

**(2013) 05 GAU CK 0003**

**Gauhati High Court**

**Case No:** WP (C) No. 274 of 2013

Dr. Jain Video on Wheels Limited

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision:** May 10, 2013

**Acts Referred:**

- Constitution of India, 1950 - Article 226

**Citation:** (2013) 3 GLD 826 : (2013) 5 GLT 151

**Hon'ble Judges:** B.K. Sharma, J

**Bench:** Single Bench

**Advocate:** C.P. Sharma, Mr. M.K. Mishra and Mr. Rishav Singh, for the Appellant; D. Saikia, AAG, Assam., Mr. D. Gogoi, SC, Health Deptt., Mr. P.K. Goswami Mr. A. Roy, Mr. B.P. Borah, Ms. B. Choudhury and Mrs. U. Bhattacharyya, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

B.K. Sharma, J.

The matter pertains to implementation of the Inter Facility Medical Ambulance Services in Assam and the awarding of contract thereof. The writ petition running to 76 pages (inclusive of annexures from page 10 to 76) was filed with the following prayer:-

It is therefore most respectfully prayed that Your Lordship would be graciously pleased to admit this petition by issuing Rule calling upon the Respondents to show cause as to why.

(i) To issue a Writ of Mandamus directing Respondent No. 2 to ensure participation of the Petitioner in the opening of financial bid.

(ii) To issue a Writ of Certiorari calling for the of RFP No. NRHM/102/IFT/976 dated 03.10.2012 issued by Respondent No. 2.

(iii) To call for the records of the case and upon perusal of the same and on hearing the parties be pleased to make the Rule absolute and/or be pleased to pass any such further or other order or orders as your lordship may deem fit and proper.

(iv) To refrain and restrain the Respondent No. 2 from taking any further action in the tender and restrain the Respondent No. 2 from awarding the tender to either Respondent No. 5 or 6 till the final disposal of present writ.

After filing the counter affidavit by the respondent No. 2 running to 9 pages (inclusive of annexures from page 5 to 9), the petitioner filed the amended writ petition running to 336 pages (inclusive of annexures from page 17 to 336) followed by further two reply affidavits running to 268 pages and 274 pages (inclusive of annexures from page 16 to 268 pages and from page 18 to 274 pages). In the amended writ petition contrary to the prayer made in the original writ petition, the following prayer has been made.

It is therefore most respectfully prayed that Your Lordship would be gracious pleased to admit this petition by issuing Rule calling upon the Respondents to show cause as to why

(i) To issue a writ, direction or order quashing the tender issued by Respondent No. 2 for implementation of Inter Facility Medical Ambulance service in Assam and cancel the Letter of Intent issued by Respondent No. 2 in favour of Respondent No. 6.

(ii) To issue a Writ of Certiorari calling for the records of RFP No. NRHM/102/IFT/976 dated 03.10.2012 issued by Respondent No. 2.

(iii) To call for the records of the case and upon perusal of the same and on hearing the parties be pleased to make the Rule absolute and/or be pleased to pass any such further or other order or orders as your lordship may deem fit and proper.

(iv) To refrain and restrain the Respondent No. 2 from taking any further action in the tender and restrain the Respondent No. 2 from awarding the tender to either Respondent No. 5 or 6 till the final disposal of present writ petition.

2. From the above two prayers made in the original writ petition and the amended writ petition, it will be seen that while in the first writ petition, the prayer of the petitioner is to allow participation in the financial bid process and to restrain the respondent NO. 2 from awarding the contract to the private respondent, in the amended writ petition, the prayer is to set aside and quash the tender process for awarding the Inter Facility Medical Ambulance Services in Assam. This position in respect of the pleadings and the prayer has been referred to in view of the drastic changes brought about to the original writ petition projecting completely a different story in the amended writ petition than that of the story project in the original writ petition. Be it stated here that such drastic changes to the pleadings and prayers in the writ petition were brought through MC 375/2013 by way of an amendment to

the writ petition which was allowed by order dated 22.2.2013, as such amendment was not objected to by the respondents.

3. As stated above, the matter pertains to implementation of Inter Facility Medical Ambulance Services in Assam for which the department of Health and Family Welfare, Govt. of Assam issued the Request for Proposal (RFP) on 3.10.2012 laying down the following eligibility criteria.

## 1.2 Eligibility

The bids will be analyzed based on the following eligibility criteria-

- a) Single Entity/Consortium of Organizations/Institutions registered/incorporated in accordance with the applicable law.
- b) Having 3 years experience in management and operation of such services with a minimum fleet of 100 vehicles supported by control room and Call Centre set up by the bidder. Certificates from the organizations to which services provided are to be submitted.
- c) Having experience in computer telephony integration with the ability to log calls with Geographical Information System with GPRS integrated Ambulance monitoring system and own software components.
- d) Average annual turnover of the last 3 financial years, not less than Rs. 20.00 Cr.
- e) An affidavit to the effect that bidder has not been blacklisted in the past by any of the State Government across the country and that they will not form any coalition with other bidder(s).
- f) Should have ability to train the personnel to be employed for implementation of the project.

Note: In case of consortium, there should be a formal agreement between the partners accepting severe and joint responsibility for implementing of the project, reference of the Lead Partner and percentage of holding of each partner in the consortium. The maximum permissible partners in the consortium are 4 (four). For the purpose of minimum eligibility criteria, experience and turn over etc. of the partners having more than 20% holdings in the consortium will be added.

4. Pursuant to the changes brought about in the eligibility conditions by the two successive corrigendums, the eligibility conditions remained as follows:-

5. In the writ petition (both original and amended), the petitioner has made the following averments in reference to the eligibility conditions laid down in the RFP.

3. The petitioner vide letter dated 13.10.2012 addressed to Respondent NO. 2 requested for modification of the eligibility criteria contained in Clause 2.1 of the RFP. The letter was accepted by Respondent NO. 2 and the petitioner's

representatives were requested to submit their observations during the meeting scheduled to be held on 15.10.2012.

6. On 28.10.2012, the petitioner telephonically followed up the issue pertaining to modification of the RFP with the Nodal Officer of Respondent No. 2. the petitioner was assured that its suggested modifications will be considered and the final decision was pending with the MD of Respondent No. 2.

7. The petitioner sent reminder issued dated 17.11.2012 to the MD of Respondent No. 2 with copy marked to the Nodal Officer of the Respondent No. 2.

8. On 25.11.2012 the petitioner again followed up the issue regarding modification of the Clauses of RFP and was informed that a corrigendum is likely to be published to incorporate the modifications.

9. The petitioner vide letter dated 27.11.2012 submitted a formal request to the Health Minister of Assam on the various aspects raised by the petitioner in its earlier correspondence with Respondent No. 2.

10. The revised corrigendum being corrigendum No. 2 was issued and published by Respondent No. 2 on 10.12.2012. Contrary to the assurances given by Respondent No. 2, the corrigendum did not incorporate the modifications sought by the Petitioner in the eligibility criteria and reflected in the RFP

6. From the above statements made in the writ petition, there is absolutely no manner of doubt that as per the own understanding of the petitioner, it did not conform to the requirements of the eligibility criteria and accordingly had suggested modifications to the same. This will be further clear from the communications made by the petitioner to the official respondents by Annexure-B, C, D & E dated 13.10.2012, 16.10.2012, 17.11.2012 and 27.12.2012, in which the petitioner had communicated, inter alia, as follows:-

1. Operating MMU (Mobile Medical Units) in any one state at least to be included in prequalification/eligibility criteria, because running/operating mobile hospitals requires more technical expertise than running routine ambulance services. Current minimum experience may include management of a minimum 50 MMUs for any state of India or equivalent as prequalification criteria.

2. Experience of running 250 ambulances for a minimum of 6 months for any state of India can be included as prequalification criteria instead of 100 ambulances for 3 years.

3. The clause referring to the EMD amounting to Rs. 50.00 lakhs, through DD should be modified to include a suitable Bank Guarantee equivalent to the amount.

4. Toll free number cost should be borne by Govt. or Govt. should assure it free from BSNL/DOT

We wish to draw your kind attention to the eligibility criteria vide clause ref 1.2 and EMD/Security Deposit ref. 2.13 drawn up in the bid process documentation referenced to here as Anx.-I, which is exclusionary in nature and is apparently designed to favour a specific/or a few select group of bidders. This is blatantly and in clear violation of the Law of Natural Justice, CVC Procurement Guidelines and the related Supreme Court Directives in this regard. The RFP documents in its current form will directly prevent a competitive and transparent bidding, preventing many experienced organizations from participating in the bid process, which ultimately will result in the selection of service providers at a higher cost, thereby causing tremendous loss to the Govt. of India/exchequer.

We thus strongly recommend re-drafting of the tender documents in view of the objections raised in this letter, thereby ensuring the creation of an enabling document, which is more inclusive in nature towards other existing experience organizations, interested to bid for the proposed project.

A robust inclusive bid process will enable the Govt. to select a suitable and a cost effective service provider.

1. The criteria indicating the requirement of a minimum experience of 03 years is exclusively and should be modified to a minimum period of 06 months which is a fair period for proving the ability of an organization to implement and operate Emergency Ambulance Services.

2. Minimum criteria of 100 vehicles should be reduced to 50 vehicles as there are many states who have recently initiated phase wise scale up of services starting from a minimum number of vehicles.

3. Average turnover of 20 Cr. over a period of last three financial years should be reduced to 10 Cr. so that many mid-sized organizations can participate in the bid process.

4. Clause 2.13 referring to the EMD, amounting to Rs. 50.00 Lakhs through BC/DD should be modified to include a suitable Bank Guarantee equivalent to Rs. 25.00 lakhs.

These suggestions will ensure that the minimum selection criteria is not in exclusion and is inclusive on the contrary, thereby encouraging an even bidding criteria and giving due importance to newer organizations in the field to provide their quality services.

We may have recently entered into the area of operations of ambulances, but even in this short time span, we have been recognized as the best service provider in the country. We are not new to the health care sector because we are successfully operating the Jain Medical Centre with Emergency, Preventive, Curative, Diagnostic and Surgical health services for the last three decades.

We are thus providing some of our suggestions for introducing certain changes in the RFP which are as follows:-

1. Running MMU (Mobile Medical Units) should be included because running mobile hospitals requires more expertise than running ambulances in the prequalification criteria (These MMUs are high end versions of Advanced Life Support Units, duly equipped with ventilators, defibrillators etc. and which are manned by doctors, nurses, paramedics and technicians. They are often used successfully to transport patients with life threatening morbidity, to higher medical center for preventing mortality and saving life. Operating such high end medical units should be thus considered an eligible criteria for bidding for the Basic Non Emergency Ambulances (102), as planned for the state of Chhattisgarh, as it requires much technically lesser skill and qualifications to run and operate the same).
2. Current experience and management of a minimum 50 MMUs or 100 ambulances can be included in prequalification criteria.
3. Experience of running 250 ambulances for 6 months can included in prequalification criteria.
4. The clause referring to the EMD amounting to Rs. 50.00 lakhs through DD should be modified to include a suitable bank Guarantee equivalent to the amount.
5. Toll free number cost should be borne by Govt., or Govt. should assure it free from BSNL/DOT.

These suggestions will ensure that the minimum selection criteria is not in exclusion and is inclusive on the contrary, thereby encouraging an even bidding criteria and giving due importance to newer organizations in the field to provide their quality services.

Dear Sir,

Kindly refer to the trailing mail on the recommendations for changes in the RFP for Ambulances in Assam. We may kindly be intimated whether our suggestions have been incorporated into the final document, particularly with ref. to the following points raised against the "Minimum Eligibility Criteria".

1. Inclusion of MMU operations as a suitable pre qualification experience for participating in the bid.
2. Inclusion of experience of 250 ambulances at the time of submission for the bid documents or 250 ambulances for 6 months of successful operation at the time of submission of bid documents.

Any of the above will allow some more eligible organizations including ours to participate in the bid and ensure a wider involvement in the process.

We look forward and seek to direct your kind attention in this regard for a favourable decision, which will encourage a few more organizations to contribute to the welfare of Assam.

Sir,

This is with ref. to-Request for Proposal (RFP) for implementing an effective Inter Facility Ambulance Services in your state. Kindly refer clause 1.2 and 2.13 of the RFP, the eligibility criteria and EMD/Security Deposit are exclusionary in nature and it may apparently favor a specific/or a few select group of bidders.

The above mentioned criteria's are in clear violation of the Law of Natural Justice, CVC procurement Guidelines and the related Supreme Court Directives about the tendering process. The RFP document in its current form will directly prevent a competitive and transparent bidding. This will lead to purposeful loss to exchequer of minimum 21 to 27 Crores.

This will stop may experienced organizations from participating in the bid process, which ultimately will result into selection of higher cost service providers, thereby causing huge loss to the Govt. of Assam/exchequer. The representation made by us during pre bid meeting along with curative suggestions is attached as Annexure-I.

We thus request you to kindly intervene in the tender process, and make the bid process more competitive.

7. Contrary to the above stand of the petitioner in the writ petition, a completely different stand has been taken in the amended writ petition and so also in the reply affidavit alleging violation of the terms of the RFP and thereby vitiating the entire tender process. According to the petitioner, rejection of its bid on the ground of its ineligibility as per the minutes of the Bid Evaluation Committee held on 28.12.2012 is contrary to the terms of the RFP. It is the stand of the petitioner that the RFP having not provided for short-listing of bidders on the basis of eligibility criteria, its bid could not have been rejected by the Bid Evaluation Committee, in terms of its meeting held on 28.12.2012, a copy of which has been annexed to the counter affidavit dated 11.2.2013 filed by the respondent No. 2. As per the said document, the petitioner did not have two years of experience in management and operation of Ambulance Services with a minimum fleet of 100 Ambulance supported by Control Room and Call Centre.

8. According to the petitioner, irrespective of its purported ineligibility, its bid ought to have been considered at the stage of Technical proposal followed by the stage of Financial Proposal as according to the petitioner, there is no indication in the RFP that the bids would be subjected to a process of short-listing.

9. It is the further case of the petitioner that the RFP only provides for analysis and not short-listing of the bids on the basis of the eligibility criteria. Significantly, the petitioner with the above ground urged in the amended writ petition, has also

stated that in view of the stand of the respondents in their counter affidavit filed on 11.2.2013, the petitioner ought to have been immediately intimated of the rejection and the price bid ought to have been returned forthwith.

10. It is also significant to note that in the writ petition there is absolutely no whisper against the plea of the respondents that the petitioner was found ineligible in reference to the experience clause in the RFP. It is not the case of the petitioner, both in the original and the amended writ petition, that it did conform to the eligibility/experience clause incorporated in the RFP. The amended writ petition is all about the objection in respect of the short-listing of the bidders. As noted above, according to the petitioner, irrespective of fulfillment of the eligibility criteria/experience, its bid ought to have been subjected to the Technical Proposal evaluation stage and Financial proposal evaluation stage. If one is to go by the averments made in the writ petition, the position that emerges is that the petitioner has not dealt with the plea of the official respondents that it did not have the eligibility criteria. However, in paragraph 18-L and 18-M of the writ petition, the petitioner has referred to the contracts awarded to it in some other States including the State of Bihar, without however, dealing with the particular experience/eligibility criteria laid down in the preset RFP.

11. As against the aforesaid position in the original and the amended writ petition, in the reply affidavits filed on 16.2.2013 against the counter affidavit dated 11.2.2013 filed by the respondent No. 2, the petitioner while again reiterating that its bid could not have been rejected on the ground of being not eligible, has also reiterated its stand regarding awarding of contracts by other States. However, there is absolutely no averment as to how it had fulfilled the eligibility criteria/experience. This reply affidavit is of about rejection of its bid by the Bid Evaluation Committee in its meeting held on 28.12.2012 on the ground of not possessing the requisite experience, as indicated above as according to the petitioner irrespective of whether it had possessed the requisite experience or not, its bid ought to have been considered at the stage of Technical Proposal followed by the stage of Financial Proposal.

12. In the second reply affidavit dated 15.3.2013 filed by the petitioner against the additional affidavit of the respondent No. 2 dated 7.3.2013, the petitioner has taken the plea that its experience in running Mobile Medial Unit (MMU) has to be treated as the experience in running the Ambulance Services as required in the RFP. In the said reply affidavit, stand of the petitioner that since the term MMU or Ambulance Service has not been defined in the RFP, the legal meaning of the words has to be looked into in order to understand the true nature and scope of MMU service vis-à-vis the Ambulance Service. In this connection, the petitioner has referred to the definition of MMU and Ambulance Service as incorporated in the particular Act and the Rules. It has also referred to the term emergency. Upon such reference, the petitioner has sought to develop another case with the inclusive definition of MMU



so as to include Ambulance Service into its fold. In its reply affidavit, the petitioner has referred to its MMU experience so as to contend that because of its MMU experience, it had fulfilled the experience of Ambulance Service and consequently its bid could not have been rejected by the Bid Evaluation Committee.

13. From the above stand of the petitioner, the following position has emerged as regards the pleas of the petitioner:-

(1) Firstly, the petitioner admitted that it did not have the requisite experience as laid down in the RFP.

(2) The changes in the eligibility criteria as suggested by the petitioner ought to have been included in the RFP.

(3) The rejection of the bid of the petitioner by the Bid Evaluation Committee was illegal, inasmuch as, irrespective its non-fulfillment of the eligibility criteria/experience, its bid ought to have been processed through technical proposal followed by financial proposal.

(4) The petitioner being experienced in MMU service, its bid could not have been rejected as the said MMU service with its inclusive definition duly conforms to the requirement of experience in ambulance Service.

14. The respondent No. 2 has filed three affidavits dated 11.2.2013, 7.3.2013 and 1.4.2013. While in the first affidavit, it has been stated that the Bid Evaluation Committee meeting was held on 28.12.2012 for Techno Commercial Evaluation of bids in which the representative of the petitioner was also present. In the said Techno Commercial analysis, it was found that out of the 3 offers received, the offer of the petitioner was technically not suitable as the bidder did not have the eligibility criteria of two years experience in Ambulance Service with minimum 100 Nos. of Ambulance supported by Control Room and Call Centre set up.

15. In the additional affidavit filed on 7.3.2013, referring to the particular experience required for the service/awarding of the contract, it has been stated that unlike the other two bidders, the petitioner only furnished a letter of intent dated 9.12.2011 issued by the State Programme Officer, State Health society, Bihar for operationalising and managing 504 basic life support Ambulance in the PHEs, SDHS and FRUs in Bihar. The petitioner also furnished an agreement entered into on 4.1.2013 with a contract period of two years. Thus, according to the respondent No. 2, the said document furnished by the petitioner along the said bid clearly reflected that the petitioner had experience of about 10 months on Ambulance Services. As regards the MMU services, it has been stated in the affidavit that since MMU only provides diagnostic facilities and not life supporting Ambulance Service, the same has no relevance in the present bid process.

16. Referring to the bid of the respondent No. 6, it has been stated that the said respondent had furnished the experience certificate showing the experience of

more than 2 years in operation of medical Ambulance services. It has further been stated that after the techno commercial evaluation dated 21.12.2012, the bids of the two technically viable bidders i.e. the respondent No. 5 and 6 were opened on 16.1.2013 in the presence of the bidders. Upon evaluation of the financial bids as per the prescribed norms in the RFP, while the respondent No. 5 scored 70.81 marks, the respondent No. 6 scored 96.2. Thus, out of the said two bidders, the respondent No. 6 scored the highest and accordingly the Committee recommended for awarding of the contract in favour of the said respondent No. 6.

17. In the affidavit dated 1.4.2013 filed by the respondent No. 2, it has been stated that the MMU activity is concerned with the services which is quite distinct and different from Ambulance Services. The main objective of the MMU is to provide primary health care facilities in inaccessible areas equipped with certain equipments to improve the access to health care services. Denying the claim of the petitioner that the MMU service is equivalent to ambulance service, the said affidavit also states that such plea on the part of the petitioner is wholly misconceived and misplaced.

18. Mr. C.P. Sharma, learned counsel for the petitioner, during the course of his argument while admitted that the petitioner has only experience in MMU service, submitted that it being equivalent to that of Ambulance services, rejection of its bid was illegal. According to him, the Bid Evaluation Committee ought not to have rejected the petitioner's bid at the very threshold in the name of technical evaluation but instead ought to have processed the bid through both the stages i.e. technical proposal evaluation stage and financial proposal evaluation stage. Referring to the particular clause relating to eligibility in the RFP, he also highlighted on the expression "Such services", which according to him relatable even to allied services like MMU in reference to Ambulance Service. The whole basis of the submission of Mr. C.P. Sharma, learned counsel for the petitioner is the MMU services experience of the petitioner and also the Annexure-I judgment dated 5.3.2012 of the Patna High Court in CWJ Case No. 22753/2012 in which the petitioner was involved as respondent No. 8. Upholding the awarding of contract for operation of basic life support Ambulance Service in favour of the present petitioner, the Patna High Court held that in the circumstances, consideration of the experience of the various constituents of the joint venture was justified.

19. Countering the above arguments, both Mr. D. Saikia, learned AAG, Assam and Mr. P.K. Goswami, learned senior counsel representing the respondent No. 6, submitted that in view of the admitted position that the petitioner did not have the requisite experience for which it had also sought for modifications in the RFP, the writ petition is not maintainable. Mr. Saikia, learned AAG, referring to the earlier stand in the original writ petition vis-à-vis the stand in the amended writ petition and the above referred reply affidavits, submitted that the petitioner cannot be permitted to keep on changing its stand leading to abuse of the process of law. He

submitted that in absence of any pleaded case of favouritism and/or nepotism and/or violation of any conditions of RFP, the petitioner is not entitled to make any challenge to the decision arrived at by the Committee. Referring to the experience of the petitioner as disclosed in the reply affidavit filed on 15.3.2013, he submitted that the MMU service and the Ambulance Service being quite distinct and different, the petitioner cannot equate the same so as to develop another case than what was the pleaded case in the original writ petition so as to pray for setting aside and quashing of the RFP process.

20. Mr. P.K. Goswami, learned senior counsel representing the respondent No. 6, referring to the nature of job and functions involved in Ambulance Service vis-à-vis the MMU service, submitted that the petitioner being not eligible in respect of the required experience in the RFP, cannot harp upon its experience in MMU service urging for equating both the services i.e. MMU and Ambulance. As regards the submissions made by the learned counsel for the petitioner in reference to the expression "such services" appearing in the RFP, he submitted that the said expression will have to be read and understood in the context of Inter Facility Medical Ambulance Services and not any service unconnected with such Ambulance Service. Referring to the own pleadings of the petitioner, he submitted that the petitioner knew it well that it would not conform to the requirement of the experience clause and accordingly repeatedly harped upon by addressing letters to the authorities for change of eligibility criteria so as to include the MMU service as well.

21. I have given my anxious consideration to the pleaded case of the petitioner and the submissions made by the learned counsel for the parties. I have also very carefully gone through the entire materials on record. My findings and conclusions are as follows.

22. As to what was/is the pleaded case of the petitioner has been noted above. If the petitioner with its MMU service experience was eligible to respond to the RFP, it would not have requested for change in the eligibility criteria/experience clause. The nature of the changes requested has also been noted above. In one of its communications i.e. the communication dated 17.11.2012 (annexure-D) while insisting for inclusion of MMU operations as a suitable pre-qualification/experience for participating in the bid and inclusion of experience for six months, the petitioner categorically stated that such inclusion would allow some more eligible organizations including their's participation in the RFP. It was with such understanding, the petitioner insisted for change in the eligibility criteria/experience in its above referred communications.

23. As noted above, in the original writ petition, case projected was that, the petitioner was not aware as to how its bid was dealt with although its representative was present in the Bid Evaluation Committee meeting held on 28.12.2012. After filing of the first affidavit-in-opposition dated 16.2.2013, the petitioner prayed for

amendment to the writ petition and filed the consolidated writ petition and as to what is the pleaded case in the said writ petition, has also been noted above. In the amended writ petition also, it is not the case of the petitioner that it had conformed to the requirements of the eligibility criteria/experience. It has only referred to its experience with some other States without whispering anything about conforming to the requirement of 2 years experience in management and operation of Inter Facility Ambulance Services with a minimum fleet of 100 vehicles supported by control room and Call Centre set up by the bidder. If the petitioner had the said experience it could have easily said so and pleaded in the writ petition instead of waiting for projection of another case in its reply affidavit filed on 15.3.2013.

24. As also noted above, in the first reply affidavit dated 16.2.2013, the petitioner has only questioned about the wisdom of the Tender Evaluation Committee in rejecting its bid on the ground of being not eligible but has not even obliquely stated as to how it had conformed to the requirement of the eligibility clause. As in the amended writ petition, in the said reply affidavit also the petitioner has only stated about its experience with the other states without highlighting anything as to how the said experience did conform to the requirement of the eligibility clause in the present RFP.

25. It is only in the reply affidavit filed on 15.3.2013, the petitioner has projected the story that MMU service is equivalent to that of Ambulance Service and thus its experience in the MMU service ought to have been taken into consideration while evaluating its bid.

26. In the said reply affidavit, the petitioner has annexed documents relating to MMU experience. During the course of hearing of the writ petition when it was pointed out that the said experience is only in respect of MMU service and not Ambulance Service, Mr. Sharma, learned counsel for the petitioner apart from the submission that the MMU service is relatable to Ambulance service, also submitted that had the petitioner being given an opportunity, it could have undertaken the contract of Ambulance Services also.

27. As the documents would reflect, MMU service is a service to improve out-reach services to medically unserved remote areas through mobile medical units. It is said to be hospital on wheels to meet health care needs of rural populace. MMU is to bring health care to the doorstep of the rural people with basic diagnostic facilities. As to what is MMU is well reflected in the profile of MMU under NRHM (Annexure-C to the additional affidavit dated 7.3.2003), which is reproduced below:-

#### Mobile Medical Unit (MMU)

◆ In 2006, National Rural Health Mission, Assam came forward with a new initiative to bring health care to the doorstep of rural people with basic diagnostics facilities and specialists. The concept of Mobile Medical Unit (MMU) starts here. A group of movable vehicle in each district with all diagnostics facilities and a team of doctors

and paramedical staff will visit the unnerved areas with predefined schedule.

◆ Each MMU comprises of three air-conditioned vehicles.

◆ Each MMU team consists of 2 Medical Officers where one of them will be a lady Medical Officer, 1 Radiographer, 2 Nurse, 1 Laboratory Technician, 1 Pharmacist, 2 Helper and 3 driver.

◆ MMU carry out the services like Curative Care, Reproductive & Child Health Services, Family Planning Services, Diagnostic, Specialized facilities & Services, Emergency services & care in times of disaster. IEC material on health, hygiene, proper nutrition will be displayed. Counseling on Family Planning, RTI/STI or any disease prevalent in the area will be given.

◆ At present Mobile Medical Unit (MMU) is functional in all the 27 districts and 23 Sub Divisions of Assam.

◆ Hospital on Wheels (Launching of Mobile Medical Unit on November 11, 2007)

28. If the plea of the petitioner that MMU service should be construed by this Court to be equivalent to that of Ambulance Service is to be accepted, apart from the fact that this Court exercising its power of judicial review under Article 226 of the constitution of India would require to give its own interpretation in respect of the eligibility criteria/experience as against the clear and unambiguous terms conveyed in the RFP, any such interpretation in favour of the petitioner would amount to denial of equality of opportunity to those who felt bound by the standard of eligibility and therefore, did not submit their tenders. Any relaxation of the standard of eligibility will amount to denial of opportunity to those who considered themselves ineligible and did not apply.

29. In [Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others](#), dealing with the power of judicial review in respect of Govt. contract, it was reiterated that terms of tender prescribing eligibility criteria are open to interference only when they are arbitrary, discriminatory or biased, but not open to interference merely because Court feels that some other terms would have been more preferable. It is well settled now that the Courts can scrutinize the award of contracts by the Govt. or its agencies in exercise of their powers of judicial review to prevent arbitrariness and favouritism. However, there are inherent limitations in the exercise of judicial review in such matters.

30. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders was examined in depth by the Apex Court in [Tata Cellular Vs. Union of India](#), and the following principles had been deduced.

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

31. The above principle was again reiterated in [M/s. Monarch Infrastructure \(P\) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others](#), when it was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters, the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It was further held that it is not for Courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitation. In paragraph 12 of the judgment in Educomp Datamatics (Supra) it has been observed thus:-

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

32. In [Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others](#), the Apex Court has observed thus:-

The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.

33. In [Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India \(UOI\) and Others](#), the apex Court observed thus:-

38. The matter can be looked at from a different angle. As noted in [Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others](#), if two views are possible and no mala fides or arbitrariness is alleged or shown, there is no scope for interference with the view taken by the authorities in inviting tenders.

40. On examining the facts and circumstances of the present case, we are of the view that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellants. When the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. 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, courts 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.

34. In the instant case, it is the specific case not only of the respondents but also of the petitioner that it does not fulfill to the requirement of experience in Inter Facility Medical Ambulance Services with a minimum fleet of 100 vehicles supported by Control Room and Call Centre set up by the bidder. The petitioner also does not specify as to whether it has the experience in computer Telephony Integration with ability to log calls with geographical information system with GPRS, Integrated Ambulance Monitoring System and own software components. In the RFP itself clause 1.13 it was clearly indicated that the department would open all proposals in presence of the applicants or their authorized representatives who choose to attend, immediately after submission i.e. on the last date of submission of proposals. As regards the terms of reference under clause 2.1, the target

group/coverage and the scheme of 102 Inter Facility Transportation Service and its objective have been referred to as follows:-

## 2. TERMS OF REFERENCE

### 2.1 Target Group/Coverage

Government of Assam has decided to provide Inter Facility Ambulance Services for the entire population of the state. However, for practical reason, the implementation will be done in a phased manner. At present coverage will be through 450 nos. of Ambulances. To provide transit health care and transportation to avail further health care facilities particularly in attending to pregnant women, neonates, parents of neonates, infants and children in situations of serious ill health and all other health emergencies in the general population, and thereby assisting the state to achieve the critical Millennium Development Goals in the health sector; i.e. reduction in Infant Mortality Rate, Maternal Mortality Rate, and overall reduce the vulnerability of the people to ailments/diseases by providing access to the comprehensive referral transport system.

The scheme 102 Inter facility Transportation service.

- ◆ The IFT/Referral services will be offered through a universal access number 102.
- ◆ One centralized 24 x 7 Control room for receiving the calls, mobilizing and monitoring of ambulances through Geographical Information System (GIS)/Global Positioning System (GPS).
- ◆ Judicious mix of BLS (200 numbers new) and 250 numbers existing Ambulances will be provided at both tertiary and secondary intake points, 100% coverage from PHC upwards on a "Dial the service" basis.
- ◆ Existing 250 nos. of ambulances in the different Health Institutions will be upgraded to and will be included under the scheme of 102 services.

### 2.2. Objectives

(a) To operate a state-of-the-art Inter Facility Medical Ambulance Services in the entire State of Assam. This will facilitate an integrated and comprehensive health care management in the state providing high-end ambulatory transportation for appropriate care in a hospital.

(b) To provide to quality patient transport care within the shortest possible time. Ensure delivery of quality patient transport care across the chain of services with a proper management system. To ensure that the system is efficient and effective as possible by providing first class management service quality and monitoring systems to run the ambulance service.

35. Laying down the agency's responsibilities, the operation of control room and call response have been emphasized as follows:-



(c) Operation of Control Room: The Agency shall operate the Control Room round the clock on 24x7 mode through a dedicated three digit number to response distress call and monitor the movement and positioning of the ambulances in the shortest possible time. For proper management of the services the agency shall equip the Control Room with Geographical Information System, Global Positioning System, Automatic Vehicle Location Track and other necessary hardware and software for computer integrated telephonic integration.

(d) Call Response: On receiving call of any nature the control room shall communicate with the ambulance to the caller and take the patient to the referral health facility depending on the severity of the patient's condition. The concerned health facility is also to be informed in advance to keep them prepared for immediate emergency care within that critical/golden hour. The agency shall be responsible to maintain the average response time of 20 minutes for urban, 25 minutes for semi-urban and 35 minutes for rural and difficult areas as a key performance parameter.

36. Performance standard of the response Centre and guidelines for preparation of the standard operating procedures for Ambulances have been laid down in the RFP as follows:

#### 2.15.2 Performance Standards for the Response Centre

(a) The Junior Executives receiving the calls on the toll free line must taken the call within three rings.

(b) From the time of receipt of call at the response call center the ambulance must be dispatched in 90 seconds.

#### 2.15.3. Guidelines for preparation of the Standard Operating Procedures for Ambulances

(a) Operator will have to develop Standing Operating Procedures (SOP) for the Ambulance and Response Centre operations by the Effective Date for acceptance and approval of the same by Department. The guiding principles for the Standard Operating Procedures to be developed by the Operator are given below:

(i) Purpose and Scope.

(ii) Dispatch Centre protocols.

(iii) Operation Systems, Structures and Protocols for Ambulances (both types) including response protocols, ring checks, call codes, vehicle maintenance, vehicle breakdown management, vehicle accident management, vehicle distribution, communication protocols.

(iv) Operational protocols for special circumstances (natural calamities, mass causality events (both manmade and natural), unattended death, transportation of

minors, transportation of obstetric cases, pediatric patients, neonate crime scene operations, fire & accidents relating to hazardous material). Department will assist in the development of the operational protocols for such special circumstances.

(v) Reporting structures and formats-overall documentation.

(vi) Health and safety protocols for personnel.

(vii) Job description, roles and responsibilities of each level of personnel in entire operations.

(viii) Training, refresher course and orientation protocols for all levels of personnel (including staff replacement protocols).

(ix) Overall administrative policies.

(x) Inter-facility transfer protocols.

(xi) On-line medical direction/guidance protocols.

(xii) Transportation refusal policies and protocols.

(xiii) Do not Resuscitate Policy.

(b) The Standard Operating Procedure shall be developed by the Operator and approved by the Department's representative before the issue of the letter of Commencement. The Department's representative shall review and communicate its approval or need for changes within a period of fifteen days from the date of submission of the draft Standard Operating Procedure by the Operator and in the event no response indicating either the approval or need for specific amendments is received by the operator then Departmental shall be deemed to have approved the draft Standard Operating Procedure submitted by the operator. The Standard Operating procedure may be reviewed and revised at periodic intervals. However department reserves the right to amend the Standard Operating procedure (SOP) unilaterally and the Operator shall be bound to implement such change from the date of its communication by the Department to the Operator.

(c) Amended versions of the Standard Operating Procedure (SOP) shall be implemented after submission to Department for necessary approval.

37. Like the above conditions, the RFP also lays down the other conditions such as Standard Experience Operating Protocol; Monitoring and Evaluation etc.

38. Much have been emphasized on the criteria for evaluation which provides that at the first stage of technical proposal and financial capability so as to contend that the Bid Evaluation Committee could not have rejected the bid of the petitioner on the ground of lacking in eligibility. Needless to say that the said clause will have to be understood in reference to the eligibility clause itself. If the petitioner did not confirm to the requirement of the eligibility clause, it cannot be said that the Bid

Evaluating Committee committed anything wrong in rejecting the bid of the petitioner, it having lacked in eligibility criteria/experience.

39. Going by the very nature of the scheme i.e., Inter Facility Medical Ambulance Service, the same cannot be equated with that of MMU service, which as noted above, is a service rendered on wheel reaching to the particular area fixed before-hand, unlike the Ambulance Services, which is operational 24 hours including night services. The experience in running mobile Medical Units (MMU) cannot be treated to be experience in running Ambulance Services. The nature and scope of the MMU and Ambulances are different. The role of MMU is to increase access to primary healthcare for people who do not live near a healthcare centre and are in medically unserved areas. The objective of the MMU is to engage in providing essential quality Primary Healthcare Services to the people with certain facilities in unserved areas on prefixed dates.

40. The MMU services cannot be compared with Ambulance Service nor the functions of an Ambulance can be performed by an MMU. Unlike ambulance services, MMUs are restricted to providing primary healthcare and diagnostic facilities. Hence, experience in running MMU cannot be treated to be experience in running Ambulance Services. For the project in question i.e. Inter Facility Medical Ambulance Services in Assam, the requirement is experience in running ambulance services with the features mentioned in the tender documents and not MMUs and therefore the experience of the petitioner in operation of MMUs is irrelevant in the present bid process. The petitioner is fully acquainted of this position which is evident from the writ petition as well as the affidavits filed by the petitioner, about which discussions have been made above.

41. This is precisely the reason as to why the petitioner had insisted by its above referred communications for inclusion of experience in MMU services as eligibility criteria. However, if the authority in its wisdom did not include the said experience as the eligibility criteria on the basis of its expertise in the field, it is not for this Court to hold otherwise exercising writ jurisdiction. Even otherwise also the particular eligibility criteria/experience laid down in the RFP is not under challenge in the writ petition. As to how the petitioner has made the gradual projection of its case one after another has been noted above.

42. Much has been emphasized on the Judgment of the Patna High Court referred to above. That decision was rendered in the background of the facts of that case. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides and not, what logically follows from it, (See Lord Halsbury in *Quinn V. Leatham*, 1901 AC 495). In the said case, the eligibility of the petitioner was considered in respect of the particular service in reference to its joint venture with St. John Ambulance Association with whom the petitioner had entered into a joint bidding agreement. One of the eligibility conditions was at-least one year

experience of operating and managing basic life support system Ambulances. It was in that context and in reference to the joint venture, the Patna High Court had the occasion to uphold the contract awarded to the petitioner. Same is not the position here. As per the present RFP, one will have to have two years experience in management and operation of such services i.e. the Inter Facility Medical Ambulance Service with a minimum fleet of 100 vehicles supported by Control Room and Call Centre set up by the bidder coupled with the experience in computer telephone integration with ability to log calls with geographic information system with GPRS Integrated Ambulance Monitoring System and own software components, which admittedly the petitioner had lacked while offering its bid. If in such circumstances, the Bid Evaluation Committee having rejected the bid of the petitioner, no fault can be attributed to it.

43. During the course of hearing of the writ petition, the learned counsel for the petitioner had also argued and contended that even the respondent No. 6 lacks in experience and consequently its bid could not have been accepted. Apart from the fact that the petitioner itself being not eligible and thus the question might be raised as to its eligibility and locus standi to call in question the acceptance or otherwise of the bid of the respondent No. 6, but as reflected in the Annexure-E document of experience annexed to the counter affidavit dated 7.3.2013 of the respondent No. 2 coupled with the disclosure of the respondent No. 6 in its affidavit about fulfillment of the RFP conditions, the said respondent duly conformed to the requirements of experience laid down in the RFP. As stated in the affidavit dated 1.4.2013, the said respondent since its inception has been providing Inter Facility Transfer Services in the various States of the country. Apart from 12 other States, even in Assam also, it has launched 108 emergency services from 6.11.2008 with number of ambulances and employees running to 284 and 1516 respectively. Its experience in the State of Andhra Pradesh is from 15th August, 2005 with 802 No. of Ambulances with 3903 number of employees.

44. Be that as it may, it is for the respondents and for that matter the Bid Evaluation Committee to evaluate the bids and to accept and/or reject the bids, on the basis of the terms and conditions of the RFP and this Court exercising its power of judicial review under Article 226 of the Constitution of India, cannot sit on appeal over such findings of the expert committee, in absence of any material placed to show any arbitrary and/or illegal exercise of jurisdiction by the said expert committee and violation of any terms and conditions of RFP. As noted above, as per the own showing of the petitioner it did not consider MMU service to be the substitute of Inter Facility Ambulance Services and accordingly vouched addition of MMU service also as conditions of eligibility. However, it having responded to the RFP without incorporation of the said condition by the authority, cannot build a case at a subsequent stage that the said MMU service is equivalent to Inter Facility Medical Ambulance Service. As indicated above, it kept on changing its stand firstly for its further participation in the tender process irrespective of fulfilling the eligibility

criteria or not and secondly attributing fault on the respondents in its process of tender evaluation and thirdly contending that it had conformed to the requirement of the eligibility criteria/experience laid down in the RFP. This being the position, the petitioner is not entitled to any relief. For all the aforesaid reasons, I do not find any merit in the writ petition and accordingly it is dismissed, leaving the parties to bear their own costs.