* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 27th July, 2023
Pronounced on: 18th August, 2023

\+ **W.P.(C) 5077/2023 & CM APPL. 19793/2023, CM APPL. 30180/2023**

BATRA MEDICOS & ORS. ..... Petitioners

Through: Mr. Vikas Singh, Sr. Advocate with Ms. Vrinda Kapoor Dev, Dr. S. Ritam Khare, Mr. Aditya Goyal and Ms. Saumya Soni, Ms. Deepika Kalia, Ms. Vaishnavi, Mr. Keshav Khandelwal, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Chetan Sharma, ASG with Mr. Mukul Singh, CGSC, Mr. Kirtiman Singh, CGSC, Mr. Abhigyan Siddhant, GP, Ms. Ira Singh, Mr. Varun Pratap Singh and Ms. Shreya Mehra, Advocates for Respondent Nos. 1 and 2.
Mr. Saurabh Kirpal, Sr. Advocate with Mr. Vinay Kumar Dubey, Mr. Abhinav Agnihotri, Mr. Prateek Tiwari, Ms. Priya Dubey and Mr. Nikhil Arora, Advocates for Prakash Medicos.
Mr. Parag P. Tripathi, Sr. Advocate with Mr. Kunal Mittal, Ms. Vasundhara Bakhru, Advocates for M/s Grownbury Pharma.
Mr. Mohit Gupta, Mr. Ankit Jain, Mr. Vishal Saxena, Mr. Dhruv Mehta, Advocates for Kailash Medicos.
Mr. Sumant De with Mr. Rohiti

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Khurana, Advocates for Gandhi Medicos.
Mr. Samrat Nigam, Mr. Shiv Dutt Kaushik, Advocates for Kaushik Medical Stores.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.

C.M. APPL. 37363/2023, 37364/2023, 37365/2023 and **37366/2023** *(under Order I Rule 10 r/w Section 151 of the Code of Civil Procedure, 1908 for impleadment)*

1. For the grounds and reasons stated therein, the applications are allowed and the Applicants/ Intervenors are arrayed as parties to the present petition. For expeditious disposal, we permitted the intervenors to file written submissions instead of counter affidavits, and they have been extensively heard.

2. The application is disposed of. Let amended memo of parties be filed within a period of one week from today.

W.P.(C) 5077/2023

3. The Petitioners who are pharmacists, submitted bids for empanelment as Authorized Local Chemist ["ALC"] for supplying medicines to wellness centers operating within Delhi under the Central Government Health Scheme ["CGHS"]. However, their bids did not secure success. The Petitioners have raised various concerns about fairness and transparency of the tender process and allege that Respondents No. 1 and 2 deviated from

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the stipulated tender conditions by awarding contracts to bidders who were below the highest bidder (known as H1), at less than highest offered discount rates. Demonstrating their commitment to equitable competition, the Petitioners express their readiness to match the proposal of H1. They assert that if the guidelines and specifications laid out in the tender documents are diligently adhered to, all eligible bidders, including themselves, would be afforded an opportunity to match H1 discount, in a systematic manner. Based on this premise, the Petitioners assert that there is a plausible chance of contracts under the tender being awarded to them.

FACTUAL BACKGROUND

4. On 04th January, 2023, the Directorate General of CGHS, Ministry of Health and Family Welfare, Government of India, issued an e-tender on the Government e-marketplace ["GeM"] portal. This tender invited bids for empanelment of ALCs for supplying allopathic medicines to 102 wellness centers, hospitals, first-aid zones, and other units of the CGHS located across six zones in the Delhi-NCR region [*collectively, "wellness centers"*], for a period of three years. The Scope of Work and Additional Terms and Conditions of Contract Empanelment [*hereinafter, "Scope of Work"*], required the bidders to quote a single uniform discount rate at which they were willing to supply the medicines to all concerned wellness centers located in different zones. The contract was designed to be awarded to the bidder proposing the highest discount rate (*i.e.*, H1). Clause 7.2 of the Scope of Work, stipulated that if H1 bidder declined to accept the offer for a specific wellness center, they would face debarment and consequently, the

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bidder quoting the immediate next highest discount (H2 bidder) would be provided an opportunity to match the discount offered by the H1 bidder.

5. In terms of the Public Procurement Policy for Micro and Small Enterprise ["MSE"], as specified in Clause 4.2(a) of Scope of Work, the participating entities, who were registered as MSEs, were entitled to receive a procurement preference. This preference would be applicable if their quoted discount rate falls within the range of H1-15%, and they express a readiness to align with the discount proposed by H1, a non-MSE entity. The precise language of the mentioned clause is provided below:

> *"4.2 In compliance with Public Procurement Policy for MSE:*
> *a) Participating bidder who is a registered MSE, and who is quoting price within price band of L1 +15 %, shall be empaneled as ALC for a unit by bringing down their price to L1 price in a situation where L1 for the equipment is a non MSE entity. In case of ALC discount, the chosen bidder would be the one quoting the highest discount (H1), in place of lowest price (L1). Hence purchase preference would be given to MSE bidder who is quoting discount within the range H1-15% and is willing to bring up the quoted discount to match H1, where H1 is a non MSE entity.*
>
> *Explanation to 4.2(a): if a non MSE H1 bidder quotes 25% for a WC, then purchase preference would be given to all MSE bidders who have quoted a discount of 25-(15% of 25) = 25-3.75=21.25. All MSE bidders who have quoted discount between 21.25 and 24.9 will be asked to match the 25% discount quoted by the H1 bidder."*

6. Certain clauses contained in the Scope of Work, including Clause 7.2, underwent modifications through issuance of two corrigenda by Respondents No. 1 and 2. Resultantly, the deadline for submission of the bids was extended to 05:00 PM of 08th February, 2023. Following the conclusion of the revised submission period, the technical evaluation committee, led by Respondent No. 2 [Additional Director of CGHS], undertook the evaluation process for the bid documents submitted by the 58 participating bidders. Within this pool, a total of 48 bidders, including the

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Petitioners, Respondent No. 4 [M/s Prakash Medicos] and the intervenors, namely M/s Grownbury Pharmaceuticals Pvt. Ltd, Gandhi Medicos, Kailash Chemists, and Kaushik Medical Store [collectively referred to as "*Intervenors*"], were declared technically qualified.

7. The online opening of the financial bids took place on 20th January, 2023, wherein one M/s Cure Pharma Chemist emerged as the H1 bidder for various wellness centers situated across different zones. Respondent No. 3, Ramesh Chemist, was declared as the H2 bidder. The tabulation, which outlines the position of bidders based on the discounts they offered, is provided as an appendix to this judgment.

8. Respondents No. 1 and 2 raised a 'price justification query' on the GeM portal, requesting M/s Cure Pharma Chemist (H1) to submit 20% of total performance security as evidence of their financial capability to supply indented medicines to the wellness centers. However, M/s Cure Pharma Chemist failed to respond, resulting in their disqualification. Respondents No. 1 and 2 then communicated the same requirement to Ramesh Chemist, the H2 bidder.

9. In light of events noted above, the Petitioners filed the present writ petition asserting that Respondents No. 1 and 2 have, in contravention of Clause 7.2, offered the contract for empanelment to H2 bidder at the discount specified by H2, rather than prompting it to align with the discount offered by the H1 bidder. According to the Petitioners, the decision of H1 (M/s Cure Pharma Chemist) to not respond to the query from Respondents No. 1 and 2 effectively amounts to refusal of the offer. Consequently, H2 should have been provided an opportunity to match the discount offered by H1. Since this crucial step was not taken, the Petitioners assert that the

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integrity of the tender process has been compromised. As a result, they seek the following prayers:

> "*1. Issue a writ of mandamus or any other appropriate writ, order or direction thereby directing the respondents to recall and not proceed with the impugned offer given to Respondent no. 3 from working on the bid given by the Respondent no. 3 himself.*
> *2. Issue a writ of mandamus or any other appropriate writ, order or direction thereby directing the Respondents to offer to act in accordance to the Clause No 7 of e-tender contract "scope of work and additional terms and conditions of contract empanelment of authorized local chemists" dated 04.01.2023 and offer to all the eligible bidders, in seriatim, to match the discount of H -1*"

10. It transpires that during the pendency of the writ petition, Respondent No. 3 [Ramesh Chemist] also refrained from responding to the price justification query. Consequently, M/s Prakash Medicos, the H3 bidder, was declared as the highest bidder. This led to the execution of agreements in their favor for a total of 37 centers. Likewise, bids submitted by H3 and other highest bidders for various other wellness centers, including the Intervenors, were also accepted. Contracts were awarded to them under the umbrella of the tender.

11. In view of the above-noted development, *vide* order dated 11th July, 2023, M/s Prakash Medicos was arrayed as a party to the present proceedings. Following this, while arguments were being presented, the Intervenors submitted applications to be impleaded in the case. Acknowledging the potential significance of the outcome of the present petition on them, their counsel were also provided ample opportunity to present their arguments.

CONTENTIONS OF THE PARTIES

On behalf of Petitioners

12. Mr. Vikas Singh, Senior Counsel for Petitioners, strongly criticized

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the manner in which Respondents No. 1 and 2 have proceeded to award the tender, by making the following submissions:

12.1. Clause 4.2 of the Scope of Work, which accords purchase preference to registered MSE bidders over non-MSE bidders, is unsustainable. This condition significantly reduces the prospects of success of a non-MSE bidder. The Public Procurement Policy relied upon by Respondents No. 1 and 2 to incorporate this benefit to MSEs, is inapplicable as the Policy is intended to encourage MSE manufacturers, and not traders. Referring to the minutes of the pre-bid meeting held on 11th January, 2023, which clarifies that 'medium enterprises' are not eligible for the purchase preference, it was argued that there is no justification for exclusion of 'medium enterprises' from the scope of Clause 4.2.

12.2. The aforesaid preference was revoked by Respondents No. 1 and 2 in the midst of tender process, on 19th April, 2023. *Vide* this communication, Respondents No. 1 and 2 merely stated that as per an Office Memorandum ["OM"] dated 02nd July, 2021 issued by the Ministry of Micro, Small and Medium Enterprises, Government of India, purchase preference will not be granted. Respondents No. 1 and 2 materially changed the terms of contract and withdrew the preferred status of MSEs, for which Petitioners were also eligible. This change was arbitrarily made after the opening of the bids, in violation of Clause 4.2 and other original terms and conditions of the tender documents.

12.3. Clause 7.2 of the Scope of Work expressly stipulates that if the H1 bidder refuses the offer, an opportunity is given to subsequent bidders to match the discount quoted by H1, in order of their ranking. In the event none of the participants are willing to accept the work at the H1 price, then the

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process has to be conducted afresh by floating a new tender. However, in the present case, subsequent to disqualification of H1 and H2 bidders, H3 has been successful in obtaining the tender at the discount rate offered by H3 and not H1, which contradicts the mandate of Clause 7.2.

12.4. A significant portion of the work has been awarded to M/s Prakash Medicos (H3) without adequate due diligence. Respondents No. 1 and 2 have favored the selected bidder over others.

12.5. Respondents No. 1 and 2 have also removed the requirement for deposit of earnest money as security, thus allowing participants to withdraw from the tender process without any consequences. This prejudices the chemists who are genuinely interested, such as Petitioners.

12.6. That apart, Respondents No. 1 and 2 had no authority to seek proof of financial competence from the interested bidders, by raising a query on the GeM portal. The condition to furnish 20% of the performance security for grant of contract does not find a mention in the Scope of Work and has been arbitrarily introduced at a later stage. The argument that tender issuing authority can raise queries under the rules of the GeM portal is misconceived, as the Scope of Work and minutes of the pre-bid meeting held on 11th January, 2023, specifically note that in case of any inconsistency between the GeM rules and the Scope of Work, the latter shall prevail.

12.7. The reasoning supplied by Respondents No. 1 and 2 to assess the bidder's annual turnover *vis-à-vis* the number of wellness centers to which the medicines have to be sold, is entirely erroneous. If the said Respondents wished to analyze whether the discount offered by H1 bidder (*i.e.,* 40%) is predatory in nature, they ought to have conducted a price-analysis in terms

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of OM dated 06th February, 2020.

12.8. Several contracts have been awarded to persons quoting 40% discount rate, and if this rate was not deemed predatory for such bidders, it should not have been considered as a predatory offer by the H1 bidder.

On behalf of the Respondents and Intervenors

13. Senior Counsel for the Respondents and Intervenors, mentioned in the appearance above, jointly made the following submissions:

13.1. In accordance with Rule 170(iii) of General Financial Rules, 2017, Respondents No. 1 and 2 decided to seek a Bid Securing Declaration from the bidders, in place of earnest money deposit or bid security. Further, to ensure that bidders do not bid for multiple wellness centers, the penalty for delayed supply of medicines has been fixed at Rs. 100/- per item, per patient.

13.2. About 50 participating entities, including Petitioners, were present in the pre-bid meeting convened on 11th January, 2023. No objection pertaining to ineligibility in availing MSE benefits was raised during the said meeting.

13.3. It is only after the issuance of the tender that the OM dated 02nd July, 2021 was brought to Respondent No. 2's notice. As per the aforesaid OM, MSE certificates are issued only for priority lending, and not for purchase preference. Accordingly, the purchase preference, mentioned in Clause 4.2 of the Scope of Work, was withdrawn. This OM was already in force at the time of issuance of the tender but was left out due to mere oversight. This mistake was corrected before the financial bids were opened and all participating entities were informed of the decision on 19th April, 2023.

13.4. On opening of the financial bids, it was discerned that M/s Cure

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Pharma Chemist (H1) quoted the highest discount rate of 40.75% and Ramesh Chemist (H2) offered 40.6%. However, at the same time, it was noticed that M/s Cure Pharma Chemist (having an annual turnover of Rs. 54 lakhs) had quoted 40.75% discount for 99 out of 102 wellness centers, which would result in an annual expenditure of approximately Rs. 500 crores. Similarly, the H2 bidder, Ramesh Chemist (with an annual turnover of Rs. 1 crore) was willing to supply medicines at 40.6% discount to 93 out of 102 wellness centers, which would involve an annual expenditure of approximately Rs. 470 crores. Such a substantial gap between their annual turnover and the projected annual expenditure raised suspicions of predatory pricing. Considering the above and relying on OM dated 06th February, 2020, Respondents No. 1 and 2 sought written clarifications from these bidders through the GeM Portal to ascertain their financial capability. However, as H1 failed to respond to the online query within the given timeframe, their financial bid was rejected and their status as H1 ceased. Likewise, H2 also did not submit a response to the query, resulting in rejection of their financial bid. In these circumstances, the H3 and other next highest bidders who satisfied the tender criteria or were able to furnish performance security as sought, were declared successful.

13.5. There is no deviation from Clause 7.2 of the Scope of Work, as alleged by Petitioners. The said clause applies only when an "offer to supply medicines" is made to the H1 bidder, but is rejected by them. In the present case, Respondents No. 1 and 2 never made an offer to M/s Cure Pharma Chemist and had only asked them to furnish a proof of financial capacity to fulfill the requirements of tender in order to clarify suspicions of predatory pricing. Keeping in view that discounts offered by H1 and H2 bidders were

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abnormally low, the remaining bidders were not asked to match such unrealistic discount rates.

13.6. The selection of the highest bidder on the GeM portal is an automated process and Petitioners' allegation of bias is misconceived. Respondents No. 1 and 2 have fully complied with the provisions of the Scope of Work.

13.7. The scope of interference by the Court in matters of awarding tenders is well-established and if the interpretation of the author of the tender is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, then the Court should restrain itself from interfering with the same.[1]

13.8. The decision taken by Respondents No. 1 and 2 for the award of the contract was made in good faith and in public interest. This Court should not exercise judicial review, even if some procedural aberration or error in assessment is identified.

14. In addition to the above, Mr. Saurabh Kirpal and Mr. Parag Tripathi, Senior Counsel for M/s Prakash Medicos and M/s Grownbury Pharmaceuticals Pvt. Ltd., respectively, argued as under:

14.1. The challenge to Clause 4.2 of the Scope of Work on the ground that it excludes 'medium enterprises' lacks foundational pleading. Irrespective, as all the successful H3 and other highest bidders are also MSEs and the preference clause was subsequently omitted, this argument is futile and does not merit consideration.

14.2. The discounts offered by Petitioners range between 27.27% to 28.80%, as compared to the offer of the successful bidders (between 30.61%

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[1] Reliance was placed upon ***N.G. Projects Limited v. Vinod Kumar Jain and Ors.,*** (2022) SCC 127, ***JBM Electric Vehicles Private Limited v. Union of India and Anr.,*** 2022 SCC OnLine Del 2405 and ***Uflex***

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and 40.1%). It is only during the hearing of the present petition, and not the tender process, that they indicated their intention to meet the rate of 40.75%, which was offered by M/s Cure Pharma Chemist (H1).

14.3. Assuming Clause 4.2 was still in force, yet, Petitioners would not be eligible for purchase preference as their quoted discounts are not within the range of H1-15%.

14.4. Petitioners have engaged in collusive bidding by deliberately quoting discounts in the same range for different wellness centers. Further, they have concealed the fact that they have been acting as ALCs under previous tenders and were supplying medicines at nominal discount. Through the present writ petition, the Petitioners are attempting to seek cancellation of the tender in order to continue their supply operations to the wellness centers, at lower discount rates.

14.5. The successful bidders have incurred substantial expenditure on procurement of medicines to be supplied under the contract. They have also furnished performance bank guarantees and invested towards capital to sustain their operations. Grave prejudice would be caused to them if the impugned tender is set-aside.

14.6. The present writ petition has been filed by misinterpreting the terms of the tender, with an intention to derail the process without any justifiable grounds.

ANALYSIS

15. The core argument presented by the Petitioners revolves around the

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Limited v. Government of Tamil Nadu and Ors., (2022) 1 SCC 165.

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purported breach of Clause 7.2 of the Scope of Work. They claim that Respondents No. 1 and 2 deviated from standard practice by awarding contracts to a bidder offering the third-highest discount (and other next highest bidders), rather than the one quoting the highest bid (H1). In response, Respondents No. 1 and 2 vehemently counter Petitioners' claim, asserting their adherence to the stipulated tender conditions, which provide for rejection of bids on the premise of predatory pricing. They maintain that their actions were driven by the need to ascertain the financial capacities of the tenderers, taking into account the contractual obligations of the tender and the broader public interest that it entails. Consequently, the crucial issues requiring determination encompass:

(a) Whether the actions of Respondents No. 1 and 2 were consistent with the process outlined in the Scope of Work, specifically Clause 7.2, and aligned with the core principles of transparency, fairness, and objectivity in tender evaluation.

(b) Whether the rejection of bids submitted by H1 and H2 bidders was justified on the grounds of predatory pricing.

(c) Whether Respondents No. 1 and 2 were justified in seeking clarifications from H1 and H2 bidders concerning their financial capabilities. Further, whether this course of action was reasonable and proportionate in the context of concerns about potential predatory pricing.

(d) Whether the suspicion raised by Respondents No. 1 and 2 regarding predatory pricing is substantiated by the significant disparity between the annual turnover of these bidders and the projected annual expenditures.

(e) Whether the absence of a response from H1 and H2 bidders affected their eligibility and overall position, rendering their bids non-responsive.

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(f) Does award of contract to H3 and other next highest bidders at their quoted discount rates, without necessitating them to match the discount proposed by the H1 bidder, conforms to the language and intent of Clause 7.2, and aligns with the broader legal framework governing the tender award process.

(g) Whether the decision to revoke the purchase preference clause by Respondents No. 1 and 2 was procedurally correct, considering the OM dated 02nd July, 2021, cited as the basis for its withdrawal.

(h) Whether the evaluation of bids and the subsequent selection of M/s Prakash Medicos (H3) and other highest bidders was conducted with due diligence and impartiality, free from favoritism or bias in the decision-making process.

FINDINGS

16. Having outlined the contentions and highlighted the pivotal questions, for clarity, we must now turn to the relevant clauses detailed in the Scope of Work.

Tender condition for determining the H1 bidder

17. Section I Clause 7 of the Scope of Work (as modified by the Corrigendum dated 18th January, 2023), which deals with the selection of bidder, reads as under:[2]

[2] The unamended Clause 7.2 of the Scope of Work is as follows:
"*If a H1 Bidder refuses to accept offer for a Wellness Centre/unit, he shall be debarred as per provisions under the Bid Securing Declaration & offer shall be made to the H2 Bidder (the bidder offering subsequent lower discount immediately after H1, to meet the discount of H1 of that WC. In case of non-acceptance by H2 bidder, the process will be repeated at H1 discount till last eligible bidder for that Wellness Centre is exhausted.*"

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*"7. **SELECTION OF BIDDER***

7.1 The bidder(s) will be ranked in order of highest to lowest discount (in descending order) and termed as H1; H2; H3 and so on. ***The bidder quoting the highest discount (herein called Hl bid) shall be offered the contract for empanelment as Authorised Local Chemist****, subject to the provisions contained in the tender clause Section 4.2 above and successful inspection of bidder's premises.*

7.2 If H1 Bidder refuses to accept offer for a Wellness Centre/unit, he shall be debarred as per provisions under the Bid Securing Declaration and he shall be rejected as successful bidder from all Wellness Centres/units where he is H1. The offer shall be made to the H2 Bidder {the bidder offering subsequent lower discount immediately after H1, to meet the discount of Hl of that WC. In case of non-acceptance by H2 bidder, the process will be repeated at H1 discount till last eligible bidder for that Wellness Centre is exhausted.

7.3 If no Chemist is available for a Wellness Centre even after bidding process on GeM due to bidders not accepting the offer to supply after the bidding process, or a no response, then due to the urgent nature of services (supply of indented medicines), an offline limited tender process shall be followed i.e., open offer shall be made to all empaneled ALCs in the city. From the pool of registered chemists, the offer accepting chemist, who is empaneled at the highest discount, shall be selected as the ALC, to supply the said WC or unit, till the validity of his contract with CGHS (along with extendable time limit as per contract}. This would be an offline contract.

7.4 If the limited tender process also fails, for empanelment of ALC for the said WC or unit, repeat bidding shall be attempted on GeM portal after ensuring adequate publicity including publishing on website of CGHS. In case of tender failure while empanelling ALCs for a WC, the annual turnover eligibility criterion shall be reduced to that applicable for the next lower Class city."

18. In terms of the afore-noted clause, bidders are ranked based on the descending order of their quoted discounts. The bidder offering the highest discount, termed as H1, is extended the offer for the contract, subject to fulfilling other relevant provisions. In the event H1 bidder declines the offer for a specific wellness center/unit, certain consequences ensue. They are debarred according to the terms of the bid securing declaration, and their status as the successful bidder for all corresponding wellness centers is revoked. The offer then shifts to H2, the bidder next in line with a lower discount, requiring them to match the discount offered by H1. Should the H2

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bidder also decline or fail to accept the offer, the iterative process continues at the H1 discount level, until the last eligible bidder for the specific wellness center is exhausted. This process ensures an opportunity for bidders with lower discounts to step in if higher bidders refuse the offer. In cases where no pharmacist accepts the offer due to non-response or refusal, alternative measures are triggered. An offline limited tender process is initiated, followed by repeated bidding attempts on the GeM portal, if necessary, with adjusted eligibility criteria in the case of tender failure.

19. The crux of the present dispute hinges on the reasoning behind Respondents No. 1 and 2's decision to reject the financial bids of H1 and H2 bidders due to concerns of predatory pricing, and their subsequent decision to award contracts to the H3 and other higher-ranked bidders. In that light, the Court shall now analyze whether this decision is arbitrary, unreasonable or beyond the ambit of the conditions provided in the Scope of Work. Our objective is to ascertain whether the impugned decision was taken in a fair and impartial manner, without any manifest arbitrariness or bias. The outcome of this assessment will be crucial in deciding the fate of the present petition. However, before delving into the issue of predatory pricing, it is imperative to address a misconception put forth by the Petitioners. Their contention that they could have secured contracts had Respondents No. 1 and 2 strictly followed Clause 7.2, is misguided. This assertion fails to acknowledge the essence of competitive bidding embedded within Clause 7. According to this clause, the contract is offered to the bidder with the highest discount rate. The Petitioners' hypothetical scenario assumes subsequent bidders' refusal, which is purely speculative and lacks legal foundation. Moreover, the bid status presented to the Court ranks the

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Petitioners as low as H11 for certain wellness centers,[3] further undermining their argument. Their stance also disregards the substantial impact of predatory pricing, the very reason behind the rejection of H1 and H2 bids.

Predatory Pricing

20. That said, we move on to the core issue – predatory pricing. At the crux of impartial tender process lies the cardinal principle of promoting fair competition. If predatory pricing tactics are employed, it can distort the bidding process by discouraging genuine competitors from participating or submitting realistic bids. The analysis of predatory pricing in tender process holds significant importance as it ensures fair competition, prevents anti-competitive practices, and safeguards the public interest. Predatory pricing can lead to sub-standard services or goods being delivered to the public, as the bidder may not be capable of providing quality products at such low prices. Proper scrutiny helps in selecting bidders who can fulfill their contractual obligations effectively. Thus, proper analysis of predatory pricing helps identify such practices and ensures a level playing field for all bidders. On this issue, the OM of 06th February, 2020 issued by the Ministry of Finance, Government of India, acts as a reference point. It underscores the need to maintain an equilibrium of pricing, thus, preventing the undue influence of artificially low (in this case high) bids. Respondents No. 1 and 2 have therefore invoked this OM as a means to safeguard the procurement process against potential predatory pricing strategies. The OM reads as follows:

"***OFFICE MEMORANDUM***

[3] *See:* Appendix to the judgement.

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Subject: Predatory Pricing/ Abnormally Low Bids - Reg.

It has come to the notice of this Department that procurement entities are facing difficulties in finalization of tenders, in cases of predatory pricing/ abnormally low bids. In this connection, para 7.5.7 of the Manual for Procurement of Goods, 2017 issued by Department of Expenditure is being reiterated for information:

> *An Abnormally Low Bid is one in which the bid price, in combination with other elements of the Bid, appears so low that it raises material concerns as to the capability of the bidder to perform the contract at the offered price. Procuring Entity may in such cases seek written clarifications from the bidder, including detailed price analyses of its bid price in relation to scope, schedule, allocation of risks and responsibilities, and any other requirements of the bids document. If, after evaluating the price analyses, Procuring Entity determines that the bidder has substantially failed to demonstrate its capability to deliver the contract at the offered price, the Procuring Entity may reject the bid/proposal. However it would not be advisable to fix a normative percentage below the estimated cost, which would be automatically be considered as an abnormally low bid. Due care should be taken while formulating the specifications at the time of preparation of bid document so as to have a safeguard against the submission of abnormally low bid from the bidder.*
>
> *Sd/-"*

21. The OM, as clearly seen from its text, defines an 'abnormally low bid' as one where the bid price, in conjunction with other elements, appears to be unreasonably low, thereby raising doubts about the bidder's capability to execute the contract at the offered price. In cases of abnormally low bids, the procuring entity has been permitted to seek written clarifications from the bidder, including detailed price analysis, to assess their capability to deliver the contract as per the offered price. The emphasis on detailed price analysis and bidder capability assessment aims to ensure that contracts are awarded to bidders who can deliver on their commitments. Scrutiny of the price analysis allows the procuring entity to determine if the bidder has adequately

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demonstrated its capability to perform the contract at the offered price. If the bidder is found to have substantially failed in demonstrating their financial capacity, their bid or proposal may be rejected. However, the OM cautions against fixing a normative percentage below the estimated cost as an automatic criterion to identify abnormally low bids. Instead, it emphasizes the importance of formulating bid specifications carefully to safeguard against the submission of such bids. The procedure for consideration of abnormally low bids, as enumerated in the aforesaid OM, also finds a mention in paragraph 7.5.7 of Chapter 7 of the Manual for Procurement of Goods, 2017 (updated as on 01st July, 2022) issued by the Department of Expenditure, Ministry of Finance.

22. There can thus, be no doubt that Respondents No. 1 and 2 were justified in examining whether the discounts offered by the bidders constituted as predatory pricing. They were rightly concerned about determining if the quoted prices were excessively low or high, raising doubts about the bidders' ability to fulfill the contract at the proposed rates. Nonetheless, the central question is whether the application of the OM dated 06th February, 2020 by Respondents No. 1 and 2 was both justified and in line with principles of fairness and reasonability. In this regard, Respondents No. 1 and 2 have provided explanation to support their decision and the methodology adopted by them in their assessment. They have also outlined the reasons behind undertaking this exercise in the Technical Evaluation Report and Minutes of the Tender Inviting Authorities,[4] as follows:

"Note #601

xx ... xx ... xx

C. As stated in the email "Conspiracy by ALC", there is a possibility that

[4] Filed pursuant to court directions issued on 18th July, 2023.

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*some bidders who have bid for several Wellness Centres **may quote abnormally high discounts ('predatory pricing' to gain undue advantage)**, and hence get selected by GeM portal as H1. There is a possibility that such H1 bidders may refuse to accept the offer to be empanelled as ALC, thereby vitiating the tender process. One way to counter this would be to seek Performance Security deposition, as soon as H1 is declared by GeM, so that in the event of refusal to accept the empanelment offer, the PBG can be forfeited. The bids of H1 bidders who do not submit Performance Security shall be rejected outright and they shall also be debarred from future participation in CGHS tenders for 02 years (as per Clause 7.2 of "Scope of work" document). In such cases, H2 shall be declared as **H1 but as a deviation from Clause 7.2, H2 may not be required to match H1 discount, which should be dismissed being the unrealistic 'predatory pricing'**."*

xx ... xx ... xx

"Note # 603
Note # 601 was submitted with Technical Evaluation Report of 58 ALC GeM bids received for Local Chemist Empanelment services, CGHS Delhi NCR and the points raised by ADs (Tender Inviting Authorities) following the meeting on 10/03/2023.
Reference Note # 602 by AD (HQ), it is submitted that without actually defining the discount % above which it would be termed "predatory pricing", we may go by the fact that, if the H1 bidder is unwilling to submit PBG, even it is a reasonable discount, then he is a non serious player.
*At the same time, the tender process requires the bidder to be given 07 days time to submit PBG. We would lose time if we keep giving 07 days time to H1 first, then to H2 on refusal by H1, H3 on refusal by H2 etc. As discussed, **we may calculate the total PBG required to be submitted by a H1 bidder and insist that he deposit 20% of the same within 02 days of being declared the H1**. The remaining amount of PBG may be deposited on Day 7. A non serious bidder would not be willing to deposit even that much amount as PBG. This would weed out non serious bidders in a shorter period of time."*

23. The above extract details the rationale behind the price justification query posed by Respondents No. 1 and 2 on the GeM portal, focusing on the financial capability of the H1 and H2 bidders. Given the significant financial obligations tied to supplying medicines to 99 wellness centers, it was imperative to verify that the bidders, especially those ranked as H1, had the means to meet the contractual requirements. Respondents No. 1 and 2's concern regarding H1 bidder's financial capability, given their relatively low reported turnover of Rs. 54 lakhs against the significant annual expenditure of Rs. 500 crores for supplying indented medicines, was well-founded.

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Additionally, the geographical dispersion of the wellness centers, some located as far as 100 kilometers apart, raised practical challenges in timely and efficient delivery of medicines. It is therefore understandable that said Respondents wanted a written clarification from M/s Cure Pharma Chemist to ascertain how they intended to manage such extensive and diverse supply requirements within the specified time frame. Therefore, we are not persuaded by Mr. Vikas Singh's argument that, in the absence of any provision within the tender documents, Respondents No. 1 and 2 lacked the authority to seek clarifications on the GeM portal. In our opinion, the OM as well as the Manual for Procurement of Goods provide Respondents No. 1 and 2 the authority to seek clarifications. The written clarification process, as a means of assessing the bidder's capability to deliver the contract at the offered price, aligns with the principles of fairness and transparency in the tendering process. By seeking clarification, Respondents No. 1 and 2 were not only fulfilling their duty to ensure the authenticity of the tender process, but also safeguarding the public interest, as the successful implementation of the tender contracts impacts the delivery of essential healthcare services to citizens.

24. At this juncture, we must underscore that although Respondents No. 1 and 2 had the authority to assess the financial competence of participating entities, and their concerns are valid, the evaluation should have been more comprehensive and encompassing. It seems that the Respondents' evaluation was predominantly centered on financial capacity, neglecting the equally crucial aspect of 'price analysis'. As noted above, the OM and the Manual for Procurement of Goods, both underline the need to evaluate not only the financial capability, but also to undertake a meticulous price analysis,

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especially when confronted with bids that suggest predatory pricing or abnormally low offers.

25. The Manual for Procurement of Goods, which provides for procuring entity's ability to seek additional security deposit or bank guarantee for cases involving abnormally low bids, also stipulates that there must be compelling circumstances and approval from higher authorities in such cases.[5] In this context, it is worth mentioning that in order to avoid ambiguity, the tender documents could have explicitly addressed the issue of predatory pricing by including comprehensive guidelines to ensure that bidders engaging in such practices are disqualified at the threshold. Such upfront clarity might have served as a deterrent, minimizing the likelihood of predatory bids and empowering genuine bidders to make well-informed decisions during the bidding process.

26. However, deviating marginally from established protocols or choosing a methodology to identify predatory pricing in the tendering process does not intrinsically make the decision of Respondents No. 1 and 2 capricious. The bar for judicial interference in such administrative decisions is set remarkably high. The primary duty of courts is to assess the legality, soundness, and prudence of the decision-making process. As observed in ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.,***[6] unless it is demonstrated that the impugned decision is wholly arbitrary or irrational that no reasonable authority, acting in accordance with law, could have reached it, the constitutional courts shall not interfere therewith. Issuance of tenders and subsequent award of contracts are commercial transactions,

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[5] Clause 7.5.7 of the Manual for Procurement of Goods.
[6] (2016) 16 SCC 818.

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which fall within the purview of the financial functions of the Government. Therefore, except in cases of manifest arbitrariness, favoritism, perversity or irrationality, the inherent autonomy and commercial opinion of Governmental authorities and experts in commercial transactions must be given paramount significance. Further, it must be borne in mind that it is the legality of the administrative decision, not its soundness, that undergoes scrutiny in the exercise of judicial review.[7]

27. Keeping in mind the afore-mentioned judicial principles of limited intervention, we find no grounds to grant the remedies sought by the Petitioners. The crucial fact remains that both H1 [M/s Cure Pharma Chemist] and H2 [Ramesh Chemist] bidders failed to respond to Respondents No. 1 and 2's queries. Their non-responsiveness, coupled with their absence before the Court to assail their disqualification, raises legitimate doubts about their genuineness and willingness to execute the contract at the offered discount rates. Their inaction effectively nullified their bids. In these circumstances, the stipulation in Clause 7.2 of the Scope of Work, which mandates subsequent bidders to match the discount rates offered by H1, did not come into play. The stage of extending an "offer to supply medicines" was never reached. With the nullification of H1 and H2's bids, Respondents No. 1 and 2 were justified in deciding to move on to the next highest bidders and awarding the tender(s) to them, which approach also aligns with public interest keeping the object of the tender in view. In totality, the Court firmly concludes that Respondents No. 1 and 2 acted with reasonableness, grounded in valid considerations. The Petitioners have also

[7] ***Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) and Ors.***, (2016) 8 SCC 622.

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not presented any substantial evidence of bias or favoritism on the part of Respondents. As such, the discretionary nature inherent to tendering processes allowed Respondents No. 1 and 2 to exercise their judgment within the parameters of the law and facts that emerged during the tender process. Consequently, the Court finds no substantial basis to uphold the challenge mounted by the Petitioners against the award of tenders to H3 (or next highest) bidders.

28. Regarding the Petitioners' assertion that Respondents No. 1 and 2 awarded contracts to certain wellness centers on the same discount rate as was offered by H1, it is important to recognize that each case must be evaluated on its individual merits. The rejection of M/s Cure Pharma Chemist's bid due to predatory pricing or an abnormally low bid was primarily founded on their comparatively low turnover in relation to the substantial contractual obligations involved. In light of the foregoing analysis, the core contention raised by the Petitioners – that Respondents No. 1 and 2 acted in contravention of Clause 7.2 of the Scope of Work by awarding contracts to H3 bidders – lacks merit. The methodology adopted by Respondents No. 1 and 2, as guided by the OM dated 06th February, 2020, stands as a legitimate safeguard against predatory pricing and abnormally low bids aiming to ensure fair competition, prevent distortions in the bidding process, and uphold the public interest.

MSE Condition

29. We now turn to the second point of contention, which revolves around the revocation of purchase preference for MSEs as stipulated under Clause 4.2 of the Scope of Work. Mr. Vikas Singh contended that the Petitioners in

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their capacity as MSEs, deserved this preference, and that the Respondents No. 1 and 2 have violated the tender conditions by awarding contract to non-MSE bidders. He further argued that Respondents No. 1 and 2 arbitrarily changed the tender conditions after the initiation of the process, which is legally and contractually impermissible. On this aspect, at the outset, we must clarify that the benefit of Clause 4.2 has not been extended to any participating MSE. Respondents No. 1 and 2 have provided an explanation for this revocation, stating that on 11th January, 2023 during a pre-bid meeting, bidders sought clarifications regarding tender conditions. Subsequently, a corrigendum was issued on 08th February, 2023, which brought about modifications to the requirements concerning the MSE certificate. The revised provision is as follows:

> *"1. The documents to be attached for eligibility criteria 1, under 1B shall include the following clause, in addition to the already existing clauses:*
> *"Only MSE certificate in the form of Udhyog Aadhar Memorandum (UAM) issued with effect from 01/04/2022 or later shall be considered, for all preferences/relaxations given to MSE. This is as per Govt. notification S.O. 278(E) dated 19 Jan 2022, issued by Ministry of MSME"."*

30. The OM dated 02nd July, 2021 issued by the Ministry of Micro, Small and Medium Enterprises, Government of India, stipulates that "*benefits to Retail and Wholesale trade MSMEs are to be restricted to priority sector lending only*". Therefore, the MSE certificates to retailers were issued solely for the purpose of priority lending and did not confer any preference in purchase during tendering processes. As a result, prior to opening of the financial bids on 19th April, 2023, Respondents No. 1 and 2 duly informed all technically eligible bidders (including those that were not MSEs), that no MSE purchase preference would be applied. This decision was based on the guidelines provided in the afore-mentioned OM, which emphasized that the

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eligibility of MSE retailers for priority sector lending was limited in scope. Therefore, no MSE preference was accorded to any participating bidders, and the GeM Portal selected H1 for each wellness center through an automated process, without any manual intervention. In Court's opinion, the withdrawal of MSE preference was a legitimate and prudent decision taken by Respondents No. 1 and 2 in pursuance of the OM dated 02nd July 2021. The Respondents' adherence to this guideline ensures consistency and uniformity in tender evaluations and prevents any ambiguity or misinterpretation of the MSE benefit.

31. The initial incorporation of MSE purchase preference under Clause 4.2 of Scope of Work, which might have been based on a misunderstanding or oversight, was subsequently corrected. Respondents No. 1 and 2's proactive approach in informing all technically eligible bidders, including non-MSE entities, about the non-availability of MSE purchase preference before opening of the financial bids affirms their commitment to providing equal opportunities to all bidders. This open communication allowed all parties to be aware of the altered conditions and ensured a level playing field for all participants. Further, the decision to withdraw MSE preference did not impact the overall outcome of the tender process, as most of the bidders, who were ultimately awarded the contract, were MSE entities. This fact further strengthens the notion that the withdrawal was not driven by any bias against MSE entities, but rather by a strict adherence to the guidelines mentioned in the OM of 02nd July, 2021.

32. Furthermore, it is essential to acknowledge that tender processes can undergo revisions and adjustments in response to evolving circumstances or regulatory mandates. The withdrawal of MSE preference can be interpreted

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as a rectification of tender conditions to align with Governmental policies. The Court also finds no persuasive evidence to hold that the revocation of purchase preference clause resulted in prejudice to the Petitioners. Pertinently, in order to be eligible for this benefit, Petitioners were required to fall within the zone of consideration [H1-15%], determined by the discount offered by them. While the Petitioners did offer a discount, they did not fulfill the criteria to avail the MSE benefit. Therefore, notwithstanding the initial provision for MSE preference, the Petitioners ultimately fell short of the necessary qualifications to avail its advantage. Therefore, even if the subsequent withdrawal of the MSE preference is perceived as a procedural deviation, it does not impact the final outcome of the tender process. The fact remains that the Petitioners would not have been entitled to the MSE advantage even if the clause had persisted. As such, its revocation bears no relevance to their case, ensuring that the tendering procedure's integrity remains intact.

33. For the foregoing reasons, the present petition is dismissed along with pending applications.

[redacted]

SANJEEV NARULA, J

[redacted]

SATISH CHANDRA SHARMA, CJ

AUGUST 18, 2023/*d.negi*

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APPENDIX

BIDDER POSITION OF DINESH, BATRA AND KUNAL MEDICOS AS PER DISCOUNT OFFERED BY THEM IN ALC GeM BID FOR CGHS DELHI WELLNESS CENTRES

CGHS South Zone					
S.No.	Name of bidder	BATRA MEDICOS (28.8%) P1	KUNAL MEDICOS (27.27%) P2	DINESH MEDICOS (27.37%) P3	POSITION OF CURRENT SUCCESSFUL BIDDER
	Total Number of CGHS Wellness Centres bid for Bid for by Batra, Kunal and Dinesh Medicos	6	21	17	
	NAME OF WELLNESS CENTRE				
1	CGHS Andrews Ganj (D30)		H9	H8	H5 (30.75%)-approved as H1
2	CGHS CBI Colony (D50A)		H3		H2 (28.33%)-empaneled
3	CGHS Faridabad (D70)	H7			H5 (33.03%)-approved as H1
4	CGHS Gurgaon Sec-5 (D92)	H7			H5 (33.03%)-approved as H1
5	CGHS Gurgaon Sec-55 (D92)	H8			H5 (33.03%)-approved as H1
6	CGHS Hauz Khas (D47)		H8	H7	H3 (30.6%-empaneled)
7	CGHS Jangpura (D40)		H8	H7	H6 (28.33%-approved as H1)
8	CGHS Kalkaji -2 (D42)				
9	CGHS Kalkaji-1 (D42)				
10	CGHS Kasturba Nagar-1 (D24)		H5		H3 (30.6%-empaneled)
11	CGHS Kasturba Nagar-2 (D72)		H5		H3 (28.75%-empaneled)
12	CGHS Kidwai Nagar (D12)			H5	H3 (30.6%-empaneled)
13	CGHS Lajpat Nagar (D11)				
14	CGHS Laxmibai Nagar (D15)	H7	H12	H11	H5 (30.75%)-approved as H1
15	CGHS Malviya Nagar (D41)				
16	CGHS MB Road (D65)	H7			H5 (30.75%)-approved as H1

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17	CGHS Moti Bagh (D16)		H8	H7	H6 (28.33%-approved as H1)
18	CGHS Munirka (D71)		H6	H5	H3 (30.6%-empaneled)
19	CGHS Nanakpura (D29)		H7	H6	H3 (30.6%-empaneled)
20	CGHS Netaji nagar (D21)		H6	H5	H3 (30.6%-empaneled)
21	CGHS Pushp Vihar (D78)				
22	CGHS RKP-I (D43)		H6	H5	H3 (30.6%-empaneled)
23	CGHS RKP-II (D46)		H6	H5	H3 (30.6%-empaneled)
24	CGHS RKP-III (D50)		H6	H5	H3 (30.6%-empaneled)
25	CGHS RKP-IV (D52)		H6	H5	H3 (30.6%-empaneled)
26	CGHS RKP-V (D57)		H6	H5	H3 (30.6%-empaneled)
27	CGHS RKP-VI (D69)		H6	H5	H3 (30.6%-empaneled)
28	CGHS Sadiq Nagar (D63)		H6	H5	H3 (30.6%-empaneled)
29	CGHS Sarita Vihar (D90)				
30	CGHS Sriniwaspuri (D37)				
31	CGHS Vasant Kunj (D91)		H6	H5	H3 (30.6%-empaneled)
32	CGHS Vasant Vihar (D96)		H6		H3 (30.6%-empaneled)
33	CGHS Zila Sainik Board (D104)	H4			H3 (30.6%-empaneled)
34	M&G Hospital		H6	H5	H3 (33.03%-empaneled)

CGHS North Zone					
	Name of bidder	BATRA MEDICOS (28.8%)	KUNAL MEDICOS (27.27%)	DINESH MEDICOS (27.37%)	POSITION OF CURRENT SUCCESSFUL BIDDER
	Total Number of CGHS Wellness Centres bid for Bid for by Batra, Kunal and Dinesh Medicos	1	0	0	

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S.No.	Schedule Title				
1	Ashok Vihar(D62)				
2	Delhi Cantt(D3)				
3	Dev Nagar(D19)	H10			H3 (40.1% - empaneled)
4	Dwarka -9 (D36A)				
5	Dwarka-23 (D100)				
6	Hari Nagar(D48)				
7	Inder Puri(D55)				
8	Janak Puri-1(D61)				
9	Janak Puri-2(D74)				
10	Jharoda Kalan (D33A)				
11	Nangal Raya(D58)				
12	Naraina Vihar(D98)				
13	New Rajinder Nagar(D45)				
14	Palam Colony(D66)				
15	Paschim Vihar(D80)				
16	Patel Nagar(D38)(West)				
17	Pitam Pura(D81)				
18	Pusa Road(D18)				
19	Rajouri Garden(D53)				
20	Rohini-16 (D89)				
21	Rohini-7(D86)				
22	Shakurbasti (D54)				
23	Shalimar Bagh (D 88)				
24	Sonipat (D 103),				
25	Sunder Vihar (D82)				
26	Tilak Nagar (D26)				
27	Tri Nagar (D64)				
28	Vikaspuri(D17A)				

CGHS East Zone					
	Name of bidder	BATRA MEDICOS (28.8%)	KUNAL MEDICOS (27.27%)	DINESH MEDICOS (27.37%)	POSITION OF CURRENT SUCCESSFUL BIDDER
	Total Number of CGHS Wellness Centres bid for Bid for by Batra, Kunal and Dinesh Medicos	6	0	0	
S.No.	Schedule Title				
1	CAG Building (D28)				
2	Chandni Chowk (D8)				
3	Dilshad Garden (D87)				
4	Ghaziabad (D68)				

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5	GKG WC (D56)	H11			H5 (38.62%-approved as H1)
6	Greater Noida (D22A)				
7	Indirapuram (D97)				
8	Kingsway Camp (D60)	H5			H3 (30.6%-empaneled)
9	Laxminagar (D67)				
10	Mayur Vihar (D77)	H10			H5 (35.1%-approved as H1)
11	Mayur Vihar Ph-II (D-102)				
12	Noida Sec-82 (D95)	H10			H5 (38.62%-approved as H1)
13	Noida (D85)	H11			H3 (40.1% empaneled)
14	Patparganj D-101				
15	Rajpur Road (D59)				
16	Sahibabad (D94)				
17	Shahdara (D49)				
18	Subzi Mandi (D6)				
19	Timarpur (D7)				
20	Vivek Vihar (D79)				
21	Yamuna Vihar (D84)	H10			H5 (38.62%-approved as H1)

CGHS Central Zone					
	Name of bidder	BATRA MEDICOS (28.8%)	KUNAL MEDICOS (27.27%)	DINESH MEDICOS (27.37%)	POSITION OF CURRENT SUCCESSFUL BIDDER
	Total Number of CGHS Wellness Centres bid for Bid for by Batra, Kunal and Dinesh Medicos	1	4	0	
S.No.	Schedule Title				
1	Aliganj(D9)		H10		H3 (33.03%-empaneled)
2	Lodhi Road(D-10)		H10		H3 (35.1%-empaneled)
3	Pragati Vihar(D-83)		H4		H3 (30.61%-empaneled)
4	Dr. Z.H Road(D-44)				
5	Pandara Road(D-2)				

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6	Telegraph Lane(D-34)				
7	Minto Road(D-4)				
8	Paharganj (D-5)				
9	Chitragupta Road (D-51)				
10	Gole Market(D-1)	H4			H3 (30.61%-empaneled)
11	Kali Bari(D-76)				
12	North Avenue(D-31)				
13	President Est(D-27)				
14	South Avenue(D-32)				
15	Chanakyapur(D-23)		H5		H3 (30.61%-empaneled)
16	PM House				

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