

GAHC010140422024



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

Case No. : WP(C)/3540/2024

1. Premier Cryogenics Limited

A company regd. under the Companies Act, 1956 and having its regd. office at Maniram Dewan Road, Chandmari, Guwahati-03, Assam and rep. by its Managing Director Abhijit Barooah

2. Abhijit Barooah

S/O- Late Bipul Chandra Barooah,
R/O- H. No-4, Kushal Kowar Road,
P.O- Latasil, PIN-781004,
DIST- Kamrup(M), Assam

.....Petitioners.

Versus

1. The State of Assam

Rep. by the Secretary, Health and Family Welfare Department,
Dispur, Guwahati-06, Assam

2. The Director of Medical Education, Assam

Khanapara, Sixmile, Guwahati-22, Assam

3. M/S Meghalaya Oxygen Private Limited

Athgaon, Guwahati-01, Kamrup (M), Assam

.....Respondents.

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioners	: Mr. I. Choudhury	 Sr. Advocate.
	Mr. K.P. Pathak.	 Advocate.
For the respondents 1 & 2	: Mr. B. Gogoi	 SC, Health.
For the respondent no.3	: Mr. K.N. Choudhury	 Sr. Advocate.

Mr. D.J. Das. Advocate.

Date of hearing : 01.08.2024

Date of Judgment : 14.08.2024

JUDGMENT AND ORDER (CAV)

1. Heard Mr. I. Choudhury, learned Senior Counsel assisted by Mr. K.P. Pathak, learned counsel for the petitioners. Also heard Mr. B. Gogoi, learned for the State respondent nos.1 & 2 and Mr. K.N. Choudhury, learned Senior Counsel assisted by Mr. D.J. Das, learned counsel for the private respondent no.3.

2. The petitioners are aggrieved with the decision of the State respondents in coming to a finding that the Technical Bid of the respondent no.3, for supply of Liquid Medical Oxygen ('LMO' in short) pursuant to the NIT dated 12.06.2024, was found to be responsive during the Technical Bid Evaluation Stage. The petitioners challenge to the State respondents finding that the Technical Bid of the respondent no.3 was responsive, is basically on the ground that the respondent no.3 did not have Past Experience for supplying LMO, in terms of Clause 4 of the NIT read with Clause 3 of the Terms and Conditions.

3. Clause 4 of the NIT and Clause 3 of the Terms and Conditions states as follows :

“Clause 4 of the NIT

Past Experience of Similar Services: The bidder must have successfully executed/completed similar Services Over the last three years i.e. the current financial year and the last three financial years(ending month of March prior to the bid opening): -

1. Three similar completed services costing not less than the amount

equal to 40% (forty percent) of the estimated cost; or

2. Two similar completed services costing not less than the amount equal to 50% (fifty percent) of the estimated cost; or

3. One similar completed service costing not less than the amount equal to 80% (eighty percent) of the estimated cost.

Clause 3 of the Terms and Conditions

3) The bidder must have experience of supplying to minimum 1 (one) Govt./Private hospitals of minimum 300 or more bedded. They should have experience in supply of LMO. Supporting copies of supply order / contract /approved price list with satisfactory completion / performance certificate/any other documents in support of this must be provided"

4. The case of the petitioners is that Notice inviting Tender (NIT) dated 12.06.2024 was issued by the State respondents for supply of LMO. The petitioner and the respondent no.3 participated in the selection process and at the Technical bid Evaluation stage, the Technical Bids of both the petitioner and the respondent no.3 were found to be responsive. The respondent no.3 was thereafter awarded the contract work, as his bid amount was lower. The counsel for the petitioners submits that the Technical Bid of the respondent no.3 should have been disqualified at the Technical Bid Evaluation Stage, as the respondent no.3 did not have the eligibility criteria pertaining to "Experience", in terms of Clause 4 of the NIT read with Clause 3 of the Terms and Conditions. He submits that in terms of Clause 3 of the Terms and Conditions, a bidder has to have the experience of supplying LMO to one Government/Private Hospital having a minimum of 300 beds. Further, supporting copies of supply order/contract/approved price list with satisfactory completion/ performance certificate and other documents have to be provided. In terms of Clause 4 of

the NIT, the bidder should have Past Experience of having executed/completed at least 3 (three) similar services costing not less than the amount equal to 40% of the estimated cost **or** two similar completed services costing not less than the amount equal to 50% of the estimated cost **or** one similar completed service costing not less than the amount equal to 80% of the estimated cost. However, the respondent no.3 did not have the required experience and neither did the respondent no.3 submit any document on that score, in terms of Clause 4 of the NIT. He submits that unless a bidder submits their experience, as required under Clause 4 of the NIT, there would be no material for the State respondents to judge and quantify the past experience of a bidder.

5. The petitioner's counsel submits that a perusal of the LMO requirements of the State respondents is provided in the tender documents (NIT) under the heading "Technical Specifications for supply of LMO", wherein the required quantities of LMO are to be supplied to the following locations, which are as follows :

Item Number	Item Title for Zone 1	Item quantity	Unit of Measure
1.	Supply of Liquid Medical Oxygen at GMCH Guwahati	3132	MT
2.	Supply of Liquid Medical Oxygen at FAAMCH, Barpeta.	620	MT
3.	Supply of Liquid Medical Oxygen at DMCH, Dhubri	115	MT
4.	Supply of Liquid Medical Oxygen at	100	MT

	KMCH, Kokrajhar		
5.	Supply of Liquid Medical Oxygen at NMCH, Nalbari	100	MT

Item Number	Item Title for Zone 2	Item quantity	Unit of Measure
1.	Supply of Liquid Medical Oxygen at AMCH, Dibrugarh.	882	MT
2.	Supply of Liquid Medical Oxygen at TMCH, Tinsukia.	100	MT
3.	Supply of Liquid Medical Oxygen at JMCH, Jorhat.	575	MT
4.	Supply of Liquid Medical Oxygen at LMCH, Lakhimpur	180	MT

Item Number	Item Title for Zone 3	Item quantity	Unit of Measure
1.	Supply of Liquid Medical Oxygen at SMCH, Silchar.	616	MT
2.	Supply of Liquid Medical Oxygen at DMCH, Diphu	125	MT
3.	Supply of Liquid Medical Oxygen at NMCH, Nagaon	100	MT
4.	Supply of Liquid Medical Oxygen at	310	MT

	TMCH, Tezpur		

6. The petitioners' counsel submits that a calculation of the required quantities of LMO, as provided in the above chart, shows that 6955 MT of LMO is required to be supplied to the State respondents at a cost of Rs.13.91 crores, pursuant to the NIT dated 12.06.2024. He further submits that in terms of Clause 4 of the NIT, the cost of three similar completed services, not less than the amount equal to 40% of the estimated cost would be equivalent to Rs.5.56 crores. In respect to two similar completed services, the cost of not less than the amount equal to 50% of the estimated cost would be Rs.6.96 crores and for one similar completed service costing not less than the amount equal to 80% of the estimated cost, the cost would be Rs.11.12 crores. However, no document has been submitted by the respondent no.3 showing that he had supplied the above quantity of LMO with the equivalent costs along with his tender documents.

7. The petitioners' counsel submits that the "list of documents" enclosed by the respondent no.3 along with its bid documents, as can be seen from the Portal, shows that the respondent no.3 did not submit any past Experience Certificate, as required under Clause 4 of the NIT or Clause 3 of the Terms and Conditions. As such, there was no material before the State respondents, on the basis of which the Technical Bid of the respondent no.3 could have been found to be responsive.

8. The petitioners' counsel submits that in spite of the "list of documents" enclosed by the respondent no.3 in its bid documents, not making a mention

that Experience Certificates had been submitted by the respondent no.3, the State respondent no.2, in his affidavit-in-opposition at paragraph-3(III), has stated that the respondent no.3 fulfilled the eligibility criteria mentioned in the "Scope of work". Further, the State respondent no.2 in his affidavit has stated that the respondent no.3 had submitted the requisite supporting documents, in order to fulfil the criteria prescribed in Clause 3 of the Terms and Conditions, which was annexed as Annexure-C (Colly). The petitioners' counsel submits that a perusal of the documents at Annexure-C (Colly) in the affidavit of the respondent no.2 shows that some of the Experience Certificates submitted by the respondent no.3 are redacted documents, inasmuch as, the rate and the gross/net amount of the LMO supplied by the respondent no.3 are redacted. Further, some of the Experience Certificates are undated and not made on printed stationary. He accordingly submits that the Experience Certificates allegedly submitted by the respondent no.3, appears to be a manipulation of the tender documents, as the "list of documents" submitted by the respondent no.3 in the portal does not reflect that the experience certificates of the respondent no.3 had been submitted along with his tender/bid documents.

9. The learned Senior Counsel for the petitioners further submits that there is no conflict between Clause 4 of the NIT read with Clause 3 of the Terms and Conditions. He submits that even if we are to assume that the respondent No.3 had submitted Experience Certificates as per the affidavit-in-opposition filed by the State respondent No.2 and the affidavit of the respondent no.3, the same does not disclose the fact that the respondent no.3 had the eligibility criteria regarding experience, as required under Clause 4 of the NIT. In support of his submissions that the respondent No.3's technical bid could not have been declared responsive, he has relied upon the judgments of the Supreme Court in

the case of ***(i) Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and Ors.***, reported in ***(1999) 1 SCC 492*** ***(ii) R.D. Shetty Vs. International Airport Authority***, reported in ***(1979) 3 SCC 489*** ***(iii) Agmatel India Pvt. Ltd. Vs. Resoursys Telecom and Ors.***, reported in ***(2022) 5 SCC 362*** and ***(iv) Vidarbha Irrigation Development Corporation and Ors. Vs. Anoj Kumar Agarwala and Ors.***, reported in ***(2020) 17 SCC 577***.

10. The petitioner's counsel submits that prior to the issuance of the present NIT dated 12.06.2024, the respondent No. 1 had issued an NIT dated 08.05.2023, for supply of LMO to various Medical Colleges and Hospitals in the State of Assam. As per the terms and conditions of the NIT, the prospective bidder was, inter-alia, required to have a manufacturing unit in North-east India with minimum combined installed capacity of 50 MT per day.

11. The technical bid of the private respondent No. 3 was rejected, as it failed to make such requirement. The petitioner No. 1 Company was allotted the supply order and successfully completed the supply of the LMO. The challenge made by the respondent No. 3 to the said supply order, vide WP(C) 3428/2023 is still pending in this Court.

12. Thereafter, the respondent No. 2 issued another tender notice dated 23.02.2024 for supply of LMO. As per the technical specification, terms and conditions enclosed in the NIT, the prospective bidder was required to have the following criteria:-

“i. The bidder should be a primary manufacturer of LMO through air liquefaction process.

ii. The bidder should have more than one Liquid Medical Oxygen manufacturing unit in Northeast India with minimum combined installed capacity of 50 MT per day and the plants must be in operation for minimum three years.

iii. The bidder should have experience of supplying to minimum 6 (six) Govt./Private hospitals of minimum 500 beds.

iv. The bidder should have experience in supply of minimum 30% of the tendered quantity in any of the last three financial years.

V. The bidder should have a minimum of 8 (eight) Liquid Oxygen Tanker with valid PESO License.”

Further, the bidder was required to have the capacity to refill liquid oxygen within a period of 6 hours at any Medical College & Hospital. Since the respondent No. 3 did not have the eligibility criteria provided in the NIT dated 23.02.2024, the respondent No. 3 requested the authorities to relax the liability criteria and some of the requests of the respondent No. 3 was accepted, while others were rejected. A corrigendum was however issued, where relaxations sought for were granted. However, the respondent No. 3 still failed to fulfil the required criteria. The State respondents thereafter cancelled the NIT dated 23.02.2024, and issued the present NIT dated 12.06.2024, to enable the respondent No. 3 to participate in the bidding process.

13. The petitioner’s counsel submits that in spite of the State respondents giving all possible help to the respondent No. 3, to ensure that the respondent No. 3 bagged the contract by whatever means possible, the respondent No. 3 has still failed to fulfil the past experience criteria required in terms of Clause 4 of the present NIT. He further submits that the inability of the respondent No. 3 to supply LMO despite the concessions given by the State respondents, has

finally caught up with the respondent No. 3, inasmuch as, the respondent No. 2 has now issued a show-cause-notice dated 26.07.2024 to the respondent No. 3, requiring it to provide satisfactory explanation, regarding the repeated failure to make timely and adequate supply of LMO, failure of which would result in a recommendation for termination of the contract.

14. Mr. B. Gogoi, learned counsel for the State respondents submits that the NIT is governed by the General Terms & Conditions, conditions stipulated in the NIT and a Service Level Agreement specific to the supply of LMO. However, in case any condition specified in the General Terms and Conditions is in conflict with the conditions stipulated in the Service Level Agreement, then the Service Level Agreement would override the provisions of the General Terms & Conditions. He submits that a reading of the Disclaimer Clause in the NIT and the preamble of the Service Level Agreement for supply of LMO, shows that when there is a conflict between the General Terms and Conditions for Goods and Services (GTC), Service Specific Terms and Conditions (STC) and the BID/Reverse Auction Specific Additional Terms and Conditions (ATC) as specified by the buyer, the ATC would supersede the STC, which in turn would supersede GTC. The purpose of Service Level Agreement as stated in the Preamble is to outline the scope of work, stakeholder's obligation and terms & conditions of all services covered as mutually understood by the stakeholder.

15. Mr. B. Gogoi submits that Clause 4 of the NIT does not come within the provisions of the Service Level Agreement and that the same is a standard term and condition, which is always there in the tenders issued under the GeM Portal. He submits that Clause 3 of the Terms and Conditions comes within the ATC, i.e., Clause 1(a)(III) of the Service Level Agreement. He also submits that

Clause 4 of the NIT is a default clause which is not to be considered, in view of the fact that the experience required of a bidder has already been provided in Clause 3 of the Terms and Conditions. He also submits that the technical parameters or the stipulations required by the buyers with regard to all aspects of the supply to be made, can be done only by the buyer and that the incorporation of the eligibility criteria by the State respondents having already been made in terms of Clause 3 of the Terms and Conditions, the attempt by the petitioners' counsel to include Clause 4 of the NIT as an essential condition of the bidding document/experience requirement of a bidder, cannot be accepted. In support of his submissions that the author of the tender is the best person to understand and appreciate the tender conditions and that the Court should not interfere when the contract has been given in public interest, he has relied upon the judgments of the Supreme Court in the case of **(i) Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.,** reported in **(2016) 16 SCC 818 (ii) N.G. Projects Limited Vs. Vinod Kumar Jain,** reported in **(2022) 6 SCC 127 (iii) Siemens Public Communication Networks Pvt. Ltd. Vs. Union of India,** reported in **(2008) 16 SCC 215** and **(iv) Central Coalfields Ltd. and Anr. Vs. SLL-SML (Joint Venture Consortium) and Ors.,** reported in **(2016) 8 SCC 622.**

16. Mr. K.N. Choudhury, learned Senior Counsel for the respondent no.3, on the other hand, submits that the stand of the petitioner that only the General Terms and Conditions will prevail for awarding the contract, by superseding all other conditions in the NIT is not a correct view, keeping in view the Disclaimer Clause provided in the NIT, read with the Preamble to the Service Level Agreement. He submits that in terms of Clause 3 of the Terms and Conditions, there is no requirement for quantification of the past supply experience of LMO,

except that he should have supplied LMO earlier to a 300 or more bedded hospital. He submits that the writ petition should be dismissed, inasmuch as, the entire case of the petitioner has been made by relying upon Clause 4 of the NIT, without making a challenge to Clause 3 of the Terms and Conditions. He submits that as there is a conflict between Clause 4 of the NIT and Clause 3 of the Terms and Conditions, the Disclaimer Clause read with the Preamble to the Service Level Agreement would come into play. As Clause 4 of the NIT was a General Term and Condition for Goods and Services (GTC) and as Clause 3 of the Terms and Conditions was a Service Specific Terms and Conditions (STC), the conflict between the two Clauses would result in the STC prevailing over the GTC, in terms of the Preamble to the Service Level Agreement. He thus submits that no quantification of the past experience of the bidders is required, as Clause 3 of the Terms and Conditions does not require any quantification of the past experience to be provided by a bidder, as is required under Clause 4 of the NIT.

17. Mr. K.N. Choudhury submits that when the bidder clicks upon "scope of work" as provided in the NIT, the technical specification for supply of LMO and the terms and conditions provided therein are opened. He submits that the technical specification for supply of LMO and the terms and conditions provided therein come within the provisions of Service Specific Terms and Conditions (STC), which supersedes Clause 4 of the NIT. He submits that the conflict between Clause 4 of the NIT, wherein quantification of the past experience of supply of LMO is required, is absent in Clause 3 of the Terms and Conditions, which does not require quantification of the past experience of supply of LMO. He further submits as the petitioner has not made out a case of perversity or *mala-fide* in the State respondents declaring the technical bid of the respondent

no.3 as responsive, the writ petition should be dismissed. In support of his submission that the State respondents are the best person to understand and interpret the tender conditions, he has relied upon the judgment of the Supreme Court in the case of ***Om Gurusai Construction Company Vs. V.N. Reddy and Ors.,*** reported in ***2023 SCC OnLine SC 1051.***

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

19. In the case of ***Raunaq International Ltd. (supra)***, the Supreme Court has held that the award of a contract is essentially a commercial transaction and in arriving at a commercial decision, commercial considerations are of paramount importance. Three out of six considerations to be considered while arriving at a commercial decision, as held by the Supreme Court in the above case, are being reproduced below as follows:-

“(3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer, and whether he has successfully completed similar work earlier;”

20. The Supreme Court in ***Raunaq International Ltd. (supra)***, further held that there could be a element of public law or public interest involved in a commercial transaction, where the State enters into a contract and that the

elements of public interest would also include services for a public purpose. It thus held that when a writ petition is filed in a High Court, challenging the award of contract by the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition.

21. In the case of ***R.D. Shetty (supra)***, the Supreme Court has held that executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those Standards on pain of invalidation of an act in violation of them.

22. In the case of ***Agmatel India Pvt. Ltd. (supra)***, the Supreme Court has referred to an NIT on the Government online portal, for supply of tablets to school children. In the said judgment, the Supreme Court referred to the terms and conditions of the NIT, wherein the experience criteria was provided in Clause 1 of the terms and conditions of the NIT and the past performance required of the bidder was provided in Clause 4, wherein the past experience of supplying medicines of a particular percentage of the goods to be supplied, which is similar to the past experience required under Clause 4 of the present NIT, has been made. In Clause 1 of the terms and conditions of the said NIT, the bidder was to have past experience and the criteria of past experience was thereafter quantified/provided in the past performance clause.

23. In the case of ***Vidarbha Irrigation Development Corporation and Ors. (supra)***, the Supreme Court has referred to the judgment in ***Afcons Infrastructure Ltd. (supra)*** and in ***R.D. Shetty (supra)***, which is to the effect that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements

and interpret its documents. The Court must defer to this understanding and appreciation of the tender documents, unless there is mala-fides or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. Further, the word used in the tender documents cannot be ignored or treated as redundant or superfluous and they must be given meaning and their necessary significance. Para 16 of the decision of the Supreme Court in ***Vidarbha Irrigation Development Corporation and Ors. (supra)*** is reproduced herein below as follows:-

“It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court.”

24. In the case of ***N.G. Projects Limited (supra)***, the Supreme Court has referred to the case of ***Uflex Ltd. Vs. Government of T.N.***, reported in (2022) 1 SCC 165, wherein it has been held that judicial review of contractual matters has its own limitations. Judicial review of administrative actions is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala-fides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties have to be governed by principles of commercial

prudence. To that extent, the principles of equity and natural justice have to stay at a distance. It further held that the Supreme Court could not lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade Courts to interfere by exercising the power of judicial review, should be resisted.

The Supreme Court thus held that the position of law with regard to the interpretation of the terms of the contract is that the question as to whether the terms of a contract is essential or not, is to be viewed from the prospective of the employer and by the employer.

25. In the case of ***Siemens Public Communication Networks Pvt. Ltd. (supra)***, the Supreme Court has held that a contract is a commercial transaction and evaluating tenders and awarding contract is essentially a commercial function. In such cases, principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bona fide and is in public interest, the Court will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.

26. In the case of ***Central Coalfields Ltd. and Anr. (supra)***, the Supreme Court has reiterated its earlier view that the decision taken by the employer as to whether a term of the NIT is essential or not should be respected. Further, while the lawfulness of a decision is questioned on a very limited ground, the

soundness of a decision cannot be questioned.

27. In the case of ***Om Gurusai Construction Company (supra)***, the Supreme Court has reiterated the decision passed in ***Afcons Infrastructure Ltd. (supra)***, whereby it was stated that the owner of the employer of a project, having authored the tender document, is the best person to understand and appreciate its requirement and interpret its document, unless there was mala-fide or perversity in the understanding or appreciation of the documents.

28. In the case in hand, the petitioner's case is that Clause 3 of the terms and conditions only provides for the general experience of a bidder and that the same has to be read with Clause 4 of the NIT, which clarifies/quantifies the requirement of past experience of a bidder. Thus, the petitioner's case is that unless a bidder has the past experience qualification required in terms of Clause 3 of the terms and conditions read with Clause 4 of the NIT, the bidder cannot be said to have the essential qualification, for having his technical bid declared responsive by the State respondents.

29. It is not disputed by any of the parties that Clause 3 of the terms and conditions of the contract is an essential condition of the contract. The problem however lies with whether Clause 4 of the NIT has to be read along with Clause 3 of the terms and conditions. The State respondents and the private respondent have both taken the stand that Clause 4 of the NIT is an independent clause, which is not to be read with Clause 3 of the terms and conditions of the NIT. As such, Clause 4 of the NIT is not an essential condition, which would have to be overlooked and not considered, for evaluating the past experience of the bidders.

30. It is not disputed by the parties that when the word “General Terms and Conditions”, which is in the Disclaimer of the NIT is clicked upon, the “general terms and conditions of GeM 4.0 (Version 1.14) dated 31st Jan, 2024” opens up.

31. The introduction to the “general terms and conditions of GeM 4.0 (Version 1.14) dated 31st Jan, 2024” states that this document is an electronic record published by GeM under the provisions of the Information Technology Act, 2000 and the Rules made there under (as applicable) and shall act as a valid agreement between Seller / Service Provider and Buyer. Further the use of GeM Portal for Sale / Purchase of Goods / Services and the resulting Contracts shall be governed by the following the General Terms and Conditions (GTC) (unless otherwise superseded by Product/Service specific Special Terms and Conditions (STC), Product/ Track/Domain Specific STC of Particular Service including its SLA (Service Level Agreement) and BID/Reverse Auction Specific Additional Terms and Conditions (ATC) as applicable).

The “general terms and conditions of GeM 4.0 (Version 1.14) dated 31st Jan, 2024” has altogether 30 Clauses and the same does not have Clause 3 of the terms and conditions or Clause 4 of the NIT, as referred to in the forgoing paragraphs.

32. It is also not disputed by the parties that when the word “Service Level Agreement” in the Disclaimer Clause of the NIT is clicked upon, the “Service Level Agreement for supply of LMO” opens up. The last paragraph of the Disclaimer Clause of the NIT states as follows:-

“This bid is governed by the General Terms and Conditions, conditions

stipulated in Bid and Service Level Agreement specific to this Service as provided in the Marketplace. However, in case if any condition specified in General Terms and Conditions is contradicted by the conditions stipulated in Service Level Agreement, then it will over ride the conditions in the General Terms and Conditions."

A perusal of the extract of the Disclaimer Clause, which is quoted in the above paragraphs, shows that the bid of a bidder is governed by - 1. General terms and conditions, 2. Conditions stipulated in the bid and 3. Service Level Agreement. If there is a conflict, the service level agreement would over ride the conditions in the general terms and conditions.

33. The Preamble to the "Service Level Agreement for supply of LMO" states as follows:-

PREAMBLE

"A. All Supply of Liquid Medical Oxygen Service Contracts placed through GeM shall be governed by the following set of Terms and Conditions:

I. General terms and conditions for Goods and Services. ("GTC")

II. Service Specific Terms and Conditions ("STC") contained in this document

III. BID/Reverse Auction specific Additional Terms and Conditions ("ATC") as specified by the Buyer

B. The above terms and conditions are in reverse order of precedence Le. ATC supersedes Service specific STC which supersede GTC, whenever there are any conflicting provisions.

C. This document represents the Special Terms and Conditions (STC) and the Service Level Agreement (SLA) governing the Contract between the Buyer and

Service Provider. The purpose of this document is to outline the scope of work, Stakeholder's obligation and terms and conditions of all services covered as mutually understood by the stakeholders."

The "Service Level Agreement for supply of LMO" has got a total 9 Clauses, pertaining to - 1. Preamble, 2. Objective and Goal, 3. Stakeholders, 4. Service Scope, 5. Terms and Conditions, 6. SLA Deductions, 7. Payment Schedule, 8. Formulae Used and 9. Additional Terms and Conditions. It does not have Clause 4 of the NIT or Clause 3 of the terms and conditions.

34. A perusal of the Preamble to the "Service Level Agreement for supply of LMO" shows that there are three parts to Clause "A" of the Preamble, which are:-

"I. General terms and conditions for Goods and Services. ("GTC")

II. Service Specific Terms and Conditions ("STC") contained in this document.

III. BID/Reverse Auction specific Additional Terms and Conditions ("ATC") as specified by the Buyer."

35. The case of the State respondents is that Clause 4 of the NIT is a standard term and condition, which is always there in a tender issued under the GeM portal and as the same is in conflict with the additional terms and conditions, i.e. ATC, the ATC would prevail over the GTC. Thus, only Clause 3 of the terms and conditions is to be considered by the State respondents, for considering whether a bidder has the past experience for supply of LMO earlier.

36. On the other hand, the stand of the private respondent No. 3 is that Clause 4 of the NIT was a "GTC" and as Clause 3 of the terms and conditions was a

STC, the STC would prevail over the GTC, in terms of the Service Level Agreement.

37. The submissions of the respondents' counsels do not appear to be correct, in view of the fact that the Preamble at Clause 1A(II) speaks of the "Service Specific Terms and Conditions ("STC") contained in this document" . If the above was to be read into the Clause "Past experience", then Clause 4 of the NIT would have to be an STC, as Clause 3 of the terms and conditions is a general term and condition. Further, this Court fails to see the conflict between Clause 4 of the NIT and Clause 3 of the terms and conditions, though it is quite apparent that quantification or qualification with regard what constitutes the past experience of a bidder, regarding similar past service for supply of LMO has not been spelt out, in terms of Clause 3, while it has been made specific in Clause 4 of the NIT. Clause 3 only provides that experience of supply of LMO to one 300 bedded or more hospital is required, while Clause 4 is in relation to the quality of LMO supplied and the cost of the LMO supplied.

38. A perusal of the documents apparently submitted by the respondent No. 3 with the respondent No. 2, shows that there are 8 documents. The first document is a certificate dated Nil issued by Nazareth Hospital, Shillong, Meghalaya, which certifies that the respondent No. 3 was a regular supplier of LMO to the more than 300 bedded hospital. There is no quantification of the amount of LMO supplied or the value of the LMO supplied. The certificate dated NIL apparently issued for and on behalf of the 5 Air Force Hospital is to the effect that the respondent No. 2 regularly supplied LMO to the hospital having bed capacity above 300. The said certificate has not been printed on any letter head. Further, there is no quantification of the LMO supplied or the cost of the

supply made. The 3rd certificate is a consignee receipt and acceptance certificate signed by the respondent No. 3, which shows that a bill had been made by the respondent No. 3 on 14.05.2022 to the 151 Base Hospital, Basistha Road, Kamrup (M), Assam, showing that 2250 Kgs. of LMO had been supplied. However, the cost portion has been redacted. There are two documents dated 28.03.2024 and 05.06.2024 issued by M/s Popu Enterprises, which is to the effect that the vendor of the LMO was the respondent No. 3 and that a total of 10,000 Kgs. (5000 Kg. + 5000 Kg.) of LMO had been transported to Lohit District AALO, District Hospital, Arunachal Pradesh. However, the price of the 10,000 Kgs. of the LMO has been redacted in both the documents issued by M/s Popu Enterprise. The next certificate dated 15.06.2024 issued by Shija Hospitals & Research Institutes Pvt. Ltd, Health village, Langol, Manipur shows that there was an alleged purchase of 19000 Kgs. of LMO. However, the value and the payment made for the said LMO have all been redacted in the said certificate. There is another certificate dated 03.02.2022 issued by the Director of Health Services (MT), Meghalaya, Shillong, which is to the effect that the respondent No. 3 has installed one LMO tank of capacity of 13 KI at Umsawli Campus of TB Hospital along with cylinder refilling facilities, for distribution to various institutions. There is nothing in some of the said certificates showing the amount of LMO supplied by the respondent No. 3 to the hospitals and the amount of payment made for the same. Similar is the certificate dated 31.05.2023 issued by the GNRC Institute of Medical Science, which is a unit of GNRC Ltd.

39. Interestingly, the private respondent No. 3, in it's affidavit-in-opposition, has stated that it had submitted documents along with tender documents,

demonstrating that it has supplied LMO to Govt./Private Hospital, having a minimum of 300 beds or more, which was the requirement as per Clause 3 of the terms and conditions. However, the respondent No. 3 has only annexed seven past experience certificates in its affidavit, while the State respondent No. 2 had annexed eight documents in his affidavit. Interestingly, none of the past experience certificates annexed by the respondent No. 3 in its affidavit are redacted, while parts of the same documents in the affidavit of the respondent No. 2 are redacted. The above gives rise to an inference that there has been some manipulation of the tender documents of the respondent No. 3.

40. The above being said, the question still remains as to whether Clause 4 of the NIT can be ignored by the State respondents, when the same is a part of the NIT, keeping in view the various judgments of the Supreme Court, wherein it has been held that owner or the employer of a project having authored the tender documents, is the best person to understand and appreciate its requirement and interpret his document. The owner or employer could not have put the clause in the NIT, only to be ignored.

41. When the State respondents required 6955 MT LMO, which is equivalent to 6955000 Kgs. of LMO, for supply to its various hospitals within the State, the respondent No. 3 would have to justify, whether the past experience documents of the respondent No. 3 shows that it has the ability to deliver the goods. This can only be done by being giving facts and figures. No facts and figures are provided in the documents purportedly submitted by the respondent No. 3, except for 19000 Kgs. of LMO apparently purchased by Shija Hospitals & Research Institutes Pvt. Ltd. In June, 2024 and the 10,000 Kgs. of LMO bought by M/s Popu Enterprise from the respondent No. 3. As stated earlier, 6955 MT

LMO is equivalent to 6955000 Kgs. of LMO. Further, as the rates/prices of the LMO supplied by the respondent No. 3, have been redacted, there is nothing to show the annual turnover/earnings of the respondent No. 3, with regard to its financial capacity to supply the required LMO, as required under Clause 3 of the Terms and Conditions.

42. The date of the NIT is 12.06.2024 and the documents submitted by the respondent No. 3 showing its past experience relating to the year 2024 pertains to a total amount of 29000 Kgs. of LMO. For the year 2022, it is only 2250 Kgs. 29000 Kgs. of LMO represents 0.416% of 6955000 Kgs. of LMO, while 2250 Kgs of LMO is equivalent to 0.032% of 6955000 Kgs. of LMO.

43. Keeping in view the judgments of the Supreme Court in the case of ***R.D. Shetty (supra)***, this Court is of the view that specifications to be submitted by a bidder in respect of past experience provided in Clause 4 of the NIT cannot be ignored. No doubt, the interpretation given by the author of the NIT would have to be respected. However, the same is subject to the condition that the same is not unreasonable, arbitrary, malafide, perverse, biased or irrational.

44. As per the considerations required to be made for awarding contracts, as laid down by the Supreme Court in the case of ***Raunaq International Ltd. (supra)***, the State respondents will have to consider whether the respondent No. 3 has the ability to deliver the goods, as per the specifications specifically provided, when a huge quantity of LMO, amounting to 6955 MT is required to be supplied to various hospitals. The ability of the bidders to deliver the goods is required to be tested, on the basis of the data in the documents submitted by it and whether it had successfully completed similar kind of work/s and to the

extent required by the State respondents. The past experience of a bidder had to be quantified to enable the respondents to come to a decision.

45. Coming back to the issue as to whether Clause 4 of the NIT can be ignored, this Court is of the view that the same cannot be ignored in view of the following reasons. Firstly, it is a part of the NIT. The NIT requires the bidders to have the eligibility criteria of having a minimum average Annual Turnover for 3 years @ Rs.800 lakhs. Secondly, the eligibility criteria requires 3 years of past experience. The documents required of bidders, as per the eligibility criteria in the NIT states as follows :

Document required from seller	Experience Criteria, Bidder Turnover, Certificate (Requested In ATC), OEM Authorisation Certificate, OEM Annual Turnover, Additional Doc 1 (Requested in ATC), Additional Doc 2 (Requested in ATC), Additional Doc 3 (Requested in ATC), Additional Doc 4 (Requested in ATC) *In case any bidder is seeking exemption from Experience/Turnover Criteria, the supporting documents to prove his eligibility for exemption must be uploaded for evaluation by the buyer.
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Thirdly, the estimated bid value of the supply to be made is Rs.13,91,00,000/-, i.e. Rs.13.91 crores. Thus, when the minimum average Annual Turnover for 3 years and 3 years past experience is required, which has clearly been spelt out in the NIT, the stand of the respondents that the same has to be ignored, as the same is redundant in view of Clause 3 of the Terms

and Conditions cannot be accepted by this Court, as it arbitrary and irrational, keeping in view the law laid down by the Supreme Court.

46. As held by the Supreme Court in the case of ***R.D. Shetty (supra)*** that the words used in the tender documents cannot be ignored or treated as redundant or superfluous. They must be given meaning and their necessary significance. It would be an anomaly if the State respondents have put Clause 4 of the NIT only for show, especially when it is the only clause in the NIT, by which the past physical and financial capacity of a bidder can be gauged, keeping in view that the supplies amounting to 6955 MTs (equivalent to 5955000 Kgs.) of LMO has to be supplied at an estimated cost of Rs.13.91 crores. In the absence of any financial data in the documents allegedly submitted by the respondent no.3 and having regard to past supplies of LMO made by him, there was no parameter to gauge the ability of the respondent no.3 to deliver the goods and whether he had successfully completed a similar kind of work with financial capacity earlier.

In the case of ***Reliance Energy Ltd. and another vs. Maharashtra State Road Development Corporation Ltd.***, reported in ***(2007) 8 SCC 1***, the Supreme Court has held that when tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms, it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

In the present case, when Clause 3 of the terms and conditions does not make any elaboration or clarification with respect to the past performance of

three years required of a bidder, while Clause 4 of the NIT provides that the bidder should not only give the past supplies made and the cost of the supplies vis-a-vis, the supplies to be made in terms of the NIT, the State respondents cannot ignore Clause 4 of the NIT, as there would be arbitrariness and unreasonableness in the decision making process. It should have been the endeavour of the State respondents to apply a harmonious construction of the provisions, if there was a conflict between the two provisions. However, there is no repugnancy and conflict between the two provisions in the present case.

47. This Court is well aware of the judgments of the Supreme Court, wherein it has held that the owner or the employer of a project having authored the tender documents, is the best person to understand and appreciate its requirement and interpret its documents. However, in the present case, the State respondents' action, in not giving any relevance to Clause 4 of the NIT appears to be unreasonable, perverse, arbitrary and irrational, especially when the allotment of the contract to the respondent no.3 is looked at, not only from the point of view of the petitioners, but also from the point of view of the State respondents. Though the State respondents do not appear to have any qualms in taking a stand that Clause 4 of the NIT is a redundant or superfluous Clause, this Court is of the view that the basis for coming to a decision as to whether the respondent no.3 has the past experience and the financial ability to make the required supply of LMO is without any basis. No doubt the Courts must exercise judicial restraint in interfering with administrative action, but the decision making process can certainly be subject to judicial review. The actions of the State respondents appear to be intended to favour the respondent no.3, especially when the past experience of the respondent no.3 shows that he has only made supplies of 0.416% of the 6955 MTs of LMO required in the year

2024 and only 0.032% of 6955 MTs of LMO in the year 2022. Further, as held in ***Afcons Infrastructure Ltd. (supra)***, Courts should normally defer to the understanding of the terms of an NIT by the author, unless there is malafides or perversity in the understanding or appreciation or application of the terms of the tender conditions. This Court is of the view that there is perversity in non-application of Clause 4 of the NIT in this case.

48. It has been held by the Supreme Court that a term of a NIT is essentially a decision to be taken by the employer which should be respected. However, the lawfulness of the said decision can be questioned on limited grounds. This Court has also noticed that in many of the tenders issued by the State respondents, similar clauses as Clause 4 of the NIT has been made the essential condition, which is required for determining/gauging as to whether a bidder has the ability and financial capacity to do a similar kind of work. As such, it is totally perverse and unreasonable for the State respondents to make a complete 'U' turn in the present case and take a stand that Clause 4 of the NIT cannot be considered in the present case.

49. In ***WP(C) 4034/2024, M/S Badri Rai and Company Vs. The State of Assam and 3 Ors.***, “the e-tendering document for Construction of Dedicated Training, Monitoring, Administrative Centre “Swasthya Bhawan” (2B+G+8) Storeys at Sixmile, Guwahati (Assam) involving Civil, MEP Works, External Development Works, Ancillary Buildings and Including Operation & Maintenance (O&M)” vide tender No.CEB(H&E)/MECH/7/ 2023/35, issued by the PWD, Assam, the approximate work value of which is Rs.188,45,16,202/-, required the bidders in terms of Clause 2(a) of the work experience to have as follows:-

“WORK EXPERIENCE

a) Similar Works Experience

The Bidder should have completed in his own name or proportionate share as a member of a Joint Venture,

*i. at least one (80% of Estimated cost) similar work of minimum value of **Rs. 150.761 Crore** during the last **7 (Seven)** years prior to the last stipulated date for submission of the Bid.*

OR

*ii. at least two (60% of Estimated cost) similar works each of minimum value of **Rs. 113.07 Crore** during the last 7 (Seven) years prior to the last stipulated date for submission of the Bid.*

OR

*iii. at least three (40% of Estimated cost) similar works each of minimum value of **Rs.75.380 Crore** during the last **7 (Seven)** years prior to the last stipulated date for submission of the Bid.*

In the case of **Agmatel India Private Ltd. (supra)**, the Supreme Court was considering the disqualification of a technical bid and whether the High Court was justified in interfering with the view taken by the tender inviting authority in rejecting the technical bid for want of fulfilment of past performance criteria about supply of same or similar category of products of 60% of bid quantity in at least one of the last 3 financial years and whether the tenders had executed a project for supply of the same or similar category products during the preceding 3 financial years as per the percentage of the estimated bid value as follows:-

“(i) Single order of at least 35% of estimated bid value: or

(ii) Two orders of at least 20% each of estimated bid value; or

(iii) Three orders of at least 15% each of estimated bid value.”

Thus, the stand taken by the respondents that Clause 4 of the NIT cannot be considered at the Technical Bid Evaluation Stage is arbitrary and unreasonable, keeping in view the stand of the State respondents in other cases, where a similar clause as in clause 4 of the NIT has been interpreted to be an essential condition. The State Government cannot be allowed to take different stands in different writ petitions.

50. This Court is of the view that Clause 3 of the Terms and Conditions cannot, in any manner throw any light, as to whether a bidder has the ability and capacity to supply 6955 MTs of LMO within a year, giving the fact that past experience documents submitted by the respondent no.3 does not even come close to showing that he had supplied 1% of the required LMO in any of the 3 years prior to the issuance of the NIT. This Court also finds that there is no conflict between Clause 4 of the NIT and Clause 3 of the Terms and Conditions. As such, the stand taken by the State respondents that Clause 4 of the NIT has to be ignored and Clause 3 of the Terms and Conditions is to decide whether a bidder has the ability and capacity to make the supply of LMO required is completely illogical, keeping in view the fact that Clause 4 of the NIT, which is one of the many eligibility criterias required of a tender, has quantified the basis for determining the ability and capacity of the past experience of a bidder, which can be used for deciding as to whether he can be entrusted with the supply of LMO to various hospitals for the sick and needy, which is in public interest.

51. In view of all the above reasons, this Court is of the view that the Technical Bid of the respondent no.3 could not have been declared to be responsive, in the absence of any material to show that he had the capacity and financial ability to perform the contract work, as he has not produced any

documents in terms of Clause 4 of the NIT. Consequently, the finding of the respondent No.3's technical bid as responsive is hereby set aside. Further, as all other subsequent/consequential actions thereto, the price evaluation uploaded in the GeM Portal on 09.07.2024 and the letter dated 11.07.2024 issued by the Director of Medical Education could not have been acted upon, they are hereby set aside. The matter is remanded back to the State respondents to consider the case of the petitioner for award of the contract, regard being had to his financial bid amount. The State respondents shall take a decision on the same within a period of 10 (ten) days from the date of receipt of a copy of this order.

52. The writ petition is accordingly allowed.

JUDGE

Comparing Assistant