

WP(C)/54/2023 on 28 April, 2023

Author: Manish Choudhury

Bench: Manish Choudhury

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GAHC010268822022

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

(1) WRIT PETITION (C) No. 54/2023

M/s Shree Ganesh Traders, A Proprietorship Firm,
having its registered office at Brindabanhati, P.O., P.S.
and District - Barpeta, Assam, Pin - 781301,
Represented by its Proprietor Mr. Anshudeep Pathak

.....Petitioner

-Versus-

1. The State of Assam, Represented by the
Commissioner and Secretary to the Government of
Assam, Medical Education and Research Department,
Dispur, Guwahati - 781006.

2. The Additional Secretary to the Government of
Assam, Medical Education and Research Department,
Dispur, Guwahati - 781006.

3. The Director of Medical Education, Assam, Six Mile,
Khanapara, Guwahati - 22.

4. The Principal-cum-Chief Superintendent, Fakhruddin
Ali Ahmed Medical College & Hospital, Barpeta, Pin -
781301.

5. The Superintendent, Fakhruddin Ali Ahmed Medical
College & Hospital, Barpeta, Pin - 781301.

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6. The Tender Committee for Outsourcing of Dietary
Services of Fakhruddin Ali Ahmed Medical College &
Hospital, Barpeta, Pin - 781301, represented by its
Chairman.

.....Respondents

(2) WRIT PETITION [C] no. 4980/2022 M/s Shree Ganesh Traders, A Proprietorship Firm, having its Registered Office at Brindabanhati, P.O. P.S. and District - Barpeta, Assam, Pin - 781301, represented by its Proprietor, Mr. Anshudeep Pathak.

.....Petitioner

-versus-

1. The State of Assam, represented by the Commissioner & Secretary to the Government of Assam, Medical Education and Research Department, Dispur, Guwahati - 781006.

2. The Additional Secretary to the Government of Assam, Medical Education and Research Department, Dispur, Guwahati - 781006.

3. The Director of Medical Education, Assam, Six Mile, Khanapara, Guwahati-22.

4. The Principal-cum-Chief Superintendent, Fakhruddin Ali Ahmed Medical College & Hospital, Barpeta, Pin -

781301.

5. The Superintendent, Fakhruddin Ali Ahmed Medical College & Hospital, Barpeta, Pin - 781301.

6. The Tender Committee for Outsourcing of Dietary Page No.# 3/39 Services of Fakhruddin Ali Ahmed Medical College & Hospital, Barpeta, Pin - 781301, represented by its Chairman.

7. Deben Das, S/o Late Jamuna Das, R/o Nalbari Town, Ward No. 1, Bhakatpara Road, P.O and District -

Nalbari, Assam.

8. N P Catering and Confectionery Bakery, Talukdar Complex, Majhar Path, ASEB Road, Guwahati - 781005, represented by its Proprietor, Ms. Babbi Talukdar.

.....Respondents Advocates :

Petitioner : Mr. J. Patowary, Advocate

Respondent nos. 1 - 6 : Mr. B. Gogoi, Standing Counsel,
Health & Family Welfare Department.

Respondent no. 8 in
W.P.[C] no. 4980/2022 : Mr. T. Deuri, Advocate

Date of Hearing : 31.03.2023, 03.04.2023 & 10.04.2023

Date of Judgment & Order : 28.04.2023

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

1. The writ petitioner has instituted both the writ petitions - W.P.[C] no. 4980/2022 & W.P.[C] no. 54/2023 - under Article 226 of the Constitution of India laying challenge to competitive bidding processes initiated for 'Outstanding of Dietary Services' for patients of the institution, Fakhruddin Ali Ahmed Medical College & Hospital, Barpeta ['the FAAMC&H, Barpeta', for short]. While the writ petition, W.P.[C] no. 4980/2022, instituted first in point of time, is relatable to a decision taken by the respondent authorities for cancellation of the bidding process initiated by a Tender Notice [e-Tender] dated 27.05.2022 by a Cancellation Notice/Order [e-Tender] dated 29.07.2022, the subsequent writ petition, W.P.[C] no. 54/2023 has been preferred seeking setting aside and quashing of a Tender Notice [e-Tender] dated 05.08.2022.

2. The writ petitioner, M/s Shree Ganesh Traders is a proprietorship firm. It is claimed that it deals inter-alia in providing dietary services. It is stated that it has rendered dietary services at the FAAMC&H, Barpeta for about 11 [eleven] years apart from providing similar dietary services at the Silchar Medical College & Hospital, Silchar ['SMC&H, Silchar', for short]. At the time of institution of the writ petition, W.P.[C] no. 4980/2022, the petitioner had been providing dietary services for patients at the FAAMC&H, Barpeta pursuant to its emergence as the successful bidder in a competitive bidding process initiated in the year 2020.

3. The background events leading to the institution of the two writ petitions can be narrated as follows : On 27.05.2022, the Superintendent, FAAMC&H, Barpeta [the respondent no. 5 in both the writ petitions] had published the Tender Notice [e-Tender] of even date inviting e-Tenders on-line through e- procurement system via website - www.assamtenders.gov.in for 'Outsourcing of Dietary Services' for patients wherever it was deemed fit to cater to the day-

Page No.# 5/39 to-day requirements of the FAAMC&H, Barpeta. By the Tender Notice [e- Tender], the FAAMC&H, Barpeta intended to enter into a Rate Contract for 1 [one] year with approved licensed dietary service [in both vegetarian and non- vegetarian diet] providers, which can offer Dietary Service as per the terms and conditions contained in the tender documents. The Tender Notice [e- Tender] dated 27.05.2022 apart from being uploaded in the e-portal :

www.assamtenders.gov.in, was also given wide publicity through Janasanayog.

3.1. The bidding process was in two-bid [Technical Bid & Financial Bid] system. The Technical Bid was to contain all the relevant information and desired enclosures in the prescribed format along with payment receipts of Tender Fee and Earnest Money Deposit [EMD]. The Tender Fee prescribed was Rs. 5,000/- and the EMD [Bid Security] to be deposited was Rs. 3,00,000/-.

The Financial Bid was to contain only the commercial documents. To qualify in the Technical Bid, the bidder should have the minimum eligibility criteria prescribed in the Tender Notice [e-Tender] dated 27.05.2022 and for that purpose, a bidder was required to submit the documents mentioned specifically in Clause 14 of the Tender Notice [e-Tender] dated 27.05.2022. The Financial Bid was to be submitted in the Price Bid Form as per Annexure-2 of the tender documents and was to be submitted in the BoQ Format on-line. The prices were required to be quoted as per the specified format, failing which the bid was to be summarily rejected. The bids [consisting of the Technical Bid & the Financial Bid] were to be submitted in the on-line mode and a hard copy of the Technical Bid was also to be submitted by each bidder as per the guidelines set forth in the Tender Notice [e-Tender] dated 27.05.2022.

Page No.# 6/39 3.2. As per the Tender Notice [e-Tender] dated 27.05.2022, the last date of submission of bids [both Technical Bid and Financial Bid] was up to 10-30 p.m., 21.06.2022 and the date of opening of the Technical Bids was scheduled at 02- 30 p.m. on 22.06.2022.

3.3. In response to the Tender Notice [e-Tender] dated 27.05.2022, the petitioner stated to have submitted its bid [both Technical Bid and Financial Bid] within the stipulated time period in the on-line mode by depositing the requisite Tender Fee and the EMD [Bid Security]. Apart from the petitioner, six other bidders had participated in the competitive bidding process by submitting their bids. The Technical Bids of all the seven participant bidders were opened on 23.06.2022. After evaluation of the Technical Bids of the seven participant bidders, the Tender Evaluation Committee had found three of the seven participant bidders fulfilling the experience criteria of providing dietary services, as laid down in the Tender Notice [e-Tender] dated 27.05.2022. The other four bidders did not fulfill such experience criteria of providing dietary service.

3.4. After opening of the Technical Bids on 23.06.2022, it transpired that the process was not furthered till the stage of opening of the Financial Bids. The respondent no. 5 on behalf of the Tender Evaluation Committee, wrote to the Director of Medical Education, Assam [the respondent no. 3 in both the writ petitions], on 07.07.2022, to give necessary suggestions in the wake of receiving one Representation [e-mail] dated 28.06.2022 from one of the participant bidders regarding the experience criteria set forth in the Tender Notice [e-Tender] dated 27.05.2022. The respondent no. 3 had replied vide his letter dated 13.07.2022 stating that as the bidding process had been Page No.# 7/39 completed and the period of the earlier Rate Contract had expired, the respondent no. 5 may conclude the bidding process in observance of the clauses in the Tender Notice [e-Tender] dated 27.05.2022 [without any deviation] ensuring that there were atleast three numbers of technically qualified bidders, subject to L-1 rate being reasonable and justifiable. The respondent no. 5 was also requested to complete the bidding process at the earliest and to give extension of the existing Rate Contract for the gap period with dietary service being an essential service, the same could not be discontinued.

3.5. According to the petitioner, after opening of the Technical Bids on 23.06.2022, the respondent authorities did not upload the results of evaluation of the Technical Bids in the website without disclosing any reason. As per the procedure laid down in the Tender Notice [e-Tender] dated 27.05.2022, the respondent authorities ought to have proceeded to the next stage of the bidding

process, that is, opening of the Financial Bids and thereafter, to bring the bidding process to its logical conclusion. When the bidding process was found to have not proceeded to the next stage despite the instruction given by the respondent no. 3 vide the letter dated 13.07.2022, the petitioner stated to have filed a Representation before the Chairman of the Tender Committee for Outsourcing of Dietary Services [the respondent no. 6 in both the writ petitions] on 25.07.2022 with a prayer to bring the bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 to its logical conclusion. The petitioner stated to have submitted a copy of the said Representation also to the respondent no. 5.

Page No.# 8/39 3.6. The petitioner stated to have learnt that the respondent authorities were in contemplation of cancelling the bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 at the behest of bidders who did not meet the terms and conditions laid down in the Tender Notice [e-Tender] dated 27.05.2022. With such apprehension, the petitioner had approached this Court by way of a writ petition, W.P.[C] no. 4980/2022 inter-alia with a prayer to declare the results of evaluation of the Technical Bids. The writ petition, W.P. [C] no. 4980/2022 was listed on 30.07.2022 for consideration. But prior to 30.07.2022, the competitive bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 came to be cancelled by a Cancellation Notice/Order [e-Tender] dated 29.07.2022 issued under the hand of the respondent no. 5. In view of the Cancellation Notice/Order [e-Tender] dated 29.07.2022, the writ petition, W.P.[C] no. 4980/2022 was withdrawn by the petitioner with liberty to file a fresh writ petition to assail the Cancellation Notice/Order [e-Tender] dated 29.07.2022.

3.7. In the above backdrop of events, the petitioner has instituted the first writ petition, W.P.[C] no. 4980/2022 assailing the Cancellation Notice/Order [e-Tender] dated 29.07.2022. The petitioner has also assailed an Order bearing no. DME/110/2014/15541 dated 21.07.2022 of the respondent no. 3 whereby the respondent no. 3 had requested the respondent no. 5 to consider for re-tendering with suitable clauses. The petitioner has also sought setting aside and quashing of the Minutes of the Meeting of the Tender Committee for Outsourcing of Dietary Services [the respondent no. 6] where the respondent no. 6 had taken a decision to cancel the Tender Notice [e-Tender] dated 27.05.2022.

Page No.# 9/39 3.8. The writ petition, W.P.[C] no. 4980/2022 was moved on 18.08.2022. This Court while issuing notices to the respondents making the same returnable on 31.08.2022, had by order dated 18.08.2022, as an interim measure, directed to the respondent authorities not to take any further steps in the process of re-tendering, for the purpose of balancing the equities.

3.9. Subsequent to the Order bearing no. DME/110/2014/15541 dated 21.07.2022 of the respondent no. 3 and the decision to cancel the Tender Notice [e-Tender] dated 27.05.2022 taken by the Tender Committee for Outsourcing of Dietary Services [the respondent no. 6] in its Meeting held on 26.07.2022, a Re-Tender Notice [e-Tender] dated 05.08.2022 has been published by the respondent no. 5 whereby e-Tenders have once again been invited on-line through e-procurement system via website - www.assamtenders.gov.in for 'Outsourcing of Dietary Services' for patients wherever it is deemed fit to cater to the day-to-day requirements of the FAAMC&H, Barpeta. It is, thus, noticed that the Re-Tender Notice has already been issued prior to passing of the order dated 18.08.2022 in the writ petition, W.P.[C] no. 4980/2022. Challenging the Tender Notice [e-Tender] dated

05.08.2022, the petitioner has instituted the second writ petition, W.P.[C] no. 54/2023.

3.10. During the pendency of the writ petition, W.P.[C] no. 4980/2022, the respondent no. 7 impleaded itself as such party-respondent therein by preferring an interlocutory application, I.A.[C] no. 2999/2022 as an applicant and by an order dated 09.11.2022, the interlocutory application, I.A.[C] no.

Page No.# 10/39 2999/2022 was allowed. Similarly, the respondent no. 8 got itself impleaded as such party-respondent by preferring another interlocutory application, I.A.[C] no. 3475/2022. By an order dated 22.02.2023, the interlocutory application, I.A.[C] no. 3475/2022 was allowed.

4. As the subject-matters of the two writ petitions are inter-connected, the same are taken up together at the admission stage itself at the request of the learned counsel for the parties. It is stated at the Bar that the parties have exchanged their pleadings and there is no necessity of any additional pleadings.

5. I have heard Mr. J. Patowary, learned counsel for the petitioner in both the writ petitions; Mr. B. Gogoi, learned Standing Counsel, Health & Family Welfare Department for the respondent nos. 1 - 6 in both the writ petitions; and Mr. T. Deuri, learned counsel for the respondent no. 8 in the writ petition, W.P.[C] no. 4980/2022. None has appeared for the respondent no. 7 in the writ petition, W.P.[C] no. 4980/2022 when the two writ petitions are being heard. It is noted that on the previous date of hearing of the two writ petitions, that is, on 03.04.2023 also, none had appeared for the respondent no. 7. Such non- representation was despite reflection of the name of the learned counsel for the respondent no. 7 duly in the Cause List.

6. Mr. Patowary, learned counsel for the petitioner has submitted that the respondent authorities in a completely arbitrary manner had taken the decision to cancel the previous bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 by the Cancellation Notice/Order [e-Tender] dated Page No.# 11/39 29.07.2022 when the said bidding process was in the mid-stream. With the stages of opening and evaluation of the Technical Bids of the participant bidders were over and the Financial Bids were to be opened and evaluated, it was not open for the respondent authorities to halt the valid process on grounds which, according to him, are specious in nature. As the period of the Rate Contract was intended for a period of only 1 [one] year, the bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 could have easily brought to its logical conclusion instead of terminating it in the mid-way. He has contended that from the events unfolded, it is discernible that the respondent no. 3 had interfered with the bidding process in an unauthorized manner as the said authority did not have any role and authority with regard to the bidding process to meddle in the affairs of the FAAMC&H, Barpeta. That apart, the respondent no. 3 is found to have taken vacillating stances at different points of time. On 13.07.2022, the respondent no. 3 had asked the respondent no. 4 to conclude the bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 in observance of the terms and conditions set forth therein without any deviation. But on 21.07.2022, the same authority had opined, by taking a U-turn, that the terms and conditions of the Tender Notice [e-Tender] dated 27.05.2022 were not market friendly and asked the respondent no. 4 to go for the bidding process afresh for larger participation of the

bidders. It is his contention that in the first bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022, there were adequate participation of bidders as seven nos. of bidders had submitted their bids. Mr. Patowary has contended that the respondent no. 3 had acted so, later on, at the behest of two ineligible participant bidders from the first bidding process as the letter dated 21.07.2022 of the respondent no. 3 had mentioned about receipt of two Page No.# 12/39 Representations, dated 27.05.2022 & dated 19.07.2022, from the said two ineligible participant bidders from the first bidding process, who only after participating in the bidding process, had cried foul. It is his contention that the respondent no. 4 and the respondent no. 5 who were responsible as the tendering authority, had abdicated their responsibility and authority to the dictate of the respondent no. 3, an authority who was not part of the bidding process. Such abdication of responsibility and authority is, according to him, illegal and arbitrary. In support of his submissions, he has referred to the decision of the Hon'ble Supreme Court of India in the case of *The Purtabpore Co., Ltd. vs. Cane Commissioner of Bihar and others*, reported in [1969]1 SCC 308 and two decisions of this Court in *Ackruti Plates Private Limited and others vs. the State of Tripura and others*, reported in 2011 [3] GLT 695, and in the writ petition, W.P.[C] no. 1528/2015 [*Sri Nabin Chandra Hatimuria vs. the State of Assam and others*], decided on 02.11.2015.

7. Per contra, Mr. Gogoi, learned Standing Counsel, Health & Family Welfare Department has refuted the contention regarding want of power and authority on the part of the respondent no. 3 to give its view or observation in connection with the bidding process for 'Outsourcing of Dietary Services' at Government Medical College & Hospital, with the FAAMC&H being one of them. The respondent no. 3 being the Director of Medical Education, Assam, is not an authority external to the bidding process whereby bids were/are being invited for 'Outsourcing of Dietary Services' for patients at the FAAMC&H, Barpeta. It is his contention that the respondent no. 3 was/is involved all throughout the bidding processes as he is the Head of the Department for all Government Medical Colleges and Hospitals in the State. It is his submission that the Rate Page No.# 13/39 Contracts entered earlier and the Rate Contract contemplated to be entered either by the Tender Notice [e-Tender] dated 27.05.2022 or by the Tender Notice [e-Tender] dated 05.08.2022 were/are not statutory in character and the bidding process is not guided by any statutory provision. As such, the ratio deducible from the decisions referred to on behalf of the petitioner is not attracted in the bidding processes under reference. To support his contention, Mr. Gogoi has also produced the official file relating to the bidding processes under reference. By referring to the terms and clauses of the Tender Notice [e-Tender] dated 27.05.2022, more particularly, Clause 17.5 thereto, Mr. Gogoi has submitted that the authority in the FAAMC&H, Barpeta had every right to cancel the bidding process without assigning any reason thereof. Notwithstanding Clause 17.5, the authority has assigned good and valid reasons for cancelling the first bidding process. The decision to go for the bidding process afresh vide the Tender Notice [e-Tender] dated 05.08.2022 is for the purpose of wider participation. It is strenuously contended that formulation of the terms and conditions of tender is exclusively reserved for the tendering authority. It is his further contention that merely because the respondent no. 3 had considered the aspects highlighted by two participant bidders as regards the experience criteria specified for the first bidding process, whose Technical Bids did not fulfill the experience criterion set forth therein, it cannot be said that the respondent no. 3 had acted at their behest. The respondent no. 3 after considering the entire aspects including non- fulfillment of the experience criteria by more than half of the participant bidders, had reached the opinion that

the experience criterion incorporated in the Tender Notice [e-Tender] dated 27.05.2022 was restrictive in nature and relaxation in the experience criterion would result in wider participation and Page No.# 14/39 there might be other bidders who though competent in every aspect, might not have the experience of providing Dietary Service in any Government Medical College and Hospital in the State of Assam. Mr. Gogoi, learned Standing Counsel, Health & Family Welfare Department has also highlighted the fact that till few years ago, there were only three number of Government Medical Colleges & Hospitals in the entire State of Assam at Guwahati, Dibrugarh and Silchar and in the year 2017, there were only six State Medical Colleges & Hospitals, and naturally, there were few persons who had the eligibility criterion of having experience of providing Dietary Services in such Medical Colleges & Hospitals. On the other hand, there is a Government Civil Hospital in every district in the State of Assam since long. It is his contention that only the experience criterion is relaxed in the Tender Notice [e-Tender] dated 05.08.2022 but there is no relaxation in so far as the criteria regarding quality, financial ability and other aspects are concerned. In so far as the petitioner is concerned, there is no question of any prejudice because he has not been made ineligible to participate in the bidding process initiated by the Tender Notice [e-Tender] dated 05.08.2022.

8. Mr. Deuri, learned counsel representing the respondent no. 8 has substantially adopted the submissions of the learned Standing Counsel, Health & Family Welfare Department. He has submitted that the respondent no. 8 is a registered unit under the Ministry of Micro, Small & Medium Enterprises [MSME], Government of India having a valid UDYAM Registration Certificate. Though the respondent no. 8 had participated in the previous bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022, finding the experience criterion laid down therein restrictive in nature, the respondent no.

Page No.# 15/39 8 by filing a Representation before the respondent no. 3 on 19.07.2022 highlighted the said aspect. By the said Representation, it was also brought to the notice of the respondent authorities that being a registered unit under the MSME, Government of India, the respondent no. 8 ought to have exempted from the deposit of Tender Fee and the EMD [Bid-Security]. Mr. Deuri has also highlighted that the respondent no. 7 who had experience of four years of providing Dietary Services in eight districts of Assam, had also filed a Representation as regards the experience criterion set forth in the Tender Notice [e-Tender] dated 27.05.2022. Mr. Deuri has articulated his submission on the aspects of limited rights of bidders and extensive powers available to the tendering authority in formulation of terms and conditions of a tender document. In support of his submissions, he has referred to the decisions of the Hon'ble Supreme Court of India in *Meerut Development Authority vs. Association of Management Studies*, reported in [2009] 6 SCC 171; *Maa Binda Express Carrier vs. North-East Frontier Railway*, reported in [2014] 3 SCC 760; and *Michigan Rubber [India] Limited vs. State of Karnataka*, reported in [2012] 8 SCC 216, cited in paragraph 7 in the case of *Airport Authority of India vs. Centre for Aviation Policy, Safety and Research [CAPSR]*, reported in AIR 2022 SC 4749.

9. I have given due consideration to the submissions advanced by the learned counsel for the parties and have also gone through the materials on record, brought by the parties through their pleadings. I have also gone through the documents in the office file produced by the learned Standing Counsel,

Health & Family Welfare Department and the decisions cited at the Bar.

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10. The bidding process by the Tender Notice [e-Tender] no. FAAMCH/eT_DST[2]/1783/2022/1056 was initiated on 27.05.2022 for 'Outsourcing of Dietary Services' for patients at the FAAMC&H, Barpeta. As per Clause 20.7 of the Tender Notice [e-Tender], the FAAMC&H, Barpeta intended to enter into an Rate Contract for 'Outsourcing of Dietary Services' for patients for a period of 1 [one] year and extension of tenure up to maximum 6 [six] months might be allowed, subject to mutual agreement at the same rate and terms. After the last date of submission of bids was over, the Technical Bids of the bidders were opened on 23.06.2022 by the Tender Evaluation Committee constituted for the purpose and it was found that there were 7 [seven] participant bidders in the bidding process. After analysis of the tender documents submitted by all the 7 [seven] participant bidders, the Tender Evaluation Committee found that only 3 [three] nos. of participant bidders had the experience of supplying dietary articles to any State Government Medical College & Hospital. Out of the remaining 4 [four] participant bidders, 3 [three] nos. of bidders were found to have submitted documents about experience of supplying dietary articles to the Government Hospitals and the 7 th bidder submitted documents regarding experience of supplying dietary articles in unclassified hospital in a State other than Assam. Out of the 7 [seven] participant bidders, one of the bidders was a registered MSME having a woman entrepreneur, that is, the respondent no. 8 herein. As the respondent no. 8 had sent an e-mail on 28.06.2022 to the respondent no. 4 seeking extension of privilege as an MSME unit with woman entrepreneur and relaxation in the experience criterion contained in Clause 14[c] of the Tender Notice [e-Tender] dated 27.05.2022, the respondent no. 4 on behalf of the Tender Committee of Page No.# 17/39 the FAAMC&H, Barpeta [the respondent no. 6] forwarded the matter to the respondent no. 3 by a letter dated 07.07.2022 with the request to give necessary suggestion whether experience of supplying diet to the Government Civil Hospital[s] would be eligible at the stage of Technical Bid evaluation. In response, the respondent no. 3 wrote to the respondent no. 4 on 13.07.2022 mentioning that as the process had been completed and the term of the earlier Rate Contract had already been expired, the respondent no. 4 could conclude the bidding process in observance of the tender clauses without any deviation by ensuring that there were at least 3 [three] nos. of technically qualified bidders. The respondent no. 4 was requested to ensure validity of the Rate Contract as per the Assam Public Procurement Rules, 2020 ['the APP Rules, 2020', for short]. Subsequent thereto, the respondent no. 7 herein on 18.07.2022 and the respondent no. 8 herein on 19.07.2022, both participant bidders in the bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022, submitted Representations to the respondent no. 3 and the respondent no. 4 highlighting certain aspects in connection with the first bidding process. The respondent no. 7 had requested for not to restrict the experience criterion only for bidders having experience of supplying Dietary Services to the State Government Medical Colleges & Hospitals and to make open the bidding process to bidders having experience of providing Dietary Services to the Government Civil Hospitals. On the other hand, the respondent no. 8 apart from terming the experience criterion of providing Dietary Services at the State Government Medical Colleges & Hospitals for 3 [three] years as a restrictive one, also sought for relaxation to registered MSME units and preference for woman entrepreneurs. The respondent no. 3 on receipt of the two

Representations, wrote back to the respondent no. 4 vide its letter dated Page No.# 18/39 21.07.2022 with the observations that the tender clauses were not open for prospective bidders and in the bidding process initiated by the Tender Notice [e-Tender] 27.05.2022, there was no provision for any pre-bid meeting to make the bidding process market friendly. With such observations, the respondent no. 4 was requested to consider for re-tendering as per Clause 17.5 of the Tender Notice [e-Tender] dated 27.05.2022 with incorporation of suitable clauses with a view to have a larger participation of bidders and with the provision of a pre-bid meeting. A meeting of the Tender Evaluation Committee consisting of 9 [nine] nos. of members with the respondent no. 4 as the Chairman and the respondent no. 5 as the Member Secretary, was convened on 26.07.2022. In the said meeting, the Committee considered the observations made by the respondent no. 3 in its letter dated 21.07.2022 and upon deliberation, the Committee decided to cancel the bidding process initiated by the Tender Notice [e-Tender] 27.05.2022 by invoking Clause 17.5 thereof. Consequently, a decision was also taken to initiate a re-tender process immediately.

11. It was during that time, the present petitioner has approached this Court by way of the writ petition, W.P.[C] no. 4980/2022 with the prayer to declare the results of evaluation of the Technical Bids. When pursuant to the decision taken by the Tender Evaluation Committee on 26.07.2022, the respondent no. 5 issued the Cancellation Notice/Order [e-Tender] dated 29.07.2022, the writ petition, W.P.[C] no. 4980/2022 was withdrawn with liberty. Thus, it is apposite, at this juncture, to consider the nature of rights of a bidder participating in a bidding process. The bidders participating in a bidding process have no other right except the right to equality and fair treatment in Page No.# 19/39 the matter of evaluation of their bids in response to a tender notice in a transparent manner and free from hidden agenda. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. It is well settled that distribution of State largesses by the State or its instrumentalities/agencies partakes the character of a trust and the methods to be adopted for such distribution must be fair and transparent providing an opportunity to all the interested persons to participate in the bidding process. Submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its instrumentalities/agencies are under no obligation to accept. The bidders participating in the bidding process cannot, therefore, insist that their tender should be accepted simply because a given tender is the highest or the lowest depending upon whether the contract is for sale of property or for execution of works on behalf of the Government or one of its instrumentalities/agencies. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also held to be fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. A bidder has an enforceable right to a limited extent before the court and the court in exercise of its power of judicial review can definitely examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest [Ref :- Meerut Development Authority (supra); Maa Binda Page No.# 20/39 Express Carrier (supra); Michigan Rubber (India) Limited (supra); & Airport Authority of India (supra)].

12. In the case in hand, when the bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 was terminated by the Cancellation Notice/Order [e-Tender] dated 29.07.2022 in the mid-stream, there was no emergence of any successful bidder as at that point of time, only the evaluation of the Technical Bids of the participant bidders was over. As the Financial Bids of the 3 [three] bidders including the petitioner, whose Technical Bids were found responsive, were then opened, the rates quoted by them were not disclosed. Thus, it cannot be said that any enforceable right had been crystallized in favour of the petitioner for him to insist at that stage to conclude the bidding process in his favour.

13. It is the contention of the petitioner that the bidding process was cancelled at the instance of the respondent no. 3 as an authority outside the purview of the bidding process and in support of such contention, three decisions, cited above, have been referred to. Thus, a survey of the aforementioned decisions is necessary at this stage.

13.1. In *The Purtabpure Co., Ltd.* [supra], the Cane Commissioner, Bihar made an order reserving certain villages in favour of the appellant under Clause 6[1] [a] of the Sugar Cane [Control] Order, 1966. For two seasons : 1964-1965 and 1965-1966, the fifth respondent challenged the validity of the order of the Cane Commissioner in the High Court, but the case was adjourned. Later, both parties made representations to the Chief Minister and the Cane Commissioner, Page No.# 21/39 who recommended to the Chief Minister against interfering with the reservation already made. The Chief Minister directed the Cane Commissioner to divide the area into two portions and allot one portion to the fifth respondent. On the basis of that direction, the Cane Commissioner made the orders. The Hon'ble Supreme Court of India has held that the impugned orders though purported to have been made by the Cane Commissioner were, in fact, made by the Chief Minister and they were invalid. It has been held that the power exercisable by the Cane Commissioner under Clause 6[1] is a statutory power and he alone could have exercised that power. While exercising that power, the Cane Commissioner could not have abdicated his responsibility in favour of anyone - not even in favour of the State Government or the Chief Minister. The interference of the Chief Minister with the functions of the Cane Commissioner was held to be improper.

13.2. A bidding process initiated by the State of Tripura through a Notice Inviting Tender [NIT] for High Security Registration Plates on Motor Vehicles was the subject-matter in *Ackruti Plates Private Limited* [supra]. The process was two-bid process consisting of Technical Bids and Financial Bids. Five bidders participated in the bidding process in response to the NIT. After the stage of evaluation of Technical Bids, two of the bidders were disqualified in terms of Clause 2.2 of the NIT. The Financial Bids of the remaining three bidders were opened and evaluated by an Evaluation Committee, constituted by the Government of Tripura in the Transport Department in terms of Clause 2.23.2 of the NIT, for a detailed scrutiny of the bids. In its report/recommendations, the Evaluation Committee reported that two of the three bidders were to be disqualified for inconsistencies in their Financial Bids Page No.# 22/39 and recommended that the bid of the remaining bidder i.e. the petitioner therein be accepted with a weighted average price. As per the procedure prescribed in Clause 2.26.1 of the NIT, the report/recommendations of the Evaluation Committee ought to have been placed for approval before the Supply Advisory Board/Works Advisory Board. But instead of placing the matter before the Supply Advisory Board/Works

Advisory Board, the matter was examined at the Transport Department and it was advised to cancel the bidding process for a de-novo process. The Chief Secretary of the State of Tripura had opined that it would be prudent to cancel the tender process and to start the work de-novo invoking Clause 2.28 of the NIT, which gave the Government the right to accept any bid and to reject any or all bids. Accordingly, the bidding process was cancelled vide a Memorandum dated 12.10.2010. Admittedly, the petitioner therein was declared the only successful bidder and the Hon'ble Court was of the opinion that if the tender process would stand cancelled, only the petitioner would suffer. After holding that the Government was entitled to cancel the tender process, the Court had gone on to examine as to whether the Government had validly exercised its inherent power to cancel the NIT. Finding the reason given by the Chief Secretary for cancelling the bidding process specious, it was held that the process leading to the cancellation had been vitiated by irrelevant considerations and the decisions to cancel the NIT and to go for a fresh process had been struck down. Direction was issued to place the report/recommendations of the Evaluation Committee before the Supply Advisory Board/Works Advisory Board for its approval or disapproval as the Supply Advisory Board/Works Advisory Board had the authority either to accept the report/recommendations of the Evaluation Committee or to reject the same, subject to valid and justifiable Page No.# 23/39 reasons. It was made clear that since the State was entitled to cancel the NIT, it was at liberty to do so, but only in accordance with law.

13.3. In *Sri Nabin Chandra Hatimuria* [supra], bids [Technical Bid & Financial Bid] were invited for 2 [two] nos. of construction projects, by a Press Notice dated 17.04.2014. In the evaluation process, the tender of the petitioner was found to be substantially responsive [L-1] but the Award of the contract was not forthcoming. The matter was requisitioned by the Principle Secretary, Assam Legislative Assembly for placing the same before the General Purposes Committee, a committee constituted under the Rules of Procedure and Conduct of Business in Assam Legislative Constituency. In a Meeting held on 27.02.2015, the General Purposes Committee recommended to award the contract-work in favour of the 2nd highest bidder [L-2]. It was in the backdrop of such fact situation, the Court has held that an authority amenable to the writ jurisdiction cannot act arbitrarily even in contractual matters by taking recourse to observations and recommendations made by any other authority not connected with the decision-making process and direction was made to the respondent Public Works Department to bring the tender process to its logical conclusion uninfluenced by observations and recommendation made by the General Purposes Committee, an authority not connected with the decision- making process.

13.4. The principles deducible from the decision in *The Purtabpure Co., Ltd.* [supra] is that the authority which has been conferred with the power and jurisdiction by a governing statute to pass a particular order, can alone pass such an order and no other person, even a superior authority, can interfere Page No.# 24/39 with the functioning of the statutory authority. If any decision is taken by a statutory authority at the behest of a person who has no statutory role to play, the same would be illegal. It has been observed in *Ackruti Plates Private Limited* [supra] that the decision of the State Government to cancel an otherwise valid bidding process in exercise of its inherent power by by-passing the authority of a body vested with the power either to accept or to reject the report/recommendations of the Evaluation Committee, is bad and arbitrary. From the decision in *Sri Nabin Chandra Hatimuria* [supra], it can be deduced that if an authority/body which is not

connected in any manner with the decision-making process in a bidding process, seeks to interfere with its observations and recommendation then the authority who has to take the final decision in the bidding process cannot be guided by and should not be influenced by such observations and recommendation of such an authority or body, extraneous to the bidding process.

13.5. Thus, the question which requires consideration is whether the aforesaid principles would be applicable in the case in hand. It is trite to mention that a decision is an authority for what it decides and not what can be logically deduced therefrom and even a slight distinction in fact or an additional or different fact may make a lot of difference in the decision-making process.

14. It is to be borne in mind that the proposed Rate Contract to be entered into by the State respondents with the successful bidder at the end of the bidding process is not a statutory contract. The Rate Contract would not become statutory because under the contract, the contractor i.e. the successful bidder would provide the Dietary Services to the patients at the FAAMC&H, Page No.# 25/39 Barpeta or because the Rate Contract would be executed by the authorities at the FAAMC&H, Barpeta on one part and the contractor i.e. the successful bidder on the other part. The bidding process leading to the execution of the Rate Contract is not governed by any statutory provision and as such, the question of wielding any statutory power by any of the authorities involved in the bidding process does not arise to bring the decision in The Purtabpure Co., Ltd. [supra] in the scenario. From the office file produced by the learned Standing Counsel, Health & Family Welfare Department, it is noticed that in the year 2017, the respondent no. 5 as per instruction given in an e-mail dated 27.06.2017 of the respondent no. 3, published a Notice Inviting Tender [NIT] bearing no. FAAMCH/DIET_SERVICES/1069/2017/76 on 10.07.2017 for 'Outsourcing of Dietary Services' for patients at the FAAMC&H, Barpeta for entering into a Rate Contract for 2 [two] years with approved licensed dietary service providers. For examination of tenders for Outsourcing of Dietary Services at the FAAMC&H, Barpeta invited by Tender Notice dated 10.07.2017, a Tender-cum-Technical Committee was constituted by the respondent no. 4 herein by an Office Order dated 24.07.2017. The Tender-cum-Technical Committee opened the bids received from three participant bidders including the petitioner herein, in response to the NIT dated 10.07.2017. After evaluation of the bids, the petitioner herein was selected as the successful bidder [L-1] and he was intimated to that effect by the respondent no. 5 by a letter dated 01.08.2017. Forwarding the tender papers including the comparative statement and intimating the selection of the petitioner as the successful bidder [L-1] by a letter dated 07.09.2017, the respondent no. 5 sought approval for the same from the respondent no. 3. The respondent no. 3 by his letter dated 23.10.2017 had forwarded a set of guidelines to the Principal-cum-Chief Page No.# 26/39 Superintendent of all the 6 [six] Medical College & Hospitals in Assam including the respondent no. 4 herein, with a direction to execute the contracts incorporating the guidelines therein. On the basis of the guidelines forwarded by the respondent no. 3 vide his letter dated 23.10.2017, the respondent no. 5 informed the petitioner herein i.e. the successful bidder [L-1] in the bidding process pursuant to the NIT dated 10.07.2017 that few clauses, indicated therein, which were set forth by the respondent no. 3 in its letter dated 23.10.2017, would be added in the proposed Rate Contract to be entered into with the petitioner for supply of Dietary Services to the indoor patients at the FAAMC&H, Barpeta. Thereafter, a Rate Contract was executed between the FAAMC&H, Barpeta and the petitioner for a period of 2 [two] years up to 31.07.2019. On 22.07.2019, the petitioner by a letter of even date

sought for extension of the Rate Contract for another 2 [two] years and the respondent no. 5 by his letter dated 31.07.2019 extended the tenure of the Rate Contract for another 2 [two] years w.e.f. 01.08.2019 with a request to execute a contract agreement on agreed terms and conditions. Having learnt about extension of the Rate Contract for another 2 [two] years in such manner, the respondent no. 3 wrote to the respondent no. 4 on 13.02.2020 to inform that such extension of Rate Contract for providing Dietary Service to the indoor patients at the FAAMC&H with the existing vendor for another 2 [two] years was contrary to all financial norms and, therefore, was not acceptable. The respondent no. 4 was thereby, instructed to float fresh e-Tender immediately for supply of Dietary Services at the FAAMC&H, Barpeta and to complete the process expeditiously after discovery of fresh approved rates. Immediately thereafter, the respondent no. 4 published a Tender Notice [e-Tender] on 14.03.2020 inviting e-Tenders through on-line for Outsourcing of Dietary Page No.# 27/39 Services for patients at the FAAMC&H, Barpeta. A Tender-cum-Technical Committee was constituted by an Office Order dated 04.04.2020. The said bidding process was concluded with the award of contract for Outsourcing of Dietary Services for the patients at the FAAMC&H by an order dated 06.05.2020 of the respondent no. 4 in favour of the petitioner herein on his emerging as the successful bidder [L-1]. By order dated 06.05.2020, the petitioner herein was awarded the Rate Contract for a period of 2 [two] years. As the period of Rate Contract entered thereby was set to expire on 10.05.2022, the respondent no. 4 by his letter dated 27.04.2022 requested the respondent no. 3 to consider for giving extension of the agreement for Dietary Services provided by the petitioner firm for a period of 3 [three] months or till completion of the bidding process, whichever was earlier, for continuation of diet supply to the admitted patients at the FAAMC&H, Barpeta. The respondent no. 3 responded vide his letter dated 20.05.2020 whereby he returned the draft bid documents for further necessary action from the end of the respondent no. 4, subject to compliance of each clauses of the Rate Contract and the provisions of the APP Rules, 2020 and to complete the bidding process at the earliest. The extension of the existing system was also allowed for a period of 1 [one] month or till the conclusion of the bidding process, whichever was earlier. Thus, it has emerged from the above events that the respondent no. 3 was involved in the bidding process initiated for Outsourcing of Dietary Services at the FAAMC&H, Barpeta since the year 2017 onwards. The respondent no. 3 is the Head of the Department for all Medical Colleges & Hospitals and other health institutions in the State under the Directorate of Medical Education, Assam and the respondent no. 3 is the immediate Controlling Officer for the Medical Colleges & Hospitals under the State Page No.# 28/39 Directorate of Medical Education. It is within the authority and jurisdiction of the Director of Medical Education, Assam to make a scrutiny and examination of the bidding processes undertaken by the State Medical Colleges & Hospitals and other health institutions for reasonableness of the discovered rates prior to issuance of approval. In view of the role assigned to the Director of Medical Education, Assam, the principles deducible from the two decisions in *Ackruti Plates Private Limited* [supra] and *Sri Nabin Chandra Hatimuria* [supra], relied on by the petitioner, are found not applicable to the case in hand.

15. Clause 17 of the Tender Notice [e-Tender] dated 27.05.2022 provided for Technical Evaluation. As per Clause 17.5 therein, the authority at the FAAMC&H had the right to accept or reject any or all tenders without assigning any reasons thereof. The bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 was cancelled vide the Cancellation Notice/Order [e-Tender] dated 29.07.2022 invoking Clause 17.5. It is in such obtaining fact situation, the assailment made by the

petitioner with regard to unsustainability of the decision of the respondent authorities to cancel the bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 and the initiation of another bidding process by the Re-Tender Notice [e-Tender] dated 05.08.2022 are to be considered as they are connected.

16. The ambit and contours of the power of judicial review under Article 226 of the Constitution of India in respect of a competitive bidding process initiated with issuance of a notice inviting tender is limited in extent. As it is well settled, it is not the decision which is under challenge but it is the decision-making process which can be reviewed in the limited scope and ambit of the Page No.# 29/39 power of judicial review, as has been reiterated in catena of decisions of the Hon'ble Supreme Court of India and of this Court. It is also not the soundness of the decision which can be reviewed and the power of judicial review is limited to examine as to whether the decision was legal or otherwise.

17. Clause 14 of the Tender Notice [e-Tender] dated 27.05.2022 had provided for the documents to be comprised in the bid. To qualify in the Technical Bid, a participant bidder had to have the minimum eligibility criteria prescribed therein. As per Clause 14[c], the bidder shall have to be a Dietary Service provider having a valid licence under the Food Safety and Standards Act, 2006 and should have minimum experience of supplying Diet to a Government Medical College & Hospital for at least 3 [three] years. Clause 14[d] required the bidder to have an average annual turnover for similar jobs of not less than Rs. 100 Lakhs. As per Clause 14[e], the bidder should have experience of running a modern kitchen with electrical gadgets for cooking preparation of food and the bidder, as per Clause 14[h], should have sufficient financial strength to run the Diet services uninterruptedly without waiting for payment of bills, etc. There are other clauses like 14[b], 14[f], 14[g], 14[i], 14[j], 14[k], 14[l], 14[m], 14[n], 14[o] and 14[p] providing for eligibility criteria for a bidder to be responsive at the stage of Technical Bid evaluation and since no changes have been brought in respect of those criteria in the corresponding clauses in the Tender Notice [e-Tender] dated 05.08.2022, there is no necessity to advert to those clauses in detail. When the Technical Bids were opened on 23.06.2022 and thereafter, were evaluated, Technical Bids of only 3 [three] participant bidders were found responsive while the remaining 4 [four] Technical Bids were found non-responsive. It is iterated that Clause 14[c] required the Page No.# 30/39 bidders to have minimum experience of supplying Diet to a Government Medical College & Hospital for at least 3 [three] years. It is already noticed that the respondent no. 3 requested the respondent no. 4 on 13.07.2022 to conclude the bidding process in favour of the successful bidder [L-1] but at that stage, the Financial Bids were not opened and there was no L-1 bidder. On 21.07.2022, the respondent no. 3 had reached a view that the clause regarding experience criterion in the Tender Notice [e-Tender] dated 27.05.2022 was not open for wider participation and requested the authorities at the FAAMC&H to give consideration for re-tender. The respondent no. 3 also expressed a view that the first bidding process was not market friendly in the absence of provision for any pre-bid meeting. The respondent no. 3 stated to have considered the reasons cited in the two Representations submitted by the two participant bidders, whose Technical Bids were declared non-responsive on having failed to meet the experience criterion. Having received the letter dated 21.07.2022 containing the request for consideration of re-tendering, the respondent no. 4 in its counter affidavit has averred that in the Meeting of the Tender Evaluation Committee held on 26.07.2022, the views

expressed by the respondent no. 3 for opening avenues for participation of a larger number of bidders and about restrictive nature of the experience criterion were considered and the Committee found the reasons justified. Accordingly, the Tender Evaluation Committee took the decisions to cancel the bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 under Clause 17.5 thereof and to initiate a re-tender process immediately.

17.1. In the Tender Notice [e-Tender] dated 05.08.2022, in Clause 15, the documents to be comprised in the bids have been specified. Clause 15[c] has Page No.# 31/39 prescribed that the bidder shall be a Dietary Service provider having a valid licence under the Food Safety and Standards Act, 2006. Clause 15[d] has laid down the experience criterion and it reads as under :

[d] The bidders should have experience of supplying Diet to Government Medical College & Hospital for minimum period of 3 [three] years. Bidder having experience of supplying Diet to District Civil Hospital for a similar period of 3 [three] years may also apply.

It is the stand of the respondent authorities in the counter affidavit that the experience criterion laid down in Clause 14[c] of the Tender Notice [e-Tender] dated 27.05.2022 had restricted the bidding process to a very few bidders including the petitioner herein, who have been running the work of dietary supply to the Government Medical Colleges & Hospitals in Assam for the last few years. According to the State respondents, the said very few bidders including the petitioner herein are running a monopoly business of supply of dietary articles to the Government Medical Colleges & Hospitals in Assam and it was for that reasons the respondent authorities had decided to cancel the entire bidding process with new clauses which, according to them, would provide avenues for wider participation of bidders in the bidding process.

18. It cannot be denied that the State respondents and for that matter, the authorities at the FAAMC&H have a duty to keep in mind the matter of public finance and it is obligatory on their part, in order to protect public money, to get the best price for execution of a work on their behalf and at the same time, to ensure optimal quality for the work. The respondent authorities are well within their rights to come to a finding that the experience criterion set forth in Page No.# 32/39 Clause 14[c] in the Tender Notice [e-Tender] dated 27.05.2022 was restrictive in nature and the same had resulted in participation of lesser number of eligible bidders. One cannot lose sight of the fact that a wider participation of bidders with relaxation in the experience criterion but without compromising on the quality, would result in a better competition amongst the bidders and there is a better possibility of emergence of a justified rate for the Rate Contract. A comparison of Clause 14[c] of the Tender Notice [e-Tender] dated 27.05.2022 and Clause 15[c] and Clause 15[d] of the Tender Notice [e-Tender] dated 05.08.2022 go to show that there have been no relaxation on the aspect of quality as the condition of the bidder to have a valid licence as a Dietary Service provider under the Food Safety and Standards Act, 2006 has been retained. The earlier condition of the bidder having experience of supplying Diet to Government Medical College & Hospital for a minimum period of 3 [three] years has also been retained. The petitioner having the said experience,

has the eligibility to participate in the bidding process initiated by the Tender Notice [e-Tender] dated 05.08.2022 and is not prejudiced on that front. By making the bidding process open for participation to bidders having experience of supplying Diet to District Civil Hospitals for a similar minimum period of 3 [three] years the respondent authorities have facilitated for a wider participation of bidders. Clause 14[d], Clause 14[e] and Clause 14[h] of the Tender Notice [e-Tender] dated 27.05.2022 have been retained as Clause 15[e], Clause 15[f] and Clause 15[i] in the Tender Notice [e-Tender] dated 05.08.2022 and as such, the qualification criteria for the bidders to be responsive on the other aspects like financial ability, financial turnover, logistical ability, etc. at the Technical Bid evaluation stage have been retained. The contention of the petitioner that the experience criterion contained in Page No.# 33/39 Clause 14[c] of the Tender Notice [e-Tender] dated 27.05.2022 has been relaxed by the respondent authorities in order to facilitate participation of a bidder of their choice cannot be countenanced for the fact that there are Government Civil Hospitals in every district in the State of Assam and Clause 15[d] of the Re-Tender Notice [e-Tender] dated 05.08.2022 have allowed participation of bidders having experience of supplying Diet to District Civil Hospitals for a similar minimum period of 3 [three] years. What has, thus, resulted with the experience criterion laid down in Clause 15[d] is there is much higher prospect of a much wider participation of bidders and as a result, the petitioner might have to face a stiffer competition. Such a situation cannot, by any stretch, infringe any fundamental rights of any of the bidders including the petitioner, who had participated in the bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022. In such backdrop, even if the view about restrictive nature of the experience criterion was held to be formed only after receipt of the two representations from two unsuccessful bidder, then also no inference can be drawn that the changes made in the experience criterion, indicated above, are guided by any extraneous factors or any element of arbitrariness, unreasonableness or irrationality.

19. It is settled that in the matter of formulating eligibility conditions in bidding documents, a greater latitude is available to the tendering authority. Unless the action of the tendering authority is found to be wholly arbitrary or irrational or unreasonable or misuse of power, an interference by court exercising its power of judicial review is not warranted. It is to be borne in mind that if the State or its instrumentality/agency acts in conformity with the principle of fairness and transparency and for a discernible reason like for Page No.# 34/39 wider participation of bidders with maintenance of quality, it cannot be said that the same is not in public interest. Mere disagreement with the decision- making process or the decision of the administrative authority is not a reason for interference.

20. It has been observed time and again that the basic requirement of Article 14 of the Constitution is fairness in action by the State or the instrumentalities of the State and non-arbitrariness in essence and substance is the heartbeat of fairplay. While exercising the power of judicial review under Article 226 of the Constitution the Court does not and is expected to act as a court of appeal to examine any administrative decision taken in matters like evaluation of tenders or awarding of tender or not awarding of tender. It is not supposed to give a finding in respect of matters like an administrative decision made in relation to any tender process as to whether the decision could have been made in a different manner in the facts and circumstances of the case. When the Court exercises the power of judicial review in respect of any tender process it primarily examines whether

there has been any infirmity in the decision-making process or whether the decision-making process is vitiated due to non-adherence to any of the essential conditions or any statutory provisions or is guided by any irrelevant or extraneous factors or mala fide, etc. It is settled that the State or an instrumentality of the State as a tendering authority has a free hand in setting the terms and conditions of a tender and only in the event the terms and conditions of the tender are found to be arbitrary, discriminatory or mala fide or actuated by favourism the Court in exercise of its power of judicial review can interfere. The Court does not ordinarily interfere with the terms and conditions of the tender prescribed by the State or an Page No.# 35/39 instrumentality/agency of the State as the tendering authority because it feels that some other terms in the tender would have been fair, wiser or logical. The Court does not ordinarily make any direction to revise the tender conditions.

21. The administrative discretion is available to the tendering authority to discharge/cancel the entire tender process in public interest provided such action is not actuated with any ulterior motive or vitiated by a kind of arbitrariness or irrationality or in violation of any statutory provisions. In *State of Jharkhand and others vs. CWE-SOMA consortium*, reported in [2016] 14 SCC 172, the matter of dispute related to construction of a dam in the State of Jharkhand. Pursuant to the NIT and a pre-bid meeting where 10 tenderers participated, only 3 [three] bidders finally submitted their bids. The tendering authority after evaluation found only the bid of the respondent as a responsive one and the bids of the other two bidders were declared non-responsive. Thereafter, the tender committee took a decision to cancel the tender and to go for re-tender to make the tender process more competitive. Aggrieved by the decision to cancel the tender process, the respondent filed the writ petition. The Hon'ble Supreme Court of India has observed that the tendering authority had the right to cancel the tender without assigning any reason but in that case, the tendering authority was found to have assigned a cogent and acceptable reason of lack of adequate competition to cancel the tender and to invite a fresh tender. The Hon'ble Supreme Court of India had further observed that in case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the tenderers who have given tenders that there is no competition, the person issuing tender may Page No.# 36/39 decide not to enter into any contract and thereby cancel the tender. So long as the bid has not been accepted, the highest bidder acquires no vested right to have the process concluded in his favour.

21.1. The Hon'ble Supreme Court in *CWE-Soma Consortium* [supra] has observed in the following manner :-

13. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well-settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour [vide *Laxmikant vs. Satyawan*, [1996] 4 SCC 208; *Rajasthan Housing Board vs. G.S. Investments*, [2007] 1 SCC 477; and *Uttar Pradesh Avast*

Evam Vikash Parishad vs. Om Prakash Sharma, [2013] 5 SCC 182].

15. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness.

20. Admittedly, in the pre-bid meeting held on 24.03.2014, ten tenderers have participated. After conclusion of the pre-bid meeting on 24.03.2014, as a result of stringent conditions prescribed in clause 4.5 [A][a] and 4.5 [A][c], only three tenderers could participate in the bidding process and submit their bids. As noticed earlier, upon Page No.# 37/39 scrutiny two were found non-responsive. In our considered view, High Court erred in presuming that there was adequate competition. In order to make the tender more competitive, tender committee in its collective wisdom has taken the decision to cancel and re-invite tenders in the light of SBD norms. As noticed earlier, the same was reiterated in a subsequent meeting held on 09.07.2014. While so, the High Court was not justified to sit in judgment over the decision of tender committee and substitute its opinion on the cancellation of tender. Decision of the State issuing tender notice to cancel the tender and invite fresh tenders could not have been interfered with by the High Court unless found to be mala fide or arbitrary. When the authority took a decision to cancel the tender due to lack of adequate competition and in order to make it more competitive, it decided to invite fresh tenders, it cannot be said that there is any mala fide or want of bona fide in such decision. While exercising judicial review in the matter of government contracts, the primary concern of the Court is to see whether there is any infirmity in the decision-making process or whether it is vitiated by mala fide, unreasonableness or arbitrariness.

23. The right to refuse the lowest or any other tender is always available to the government. In the case in hand, the respondent has neither pleaded nor established mala fide exercise of power by the appellant. While so, the decision of tender committee ought not to have been interfered with by the High Court. In our considered view, the High Court erred in sitting in appeal over the decision of the appellant to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender.

22. In this connection, it is also apt to refer to the following observations made by the Hon'ble Supreme Court of India in the celebrated decision of Tata Cellular vs. Union of India, reported in [1994] 6 SCC 651 :-

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of Page No.# 38/39 the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

23. It is pertinent to note that in the bidding process initiated by the Tender Notice [e-Tender] dated 05.08.2022, a Pre-Bid Bidding has been provided for facilitating a better inter-action between the prospective bidders and the tendering authority. This Court has not found any reason to hold that the decision to go for a fresh bidding with modified clause on the experience criterion with a view have a wider participation without relaxation other aspects, already mentioned hereinabove, has suffered from any arbitrariness or mala fide or want of bona fide on the part of the respondent authorities. In the considered view of the Court, the decision to cancel the previous bidding process initiated by the Tender Notice [e-Tender] dated 27.05.2022 with a decision to go for a fresh bidding process was taken on the basis of reasons assigned and no exception can be taken about such reasons which are reasonable and rational and taken in public interest. In view of the discussions made above and for the reasons assigned therein, this Court has not found any element of arbitrariness, irrationality or mala fide on the part of the respondent authorities in cancelling the bidding process initiated by the Tender Notice [e- Tender] dated 27.05.2022 by the Cancellation Notice/Order [e-Tender] dated 29.07.2022 and in initiating a fresh bidding process with changed experience criterion by the Tender Notice [e-Tender] dated 05.08.2022. Consequently, both the writ petitions are found to be bereft of any merits and the same are Page No.# 39/39 liable to be dismissed. They are accordingly dismissed. The interim order, if any, stands recalled. There shall, however, be no order as to costs.

24. In view of the dismissal of the two writ petitions, the respondent authorities may now proceed with the bidding process initiated by the Re- Tender Notice [e-Tender] dated 05.08.2022 to bring it to its logical conclusion as expeditiously as possible, in order to enter into a Rate Contract for Outsourcing of Dietary Services for patients at the FAAMC&H, Barpeta.

JUDGE Comparing Assistant