



GAHC010145192021



Judgment reserved on **24.02.2022**

Judgment delivered on **08.04.2022**

IN THE GAUHATI HIGH COURT

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

W.P(C) No.4683 of 2021

Community Action Through Motivation Programme (CAMP), a registered society having its office at House No. 8/668, Anand Nagar, Badabag, Rewa, Madhya Pradesh, Pin-486001, and represented by its authorized signatory and State Coordinator Sri Ashis Choudhury.

.....Petitioner

-Versus-

The State of Assam, represented by the Principal Secretary, Health & Family Welfare Department, Dispur, Guwahati-781006.

2 The Mission Director, National Health Mission, Christian Basti, Guwahati-781005, Assam.

3 M/s Pashupatinath Distributors pvt. Ltd., through The Mission director, national Health Mission, Christian Basti, Guwahati, 781005, Assam

.....Respondents



W.P(C) No.4543 of 2021

Community Action Through Motivation Programme (CAMP), a registered society having its office at House No. 8/668, Anand Nagar, Badabag, Rewa, Madhya Pradesh, Pin-486001, and represented by its authorized signatory and State Coordinator Sri Ashis Choudhury.

.....Petitioner

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.....Respondents

- B E F O R E -

HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the petitioner : Mr. U.K. Nair, Senior counsel assisted by
Ms. A. Verma & Mr. K.P. Pathak, Advocates

Advocate for the respondents : Mr. D. Saikia, Advocate General for R-1
Mr. B. Gogoi, Standing Counsel for R-2
Mr. A.K. Bhattacharjee, Senior counsel assisted by
Mr. S. Dutta, Advocate for R-3



JUDGMENT AND ORDER (CAV)

The Mission Director, National Health Mission, Assam operates a scheme called "*Free Adarani Pick-up and Dropback Services*" in the state of Assam. A Notice inviting Expression of Interest (hereinafter referred to as "EOI") was issued by the Mission Director, National Health Mission, Assam on 24.12.2020 for shortlisting of eligible service providers for participating in a Request for Proposal (RFP) for the process for selection for being awarded the contract for operation and management of the said services. In response to the said EOI, as many as 5 (five) bidders submitted their bids including the present petitioner and the private respondent No. 3. During the process of evaluation of bids offered, the respondent No. 3's bid although initially was not found technically accepted, but subsequently it was also recommended for issuance of RFP alongwith other Bidders including the petitioner. The Respondent No. 3 was finally shortlisted as the L-1 Bidder. Being aggrieved, petitioner filed the writ petition being W.P.(C) No. 4543/2021 challenging the decision of the National Health Mission, Assam of permitting the respondent No. 3 to submit its Request for Proposal. During the pendency of this writ petition in the course of hearing, the petitioner came to be informed that the work order for the award

of the contract was issued to the respondent No. 3. Accordingly, the W.P(C) No. 4683/2021 came to be filed by the petitioner challenging the letter of intent issued. This Court vide the order dated 22.09.2021 while issuing notice had suspended the work order dated 31.08.2021 till the next returnable date. The interim order passed subsequently came to be extended on various dates. Since both the writ petitions were connected together, the matters were taken up for hearing on various dates and was finally reserved for Judgment.

2. The NHM, Assam issued a Notice inviting EOI for shortlisting of eligible applicants to participate in the RFP process for operation and management of "Free Adarani Pick-up & Dropback Services" in the State of Assam under the Janani Shishu Suraksha Karyakram (JSSK). The Services, Target Group & Coverage as specified under Clause-1.2 of the EOI indicates that the proposed services require 373 Vehicles covering all districts to be provided by the service providers. The Objectives & Goals of the Project provides inter alia for creating better transportation facility in general to reduce the vulnerability of the New Mother and infants by providing accessibility at free of cost. It would provide pick up facility for postnatal check-ups of pregnant women from their

homes to their nearest hospitals and for their return back to their homes.

3. Initially the last date of submission of the EOI was 12.01.2021 upto 2 PM. Thereafter, by a Corrigendum issued for submission of EOI was extended upto 1 PM of 22.01.2021. The purpose of the EOI is provided for under Clause 3.1. As per Para 1.2 of the EOI, the Authority will shortlist the qualified applicants as per eligibility criteria given under Para 1.2. Upon completion of the said shortlisting in the EOI process, the Authority shall recommend for issuance of the Request for Proposal (hereinafter referred to as "RFP") to the shortlisted applicants requesting them to submit detailed proposal as per the RFP terms and conditions. In the RFP stage, the most suitable applicants shall be selected for award for contract based on evaluation of proposal submitted. As per the eligibility criteria prescribed under Clause 3.2, the Authority will shortlist the applicants in the EOI process for issuance of the RFP to the shortlisted applicants.

4. On 25.01.2021, the Tender Committee meeting was held for examination of bids submitted for the EOI. Out of the Five (5) bidders, three (3) bidders were technically accepted. The three acceptable bidders are: a) M/s Ziqitza Health Care Limited, b) M/s GVK EMRI and c) M/s Community Action through motivation Programme "CAMP". The

petitioner was among the three (3) acceptable bidders. Respondent No. 3 and one M/S Kria Health Care Pvt. Ltd. were held to be not technically acceptable. Details in respect of each of the five (5) bidders as is evident from the Minutes of the meeting held on 25.01.2021 extracted below for convenience.

Sl No	Firm Name	Deviation if any from the EOI terms and conditions	Result
1	M/s Ziqitza Health Care Limited	No deviation	Technically accepted
2	M/s GVK EMRI	No deviation	Technically accepted
3	M/s Community Action through motivation Programme "CAMP".	No Deviation	Technically accepted
4	M/s Pashupatinath Ltd	The experience details submitted by M/s Pashupatinath Ltd is a combination of experience of 2 firms namely Pashupati and Samman Foundation. The party had not clarified the matter inspite seeking the same through email. Hence, it is understood, that the party does not meet the eligibility criteria 3.2.1	Technically not accepted
5	M/S Kria Health Care Pvt Ltd	(i)The party does not have average annual turnover of Rs 10 crores. They have standalone turnover of Rs. 6.23 crores. They have consortium turnover of Rs 23.22 crores, which cannot be considered as per EOI terms and conditions. (ii)The party has not properly	Technically not accepted

		indicated the total no of vehicles operated by them as on 30.11.2020. Hence they deviate from the EOI clause 3.2.2	
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5. The Committee, therefore, recommended the three (3) shortlisted bidders for seeking detailed RFP for the "Free Adarani Pick-up and Dropback Services" in the state of Assam. The said tender summary report was also uploaded on the website on 11.02.2021. The Tender Committee recommended issuance of the Request for Proposal (RFP) from the three shortlisted bidders including the writ petitioner.

6. In the RFP, the process for Technical Evaluation is prescribed under Clause 1.10. As per Clause 1.10.5, the Technical Evaluation of the bidders will be carried out in terms of the criteria provided under the said Clause. In terms of the said Clause, the applicant/bidder who fails to score a minimum of 60 marks out of the 100 marks in technical evaluation shall not qualified for further evaluation. Financial Evaluation is prescribed under Clause 1.10.6. Under the said Clause, it is provided *inter alia* that the technically qualified applicant/bidder having the lowest financial quote will be declared as the winner and invited for signing the contract. The Authority however reserved their rights to invite the second lowest applicant for signing the contract at the lowest rate in



case the preferred L-1 bidder fails to execute the contract within due date for whatever reasons.

7. Subsequently, the petitioner came to be informed that the Authority reviewed its earlier decision held on 15.02.2021 and thereby arrived at a conclusion that respondent No. 3's bid was also technically acceptable and therefore, it recommended issuance of RPF to the Respondent No. 3 as well in addition to the other three (3) shortlisted bidders including the petitioner. Thereafter, financial bid was opened on 31.03.2021 in which the respondent No. 3 was shortlisted as the selected bidder. The petitioner represented before the Authority against the shortlisting of the respondent No. 3 raising their objections on the eligibility qualification by their E-mail dated 19.05.2021. Subsequently, another representation was preferred before the Mission Director, NHM, Assam vide representation dated 23.05.2021. Similar representations were also submitted on 15.07.2021 as well as on 02.08.2021. A representation to that effect was also submitted before the Principal Secretary, Health and Family Welfare Department by representation dated 02.09.2021. However, since their representations remained unattended, the petitioner preferred the writ petition challenging the shortlisting of the respondent No. 3 pursuant to its initial rejection as



being “technically not accepted” as well as the subsequent work order issued on 31.08.2021 to the respondent No. 3 as the L-1 bidder.

8. In the present proceedings, the petitioner assails the shortlisting of the respondent No. 3 at the EOI stage and as well the selection of the respondent No. 3 in the RFP stage leading to issuance of the work order on two grounds.

- a) The petitioner assails the shortlisting of the respondent No. 3 at the EOI stage by review of the earlier order by the Authorities on the ground that review is a creature of the statute and in the context of the NIT when there is no specific power conferred upon the Authority/Tender Evaluation Committee in the NIT, it was impermissible for the Authority to review its earlier order and which was also uploaded in the website. It is contended that once an order is passed on the basis of the materials available before the Authority concerned, in the absence of any specific provision/power conferred under the various clauses of the NIT, the action of the Authority in qualifying the Respondent No. 3 vide their meeting held on 17.02.2021 is completely arbitrary inasmuch as by the earlier meeting held on 25.01.2021. The Respondent No. 3 was considered to be “technically not accepted” as the experience details submitted



by respondent No. 3 is a combination of experience of two (2) firms namely M/S Pashupati and M/s Samman Foundation. It is contended that the party does not meet the eligibility criteria 3.2.1. It is contended that where the Authority has not been bestowed with any power to review its own order, a delegatee of the said Authority namely, the Tender Evaluation Committee, cannot review its earlier order passed. Such action adopted by the Tender Evaluation Committee not being specifically provided for in the NIT, the order of shortlisting the respondent No. 3 by the Tender Evaluation Committee vide its meeting held on 17.02.2021, by reviewing its earlier order dated 25.01.2021 is arbitrary and colorable exercise of power and therefore, bad in law and needs to be suitably interfered with.

b) The second contention of the petitioner is that on the facts it was not disputed that the experience projected by the Respondent No. 3, as required under the eligibility criteria of the NIT, was in respect of Ambulatory Services offered in the State of Bihar by the Respondent No. 3 in a joint venture with another organization i.e. M/S Samman Foundation. As such the experience gathered by a consortium cannot be individually claimed by a constituent of the consortium. It is contended that unless the respondent No. 3 can submit credentials for its



experience in its individual capacity, any experience gathered as a constituent of the consortium cannot be claimed individually by a constituent i.e. namely the Respondent No. 3. As Clause 3.2.1 specifically debars any consortium from participation and only permits single entity registered under appropriate laws in India, the action of the Authority in shortlisting the respondent No. 3 at the EOI stage for the purposes of issuance of the RFP by taking into consideration the experience gathered as a consortium, is in violation of the Clauses of the NIT and therefore, the action of the Authority in shortlisting the respondent No. 3 is arbitrary. Consequently, the actions of the Authority being arbitrary and colorable, the work order issued to respondent No. 3 should be interfered with, set aside and quashed and direction be issued to the respondents/Authorities to finalize the tender process in favour of the petitioner/society.

9. In respect of the first contention Mr. U.K. Nair, learned Senior Counsel for the petitioner relying upon the Judgment of the Apex Court rendered in *Patel Narshi Thakershi and Ors. Vs. Shri Pradyumansinghji*, reported in (1971) 3 SCC 844 submits that if the Authority is not empowered to review its own order then a delegatee of the said



Authority namely the Tender Evaluation Committee cannot have the power to review its own order passed earlier.

10. In respect of the second contention, the learned Senior counsel for the petitioner relies to the Judgment of the Apex Court in *Municipal Corporation of India Ltd & Anr Vs. B.G.V. India Ltd and Ors.* reported in (2018) 5 SCC 462. The learned Senior counsel for the petitioner submits that the Apex Court in this Judgment has held that the bidder who submits a bid expressly declaring that it is submitting the same independently and without any partners, consortium or joint venture, cannot rely upon the technical qualifications of any third party for its qualification.

11. The learned Advocate General appearing for the State respondent contested the allegations against them in the writ petition in its affidavit. It is submitted that there was absolute transparency in the process and the entire process for shortlisting the eligible bidder has been undertaken by the NHM in strict compliance of the tender conditions and as per the provisions of law applicable. It is submitted that the allegations of the petitioner are completely unfounded and the actions of the Authority being administrative in nature, the ratio laid down in the Judgment of *Patel Narshi Thakershi and Ors. Vs. Shri Pradyumansinghji* reported in (1971) 3 SCC 844 is not applicable as the same is in respect

of a Quasi Judicial function. It is submitted that as per the Clause of the EOI during the preliminary scrutiny, the Authority is permitted to seek further clarifications, explanations or information on any issue relating to the eligibility till such time the committee is fully convinced.

12. The learned Advocate General relied on a catena of Judgments of the Apex Court and strenuously urged that in matters of commercial contracts and settlement of Government tenders, the scope of judicial review under Article 226 is extremely circumscribed. It is submitted that since public interest and public finance are involved, the Authority has to take every precaution to ensure that the most suitable bidder is shortlisted or selected for award of the contract. The Respondent No. 3 was a lead partner of the consortium, which had rendered Ambulatory Services in the State of Bihar. The Government of Bihar has also certified by issuing necessary communication that the services rendered by the respondent No. 3 as the lead partner of the consortium is satisfactory. Referring to *New Horizons Limited Vs. Union of India* reported in (1995) 1 SCC 478 the learned Senior counsel submitted that the experience gathered as a member of a consortium can also be relied upon in matters where the components of the consortium participates individually. In the facts of the present case, the respondent No. 3 was a lead partner and it has submitted its necessary credentials to support its

claim that it had executed similar Ambulatory Services in the State of Bihar. Referring to the communication received from the State of Bihar, in response to queries made by the NHM, Assam, the learned Advocate General submits that there has been no occasion for complaint in respect of similar Ambulatory Services offered by the respondent No. 3 as a lead partner of the consortium in the State of Bihar. Under such circumstances, no fault can be attributed to the Authority in accepting the experience gathered by respondent No. 3 as a lead partner of the consortium in the State of Bihar to consider its eligibility in the present tender process. The law laid down by the Apex Court in *New Horizons Limited (Supra)* is still a good law and has not been overruled in subsequent Judgments.

13. Mr. A.K. Bhattacharjee, learned Senior counsel assisted by Mr. S. Dutta contested the claims of the petitioner on behalf of shortlisted bidder namely M/S Pashupathinath Distributors Pvt. Limited which is arrayed as respondent No. 3 in the present proceedings. Mr. Bhattacharjee, learned Senior counsel strenuously urged that the offer of the respondent No. 3 is proper in all respects and that apart it was the lowest bidder. The learned Senior counsel urged that the contention of the petitioner that the shortlisting of the respondent No. 3 by the Authority vide the second meeting dated 25.01.2021 is impermissible in

the absence of any specific provision for review under the Clause of the EOI and that such action of the Authority is completely unacceptable as the said proposition is alien in the realm of commercial contracts and administrative actions carried out by the State. Such an argument is totally misconceived and is based upon incorrect interpretation of law. The learned Senior counsel submits that if the proposition of there being no review available to an administrative authority while rendering its administrative functions, in the absence of any specific provisions, is to be accepted then it will lead to completely anomalous situation. The learned Senior counsel urged that the EOI is not a part of any statute. It is a tender floated by the Government and the terms and conditions mentioned in the tender clearly permits the Authority to pass any order in order to arrive at a just conclusion. The learned Senior counsel relies on the Judgments of the Apex Court in *R.R. Verma & Ors. Vs. Union of India & Ors.* reported in (1980) 3 SCC 402 and *State of H.P & Ors. Vs. Rajesh Chander Sood & Ors.* reported in (2016) 10 SCC 77. The learned Senior counsel further urged that in administrative functions, the bar of review unless prescribed as sought to be urged by the petitioner is completely not applicable. The learned Senior counsel urged that the writ petition at the behest of unsuccessful tenderer is not acceptable and the law in this regard has been consistent all throughout since the *Raunaq International Ltd. Vs. I.V.R. Construction Ltd.,* reported in

(1999) 1 SCC 492. The further contention of the learned Senior counsel is that the experience of the respondent No. 3 gathered as a constituent member of a consortium is available to be relied upon in respect of such a constituent member more particularly when the constituent was a lead partner of a consortium. Under such circumstances, there is no infirmity in the shortlisting of the respondent No. 3 for RFP and consequent issuance of work order by the Authority in favour of the respondent No. 3 upon being declared as the L-1 bidder in respect of the present tender process. The learned Senior counsel further urged that besides there being no merit, the writ petition ought to be dismissed on the ground of delay and laches as the petitioner was well aware of the shortlisting of the Respondent No. 3 being shortlisted for issuance of RFP and its participates in the RFP process as far back as atleast 07.06.2021 but the petitioner chose to approach this writ Court only on 09.09.2021 after the issuance of the work order dated 31.08.2021 to respondent No. 3. The learned Senior counsel submits that pursuant to the work order issued the respondent No. 3 has undertaken substantial investments in order to mobilize men and materials for undertaking the "Free Adarani Pick-up and Dropback Services" contract of which is offered to the respondent No. 3. The learned Senior counsel, therefore, submits that the interim order dated 22.09.2021 passed by this Court has caused substantial losses to the respondent No. 3. Therefore, the interim order be vacated

and the writ petition be dismissed and costs imposed on the petitioner. In support of its contentions, the learned Senior counsel refers to the Judgments of *State of M.P Vs. Nandwal Jaiswal* reported in (1986) 4 SCC 566, *Ascon (M/s) & Anr Vs. State of Assam* reported in 2017 (5) GLT 875 and *Maa Chandi Stone Crushing Vs. Chief Engineer* reported in 2005 SCC OnlineOri 1 to contend that the relief in writ proceedings is not available to a litigant on account of delay and creation of third party rights.

14. I have heard the learned counsels for the parties and I have also carefully perused the pleadings on record and the case laws cited in support of their contentions. Records of the Tender Process which were called for have also been furnished for perusal of the Court.

15. Before proceeding further, it would be necessary to refer to some of the relevant clauses of the EOI. By the Notice inviting EOI, the Mission Director, NHM, Assam invited eligible applicants/bidders for shortlisting to participate in the RFP process for the operation and management of "Free Adarani Pick-up and Dropback Services" in the State of Assam under JSSK. The key information provided are as under:

S.No	Key Information/ Events	Time/Venue/Address
1	Date of issue of the EOI Document	Date: 24/12/2020
2	Last date of download of EOI Document	Date: 24/12/2020

3	Date of Pre-submission meeting	Date: 04/01/2021
4	Due date and Time of submission (online& Hard Copy)	Date: 18/01/2021 (Subsequently extended till 22.01.2021)

16. The Objectives and Goals of the projects are provided under Clause 1.3. The relevant portion of which is extracted below:

“1.3.1 Creating better transportation facility in general to reduce the vulnerability of the New Mother and infants by providing accessibility at free of cost is the underlying principle of Adarani. It complements the Janani Shishu Suraksha Karyakram which provides cash incentives to women availing institutional delivery and the members supporting them in the process like ASHA.

1.3.2 To operate the service from a centralized state of the art call centre (Control Room) with computer telephony integration, computer aided dispatch of vehicles and ability to log calls with GIS based GPRS integrated vehicle monitoring system for Adarani- Drop back and Pickup Service in the State of Assam.

1.3.3 It would provide Dropback service to JSSK beneficiaries through Adarani Vehicles from 7am to 6 pm on 365 days in a year basis as per 12 hr shift operation due to the early sunrise and remoteness of rural areas prevailing in this North-eastern part of the country.

1.3.4 It would provide pick up facility for postnatal check-ups of pregnant women from their homes to their nearest hospitals and return back to their homes.

.....”

17. The Purpose of the EOI is provided under Clause 3.1. The relevant portion of which is extracted below:

“Purpose of this EOI is to shortlist qualified Applicants as per the

eligibility criteria given under para 1.2 (i.e. EOI Stage). Subsequent to the completion of the EOI process for shortlisting, the Authority shall issue RFP to the shortlisted applicants requesting them to submit a detailed proposal (financial & Technical) as per the FRP terms and conditions (i.e. RFP Stage). In the RFP stage, the most suitable Applicant shall be selected for award of contract based on the evaluation of the proposals submitted.”

18. The Eligibility Criteria is prescribed under Clause 3.2. The relevant portion of which is extracted below:

“3.2.1 The Applicant (or the Firm intending to participate in the EOI process) must be a single entity (consortiums not allowed) registered under appropriate laws in India.

3.2.2 The Applicant should have a minimum three years of business experience and out of which at least one (1) year in successfully handling similar JSSK services in public sector with a minimum of 300 vehicles as of 30/11/2020.

3.2.3 Satisfactory experience in call centre based vehicle management and operation with GIS based GPRS integrated vehicle monitoring system. The party has to produce supporting documents to this effect including certificate from the Client or the Authority valid for the above motioned period.

3.2.4 Average Annual Turnover of the Applicant in the last three financial years i.e. 2017-18, 2018-19 and 2019-20 from similar activity should not be less than Rs. 1,000.00 Lakhs (**Rupees ten crores only**). The average annual turnover certificate as issued by the of Auditor/Chartered Accountant should be submitted in the format enclosed as Annexure 3 of this EOI document. The Certificate must be accompanied by attested copies of audited Statement of Accounts of last three financial years (i.e. 2017-18, 2018-19 and 2019-20).

3.2.5 Entities blacklisted by the Inviting Authority or by any State



Government or Central Government Organization shall not be allowed to participate in the process during the period of blacklisting.

3.2.6. Registration: The Party should be registered under Income Tax , GST and relevant Labour Laws including Employees Provident Fund Organization, Employees State Insurance Corporation etc., as prescribed by law.”

19. The Evaluation and Shortlisting is prescribed under Clause 4. The relevant portion of which is extracted below:

“4.1 Preliminary Scrutiny

4.1.1 All the applications (online & hardcopy) received within due date and time shall only be considered by the Evaluation Committee.

4.1.2 The evaluation committee shall first ensure that the applications are complete in all respect. Only those applications which are complete in all respect shall be considered for further scrutiny.

4.1.3 Evaluation Committee reserves the right to seek further clarifications, explanation or information on any issue relating to the eligibility till such time the Committee is fully convinced.

4.1.4 NHM shall finalize the list of the Applicants to be empaneled based on the evaluation and decision of the authority on the same shall be final and binding.

4.1.5 Names of the Applicants shortlisted (for RFP process) as per the evaluation of the EOI Application will be hosted on our website on completion of all formalities. No correspondence on the above subject will be entertained.

4.1.6 NHM, Assam reserves the right to reject any or all applications without assigning any reason(s) thereof.”

20. The issue of RFP for selection is prescribed under Clause 4.2. The relevant portion of which is extracted below:

"2.2.1 Detailed Proposal shall be invited by NHM from the shortlisted Applicants (Parties) issuing RFP. In the RFP document all technical and operational details shall be furnished. At this stage the parties have to submit detailed technical and financial proposal for evaluation and selection of most suitable amongst them, as per the proposal submitted.

2.2.2 The selection of the firm shall be strictly on the basis of most preferable bid received in response to the RFP, as per the terms and conditions and specifications mentioned therein."

21. The Tender Committee in its meeting held on 25.01.2021, after examining the various EOIs submitted by the bidders, shortlisted three (3) bidders at the EOI stage, out of the five (5) bidders who submitted its bids. The petitioner was among the shortlisted bidders in the EOI process and the Respondent No. 3 and another bidder were declared as "Technically not accepted". Details of which as provided in the Minutes dated 25.01.2021 is extracted below:

Sl No	Firm Name	Deviation if any from the EOI terms and conditions	Result
1	M/s Ziqitza Health Care Limited	No deviation	Technically accepted
2	M/s GVK EMRI	No deviation	Technically accepted
3	M/s Community Action through motivation Programme "CAMP".	No Deviation	Technically accepted

4	M/s Pashupatinath Ltd	The experience details submitted by M/s Pashupatinath Ltd is a combination of experience of 2 firms namely Pashupati and Samman Foundation. The party had not clarified the matter inspite seeking the same through email. Hence, it is understood, that the party does not meet the eligibility criteria 3.2.1	Technically not accepted
5	M/S Kria Health Care Pvt Ltd	(i)The party does not have average annual turnover of Rs 10 crores. They have standalone turnover of Rs. 6.23 crores. They have consortium turnover of Rs 23.22 crores, which cannot be considered as per EOI terms and conditions. (ii)The party has not properly indicated the total no of vehicles operated by them as on 30.11.2020. Hence they deviate from the EOI clause 3.2.2	Technically not accepted

22. The shortlisted bidders were recommended for issuance of RFP for selection and award of the order for operation and management for “Free Adarani Pick-up and Dropback Services” in the State of Assam. The respondent No. 3 represented that there was no communication received either in writing or verbal from the Office of NHM regarding any clarifications sought for, as reflected in the Minutes dated 25.01.2021 and therefore, they were not aware of such clarifications sought for. The Respondent No. 3, therefore, requested for re-consideration of their bid and any such clarifications as may be sought for by the NHM will



accordingly be furnished by the respondent No. 3. Pursuant to the representation dated 15.02.2021 submitted by the respondent No. 3 to Mission Director, NHM, Assam requesting for recall or re-evaluation of the findings of the Bid Evaluation Committee meeting held on 25.01.2021, the Authority took the views of the procurement expert who in turn advised that the experience of respondent No. 3 as a lead partner in the consortium can be considered. The committee thereafter reviewed its earlier decision in its meeting held on 17.02.2021. In addition to the earlier shortlisted bidders including the petitioner, the NHM authority also recommended the respondent No. 3 for issuance of RFP documents. The Tender Committee thereafter, proceeded for Technical Evaluation of the RFP submitted by the bidders shortlisted pursuant to EOI stage including the petitioner and the respondent No. 3. This meeting was held on 12.03.2021. The Technical Evaluation was carried out in terms of the provision of Clause 1.10 of the RFP. As per the said Clause, the most preferred bidders must have a qualifying score of 60 marks in the technical evaluation as per the provisions of Clause 1.10.5. All the four (4) shortlisted bidders were found to be "technically qualified" in terms of the criteria laid down as per Clause 1.10.5. The Authority thereafter proceeded for financial bid opening. The financial bids were opened on 31.03.2021. As per the comparative statement prepared by the Authority, the financial bid offered by the respondent

No. 3 was considered to be the lowest and accordingly, the tender committee recommended the respondent No. 3. However, it was also recommended that a performance and feasibility report be called for from Bihar NHM to assess the feasibility and capability of the respondent No. 3 in running the "Free Adarani Pick-up and Dropback Services" The respondent No. 3 being the L-1 bidder, work order vide the order dated 31.08.2021 was issued by the NHM Authority. The work order was issued to Respondent No. 3 after receipt of feedback from the Bihar, NHM, which was found to be satisfactory. The comparative statement prepared by the Authority as available in the Minutes of the financial bid opening are extracted below for convenience:

"The Comparative Statement of the Financial Bid is given below (Annexure)

a) Price offered by the technically qualified bidders for Adarani Drop Back and Pick Up Services:

<i>Sl No</i>	<i>Name of the bidder</i>	<i>Monthly Service Charges per vehicle per month in Rs.</i>	<i>Quantity</i>	<i>Total Monthly charges per vehicle/month for Adarani Drop Back and Pick up Services including GST In Rs.</i>	<i>Awarded</i>
<i>1</i>	<i>Pashupati Distributors Pvt Ltd</i>	<i>54921.00</i>	<i>373</i>	<i>20485533.00</i>	<i>L1</i>

2	Community Action Through Motivation Programme "Camp"	79200.00	373	29541600.00	L2
3.	GVK- Emergency Management and Research Institute	88110.00	373	32865030.00	L3
4	Ziqitza Health Care Limited	88900.00	373	33159700.00	L4

Out of the four nos of bidders, the Tender Evaluation Committee observed that Pashupati Distributors Pvt Limited has quoted the lowest price (L1) for Operation and Management of Adarani Pick Up and Drop Back Services.

The Committee recommended that Pashupati Distributors Pvt Limited has participated for the first time in Adarani Tender in Assam. They are presently running the ambulatory services in Bihar, so a performance report of Pashupati Distributors Pvt Limited may be obtained from NHM, Bihar to assess the feasibility and capability of Pashupati Distributors Pvt Limited to run the Adarani Drop Back Services in Assam.

Sd/-

BME

Sd/-

Programme Executive

Sd/-

Director Finance & Accounts

Sd/-

AMD AMSCL "

23. From a perusal of the Tender Notice, it is seen that the Notice inviting EOI has three (3) stages of evaluation. The bids offered by the intending bidders were initially scrutinized and evaluated under the said



tender process as specified under Clause 4. The eligibility criteria for such an evaluation is prescribed under Clause 3.2. It is only upon the said preliminary scrutiny and evaluation that the Authority will choose to recommend the bidders from whom the RFP will be sought for. In terms of the said Clause, during the process of preliminary evaluation, the Evaluation Committee is empowered to seek clarifications/explanations/information of any issue relating to the eligibility till such time, the committee is fully convinced. Upon the preliminary scrutiny, the Authority will recommend the intending bidders from whom the RFP will be sought for. Thereafter, the RFP submitted by the bidders, will be subject to technical evaluation as provided for under Clause 1.10.5. Upon being technically qualified, the financial bids of the technically qualified bidders will be opened and evaluated as per Clause 1.10.6. Upon due perusal of the various Clauses in the EOI and the RFP, it is seen that the evaluation of the tender involves three (3) different stages of scrutiny and evaluation. As is evident from the affidavit-in-opposition filed on behalf of NHM, upon the results of the preliminary scrutiny being uploaded in the website, the respondent No. 3 represented before the department with a request for re-evaluation of its decision dated 25.01.2021 wherein the respondent No. 3 was shown to be "technically not accepted". The re-evaluation was sought for primarily on the ground that in the details of the Minutes of the meeting



held on 25.01.2021 uploaded in the website of the NHM, in respect of respondent No. 3 whose name appeared in the Sl. No. 4 of the Chart, it was mentioned that *"the experience details submitted by the M/S Pashupatinath Ltd is a combination of experience of 2 firms namely pashupati and Samman Foundation. The party had not clarified the matter inspite of seeking the same through email. Hence, it is understood, that the party does not meet the eligibility criteria 3.2.1."*

24. The respondent No. 3 by its representation dated 15.02.2021 represented as under:

"Ref.: PDPL/

Date.....

BY E-MAIL / SPEED POST

PDPL/ NHM-001/2021

15th February, 2021

To,
The Mission Director,
National Health Mission, Assam.
Saikia Commercial Complex, Shrinagar Path.
Christian Basti, G S Road,
Guwahati-781005, Assam
Email- misnrhm.assam@gmail.com

Ref: i) Etender-nic@nic.in email dated 11.02.2021 for the Bid 102308;

ii) Record Note of discussion held on. 25.01.2021 relating to EOI No.NHM/24011/8/2018-Referral Transport-NHM/(Part-1)/24759 dated:24/12/20 For Operation and Management of "Free Adarani Pick-Up & Dropback Services" to Mother and Neonates as part of Janani Sishu Surakhsha Karayakaram (JSSK) in the State of Assam.

Dear Sir/s.

*We refer to the Bid Evaluation Committee meeting held on 25.01.2021 (hereinafter referred to as the "**Meeting**") in presence of the Members (Tender Committee) and in particular the deliberations, observations, reasons and directions given for not accepting the technical bid of our company (hereinafter referred to as the "**PDPL**") i.e. PDPL (Sl no.4 of Annexure A of the Record Note of discussion held on 25.01.2021 relating to EOI No.NHM/24011/8/2018-Referral Transport-NHM/(Part-1)/24759)*

a) At the outset, it is submitted that our "company has not received any verbal or written clarification email/letter/communication from National Health Mission, Assam, its representatives or from the website of assamtenders.gov.in or anyone as mentioned in the Meeting of 25.01.2021. It is pertinent to note that the experience details submitted by PDPL is technically correct and qualify the eligibility criteria under 3.2.1 of the EOI for the following reasons;

- i) PDPL is a company registered under the laws India and has applied for the above mentioned bid as a single entity and not as consortium; therefore it meets the requirements of 3.2.1 of the EOI.*
- ii) PDPL meets the eligibility criteria of Business experience (3.2.2 of the EOI), experience in call centre based vehicle management and operation with GIS based GPRS integrated vehicle monitoring system (3.2.3 of the EOI, Average Annual Turnover (3.2.4 of the EOI) along with the clause 3.2.5 and 3.2.6 of the EOI. The supporting documents for the above are already on record with NHM, which was submitted physically to and accepted by NHM on 22.01.2021.*
- iii) PDPL or its representatives have not received any clarification email/letter/communication from National Health Mission, Assam, its representatives or from the website of assamtenders.gov.in or anyone to seek clarification on the "experience" of PDPL.*
- iv) It is germane to note that Consortium of PDPL & Samman foundation is a different entity from PDPL. To obviate the confusion, it is submitted that PDPL for one of the business transactions in the same sector formed a Consortium with Samman Foundation naming "PDPL & Samman foundation". Please note that "PDPL & Samman foundation" have not applied for the present EOI bid No.NHM/24011/8/2018-Referral Transport-NHM/(Part-1)/24759 dated: 24/12/20, rather only PDPL as a separate entity has applied for the abovementioned bid.*

b) That in the interest of the project, the most suitable Applicant shall be selected for award of contract based on the evaluation of the proposal submitted. Keeping

into the consideration the prominence, credentials, professionalism and experience, we request that PDPL should get fair chance to represent itself on account of any queries or clarifications required by the Bid Evaluation Committee or any NHM representatives before rejecting its technical bids.

c) In light of the above facts, it is only in the Interest of justice, besides being absolutely necessary for the protection of the interest of PDPL to:

- i) Stay and recall the directions, observation and reasoning of the Bid Evaluation Committee meeting held on 25.01.2021;*
- ii) Stay the Bid Evaluation Committee recommendations dated 25.01.2021 for the empanelment of the agencies namely M/s Ziqtizaa Health care, M/s GVK EMRI and M/s Community Action through motivation Programme "CAMP" and seeking detailed RFP from them for the further process in the bid of Janani Sishu Surakhsha Karayakaram (JSSK).*
- iii) re-evaluate the technical bid presented by the bidders after tak*
- iv) ing due clarifications if needed by proper email or communications.*

We request the respected committee to take on record our submissions, while passing any further directions as it deems fit and proper. We further submit that if need arises we are available to give presentation, for the said purpose before the committee and shall be allowed to submit more documents if necessary as per the committee instructions.

Please note that we received the information of our technical bid being rejected by etender-nic@nic.in email of 11.02.2021 and is submitting our objection against the directions of the Bid Evaluation Committee meeting held on 25.01.2021 within time.

Yours faithfully,

For PashupatiNath Distributor Private Limited (PDPL)

For PASHUPATINATH DISTRIBUTORS PRIVATE LTD.

Sd/-

Director

(RAJEEV RANJAN)"

25. On the basis of the representation that the respondent No. 3 has submitted in its individual capacity as a separate entity and not as a consortium, the Tender Evaluation Committee in its meeting held on



17.02.2021 reviewed its earlier decision on 25.01.2021 and recommended the respondent No. 3 along with the other three (3) shortlisted bidders for issuance of RFP scheme.

26. The question before this Court is whether in the absence of any specific clauses/prescription in the EOI can the tender evaluation committee review its earlier decision taken?

27. The further question which arises for a decision is that admittedly the experience details furnished by the respondent No. 3 in support of its eligibility to participate in the tender process, relates to work executed by the respondent No. 3 as a component of a consortium offering Ambulatory Services in the State of Bihar. Can the experience gathered by the consortium be individually claimed by a Constituent of the Consortium?

28. The third issue which arises for a decision is that in the facts of the case, the eligibility of the respondent No. 3 for participating in the technical evaluation of the RFP was known to the petitioner at least as far back as on 12.03.2021 i.e. the date of technical evaluation on which date all the four (4) shortlisted bidders were held to be technically accepted. That apart, by the meeting held on 31.03.2021, the financial bids were opened and the respondent No. 3 was recommended as L-1. In spite of the knowledge of the participation of the respondent No. 3,

the writ petitioner approached this Court only in the month of September, 2021. Pursuant to the recommendation of the Tender Committee recommending the respondent No. 3 as L-1, the work order was issued to respondent No. 3 on 31.08.2021. In view of the work order being issued to respondent No. 3 and in view of the statements made at the bar that the respondent No. 3 has incurred substantial investment towards mobilization of manpower and machine towards implementation of the "Free Adarani Pick-up and Dropback Services" in the State of Assam. Pursuant to the work order dated 31.08.2021 being issued, third party rights have been created in the meanwhile. Under the circumstances whether the writ petitioner can be granted any relief at the stage.

29. In so far as the first issue is concerned, the Judgment relied upon by the petitioner which is pressed into service to rely on the contentions of the petitioner was rendered in the context of orders being passed by the Administrative Officers. The question which was before the Apex Court is whether the then Commissioner of Rajkot had competence to quash the order made by the Saurashtra Government on 22.10.1956. The then Commissioner was acting as a delegatee of the State Government and in that context the Apex Court held that the order passed by the then Commissioner amounted to review of the order

made by the Saurashtra Government and the Apex Court, therefore, held that the power of review is not an inherent power and it must be conferred by law either specifically or by necessary implications. If the Government had no power to review its own order, it is obvious that its delegatee would not have power to review its order.

30. In the context of the present proceedings, the issue before this Court is whether the Tender Evaluation Committee could have reviewed its earlier order.

In the scheme of the EOI, the powers for evaluation by the Tender Evaluation Committee are prescribed in the EOI/RFP_unlike in the case of *Patel Narshi Thakershi (Supra)*, where the Supreme Court held that power of review is not inherent and a delegatee cannot have the power of review unless prescribed. The facts involved in the present proceedings are different from the facts in the case of *Patel Thakershi (Supra)*. The said Judgment of the Apex Court came to be considered in a subsequent Judgment before the Apex Court in *R.R. Verma (supra)*. The Apex Court therein had held that where the Government was exercising quasi judicial powers vested by a statute, the power of review must be conferred by a statute specifically or by a necessary implications. However, the said principle is not applicable to decisions purely of administrative nature. The Apex Court held that to extend this

principle to purely administrative decisions would lead to untoward and startling results. The Government must be free to alter its policy or its decision in administrative matters. The relevant paragraph of the Judgment is extracted below:

"5. The last point raised by Shri Garg was that the Central Government had no power to review its earlier orders as the rules do not vest the government with any such power. Shri Garg relied on certain decisions of this Court in support of his submission: Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji [(1971) 3 SCC 844 : AIR 1970 SC 1273] ; D.N. Roy v. State of Bihar [(1971) 3 SCC 844 : (1971) 3 SCC 844 : (1971) 2 SCR 522] and State of Assam v. J.N. Roy Biswas [(1976) 1 SCC 234 : 1976 SCC (L&S) 10 : AIR 1975 SC 2277 : (1976) 2 SCR 128] . All the cases cited by Shri Garg are cases where the government was exercising quasi-judicial power vested in them by statute. We do not think that the principle that the power to review must be conferred by statute either specifically or by necessary implication is applicable to decisions purely of an administrative nature. To extend the principle to pure administrative decisions would indeed lead to untoward and startling results. Surely, any government must be free to alter its policy or its decision in administrative matters. If they are to carry on their daily administration they cannot be hidebound by the rules and restrictions of judicial procedure though of course they are bound to obey all statutory requirements and also observe the principles of natural justice where rights of parties may be affected. Here again, we emphasise that if administrative decisions are reviewed, the decisions taken after review are subject to judicial review on all grounds on which an administrative decision may be questioned in a court. We see no force in this submission of the learned Counsel. The appeal is, therefore, dismissed."

31. The Judgment rendered in the Apex Court in *R.R. Verma(supra)* is also followed in a recent Judgments of the Apex Court rendered in *Rajesh Chander Sood (Supra)*. In this Judgment the Apex Court held that the power of Administrative Review can be exercised for good and valid justifications.

32. Accordingly, in view of the law laid down by the Apex Court, it is held that in administrative actions, the administrative Authority is empowered to revisit or review its orders for justifiable reasons. That power is inherent in the Government or an instrumentality of the State, but for good and justifiable reasons. To restrict any administrative authority to review or revisit any order or policy, supported by justifiable reasons, where required, will certainly lead to an anomalous and unworkable situation. Accordingly, the first contention of the writ petitioner that the Tender Evaluation Committee by its Second order dated 17.02.2021 could not have reviewed its earlier order and the same is therefore arbitrary, cannot be accepted and the same is therefore rejected.

33. In respect of the second question, the Apex Court in *New Horizons Limited and Anr. Vs. Union of India and Anr.* reported in (1995) 1 SCC 478 has clearly upheld that the experiences gathered as a constituent of a consortium can also be relied upon for evaluating the experience in

respect of the said entity when it participates as a single entity. The Apex Court in *New Horizon Limited (Supra)* held that earlier experiences as one of the partners of a firm cannot be discounted. Similarly, when a company having past experiences undergoes re-organization as a result of merger or amalgamation with another company having no such past experiences, the tender submitted in the name of the re-organized company, cannot be rejected. Alternatively, in case of a split in a company, the new company though having persons with experience in the field may not have experience in its name while the original company having experience in its name lacks persons with experience. It was held that while considering the requirement regarding experience it has to be born in mind that the said requirement is contained in a document inviting offer for commercial transaction and the terms and conditions of such document have to be construed from the standpoint of a prudent businessman. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. The relevant paragraph of the said Judgment is extracted below:

"23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document

have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom

which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India."

34. In the facts of the case in *BVG India Pvt Ltd. (Supra)*, it was necessary in terms of the tender Clauses thereunder to set out details of any other company/firms involved as a consortium member. The said company in response to the said Clause replied in negative, which was construed to mean that no other company or firm was involved as a consortium member in BVG India Limited. The bid was submitted by *BVG India Limited (Supra)* on its own, unaccompanied by any consortium member. Despite the same BVG India Limited furnished experience certificate of its consortium namely BVG Kshitij Waste Management Services Pvt. Ltd. In the Bid papers, no information whatsoever was given of the relationship/linkage of the BVG Kshitij Waste Management Services Pvt. Ltd. and the respondent/BVG India Limited. Under these circumstances, the Apex Court held that on the purported experience certificate issued in the name of BVG Kshitij Waste Management Services Pvt Ltd. cannot come to the help of BVG India Ltd so show its work experience. The said certificate relied upon by BVG India Limited, neither showed three years experience of BVG India Ltd

nor did it specify that BVG India Ltd was carrying out garbage/waste collections or more than 300 MT per day. Further before the Apex Court, no material was produced to show that M/S BVG Kshitij Waste Management Services Pvt. Ltd is the same as the BVG India Ltd or that is a consortium member. It is on these facts, the Apex Court held that the experience certificate issued in favour of BVG Kshitij Waste Management Services Pvt. Ltd. cannot be relied upon to fulfill the eligibility criteria of BVG India Ltd. The facts involved in *BVG India Ltd(Supra)* are clearly distinguishable on the facts involved in the present proceedings. In the present proceedings, there was no declaration sought for from the respondent No. 3 as to whether it was involved in any consortium. The criteria prescribed in the Notice inviting EOI is that the intending bidders must submit their bids in individual capacity. No consortiums were permitted to apply.

35. It is evident from the pleadings as well as from the submissions made at the bar that there is no quarrel that the respondent No. 3 had submitted its bid in its individual entity. The only question was whether the experience it had gathered as a lead partner of the consortium Samman Foundation can be relied upon to satisfy the requirement of experience for the purposes of eligibility. The law in this regard has been explained elaborately by the Apex Court in *New Horizons Ltd (Supra)*.

Even in *BVG India Limited (Supra)*, the earlier decision of the Apex Court in *New Horizons Ltd. (Supra)* has not been distinguished or differed with. The law laid down by the Apex Court in *New Horizons Ltd (Supra)* is still a good law and no Judgments have been pressed into service by the petitioner to submit that subsequent Judgments of the Apex Court had differed with the view and the law laid down in *New Horizons Ltd (Supra)*.

36. On the contrary in a recent Judgment rendered by the Apex Court in *Maa Nabadurga Construction Vs. Saroj Kumar Jena & Ors* reported in *MANU/SC/1279/2015*. The Apex Court relied upon the law laid down in *New Horizons Ltd. (Supra)*. Coming to the facts of the case, the records which were produced before the Court pertaining to the instant tender process also contains the tender papers submitted by the selected tenderers. Perusal of the tender papers submitted by the respondent No. 3 reveals that the bid documents have been submitted as per the criteria prescribed in the EOI/RFP. Further, in terms of the clarifications sought for by the NHM authority, the appropriate Authority in the State of Bihar has duly certified that the respondent No. 3 had satisfactorily executed Ambulatory Services in the State of Bihar as a lead partner of the consortium Samman Foundation. In view of the principle culled out by the Apex Court in *New Horizons Ltd. (supra)*, it has to be held that the

experience gathered by the respondent No. 3 as a lead partner of the consortium Samman cannot be discredited. The tender issuing authority upon perusal of the relevant documents and papers relating to the bid submitted has arrived at a satisfaction that the respondent No. 3 fulfills the criteria and has the experience necessary for being shortlisted at the EOI stage for issuance of RFP.

37. Accordingly, in view of the law laid down by the Apex Court, the contention of the petitioner that the experience gathered by constituent of a consortium cannot be taken into account when the constituent participates in a tender process in its individual capacity, being contrary to the law laid down by the Apex Court in *New Horizons Ltd (Supra)* is therefore rejected.

38. The Judgment of the Apex Court in *BVG India Ltd. (Supra)* pressed into service by the petitioner, on the facts of the present proceedings is clearly distinguishable from the facts of the present case and therefore does not come to the aid of the petitioner.

39. There is no specific challenge to the tender evaluation process in the RFP stage, either during technical evaluation or in the financial evaluation. The sheet anchor of the petitioner is that the experience of the consortium cannot be availed of by the respondent No. 3 as a constituent in its individual capacity and the respondent No. 3 being

already rejected by the Tender Evaluation Committee and there being no power of review conferred specifically in the NIT Clauses, the Tender Evaluation Committee could not have reviewed its earlier decision to make the respondent No. 3 eligible for the issuance of RFP.

40. The entire gamut of the challenge made by the respondent No. 3 is directed towards the evaluation/re-evaluation conducted at the EOI stage. The process of evaluation at the EOI stage came to be concluded on 17.02.2021. From the pleadings available on record, it is evident that the petitioner was aware of this evaluation/re-evaluation made atleast as far back as 12.03.2021 when the technical evaluation of the shortlisted tenderers took place. Although representations were addressed to the tendering authority, the challenge in the present proceedings came to be made only by filing the writ petition in the month of September, 2021 that to after issuance of the work order dated 31.08.2021, although the petitioner claimed that it was unaware about the issuance of work order to the Respondent No. 3, when the first Writ Petition being W.P(C) No. 4543/2021 was filed. Under such circumstances what fell for consideration before this Court is the process of evaluation only at the EOI stage. There being no specific challenge made nor pleadings available in respect of infraction of the tender conditions during the technical and financial evaluation, or any other

ground other than the grounds relied upon to assail the shortlisting of respondent No. 3 at the EOI stage, there is no necessity for this Court to venture into the evaluation process resorted to by the tender issuing Authority in the technical evaluation as well as the financial evaluation.

41. No malice/Bias/Ulterior motives have been alleged or attributed to the NHM Authorities or the respondent No. 3. It is also no the pleaded case that the actions of the NHM Authority/State was exercised for purposes foreign to the purposes intended and thereby it amounted to malice-in-law. From a perusal of the records presented to the Court, it is seen that the NHM Authority has followed the tender conditions and criteria specified while arriving at it's decision of awarding the contract to the L-1 bidder namely the Respondent No. 3. There is no malice-in-law that can be attributed to the respondent authorities on the given facts and circumstances of this case.

42. In any view of the matter, the scope of judicial review under Article 226 of the Constitution of India matters relating to commercial contracts is well laid down by the Apex Court. The various pronouncements of the Apex Court relating to scope of Judicial review in exercise of Article 226 of the Constitution of India in contractual matters are relevant for the purposes of the present proceedings.

43. In *Raunaq International Ltd. Vs. I.V.R. Construction Ltd*, reported in (1999) 1 SCC 492, the Apex Court held that superior Courts should not interfere with in matters of tenders unless substantial public interest was involved or the transaction was malafide.

44. In *Air India Ltd. Vs. Cochin International Airport Ltd.* reported in (2000) 2 SCC 617, the Apex Court held that Courts must proceed with great caution while exercising their discretionary powers and should exercise such power only in furtherance of public interest and not merely on making out a legal point.

45. In *Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd.* reported in (2005) 6 SCC 138, it was held that the Court should primarily concerned itself with the question as to whether there was any infirmity in the decision making process.

46. In *Jagdish Mandal Vs. State of Orissa*, reported in (2007) 14 SCC 517, the Apex Court held that a contract is a commercial contract. Evaluation of tenders and awarding of contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, Courts will not interfere in exercise of power of judicial review, even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out.

47. In *B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd.*, reported in (2006) 11 SCC 548, the Apex Court held that the Court's interference in contractual matters should be minimal. The High Court's jurisdiction in such matters is limited and it should exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

48. In *Michigan Rubber (India) Ltd. Vs. State of Karnataka*, reported in (2012) 8 SCC 216, it was held that if the State or its instrumentalities acted reasonably and fairly in public interest in awarding contract, interference would be very restrictive since no person can claim fundamental right to carry on business with the Government. Therefore, Court would not normally interfere in policy decisions and in matters challenging award of contract by the State or public authorities.

49. In *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corpn Ltd.*, reported in (2016) 16 SCC 818, it was held that a mere disagreement with the decision making process or with the decision of the authority cannot be a reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the Constitutional Court interferes with decision making process or the decision.

50. In *Montecarlo Ltd. Vs. NTPC*, reported in *AIR 2016 SC 4946*, it was held that where the decision is taken is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the Court should follow the principle of restraint. Technical evaluation or comparison by the Court would be impermissible.

51. In *Silppi Constructions Contractors Vs. Union of India and Anr.*, reported in *(2020) 16 SCC 489*, the Apex Court after considering catena of Judgments held that that the essence of law laid down by the Apex Court, in the settled Judgments, is in the exercise of restraint and cautioned; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities. Unless there is total arbitrariness or unreasonableness in the decision making process, the Court's should give way to the experts. The Court is not to sit like a Court of appeal over the appropriate authority, the authority floating the tender is the best judge of its requirements and as to how the documents are to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. Therefore, the Court's interference in tender matters should be minimal. It shall only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

52. In the above conspectus, the present case will have to be examined. The scope of work in the contract is with regard to providing Ambulatory Services for new born babies along with their mothers for pick up and drop facilities from their residents. The vehicles and the manpower are to be provided by the service provider. The service provider is to put up a mechanism to ensure that the requirements of the scope of work are fulfilled to the desire extent. There is no dispute that the Respondent No. 3 had submitted along with its bid papers where it had stated that it had offered such ambulatory services as a lead partner of a consortium. It is not the pleaded case of the petitioner that such services were not at all rendered at all by the respondent No. 3 or that the services rendered in the State of Bihar and the scope of work pertaining to the present tender process are completely different. The only ground on which the shortlisting of the respondent No. 3 has been challenged is the benefit of experience claimed by the respondent No. 3 as a lead partner of the consortium while rendering Ambulatory Services in the State of Bihar as necessary experience in the present tender process, where the respondent No. 3 has participated in its individual capacity. That apart, the petitioner was well aware that the respondent No. 3 being permitted to participate after being initially declared as "technically not accepted". It is apparent that the petitioner took every opportunity to participate in the bid process along with other

intending bidders including the respondent No. 3 without raising any objections to the tender process initiated by the authority concerned. It is only upon the event of the petitioner not being shortlisted as L-1 that he approached this Court by filing the present writ petition.

As discussed above, no mala fides have been attributed against the authority concerned. In the given facts and circumstances, the authority concerned having proceeded in terms of the NIT published, no case for arbitrariness or bias is made out.

53. The law culled out in respect of commercial contracts as extracted above is very clear. The scope of judicial review under Article 226 is extremely limited and the same is available only when the decision making process is illegal, irregular, arbitrary or opposed to public policy.

54. As discussed above, since the writ petition is directed against the decision taken by the Tender Evaluation Committee reviewing its earlier decision to permit the respondent No. 3 to be shortlisted for issuance of RFP and no other grounds have been urged in this proceedings to assail the decision of technical evaluation, financial evaluation and the consequential issuance of work order, in view of what has been held above as well as in view of the law pertaining to scope of judicial review under Article 226, the challenge made by the writ petitioner cannot be sustained and the same is therefore rejected.

55. That apart besides the representation issued by the petitioner pursuant to technical and financial evaluation, there are no pleadings as to why the writ petitioner continued to participate in the tender process and came before this Court only after being rejected in the financial evaluation. It is evident that the grievance of the petitioner as regards the respondent No. 3 being shortlisted in the EOI stage for issuance of RFP, appears to have germinated only after the financial evaluation wherein the petitioner was declared as L-2 and the respondent No. 3 was declared L-1.

56. The facts pleaded reveal that the petitioner took every opportunity to participate in the tender process to take its chance for being selected as the L-1 bidder. It appears that it is only after the petitioner has been evaluated as L-2 bidder that the present proceedings have been initiated to question the scrutiny and selection of the respondent No. 3 at the EOI stage. As submitted at the bar that the respondent No. 3 in the meantime has stated to have made substantial investments for mobilization of manpower and materials towards effective implementation of the "Free Adarani Pick-up and Dropback Services" in the State of Assam. The writ Court being a Court of equity cannot come to the aid of a person or an entity who is not able to sufficiently explain the delay and laches while approaching this Court to ventilate its



grievances and more so were third party rights have been allowed to be created. Interference by the Writ Court is completely unwarranted in the facts of present case, more particularly in the absence of specific pleadings attributing any malice against the State/NHM Authority or the respondent No. 3.

57. Reference in this context to be made in the cases of *State of M.P Vs. Nandwal Jaiswal* reported in (1986) 4 SCC 566, *Ascon (M/s) & Anr Vs. State of Assam* reported in 2017 (5) GLT 875 and *Maa Chandi Stone Crushing Vs. Chief Engineer* reported in 2005 SCC OnlineOri 1.

58. In view of the above, the writ petition is found to devoid of any merit and the same is therefore dismissed. No order as to costs.

59. The interim order dated 22.09.2021 is hereby stands vacated.

60. Records produced before the Court are returned to Mr. B. Gogoi, learned Standing Counsel for the respondent No. 2.

JUDGE

Comparing Assistant

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