by Clinical Engineers. **Preventive Maintenance** is defined to be an action to eliminate the cause of a potential non-conformity and **Corrective Maintenance** is stated to be an action to eliminate the cause of detected non-conformity. It is mentioned that **Preventive Maintenance** includes care and servicing by personnel for the purpose of maintaining equipments and facilities in satisfactory operating conditions by providing for systematic inspection, detection and correction of incipient failures either before they occur or before they develop into major defects, including tests, measurements, adjustments, and parts replacement, performs specifically to prevent faults from occurring. **Corrective Maintenance** is a maintenance task performed to identify, isolate, and rectify a fault so that the failed equipment, machine, or system can be restored to an operational condition within the tolerances or limits established for in-service operations. **Calibration** is defined to be the act of marking units of measurement on an instrument so that it can be used for measuring something accurately. As per the objectives stated in the Bid Documents of both the Tender Processes, Bio-Medical Equipment Management and Maintenance Programme [BEMMP] is a Government of India initiative under the National Health Mission [NHM] in order to strengthen the public health system in the country with a vision to minimize the downtime of the Biomedical Equipments available in the Hospitals/health care institutions especially in remote locations and the same is to be a Public Private Partnership [PPP] in order to achieve the goal through a set of mutually agreeable terms and conditions.

- 9.1. While by the 1st Tender Process, as already noted above, the Tender Inviting Authority on behalf of the Government of Assam has sought to engage Service Provider[s] for Biomedical Equipment Management and Maintenance Programme [BEMMP] in the Medical Colleges of the State, the 2nd Tender Process is initiated for hiring of Service Provider[s] for Biomedical Equipment Management and Maintenance Programme [BEMMP] from the level

of DH [District Hospital] to PHC [Primary Health Centre]. The Scope of Works of both the Tender Processes are more or less similar as it inter alia mentions about seeking to engage Service Provider[s] for maintenance of Biomedical Equipments with an aim to maintain Biomedical Equipments in all the health care institutions, from the Medical Colleges to Primary Health Centres [PHCs], supported by 24x7 Call Centre, that is accessible through a Centralized toll-free number [the Centralized Call Centre Number]. The 24x7 Centralized Call Centre is to be set up in Assam within 3 [three] months from the date of signing of the Agreement and able to accept calls in local language for fault registration. The Centralized Call Centre would also register and liaise for different purposes pertaining to Biomedical Equipment Management such as Calibration & Maintenance requirement.

10. Clause 3.1 contained in Section III of the Bid Documents of both the Tender Processes has provided for the Details of Tender including the Eligibility to bid. It has mentioned about the Technical Capacity and the Financial Capacity of a bidder to participate in the two Tender Processes.

- 10.1. The eligibility criteria to bid, as set forth initially in the e-Tender Notice dated 13.10.2022 for Tender no. NHM-18016/8/2022-Procurement-NHM-55-P, read as under :-

Eligibility to bid	The Bidder may be a sole Bidder or a group of companies [maximum 3] coming together as Consortium to implement the Project. The Bidder cannot be an individual or group of individuals. The Bidder should be registered as a legal entity such as company registered under Companies Act, Societies Registration Act, Trust Act or an equivalent law applicable in Assam. Technical Capacity : The Bidder should have at least four [4] financial years of experience of [till the date of bidding] maintaining all Biomedical Equipment at different Districts/State/Country. Work Satisfaction reports from competent Authority[s] must be submitted.
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	The Bidder should be able to give evidence of existence of a centralized call center of capacity adequate to meet the complaints from the number of facilities as expressed in the contract agreement or a tie-up agreement with a computerized call center service provider. The 24x7 Centralized Call Centre must be set up in Assam within 30 days from the date of signing of the Agreement and able to accept calls in Local language for fault registration. The Centralized Call Centre will also register and liaise for different purposes pertaining to biomedical equipment management such as Calibration & Maintenance requirement. The call center should be established within the remapping period after the selection of the bidder i.e. within 3 months of the award of the contract. The Bidder must equip the trained Biomedical/Clinical engineering human resource with required vehicles to reach out to sites as well as vehicles to carry tools and equipment to and from the site, <i>The bidder must have minimum 100 nos. of experienced Biomedical Engineers in their payroll and evidence of PF/ESI/Payments are to be furnished.</i> The Provider must also ensure that no equipment is transferred across health facilities to meet requirements at random as this could disturb patient care and planning. The bidder should have valid ISO 9001, ISO 13485 certificate and NABL accreditation for Calibration of Biomedical Equipment and AERB-QA certification for radiology Equipment. Financial Capacity : The principal bidder/lead partner shall have an average turnover of Rs. 30.00 Crores in last three financial year 2018-19, 2019-20 and 2020-21 or 2019-20, 2020-21 and 2021-22. The above experience could be demonstrated by the single bidder or the lead member of the consortium. In case of consortium bidding, aggregate financial turnover of only those members of consortium
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	would be considered who qualify the technical eligibility independently.
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10.2. The eligibility criteria to bid, as set forth initially in the e-Tender Notice dated 18.10.2022 for Tender no. NHM-18016/8/2022-Procurement-NHM-83-P, read as under :-

Eligibility to bid	The Bidder may be a sole Bidder or a group of companies [maximum 3] coming together as Consortium to implement the Project. The Bidder cannot be an individual or group of individuals. The Bidder should be registered as a legal entity such as company registered under Companies Act, Societies Registration Act, Trust Act or an equivalent law applicable in Assam. Technical Capacity : The Bidder should have at least four [4] financial years of experience of [till the date of bidding] maintaining all Biomedical Equipment at different Districts/State/Country. Work Satisfaction reports from competent Authority[s] must be submitted. The Bidder should be able to give evidence of existence of a centralized call center of capacity adequate to meet the complaints from the number of facilities as expressed in the contract agreement or a tie-up agreement with a computerized call center service provider, The 24x7 Centralized Call Centre must be set up in Assam within 30 days from the date of signing of the Agreement and able to accept calls in Local language for fault registration. The Centralized Call Centre will also register and liaise for different purposes pertaining to bio-medical equipment management such as Calibration & Maintenance requirement. The call center should be established within the re-mapping period after the selection of the bidder i.e. within 3 months of the
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	award of the contract. The Bidder must equip the trained Biomedical/Clinical engineering human resource with required vehicles to reach out to sites as well as vehicles to carry tools and equipment to and from the site. <i>The bidder must have minimum 100 nos. of experienced biomedical Engineers in their payroll and evidence of PF/ESI/Payments are to be furnished.</i> The Provider must also ensure that no equipment is transferred across health facilities to meet requirements at random as this could disturb patient care and planning. The bidder should have valid ISO 9001, ISO 13485 certificate and NABL accreditation for Calibration of Biomedical Equipment and AERB-QA certification for radiology Equipment. Financial Capacity : The principal bidder/lead partner shall have an average turnover of Rs. 25.00 Crores in last three financial year 2018-19, 2019-20 and 2020-21 or 2019-20, 2020-21 and 2021-22. The above experience could be demonstrated by the single bidder or the lead member of the consortium. In case of consortium bidding, aggregate financial turnover of only those members of consortium would be considered who qualify the technical eligibility independently.
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11. By the Corrigenda, dated 23.11.2022, certain amendments have been made in respect of Technical Capacity under Eligibility to Bid contained in Clause 3.1 of Section III of the Bid Documents in similar manner in both the Tender Processes as under :-

2. Clause 3.1 of Section III “Technical Capacity under Eligibility to bid [page11]” is amended and to be read as follows :

The Bidder shall participate as a sole Bidder and should have at least four [4] Financial years of experience in BEMMP in at least two states [in continuation on the date of invitation of Bid] maintaining all Biomedical Equipment. Work Satisfaction

reports mentioning the years of service from competent Authority[s]/Tender Inviting Authority must be submitted.

Consortium bidding is not allowed. All clauses in the tender in connection to Consortium is deleted and hence may be ignored. Bidder has to participate as sole bidder only.

3. Clause 3.1 of Section III “Technical Capacity under Eligibility to bid [page11]” is amended and to be read as follows :

The bidder should have valid ISO 9001, ISO 13485 certificate and NABL accreditation for Calibration of Biomedical Equipment and AERB-QA certification for radiology Equipment or Bidder should ensure the Calibration of Medical device should be done as per NABL/AERB guideline by an accredited agency appointed by Bidder.

12. By the Clarification to the Corrigendum dated 29.11.2022, more amendments have been made in respect of Technical Capacity under Eligibility to Bid contained in Clause 3.1 of Section III of the Bid Document in the 1st Tender Process as under :

1. Clause 3.1 of Section III “Technical Capacity under Eligibility to bid [page 11]” is amended and to be read as follows :

The Bidder shall participate as a sole Bidder and should have total four [4] Financial years of experience in BEMMP and should have worked at least in two states [in continuation on the date of invitation of Bid] maintaining all Biomedical Equipment. Work Satisfaction reports mentioning the years of service from competent Authority[s]/Tender Inviting Authority must be submitted.

In this regard it is clarified that the four [4] years of experience in BEMMP in at least two states means the bidders should have work experience in at least 2 states for a total period of 4 financial years taken together.

All other terms and conditions of the tender referred to above shall remain unchanged.

- 12.1. By the Clarification to the Corrigendum dated 29.11.2022, more amendments have also been made in respect of Technical Capacity under Eligibility to Bid contained in Clause 3.1 of Section III of the Bid Document in the 2nd Tender Process as under :-

1. Clause 3.1 of Section III “Technical Capacity under Eligibility to bid [page 11]” it was amended as follows :

The Bidder shall participate as a sole Bidder and should have total four [4] Financial years of experience in BEMMP in at least in two states [in continuation on the date of invitation of Bid] maintaining all Biomedical Equipment. Work Satisfaction reports mentioning the years of service from competent Authority[s]/Tender Inviting Authority must be submitted.

Clarification :

In this regard it is clarified that the four [4] years of experience in BEMMP in at least two states means the bidders should have work experience in at least 2 states for a total period of 4 financial years taken together.

All other terms and conditions of the tender referred to above shall remain unchanged.

13. The learned counsel for the parties, during the course of their submissions, have referred to a number of clauses from the Bid Documents, which are already indicated above. The clauses of the Bid Documents so referred, are as under :-

SECTION IV

Specific Conditions of Contract

- 4.2.7 The Service Provider shall be required to deploy adequately qualified and trained staff for delivering the Maintenance Services. Name of key officers of the Service provider at state and district level, biomedical engineers, technicians hired for the purposes and any other purpose which is a part of this agreement must be given to the “Contracting Authority” any change in the team should be notified to the Contracting Authority promptly. The human resources *hired* by the agency must have an adequate mix of technical and professional skills to ensure that they meet the contract goal, customer expectations and quality maintenance.

* * * * *

- 4.2.9 Maintenance service provider shall establish and operate an exclusive 24x7 customer care center 365 [complete year] days in a year and maintain all Biomedical Equipment in the Medical Colleges for accepting calls and managing the maintenance services.

For purpose of clarity, operationalization will be regarded as :

* * * * *

- Appointment and recruitment of trained engineering and administrative human resource.

4.2.13 The responsibility of work of Authority and Service Provider under the comprehensive equipment maintenance *outsourced* model has been tabulated below :

Components	Authority	Service Provider
Formulation and agreement of the contract	Yes	Yes
Hiring of the trained human resource	No	Yes
Purchase of inputs for service delivery	No	Yes
Actual provisioning of maintenance services	No	Yes
Forecasting of Inventory	No	Yes
Forecasting of Budget	Yes	Yes
Training of Users	Yes	Yes
Monitoring of services	Yes	Yes
Evaluation of services	Yes	Yes

* * * * *

4.2.18.9

* * * * *

[d] The service Provider will be responsible for procuring all the necessary tools, spare parts, *manpower*, vehicles and other services required for the satisfactory completion of the contract. The service provider shall be responsible for the safety and occupational health of its staff involved with performance of various duties towards the fulfillment of this contract.

SECTION V

5. Pre-qualification of tenderers :

- 5.1 For determining the eligibility of Bidders for their qualifications hereunder, the following shall apply :

* * * * *

[e] The Bidder must equip the trained Biomedical/Clinical engineering human resource with required vehicles to reach out to sites as well as vehicles to carry tools and equipment is transferred across health facilities to meet requirements at random as this could disturb patient care and planning.

SECTION VI

6. General Conditions of Contract

* * * * *

6.11 Pre Tender Meeting

- 6.11.1. A pre-tender meeting will be convened to clarify the doubts of the prospective tenders. The organisation may not amend the terms and conditions as well as scope of services of the tender document after the pre-tender meeting on the basis of feedback obtained during such meeting with a view to obtain maximum number of competitive bids.

* * * * *

- 6.11.3. Pre-tender meeting is called by the Tender Inviting Authority to explain briefly about the requirements as well as the terms and conditions of the tender document and to get the views of the prospective bidders, as part of ensuing transparency in the tender process.

- 6.11.4. It is an opportunity for the prospective bidder to obtain all the details about the tendered items, conditions governing the tenders and also to get the explanation of any ambiguous condition that may be present in the tender document.

- 6.11.5. It is also an opportunity for the Tender Inviting Authority to assess the market and obtain feedback on the scope/conditions, etc. requested by the User Institution/funding agency, so as to make amendments in the tender document on the basis of expert advice.
- 6.11.6. Failure to attend the Pre-tender meeting will not be a disqualification, but a loss of opportunity for the prospective bidders to understand about the items tendered and the tender conditions.

* * * * *

6.13 Contents of Bid submission.

- Information regarding bidder as per Annexure X.
- Details of eligible experience as per Annexure XI.
- Brief description of the roles and responsibilities of individual members of the consortium, particularly with reference to financial and technical obligations.
- Annual turnover statement for last three years certified by the auditor as per Annexure XV. The certificate of Auditor/Chartered Accountant must be supported by attested copies of “Profit & Loss Statement” and “Balance sheet” of past three financial years.
- The documents such as work orders, performance reports, agreement from the user institutions providing that the bidder has a centralized call center of capacity adequate to meet the complaints from the number of facilities as expressed in the contract agreement.
- Documents to prove that the bidder have adequate skilled Biomedical/Clinical engineering human resource to meet the work load. This may be expressed as minimum number of engineers per facility/zone/district/state.
- Undertaking to equip its trained Biomedical/Clinical engineering human resource with required vehicles to reach out to sites as well as vehicles to carry tools and equipment to and from the site. The bidder must also undertake that no equipment is transferred across health facilities to meet requirements at random as this could disturb patient care and planning at a given facility.
- Notarized audited copies of the P&L Accounts, Balance Sheet, annual report for the last three completed years certified by the auditors.

- List of hospitals/other institutions/states where Bio-medical equipment maintenance is done/doing by the bidder with year and period of contract, name/designation of the contract person, phone number/fax/email.

* * * * *

6.17. Evaluation Parameters

1. The selection of firm will be based on Quality-cum-Cost Based Selection [QCBS] criteria, wherein 70% weightage shall be given to technical evaluation score based on the technical proposals submitted by the agency/bidder while 30% of the weightage shall be given to the financial score based on the financial bids quoted by the agency/bidder. The contract agreement shall be signed with the NHM-Assam and the bidder/agency, whose combined score is highest, subject to all conditions laid down in the tender document and the bidder/agency fulfilling the eligibility criteria.
2. Only those firms whose technical proposals scored 60 and above will be qualified for opening of their respective Financial Proposal.
3. Tender inviting authority reserves the right to lower the minimum qualifying marks in the technical evaluation by 5 marks in case the number of eligible bidders is less than 2 after the technical evaluation.

13.1. Clause 6.18 of the Bid Documents has provided for Technical Evaluation and Technical Evaluation Matrices. The Technical Evaluation Matrices have been amended subsequently in similar manner in respect of both the Tender Processes by the Corrigenda dated 23.11.2022. The amended Technical Evaluation Matrices are as under :

Technical Evaluation Martix				
Sl. No.	Particulars	Allocation of Marks		Maximum Weightage
1.	Bidders should have completed 4 years of continuous service under BEMP program	Less than 4 years	0 Marks	20 Marks
		4 years to 5 years	16 Marks	
		5 years and above	20 Marks	
2.	The bidder should currently be employing on roll, at least 100 biomedical engineers across the country	Less than 100 biomedical engineers	0 Marks	10 Marks
		100 to 150 Engineers	7 Marks	
		150 Engineers and	10 Marks	

		above		
3.	The bidder should have an average annual turnover of INR 25 crores only on during the last three financial years [2018-19, 2019-20, 2020-21 or 2019-20, 2020-21 and 2021-22]	Equal to 30 crores	14 Marks	20 Marks
		For every additional 10 crore 2 marks	20 Marks [max]	
4.	Firms with NABL and AERB Certification	Valid NABL and AERB Certification	5 Marks	5 Marks
5.	Bidder should have successfully handled at least 10,000 numbers of Equipment	For 10,000 numbers of Equipment	10 Marks	15 Marks
		For every additional 10,000 numbers of Equipment 2.5	15 Marks [max]	
6.	Agencies with ISO 9001 and ISO 13485 Certification	Valid ISO 9001 and ISO 13485 Certification	5 Marks	5 Marks
7.	Bidders having experience of handling similar BEMMP project with minimum 4 years’ experience in other States. Work Satisfaction Report to be submitted against the undertaken/ongoing project	In two States with 4 years of services	5 Marks	15 Marks
		For every additional states with 4 years of services 2.5 marks	5 Marks [max]	
		Work Satisfaction report at least from 2 States with BEMMP 5 years’ service completion	5 Marks	
8.	Presentation to be made by the firm on implementation methodology, dashboard, and data transparency BEEMP management process : 4 Marks, Dashboard : 4 Marks, Presentation Skill : 2 Marks etc.			10 Marks
Total Marks				100 Marks

14. The same 3 [three] nos. of bidders including the petitioner and the respondent no. 5, are in the fray in the 1st Tender Process as well as in the 2nd Tender Process. The Bid Evaluation Committee held one of its Meetings on 19.01.2023 for the purpose of evaluating the Technical Bids received in response to the e-Tender Notice dated 13.10.2022 for Tender no. : NHM-18016/8/2022-Procurement-NHM-55-P for the purpose of 'Hiring of Service Providers for Biomedical Equipment Maintenance and Management Programme [BEMMP] in the Medical Colleges of the State' and also the Technical Bids received in response to the e-Tender Notice dated 18.10.2022 for Tender no. : NHM-18016/8/2022-Procurement-NHM-83-P for the purpose of 'Hiring of Service Providers for Biomedical Equipment Maintenance and Management Programme [BEMMP] from the level of DH to

PHC'. In the said Meeting, the Bid Evaluation Committee prepared a Synopsis of Bid Evaluation whereby it had sought for certain clarifications from the 3 [three] participant bidders.

14.1. From the Minutes of the Meeting dated 19.01.2023, it transpires that the Bid Evaluation Committee/Tendering Authority sought the following clarifications from the 3 [three] participant bidders in respect of 1st Tender Process :-

Hiring of Service Providers for Biomedical Equipment Maintenance and Management Programme [BEMMP] from the level of DH to PHC	
Name of the Bidder	Clarifications Required
M/s Medicit Health Care Service Private Limited [the petitioner]	Clarification may be sought for 100 nos. of experienced Biomedical Engineers for marking [7 Marks] and 150 biomedical Engineers and above [10 Marks] for higher marking on your payroll and evidence of PF/ESI/Payments are to be furnished along with.
M/s TBS India Telematic and Biomedical Services Private Limited	XXX XXX XXX
M/s AOV International LLP [the respondent no. 5]	Clarification may be sought : 1. 4 years of continuous service under BEMMP programme : 4 years to 5 years [16 Marks] for marking, 5 years and above [20 Marks] for higher marking need to be submitted. 2. Work Experience of handling similar BEMMP project with minimum 4 years of experience : in two states with 4 years of services [5 Marks] for marking, for every additional states with 4 years of services 2.5 marks is awarded [Maximum 5 Marks] for higher marking, Work Satisfaction report from at least 2 states with BEMMP 5 years service completion [5 Marks] for higher marking need to be submitted.

14.2. It further transpires from the said Minutes of the Meeting dated 19.01.2023, the Bid Evaluation Committee/Tendering Authority sought for the following clarifications from the 3 [three] participant bidders in respect of the 2nd Tender Process :-

Hiring of Service Providers for Biomedical Equipment Maintenance and Management Programme [BEMMP] in the Medical Colleges of the State	
Name of the Bidder	Clarifications Required
M/s Medicit Health Care Service Private Limited [the petitioner]	Clarification may be sought for 100 nos. of experienced Biomedical Engineers on your payroll and evidence of PF/ESI/Payments are to be furnished along with.
M/s TBS India Telematic and Biomedical Services Private Limited	XXX XXX XXX
M/s AOV International LLP [the respondent no. 5]	Clarification may be sought for : 1. Four [4] Financial years of experience in BEMMP taken together in at least 2 states [in continuation on the date of invitation of Bid] as a sole bidder. 2. Work satisfaction report mentioning years of service from competent Authority/Tender Inviting Authority in BEMMP Program from at least 2 states for a period of 4 financial years taken together need to be submitted.

15. On receipt of the communications from the Tendering Authority/Bid Evaluation Committee seeking clarifications from the 3 [three] participant bidders including the petitioner and the respondent no. 5, on the afore-mentioned aspects, clarifications were provided by them to the Tendering Authority/Bid Evaluation Committee for further evaluation of the Technical Bids. On receipt of the clarifications, the Bid Evaluation Committee had convened another Meeting on 05.04.2023 for evaluation of the Technical Bids along with the clarifications received from the bidders. After deliberation, the Bid Evaluation Committee arrived at its findings about responsiveness or non-responsiveness of the Technical Bids of the 3 [three] participant bidders and recorded the same in its Minutes in the following manner :-

Sl.	Name of the	Summary of Evaluation
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No.	Programme		
1.	Biomedical Equipment Maintenance and Management Programme for Medical Colleges of Assam and for DH to PHC level of Assam	List of Technically Qualified Bidders :	
		Name of the Bidders	Clarifications sought and Responses of the bidders
		M/s Medicit Health Care Services Private Limited	<u>Clarification Sought:</u> Clarification regarding availability of 100 nos. of experienced Biomedical Engineers on payroll and evidence of PF/ESI <u>Response of the bidder</u> Bidder has submitted a letter to MD NHM along with copy of affidavits where they have accepted that they are deploying manpowers for the BEMMP Project through their outsourcing contractors in different states. Further they have submitted a copy of employee details where it is seen that they have a total nos. of 180 Biomedical Engineers [through outsourced companies] having more than 3 years of experience and also submitted PF and ESI payment receipt. Further they have emailed a copy of affidavit where they ensured that once they get the BEMMP Project in Assam they will deploy employees on their payroll for the project. <u>Remarks:</u> The Tender Committee recommended that the bidder is technically not acceptable after submission of the shortfall documents because as per Section III, 3.1 “The details of Tender”

			under the column “Eligibility to Bid” of the NIT prescribes that the bidder must have minimum 100 numbers of experienced Biomedical Engineers in their payroll and evidence of PF/ESI/Payments are to be furnished. From the clarification furnished by the bidder M/s Mediciti Health Care Service Pvt. Ltd., as mentioned above, it is apparent that the said bidder does not have 100 numbers of experienced Biomedical Engineers in its payroll and thus, fails to fulfill the criteria prescribed in the section III, 3.1 “The Detail of tender” under the column “Eligibility to Bid”. The said lacuna of the bidder, M/s Mediciti Health Care Service Pvt. Ltd., further fortified from the affidavit submitted by the said bidder along with the clarification as mentioned above where they has assured that in the event of allotment of the work in question, they will deploy the 100 numbers of Biomedical Engineers in their payroll. Keeping in view of all the above, the tender committee recommended that the bid submitted by the party is technically not acceptable.
		M/s AOV International LLP	Clarification sought for : 1. Submission of Four [4] Financial years of experience in BEMMP taken together in at least 2 states [in continuation on the date of invitation of

			Bid] as a sole bidder. 2. Work satisfaction report mentioning years of service from component Authority/Tender Inviting Authority in BEMMP Program from at least 2 states for a period of 4 financial years taken together need to be submitted. <u>Response of the bidder</u> 1. Bidders have submitted work experience certificates in BEMMP Program from Madhya Pradesh [5 Years] in consortium with Instromedix India Pvt. Ltd., Mass Biomedical Pvt. Ltd. [with SPV named as AIM Health Care]. They have submitted a satisfactory letter of performance in combination with SPV AIM Health Care against their 5 years service in Madhya Pradesh West Bengal [4.5 Years] - HLL Infra tech Services Limited [HITES] subcontracted the BEMMP programme to M/s AOV International LLP. In the current tender M/s AOV International LLP has submitted performance and Work satisfactory Certificates from HITES. HITES being a Central Govt. PSU under Ministry of Health and Family Welfare, is the competent authority to issue the certificate and hence acceptable. Moreover, the party has submitted the
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			list of experienced manpower which were employed for maintenance of equipment in other States where they took part as a consortium Member. They have also submitted work experience certificates for the States like Maharashtra [11 months], and the order copy and LOI for the states like Punjab [7 months], Madhya Pradesh [10 months] in 2nd term and West Bengal [15 months] in 2nd term as a sole bidder. <u>Remarks:</u> In respect of the bidder M/s AOV International LLP, the tender committee observes that the said bidder has experience of executing similar nature of jobs for a period of 4.5 years in West Bengal as a sub-contractor under HLL Infra Tech Services Limited [HITES], a Central Government PSU under Ministry of Health and Family Welfare, and in this regard the said authority has issued certificate in respect of M/s AOV International LLP, HITES being a Central Govt. PSU under Ministry of Health and Family Welfare, is the competent authority to issue the certificate and hence acceptable and apart from the above experience, the bidder M/S AOV International LLP have also submitted Satisfactory Letter of performance in connection with SPV AIM Health Care against their 5 years in service in Madhya Pradesh. The said bidder has also submitted experience
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			certificates for execution of similar jobs in the states viz. Maharashtra for 11 months, Punjab for 7 months and West Bengal for 15 months as a sole bidder. As per the clause 3.1 of Section III [as amended] of the NIT, a bidder should have four [4] Financial years of experience in BEMMP in at least 2 states for a total period of 4 financial years taken together and also Work satisfaction report mentioning the years of service from competent Authority/Tender Inviting Authority is hence fulfilled by the said bidder. In view of all the above tender committee observed that the bidder has experience of Working at least 4 Financial years taken together in at least two states and satisfactory certificate submitted atleast from two states. Hence, committee recommended the party as technically acceptable.
		M/s TBS India Telematic and Biomedical Services Pvt. Ltd.	XXX XXX XXX

4. Therefore, in view of the above the Committee recommends that price bids of technically qualified bidders may be opened and evaluated. Further, technical marks of the technically qualified bidders is enclosed as Annexure A.

Sl. No.	Name of the Programme	Name of the qualified bidder
1	Biomedical Equipment Maintenance and	M/s AOV International

	Management Programme for Medical Colleges of Assam and for DH to PHC level of Assam	LLP
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15.1. The Tendering Authority/Bid Evaluation Committee on 05.04.2023, had also declared the Technical Bid of the other remaining bidder of the 3 [three] participant bidders viz. M/s TBS India Telematic and Biomedical Services Pvt. Ltd. as non-responsive. As M/s TBS India Telematic and Biomedical Services Pvt. Ltd. is not a party to the instant writ proceedings, there appears no necessity to refer to the findings recorded in respect of the Technical Bid of the said bidder as none of the parties involved in the present writ proceedings has referred to such findings and in that view of the matter, the findings recorded in respect of the Technical Bids of the said bidder are not extracted hereinabove.

16. The scope of judicial review under Article 226 of the Constitution of India in matters relating to award of contracts by the State and its agencies/instrumentalities is settled by a long line of decisions including *Ramana Dayaram Shetty vs. International Airport Authority of India and others*, [1979] 3 SCC 489; *Central Coalfields Limited and another vs. SLL-SML [Joint Venture Consortium]* and others, [2016] 8 SCC 622; *Silppi Constructions Contractors vs. Union of India and another*, [2020] 16 SCC 489; *Municipal Corporation, Ujjain and another vs. BVG India and others*, [2018] 5 SCC 462; and Civil Appeal no. 3897 of 2023 [*TATA Motors Limited vs. The Brihan Mumbai Electric Supply & Transport Undertaking [BEST] and others*]. The principles deducible from the long line of decisions can inter alia be summarized as follows :-

- The tendering authority/employer of a project has the right to rigidly enforce the terms and conditions of the contract or the notice inviting tender. The tendering authority/employer as an administrative authority must be rigorously held to the standards by which its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.
- While exercising power of judicial review in respect of award of contracts, the court should concern itself primarily with the question, whether there has been any infirmity in the decision-making process. The court's jurisdiction under Article 226 in such matters is limited and the court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the tendering authority/employer is apparent on the face of the record.

- The court does not have the expertise to correct the administrative decision. Judicial review of administrative decision is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether the choice or decision is made lawfully and not to check whether choice or decision is sound. If the State or any of its agencies/instrumentalities has acted reasonably, fairly and not against public interest in the matter of awarding contract, interference by Court is restrictive since no person can claim fundamental right to carry on business with the State.
- The tendering authority/employer of a project, having authored the tender document, is the best person to understand and appreciate its requirements and interpret the tender document. It is possible that the tendering authority/employer of a project may give an interpretation to the tender document that is not acceptable to the constitutional court but that by itself is not a reason for interfering with the interpretation given. A mere disagreement with the decision-making process or the decision of the tendering authority/employer is no reason for a constitutional court to interfere, in the absence of elements of arbitrariness or irrationality or any intention to favour someone or mala fides.
- Where a decision is taken by the tendering authority/employer that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the constitutional court should follow the principle of restraint. A bidder's expertise and technical capability and capacity must be left to be assessed by experts. The tendering authority/employer should be allowed to carry out the purpose and there has to be allowance of free play in the joints. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender document relating to technical works and projects requiring special skills.
- The tendering authority/employer is in the best position to find out the best person or the best bid depending on the nature of work to be entrusted under the contract and the court should exercise the principle of restraint from compelling the tendering authority/employer to engage any undeserving person to carry out the work.
- The court should give way to the opinion of the experts unless the decision is ex facie arbitrary or unreasonable. The court does not sit like a court of appeal over the tendering authority/employer in respect of the contract-work proposed to be awarded. The tendering authority/employer which floats the contract or the tender and has

authored the tender document is the best judge as to how the tender document has to be interpreted. If two interpretations are possible then the interpretation of the author of the tender document/notice inviting tender is to be accepted.

- The issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of an unsuccessful party but also from the point of view of the tendering authority/employer. The terms and conditions set forth in a notice inviting tender or tender document cannot be ignored as being redundant or superfluous.
- To reject words as redundant or superfluous should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by others should be presumed to use words without a meaning. The court has, therefore, to avoid a construction which would render the words used by the author of the document meaningless. Whether a term of the notice inviting tender or the tender document is essential or not is a decision taken by the tendering authority/employer, which should be respected. The court in exercise of the power of judicial review is not supposed to take over the decision-making function of the tendering authority/employer and to make a distinction between essential and non-essential terms contrary to the intention of the tendering authority/employer and thereby re-write the arrangement.
- It is not open for a bidder participating in a competitive bidding process to insist that his bid should be accepted simply because his bid is the highest or the lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the State or any of its agencies/instrumentalities. All that a participating bidder is entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of his bid. The award of a contract essentially being a commercial transaction, must be determined on the basis of consideration that are relevant to such commercial decision and the terms subject to which bids are invited are not open to the judicial scrutiny unless they are found to have been tailor-made to benefit any particular bidder or a class of bidders. No bidder is entitled as a matter of right to insist the tendering authority/employer for entering into further negotiations unless the terms and conditions of the tender document/notice inviting tender so provided for such negotiations.
- When a decision-making process is found to be so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully would have arrived at such decision, the power of judicial review can be exercised. However, if the decision is bona

fide and in public interest, the court should not interfere in the exercise of power of judicial review even if any procedural lacuna or a defect in the decision-making process is found. The principles of equity and natural justice do not operate in the field of commercial transactions. Wherever a decision has been taken appropriately in public interest, the court ordinarily should exercise judicial restraint. When a decision is taken by the tendering authority/employer upon due consideration of the bids submitted by all the bidders on their own merits and it is ultimately found that the successful bidder has in fact substantially complied with the purpose and object for which the essential conditions have been laid down, then such a decision is ordinarily not to be interfered with.

- Grant of judicial relief at the instance of a party which does not fulfill the requisite criteria is something which could be termed as misplaced. The court has to exercise its discretionary powers under Article 226 of the Constitution of India with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

17. Reverting back to the facts of the case in hand, the case pleaded by the petitioner is that when it received the communication from the Tendering Authority/Bid Evaluation Committee subsequent to the Meeting, held on 09.01.2023, seeking clarification as regards availability of 100 nos. of experienced Biomedical Engineers on its Payroll and evidence of PF/ESI payments etc., it provided the clarifications by its Letter dated 21.01.2023 to the respondent no. 2, stating that it had entered into service agreements with 3 [three] entities viz. [i] M/s Trimed Solutions India Pvt. Ltd.; [ii] M/s Chhatisgarh Healthcare; and [iii] M/s Hexamed Technologies Pvt. Ltd. It has also been urged that the relevant service agreements along with documents evidencing proof of payments towards PF/ESI etc. were also submitted along with the Letter dated 21.01.2023. With such projections, the petitioner side has urged that it had demonstrated before the Tendering Authority/Bid Evaluation Committee that it had fulfilled the manpower and employee requirements of the two Tender Processes through such collaboration with the above 3 [three] entities. It has also been sought to contend that due to such collaboration with the afore-mentioned 3 [three] entities, the total

nos. of Biomedical Engineers having more than 3 [three] years of experience, available with the petitioner for deployment on the last date of bid submission, were 188 nos.

18. The Letter dated 21.01.2023 [supra] which was addressed to the respondent no. 2, has been annexed to the writ petition. The said Letter dated 21.01.2023 was addressed in reference to a mail dated 20.01.2023 of the respondent no. 2 and in reference to Tender no. NHM-18016/8/2022-Procurement-NHM-55-P & Tender no. NHM-18016/8/2022-Procurement-NHM-83-P. It was stated that the petitioner company was having service agreements with [i] M/s Trimed Solutions India Pvt. Ltd.; [ii] M/s Chhatisgarh Healthcare; and [iii] M/s Hexamed Technologies Pvt. Ltd. towards supply of manpower. The Letter also enclosed a list of experienced Biomedical Engineers on Payrolls and their PF/ESI payment receipts. It was stated that a total of 188 nos. of Biomedical Engineers with more than 3 [three] years of experience were available. The petitioner company had also submitted two affidavits, sworn on 21.01.2023, in reference to Tender no. NHM-18016/8/2022-Procurement-NHM-55-P & Tender no. NHM-18016/8/2022-Procurement-NHM-83-P whereby it had certified that all the employees deployed in its BEMMP projects in the other states were employed through the petitioner company's outsourcing contractors and their salaries, perks, PF/ESI payments, etc. were being paid regularly. By another Letter dated 23.01.2023, the petitioner company had informed the respondent no. 2 about the BEMMP projects it had completed in 6 [six] nos. of other States. In the said Letter, the petitioner company had reiterated about the fact of its having service agreements with the afore-mentioned 3 [three] entities for supply of manpower and availability of 188 nos. of Biomedical Engineers with more than 3 [three] years of experience, who would be utilized for training, initial implementation and technical support, if the BEMMP projects in Assam would be awarded to the petitioner company. The Letter had further stated that the petitioner company would also recruit experienced Biomedical Engineers from the State of Assam directly if the BEMMP projects would be awarded to it.
19. In Clause 3.1 : Details of Tender of the Bid Documents, quoted hereinabove, the Tendering Authority has set forth the eligibility criteria to bid prescribing the Technical Capacity and the Financial Capacity. As per the Technical Capacity so set forth, a bidder must inter alia equip the trained Biomedical/Clinical Engineering human resource with required vehicles to reach out to sites as well as vehicles to carry tools and equipment to and from the sites and the said condition is reiterated in Clause 5.1[e] of the Bid Documents. A bidder must have

minimum 100 nos. of experienced Biomedical Engineers on the bidder's Payroll and the bidder was required to submit evidence of PF/ESI payments at the time of submission of the bid. Clause 6.13 : Contents of Bid Submission required a participant bidder to submit documents to prove that the bidder had the adequate skilled Biomedical Engineering human resource to meet the work load. One of the parameters in the Technical Evaluation Matrices, as provided by Clause 6.17 and Clause 6.18, as amended, of the Bid documents has also made it specific that the bidder should *currently* be employing on rolls, at least 100 Biomedical Engineers across the country. The allocation of marks has indicated that if the bidder does not have 100 nos. of Biomedical Engineers *currently* employed on rolls, then such a bidder would not be allocated any marks in that head. The word, *currently* is discernibly relatable to the last date of bid submission. As per the check list provided by Annexure XIV, the detailed proposal of the bidder required the category and manpower details of the current on-roll employees. It does not transpire that the Corrigenda issued subsequent to the e-Tender Notice dated 13.10.2022 for Tender no. NHM-18016/8/2022-Procurement-NHM-55-P and the e-Tender Notice dated 18.10.2022 for Tender no. NHM-18016/8/2022-Procurement-NHM-83-P have done away with the condition of having minimum 100 nos. of experienced Biomedical Engineers on the Payroll of a participant bidder.

20. As per the Oxford Dictionary of English, Third Edition, 'Roll' means an official list or register of names and 'Payroll' is a list of a company's employees and the amount of money they are to be paid. The meaning ascribed to the word, 'Payroll' in the Black's Law Dictionary, Ninth Edition, is that of a list of employees to be paid and the amount due to each of them. In common parlance, the employees on the Payroll of an organization are the persons who are directly employed by the organization having direct employer-employee relationship and such employees on the Payroll are directly paid by the organization. Two concepts, on-roll and off-roll are also associated with Payroll. 'On-roll' and 'off-roll' are terms used in connection with Payroll to distinguish between employees who are directly employed by an organization and those employees who are employed through a third-party or a contractor. One is considered to be on-Payroll of an organization if he is directly employed by the organization and if he has a formal employment contract with the organization and in such a case, the employer has the responsibility to comply with the provisions of making deposits towards PF/ESI etc. On the other hand, off-Payroll indicates to an arrangement where a person provides services to an organization as an independent contractor or through an

intermediary and in such an arrangement, there is no direct employer-employee relationship between them. In the later case, the person is not an employee of the organization he is working for. In respect of an off-Payroll employee, the organization does not ordinarily, have any direct responsibility to make deposits towards PF/ESI etc. Thus, in the considered view of this Court, having 100 nos. of experienced Biomedical Engineers on its Payroll is one thing and having 100 nos. of experienced Biomedical Engineers on the Payroll of another person/entity, with whom one has entered into an agreement to avail their services, is another thing. An employer who has the employees on its Payroll, is in a better position to determine their conditions of service by the contracts of employment but, in the second situation, where the employer has entered into an agreement with other person/entity who has the employees on its Payroll, the employer would not be in a position to fully determine the conditions of service of such employees as the employer does not have any direct relationship with such employees by virtue of any contract of employment.

21. The petitioner side has relied on Clause 4.2.7, Clause 4.2.9, Clause 4.2.13 and Clause 4.2.18.9[d] in seeking to interpret that the bidder would not have to meet the requirement of having 100 nos. of Biomedical Engineers on Payroll at the time of submission of the bids and it would only as a Service Provider, it would be required to fulfill the same, which would be at a later point of time and as such, requirement of 100 nos. of Biomedical Engineers on the bidder's Payroll, at the time of submission of the bid, could not be termed as a non-essential condition of eligibility to submit the bid. Perusal of the Bid Documents go to show that Clause 4.2.7, Clause 4.2.9, Clause 4.2.13 and Clause 4.2.18.9[d] are parts of Section IV of both the Bid Documents wherein the Scope of Works for the Service Provider[s] have been delineated. The clauses viz. Clause 4.2.7, Clause 4.2.9, Clause 4.2.13 and Clause 4.2.18.9[d] have mentioned about the Service provider[s], not of the bidders. But the Bid Documents have *inter alia* provided that the Tendering Authority would notify the successful bidder[s] that its bid for Biomedical Equipment Maintenance, which has been selected by the Tendering Authority, has been accepted, also briefly indicating therein the essential details like the Scope of Works, terms & conditions and corresponding accepted prices by issuing a Letter of Intent [LoI]. The successful bidder, upon receipt of the LoI, has to enter into an agreement in the format given under Annexure-12 of the Bid Documents as the contractor. Thus, it is only the successful bidder who after issuance of the LoI and execution of the agreement in the prescribed form, becomes the Service Provider/Contractor for undertaking the BEMMP, envisaged in the e-Tender Notices and the Bid Documents. Thus, leaning on the

said afore-mentioned clauses by the petitioner side at a time prior to its emergence of the successful bidder, not to speak of the issuance of the LoI, is found to be misplaced. As per Clause 6.11.3, the Tendering Authority would be required to explain briefly about the requirements as well as the terms and conditions of the Bid Document at the time of the Pre-Tender Meeting. Clause 6.11.4 of the Bid Documents had provided for an opportunity for the petitioner as a prospective bidder to obtain all the details about the tendered items, conditions governing the tenders and also to get the explanation of any ambiguous condition that might be present in the Bid Documents. It is not the case of the petitioner that having nursed any doubt about the condition, it had made any query about the condition of having 100 nos. of Biomedical Engineers on the Payroll of a bidder at the time of the Pre-Tender Meeting or any time thereafter.

22. Whether the condition of having 100 nos. of Biomedical Engineers on the Payroll of a bidder, at the time of submission of the bids in the two Tender Processes, is an essential condition or not is clearly a decision to be taken by the Tendering Authority/employer of the contract-work. In the case in hand, the Tendering Authority/employer as well as the Bid Evaluation Committee has taken a specific stand that the condition of having 100 nos. of Biomedical Engineers on the Payroll of a bidder, at the time of submission of the bid, is an essential condition of eligibility to bid and this Court has to defer to such a decision of the Tendering Authority/employer. The condition of having 100 nos. of Biomedical Engineers on the Payroll of a bidder, at the time of submission of the bid, is a condition incorporated in the e-Tender Notices and the Bid Documents and it cannot be said that such a decision on the part of the Tendering Authority/employer is manifestly not in consonance of the e-Tender Notices and the Bid Documents of the two Tender Processes. Admittedly, the petitioner did not have 100 nos. of Biomedical Engineers on the Payroll at the time of submission of its bids and in such view of the matter, the decision taken by the Bid Evaluation Committee to declare the Technical Bids of the petitioner submitted in respect of the two Tender Processes as non-responsive, cannot be termed as arbitrary and irrational. Therefore, this Court is of the unhesitant view that the said decision does not call for any interference.
23. It is trite, as observed in **Ramana Dayaram Shetty** [supra], that it is open for a bidder whose bid has been rejected to complain that the bid of someone else has been wrongly accepted. It has been contended herein that the Technical Bids of the respondent no. 5 have been wrongly accepted. By amendments carried out to the part, 'Technical Capacity under the

Eligibility to bid' contained in Clause 3.1 of Section III of the Bid Documents, vide Corrigenda being Corrigendum no. 1 dated 23.11.2022 in respect of both the Tender Processes, the Tendering Authority has laid down that a bidder shall have to participate as a sole bidder and should have at least 4 [four] Financial Years of experience in the BEMMP projects in at least two states [in continuation on the date of invitation of bid] maintaining all biomedical equipments. The said Corrigenda while doing away with consortium bidding, have stipulated that Work Satisfaction Reports mentioning the years of service from Competent Authority[s]/Tender Inviting Authority must be submitted. It has been clarified by Clarification to Corrigendum no. 1 dated 29.11.2022 that the 4 [four] years of experience in the BEMMP in at least 2 [two] states would mean that the bidders should have work experience in at least 2 [two] states for a total period of 4 [four] Financial Years taken together. The Clarification to Corrigendum no. 1 has mentioned specifically that all other terms and conditions of Tender no. NHM-18016/8/2022-Procurement-NHM-55-P dated 13.10.2022 and Tender no. NHM-18016/8/2022-Procurement-NHM-83-P dated 18.10.2022 would remain unchanged.

24. The respondent nos. 2, 3 & 4 in the counter affidavit have stated that it had considered the experience gained by the respondent no. 5 in the BEMMP in the following manner :- [i] Madhya Pradesh : 5 years [1st term] Consortium with M/s Intromedix India Pvt. Ltd and M/s Mass Biomedical Pvt. Ltd [with SPV named as AIM Health Care]; [ii] Madhya Pradesh : 10 months [2nd term]; [iii] West Bengal [subcontracted by HITES] – 4.5 years [1st term]; [iv] West Bengal [as a sole bidder] – 15 months [for 42 nos. of Super Speciality Hospital]; [v] Punjab [as a sole bidder] – 7 months; and [vi] Maharashtra [as a sole bidder] – 11 months. By counting the experience of the respondent no. 5 in the afore-stated manner, it has been averred that the respondent no. 5 has more than 5 [five] years of experience against the required working experience of minimum 4 [four] years in at least 2 [two] states taken together. From the excerpts of the Minutes of the Meeting of the Bid Evaluation Committee, held on 05.04.2023, extracted hereinabove, it is noticed that the Bid Evaluation Committee considered the Work Satisfaction Reports mentioning years of service from the Competent Authority[s]/Tender Inviting Authority in the BEMMP programme. The Bid Evaluation Committee had accepted the Work Experience Certificate submitted by the respondent no. 5 for the State of Madhya Pradesh where it undertook the BEMMP programme in consortium with other entities through an SPV for a period of 5 [five] years. The Bid Evaluation Committee had also accepted a period of experience for 4.5 years in the State of West

Bengal on the premise that in the said State, M/s HLL Infra Tech Services Limited [HITES] had sub-contracted the BEMMP programme to the respondent no. 5 for 2 [two] districts. As the Work Satisfactory Certificate was issued by M/s HITES, a Public Sector Undertaking [PSU] under the Ministry of Health & Family Welfare, Government of India; and M/s HITES was the main contractor, it is a Competent Authority to issue a Work Satisfactory Certificate. The Bid Evaluation Committee had also accepted the experience certificates, submitted by the respondent no. 5, for execution of similar jobs in the States viz. [i] Maharashtra for 11 months; [ii] Punjab for 7 months; and [iii] West Bengal for 15 months, as a sole bidder. The Bid Evaluation Committee had, thus, found the Technical Bids of the respondent no. 5 as compliant on the premise that as per Clause 3.1, as amended, of Section III of both the Bid Documents, a bidder should have 4 [four] Financial Years of experience in the BEMMP in at least 2 [two] states for a total period of 4 [four] financial years taken together.

25. It has been canvassed by the petitioner's side that as per amended Clause 3.1 which has provided for Technical Capacity, the prior experience of a bidder in the BEMMP in 2 [two] other States must be experience which were to be gained as a Service Provider after participating in the concerned tender processes as the sole bidder. On the other hand, it has been canvassed by the respondent sides that the bidder was required to participate in the 1st Tender Process and the 2nd Tender Process as a sole bidder and it has no co-relation with the other part of the condition that the bidder should have 4 [four] Financial Years of experience in the BEMMP in at least 2 [two] states maintaining all Biomedical equipments and such experience need not be continuous and need not be gained as a sole bidder. As has emerged from the principles extracted above that in a scenario where the contesting parties urge on two kinds of interpretation in respect of a clause in a notice inviting tender/bid document, the court while exercising the power of judicial review should ordinarily, give way to the opinion of the experts unless the decision is found to ex facie arbitrary or unreasonable as the court being not an appellate authority, has to accept the position that the Tendering Authority having authored the Bid Documents is the best judge as to how the clauses in the Bid Documents have to be interpreted and if two interpretations are possible then the interpretation of the author must be accepted. It is seen that the Bid Evaluation Committee consisted of experts. When a decision is taken by a committee of experts who had the necessary expertise and domain knowledge in the field, upon due consideration of the requirements of the Bid Documents of the 2 [two] Tender Processes and the Technical Bids on their own merits and if such a committee of experts have found

that the Technical Bids of the respondent no. 5 are substantially responsive to the terms and conditions set forth in the Bid Documents, this court exercising the power of judicial review under Article 226 of the Constitution of India shall not ordinarily interfere, unless such a decision is to the detriment of public interest. In the case in hand, the Bid Evaluation Committee had taken a view that the experience gained by the respondent no. 5 as a part of the consortium in the State of Madhya Pradesh and as a sub-contractor in the State of West Bengal on being sub-contracted by a Central PSU, would count for the purpose of 4 [four] Financial Years of experience in at least 2 [two] States fulfilling the conditions incorporated in amended Clause 3.1 of the Bid Documents. The Bid Evaluation Committee have also considered and accepted the experience certificates submitted by the respondent no. 5 for execution of similar jobs in 3 [three] States for a total period of 33 [=11+7+15] months. As such an interpretation of amended Clause 3.1 of the Bid Documents is one of the two possible interpretations which can be drawn therefrom and such interpretation has been made by the Tendering Authority/Bid Evaluation Committee consisting of experts, this Court exercising the power of judicial review examining whether the decision is made lawfully, does not find any good and sufficient reason to hold that the decision is not lawful so as to interfere with such a decision taken by the Tendering Authority/Bid Evaluation Committee while accepting the Technical Bids of the respondent no. 5 for the 2 [two] Tender Processes as the petitioner side has not been able to show that the public interest has thereby, been suffered.

26. In **New Horizons Limited** [supra], the Hon'ble Supreme Court had considered the matter of a joint venture company and after lifting the veil of the corporate personality, had observed that in respect of the joint venture company referred therein, the experience of the company can mean the experience of the constituents of the joint venture. In **Municipal Corporation, Ujjain** [supra], a notice inviting tender was floated for appointment of an agency to carry out 'Municipal Solid Waste Door-to-Door Collection and Transportation' for a period of 10 [ten] years in the city of Ujjain. The respondent no. 1, M/s BVG India Limited participated in the tender process and submitted an experience certificate issued in favour of one M/s BVG Kshitij Waste Management Services Private Limited. No material was produced before the court to show that M/s BVG Kshitij Waste Management Services Private Limited was same as M/s BVG India Limited or that it was a consortium member. M/s BVG India Limited had submitted its bid as an individual bidder and not as a consortium with M/s BVG Kshitij Waste Management Services Private Limited. It was held in that background that the experience

certificate issued in favour of M/s BVG Kshitij Waste Management Services Private Limited could not be relied upon to fulfill the eligibility criteria by M/s BVG India Limited and the experience certificate being a certificate of a third-party, could not be considered for the benefit of meeting the technical qualification of the respondent no. 1, M/s BVG India Limited. The issue involved in **M/s A.G. Construction Co.** [supra] was whether the experience gained by a bidder as a partner previously in a partnership firm could be counted in proportion to his share in the said partnership firm or not. As the issues involved in the decisions, referred in this paragraph, are found directly applicable the issues involved in the case in hand, no further dilation appears necessary.

27. In view of the discussions made above and for the reasons recorded therein, the points raised by the petitioner in this petition in challenging the decisions taken by the Tendering Authority/Bid Evaluation Committee in its Meeting, held on 05.04.2023, do not deserve acceptance. Consequently, the writ petition is found bereft of merits and is, therefore, liable to be dismissed. It is accordingly dismissed. The interim order stands recalled. With the dismissal of the writ petition, it is open for the Tendering Authority to proceed further with the 1st Tender Process and the 2nd Tender Process, initiated by the e-Tender Notice dated 13.10.2022 and the e-Tender Notice dated 18.10.2022, to bring them to logical conclusions. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant