
(2012) 07 AHC CK 0002

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 9481 (MB) of 2011

M/s. Falck India Pvt. Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 30-07-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2012) 8 ADJ 626

Hon'ble Judges : Virendra Kumar Dixit, J;Uma Nath Singh, J

Bench : Division Bench

Advocate : Shraddha Agarwal, for the Appellant; Rajiv Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Uma Nath Singh, J.—We have heard learned counsel for parties and perused the pleadings of writ petition. By way of this writ petition, the petitioner company, inter alia, has prayed: (i) for quashment of order dated 24.9.2011 (Annexure-8) as well as Government Orders dated 11.11.2011 (Annexures 9 and 10) while seeking direction to include the petitioner company in the list of eligible/qualified tenderers; (ii) for restraining the respondents from giving effect to the said orders dated 24.9.2011 and 11.11.2011; (iii) for direction to desist from finalising the financial bid, and (iv) for quashment of the order, if any, whereby the technical bid of the petitioner company was rejected. The petitioner company submitted its bid towards a tender notice published for maintenance of ambulances and to ensure their availability under an scheme called "the operation of Emergency Medical Transport Services Uttar Pradesh" (for short, "the EMTS"). It appears that the EMTS has been constituted with the objects namely: (i) to provide fast service in medical emergencies in any part of the State (Urban as well as Rural); (ii) to give first aid and stabilize the patients, and (iii) to transport them to the nearest Government hospitals or CHCs in as short a time frame as possible. As per instructions to bidders, the authority envisaged

the operation, initially, of a total of 988 Basic Life Support (BLS) ambulances as part of the scope of work for the EMTS which will be supported by a well-equipped and adequately staffed centralized call centre. Such call centre is to remain accessible through a toll free number and the services shall operate 24 hours a day and 365 days a year. Besides, the services shall be provided free of cost to the public.

2. For operation of scheme the EMTS" in Uttar Pradesh, a tender notice was first issued on 24.3.2011 and a pre-bid conference was held in New Delhi on 12.4.2011. A number of queries were raised by the prospective bidders, which were discussed with bureaucracy at the highest level namely Chief Secretary/ IIDC and Principal Secretary, Medical Health and Family Welfare, Government of U.P., and in pursuance thereof a revised draft of the Request for Proposal (the RFP) for the EMTS was submitted by the consultants to Director General, Family Welfare on 20.4.2011.

3. The Request for Proposal for the EMTS was approved by the Cabinet and a Government order in respect thereof was issued on 28.5.2011. As per the Government Order dated 28.5.2011 for selection of service provider for the EMTS, an advertisement for the tender was published on 31.5.2011.

4. Against the advertisement issued on 31.5.2011 only two bids, one from M/s GVK EMRI, and another from M/s ZIQITZA Health Care, were received, till the last date and due time. However, the Government was of the opinion that since there were only two bidders, the technical bids may not be evaluated and for the sake of financial propriety and fair competition, it was thought proper to go for re-tendering and thus re-tender was published on 24.6.2011.

5. In respect of the said tender issued on 24.6.2011, a pre-bid meeting was held on 30.6.2011 in which the petitioner also participated.

6. Thus, against the tender floated on 24.6.2011 three bid proposals were received from M/s GVK EMRI, M/s ZIQITZA Health Care and M/s Falck India Pvt. Ltd. Thereafter, certain clarifications were sought from petitioner and another bidder M/s ZIQITZA Health Care Ltd. vide letters dated 22.7.2011.

7. To discuss and deliberate on the clarifications and supporting documents submitted by the bidders, in response to letter dated 22.7.2011 seeking clarification, the Consultancy Monitoring Committee (for short the CMC) met on 3.8.2011 at 11.00 a.m.

8. In the aforesaid meeting dated 3.8.2011 the issues like Test of Responsiveness to the RFP, and clarifications sought and received from the bidders were discussed by the Committee members and the representatives of three bidders (including the representative of petitioner) were individually asked to put up their case and explain the deficiencies in the bid documents.

9. As per the criteria given in Clause 2.3.2(a) of the Request for Proposal, the bidders were required to possess at least two years of experience of running a

minimum fleet of 100 ambulances supported by a control room of at least 35 seats set up. As per the aforesaid Clause 2.3.2(a) of the RFP, the petitioner and M/s Goldrush Sales and Services Ltd., Lucknow mentioned the experience of M/s Falck Benelux N.V. but did not mention about the experience of its another consortium member including Falck Denmark A/S. Further, the experience of M/s Falck Benelux N.V. (which is not a member of consortium formed by petitioner to participate in bid process), also did not meet the requirements of clause 2.3.2(a) of the RFP. The Consultancy Monitoring Committee (the CMC), finding that petitioner's consortium was technically ineligible, forwarded its recommendations to Executive Committee to take decision, and on 3.8.2011 itself, after due deliberations on the issue of technical bid of the petitioner, the Executive Committee took the decision that the consortium of M/s Falck India Pvt. Ltd. (Petitioner) and M/s Goldrush Sales and Services Ltd. is not technically eligible.

10. After evaluation of the technical bids of bidders only two bidders namely, M/s. GVK-EMRI and M/s ZIQITZA Health Care were found to be technically qualified. The Government thus took a decision on 5.8.2011 that for the sake of fair competition and financial propriety it would be proper that notice should be issued again for inviting fresh bids and not to open the financial bids of bidders. The sealed financial bids of the tenderers were thus returned unopened, which was received by Mr. Sandeep Mishra from M/s Goldrush Sales and Services Ltd. on 9.8.2011 who was authorized by Mr. Vikas Kuthiala, Managing Director, M/s Falck India Pvt. Ltd., in the case of petitioner.

11. Thereafter, a tender notice for the EMTS in Uttar Pradesh was again published by Department of Medical, Health and Family Welfare, State Programme Management Unit, National Rural Health Mission, U.P., on 7.8.2011.

12. Against the said tender, total three sealed bids were received before the due date. The due date for receiving the bids was 29.8.2011, at or before 11.00 a.m.

13. The CMC, constituted for opening of bid proposals for the EMTS, started the process of opening of the sealed covers of bids in presence of the representatives of bidders on 29.8.2011 at 12.30 p.m. The representative of petitioner company was also present at the time of opening of sealed bids.

14. The Committee proceeded in accordance with Clause 3 of the Request for Proposal (the RFP) and opened the main envelopes of three bids. All these envelopes were found to contain envelopes like "Part-I the Technical Qualification Bid", "Part-II the Financial Bid" and separate envelopes containing the Demand Drafts. The unopened sealed envelopes "Part-II (the Financial Bids) of three firms were signed by all the committee members and the representatives of three bidders and were re-sealed in a separate brown envelop which was also signed by the committee members and the representatives of bidders. Then the committee apprised the representatives that the evaluation of proposals will be done in due course of time and the bidders who have submitted proposals will be informed accordingly about the result of evaluation before opening of the

Financial Bids.

15. Thereafter, the meeting of the CMC was held on 1.9.2011 to deliberate on and discuss the preliminary findings based on the interim report (the Review of Technical RFP applications) submitted by the consultants namely M/s Ernst and Young for all three bids received for Operation of the EMTS in Uttar Pradesh.

16. In respect of the technical bid proposals, some clarifications were sought from the consortium of M/s Falck India Pvt. Ltd. and M/s Goldrush Sales and Services Ltd., vide letter dated 12.9.2011. In the aforesaid letter dated 12.9.2011, it was also mentioned that the Financial Bids of technically qualified bidders will be opened on 14.9.2011 at 16.30 hrs.

17. The petitioner submitted its clarification on 13.9.2011 which were examined by the consultants M/s Ernst and Young.

18. On 14.9.2011 the CMC held its meeting to deliberate on and discuss about the clarifications and supporting documents submitted by the petitioner in response to clarifications sought vide the aforesaid letter dated 12.9.2011 and the technical bid report submitted by the Consultants M/s Ernst and Young, New Delhi for all three bids.

19. In the meeting, Senior representatives of the Consultants namely M/s Ernst and Young, made a detailed presentation before the CMC on the clarification sought from and provided by the petitioner alongwith the copy of Agreement in support of the claim of technical experience. The issue was discussed in detail before the Committee made its recommendations. However, on the examination of the "Call Centre Services Agreement", it was not found to fulfill the technical criteria for the following reasons:

(i) that the agreement was entered in June 2011 and there is no proof to suggest that prior thereto, for the period from January, 2009-December 2010 there was any formal arrangement in the form of agreement or otherwise to meet the mandatory requirements of the tender. Thus only on the basis of the "Call Centre Services Agreement" provided by the petitioner as a proof of its possessing the minimum experience criteria, the Committee was not satisfied that the consortium of petitioner fulfilled the requirement of minimum experience as required in the tender;

(ii) that even otherwise the "Call Centre Services Agreement" executed by Falck Denmark A/S and Falck Benelux NV was not found to be properly executed because the two parties have signed on different copies of the document and,

(iii) that the specific date of execution of agreement is not mentioned on the copy of agreement provided by M/s Falck India Pvt. Ltd. and it only mentioned like: "This Agreement is made in June 2011". However, the agreement was not found to be legally binding and thus it was not considered to be a valid document.

In the premises as aforesaid, it was finally resolved by the CMC that the

Executive Committee be requested to take decision on its recommendations and declare the list of qualified bidders for opening their Financial Bids.

20. The Executive Committee, on 14.9.2011 found that as per the criteria given in the Request For Proposal, only two bidders namely M/s GVK Emergency Management and Research Institute and the consortium of M/s ZIQITZA Health Care Ltd. and M/s Mather Projects Pvt. Ltd., fulfilled the Technical criteria, and thus decided that their financial bids be opened by the authorized committee.

21. In compliance with the decision of Executive Committee held on 14.9.2011 at 4.00 p.m., the CMC started the proceedings of opening of the financial bids in presence of the representatives of technically qualified bidders and after completing the process, the Executive Committee was requested to accord its approval to M/s GVK Emergency Management and Research Institute as the lowest first (L1) bidder.

Thereafter, the Executive Committee in its meeting held on 14.9.2011 accorded its approval in-principle to give the contract to the lowest first (L1) bidder and sent the proposal to State Government for its consent.

22. Learned Senior Counsel Sri Prashant Chandra, appearing for the petitioner submitted that earlier also, on 31.5.2011 and 24.6.2011, twice, the tender notices had been issued and cancelled. In the tender notice dated 24.6.2011, the petitioner alongwith other tenderers had submitted both, namely, the technical and the financial bids and its financial bid was the lowest. In the third tender notice dated 6.8.2011, the bid of petitioner was again the lowest, however, its technical bid was rejected without a valid reason. According to learned Senior Counsel, though petitioner's Request For Proposal (the RFP) contained all necessary informations as required under the instructions to bidders issued by the official respondent, a letter dated 12.9.2011 was issued to seek clarification from the petitioner regarding statutory auditor's certificate. The petitioner vide the letter dated 13.9.2011 submitted the clarification to the respondent alongwith supporting evidence. The clarification sought by the Mission Director, SPMU, NRHM vide the letter dated 12.9.2011 is as under:

The clarifications submitted in reply thereto by the petitioner vide a letter dated 13.9.2011, are as follows:

(a) Which of the Falck Entity's employee were supporting to Falck Benelux N.V. in ERC/Call Centre

Falck Denmark A/s established Falck Benelux NV in 2006 as a company for Falck's emergency activities in the Benelux-countries. At the same time Falck started integration of systems between the Benelux-company and Falck Denmark A/S. As part of this integration, Falck Benelux NV was included in the Falk IT backbone, which connects Falck entities across Europe.

A part of this integration was also to incorporate a back-up arrangement between the existing call centers, so that in case of call overflow call centers are able to

route calls from one call centre to another. To this effect, Falck Denmark A/S sent a number of experienced call-centre staff to Belgium to learn how to operate the Belgian call centre system. This team also helped in the transition and migration of the skill, process flows and seamless interoperability. The list of these people in the team and their designation is enclosed below:

Tinna Grubbe, Department Head, Falck Control Centre/Vejle

Torben Skovgaard. ERC Manager, ERC Midtjylland/Aarhus

Ulla Rasmussen, ERC Manager, ERC Capitol/Zealand, Copenhagen

Karsten Tokking, Supervisor, ERC Midtjylland/Aarhus

Mads Wejdemann, Supervisor, ERC Midtjylland/Aarhus

Christian Falberg, Supervisor, ERC Nordjylland/Aalborg.

After their visit to Belgium, these managers and supervisors returned back to their regions in Denmark and trained their employees in the call centers at each of the respective locations, bringing the total number of employees able to take Belgian calls to well over 50, and effectively distributed across all the Danish call centers. Please note that even within Denmark the ambulance operations are sustained by more than one call centre as the network of call centers is further decentralized across several regions North Jutland. Central Jutland, Southern Denmark, Zealand, Capital (in Denmark the regions are equivalent of States in India). So the Benelux call centre has, when necessitated, a seamless interoperability with not one call centre location but a network of well distributed and decentralized call centers.

(b) Please provide the explanation on the nature of support given by this Entity alongwith relevant proof of the support extended to Falck Benelux N.V. during 2009 and 2010.

As Falck Denmark A/s has extensive know-how and capabilities within the field of call centers, it has supported Falck Benelux throughout the period, including in 2009 and 2010. We have ensured that interoperability is live at all times and call flows and escalations can occur in real time.

The nature of the agreement is a back-up agreement in case of overflow, and has been in force throughout 2009 and 2010. This is in keeping with international best practices for emergency call centers where even after creating adequate call handling capacity and buffer in one location a system is devised to give seamless access to other locations to immediately escalate the operations to handle large scale accidents, disasters and catastrophes.

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The Agreement and its provisions have been sustained through 2009 and 2010 by way of continued supervision, testing and visits to the site by Falck IT executives.

Falck Group IT department has continuous operational interface with Falck Benelux, and are working with Falck Benelux to help upgrade the call-and control centre with new dispatch software. IT-infrastructure and server infrastructure. The personnel involved here included:

Jesper Sanholt, Head of Falck IT Server department

Kasper Brandt Svanekjaer, IT-infrastructure specialist

Operations Analyst Jesper Kroyer Hansen of Falck Denmark spent over 9 months in Falck Belgium to implement the new dispatch system and supports the integration of the Belgian operation into the Danish organization. Mr. Hansen was present during the EMTS pre-bid meeting, which was held in New Delhi in April 2011.

(c) Supporting evidence

It is standard Falck practice to support its subsidiaries within the Falck Group with whatever assistance they need, be it operational, technical, logistical or otherwise. Most of this support takes place without any form of specific written agreement between the affiliated companies. In the case of the support to Falck Benelux, an agreement was signed in June 2011, which formalizes the cooperation.

We have enclosed a scanned copy of this agreement for your information. Please note that according to Danish and Benelux law such agreement does not require any official stamps, logos, notarization etc to be legally valid and enforceable. Legally, the signatures by the authorized signatories of the companies are sufficient to establish a binding contract. The agreement is approved by Falck Group Legal department in Copenhagen, and effectively confirms the arrangement from the time of the establishment of Falck Benelux NV in 2006.

As part of the clarifications of our bid in July 2011, we have previously submitted a declaration from the managing director of Falck Benelux NV which confirms the arrangement on call-centers between Falck Benelux NV and Falck Denmark A/s. We enclose this statement again for your convenience.

23. Sri Prashant Chandra, learned Senior Counsel, also referred to the eligibility to bid as prescribed in the Request For Proposal (the RFP) as under:

Vide the letter dated 24.9.2011, the Mission Director, NRHM (respondent No. 2) did not agree with clarifications for the following reasons:

The clarification and Agreement were examined by the Authority and it was found that the said Agreement was not legally binding and the same could not be considered for the purpose of treating you as Technically qualified. In fact, the Agreement was entered into "in June 2011" and the same was otherwise undated. There is further no proof whatsoever that any formal arrangement existed, either in form of an Agreement or otherwise, during the period you have shown as period of experience (January 2009 to December 2010). The "Call

Center Services Agreement" is also not properly executed Agreement in as much as the Agreement between M/s Falck Denmark A/S and M/s Falck Benelux NV is not signed by both parties and in fact the two parties have signed on different copies of the same page of the Agreement.

Under the circumstance stated above your Financial Bid was not considered for opening since you did not fulfill the minimum eligibility criteria (in terms of Technical capacity) as per the RFP document.

Sri Prashant Chandra, learned Senior Counsel, contended that the experience of one member has to be counted as the experience of all members of the consortium. He further submitted that the Agreement entered into between FALCK, DENMARK A/S AND FALCK, BENELUX NV has been duly signed by both the parties as per the law governing the subject-matter in the European Economic Community which includes BENELUX countries; and the Authority cannot sit over the said agreement which had been ratified to be duly binding between both the parties; and a certificate to that effect had also been filed. According to learned Senior Counsel, reference to experience pertaining to period January, 2009 to December, 2010 is totally misplaced as the same is against the very concept of a consortium or a joint venture, by whatever name called. It is indeed surprising that even after mentioning of judgments of Hon''ble the Supreme Court in the body of writ petition, a totally contrary stand has been taken by the respondents in justifying the non-opening of petitioner's financial bid. Further according to learned Senior Counsel, the petitioner has little hesitation in submitting that the Authority concerned namely the Mission Director, who has taken the decision after filing of writ petition with apparent premeditation, has acted in a contemptuous manner in as much as the reasons indicated in the order dated 24.9.2011 are against the principles laid down by Hon''ble the Supreme Court.

Sri Prashant Chandra, learned Senior Counsel, pointed out that in the order dated 24.9.2011, nothing has been explained to show as in respect of which terms of technical capacity forming a part of the RFP document, the petitioner has failed to fulfill the minimum eligibility criteria. He contended that the order dated 24.9.2011 has been issued for the sake of justifying the refusal to open petitioner's financial bid on 14.9.2011 and with the objective of raising a lame defence in doing so. In support of his contention, learned Senior counsel placed reliance on a judgment of Hon''ble the Apex Court in the case of Ganpati RV-Talleres Alegria Track Pvt. Ltd. Vs. Union of India (UOI) and Another, .

Sri Prashant Chandra, learned Senior Counsel argued that issuance of Government order and Letter of Intent dated 11.11.2011, is contemptuous having the effect of impeding the course of justice. It is also extraneous and mala fide in as much as the petitioner has wrongly been disqualified technically, for untenable and unsustainable reasons. In furtherance of this submission, he contended that a reading of Government order dated 11.11.2011 would indicate that while technically disqualifying it, the total experience of Joint Venture of

petitioner, which includes the experience of its associates has not been taken into consideration even while the Request For Proposal duly submitted by the petitioner contained a joint venture agreement dated 15.6.2011.

Sri Prashant Chandra, learned Senior Counsel, also pleaded that the clarification dated 13.9.2011 submitted by the petitioner contained the certificate of auditor as well as supplementary agreement entered into between FALCK BENELUX and FALCK DENMARK in support of the documents already submitted to indicate that in rendering the services under the contract, FALCK BENELUX shall actively participate. Consequently, the presumption drawn that the experience of FALCK DENMARK (being a party to the Joint Venture) cannot be counted as the experience of the Joint Venture is per se erroneous and in any case contrary to the law laid down by Hon''ble the Apex Court in the case of New Horizons Limited and Another Vs. Union of India (UOI) and Others, .

24. Learned Senior Counsel also explained that the manner in which the clarificatory agreement was executed between FALCK DENMARK and its associates, is internationally accepted business practice. There is no reason to say that the State Government is not aware of such a well-settled practice for signing of every agreement and it is no longer required for the parties to converge at one particular place for appending their signatures.

25. It is also an argument of learned Senior Counsel Sri Prashant Chandra that after the request certificates were submitted indicating that there would be active participation of Falck Denmark A/S as a part of joint venture, a presumption on to the contrary could not have been drawn and the petitioner could not have been technically disqualified.

26. Learned Senior Counsel contended that the additional information supplied by the petitioner was unilaterally considered and misconstrued. The petitioner was not provided an opportunity of hearing to explain the same, and besides, no reason not to accept the auditor's certificate was assigned by respondent No. 2, the Director NRHM. It is reiterated in the submissions that the FALCK Group experience includes the experience of FALCK Denmark and FALCK Benelux being the affiliates of the same group. It is also an argument on behalf of the petitioner that its financial bid submitted in pursuance of the tender notification dated 24.6.2011 had remained with the respondents for a considerable period of time, and therefore, there was an apprehension that its bid must have been opened and seen by them. It is also submitted on behalf of the petitioner that vide order dated 30.9.2011 respondent No. 2 was not granted liberty to continue with the process of finalization of tender. The order had only required respondent No. 3 to file a counter-affidavit. As per submission on behalf of the petitioner, the order dated 30.9.2011 has been deliberately misinterpreted to show as if respondent No. 2 had acted in compliance of that order. In fact, respondent No. 2 ought to have filed counter-affidavit instead of finalizing the bid.

27. On the contrary, the letter of intent was issued on 11.11.2011 and the tender

contract was signed on 21.12.2011. It is also an argument on behalf of the petitioner that the reason for awarding contract to respondent No. 3 was recorded on 11.11.2011 whereas the petitioner was declared as disqualified in the technical bid earlier on 14.9.2011 itself, irrespective of the fact that in the meeting of the CMC held on 29.8.2011, petitioner's technical bid had been accepted. Thus, the ousting of petitioner from the area of consideration was premeditated and reasons to justify were manufactured subsequently, much after filing of the writ petition.

28. Learned Senior Counsel appearing on behalf of the petitioner criticized the stand of respondent No. 2 in as much as it is his contention that there was no reason to take time of four months just to get the draft of counter-affidavit settled by learned Additional Advocate General, particularly in view of the fact that the Court had directed filing of counter-affidavit by 14.10.2011. It is further contended that there is no occasion for involving an outside consultant M/s Ernst and Young for "Review of Technical RFP Applications". The terms and conditions of the tender are unambiguous and clear, in accordance with which the petitioner had duly qualified and in support, the experience of FALCK Benelux is already available to the consortium of petitioner vide a joint venture agreement which specifically mentioned as :

(s) "Falck Group" shall mean Falck Denmark and its downstream Affiliates.

29. In fact, the Director of FALCK BENELUX had directly addressed letter dated 2.8.2011 to the Mission Director, SPMU-NRHM that they have been a part of FALCK since 2006 and are also a part of FALCK IT backbone. Further, it was clarified in the said letter that there has been intensive IT cooperation and know how transfer between FALCK Denmark A/S and FALCK Belgium A/S, including staffing, software support, etc which would thus mean that the additional call centers employees should be taken into account when assessing the technical capacity of FALCK BENELUX NV as they were and had been at their disposal since 2006. Once the letter of 2.8.2011 was already furnished by FALCK BENELUX to the respondents, there was no occasion to ask for any further clarification in respect of the technical capacity of petitioner. The CMC in fact in the Minutes of its Meeting dated 29.8.2011, has recorded that the experience of Call Centre may be considered while computing the technical capacity of petitioner. The relevant portion of the Minutes of Meeting dated 29.8.2011 are being reproduced here under :

30. In clarificatory reply, the petitioner furnished a certificate from its statutory auditor regarding the associates of FALCK. In fact, while assessing the technical capacity of respondent No. 3 the undertaking from statutory auditor of respondent No. 3 has been taken into consideration and in the most discriminatory manner the certificate submitted by the petitioner has been disregarded. A bare perusal of the certificate from statutory auditor submitted by the petitioner would show that the petitioner was technically qualified and its technical bid could not have been rejected. Further according to learned Senior

Counsel, be that as it may, the petitioner was technically qualified and is the lowest bidder, and thus, the tender in question ought to have been awarded to it. The relevant extract from statutory auditor's report as submitted by the petitioner was referred to, during the course of arguments, and therefore, it is reproduced here under:

FORMAT 16 Certificate from Statutory Auditor regarding Associate.

Based on the authenticated record/Annual Report of the Falck Group, this is to certify that more than 50% (fifty percent) of the subscribed and paid up voting equity of Falck India Pvt. Ltd. is held, directly or indirectly, by FALCK Denmark A/S; and more than 50% (fifty percent) of the subscribed and paid up voting equity of Falck Benelux NV is held, directly or indirectly, by Falck Denmark A/S.

By virtue of the aforesaid shareholding, Falck Denmark A/S exercises control over Falck India Pvt. Ltd. and Falck Benelux N.V. Consequently the companies are under "common control" and Falck Benelux N.V. thereby an "Associate" of Falck India Pvt. Ltd. in terms of Clause 2.3.1

The shareholdings of Falck Denmark A/S is as follows:

Falck India Pvt. Ltd. : 99%

Falck Benelux N.V. : 60%

Name of the audit firm/company secretary : KPMG

31. Besides, according to learned Senior Counsel, the letter dated 12.9.2009 seeking clarifications from the petitioner does not mention about the evaluation done and the report submitted by M/s Ernst and Young and the said allegations that the petitioner did not qualify the technical bid was just an afterthought. It has been submitted that the findings recorded by the Committee are factually incorrect and do not conform to the terms as contained in the Joint Venture agreement which specifically describes the Falck Group. In fact, there was no necessity to seek any clarifications, as the documents supplied by the petitioner with the bid clearly indicated that the Falck Group consisted of its Affiliates as well. Learned Senior Counsel contended that hyper-technical issues are now being raised in the counter-affidavit to somehow justify the rejection of technical bid of the petitioner, which as per the tender documents submitted, could not have been done. In fact, seeking a clarification vide the letter dated 12.9.2011 is an eyewash as all necessary materials were already on record. It is also submitted that the agreement inter se the Affiliates of Falck Group are valid and binding and have been executed in accordance with the settled and accepted business norms in the European Economic Community. The certificate given by Auditor has deliberately been ignored which confirms the active participation of FALCK BENELUX in the execution of contract.

32. On the contrary, it is the argument on behalf of petitioner that as per the tender document submitted by the consortium of GVK and Emergency Medical

Research Institute (EMRI), it was not qualified as it was unable to execute a similar contract (entered into between them and the Government of Rajasthan). The inclusion of respondent No. 3 amongst the qualified tenderers, is extraneous and mala fide and contrary to public interest. It is also a submission that the entire transactions of granting the tender smacks of mala fide and there is complete lack of transparency in finalizing the contract in favour of an unqualified tenderer, namely, respondent No. 3.

33. Vide condition No. 2.3.6 if an entity is barred by any Government, it will stand disqualified. The said condition reads as under :

2.3.6 Any entity which has been barred by the Government of Uttar Pradesh, any other State Government or Government of India from participating in any project, and the bar subsists as on the Proposal Due Date, the entity would not be eligible to submit the Proposal, either individually or as member of a Consortium. The Bidder/member is expected to submit an affidavit to this effect as per FORMAT 4 as part of the Qualification Proposal.

34. On the other hand, vide the minutes of meeting held on 1.9.2011 to deliberate and discuss the preliminary findings based on the interim report "Review of Technical RFP Applications" submitted by the consultants M/s Ernst and Young in respect of three bid proposals received on 29.8.2011, the CMC has recorded its findings regarding computing of technical capacity against Format No. 11 and Format No. 12 as under:

35. In addition to the aforesaid submissions, it is also a contention on behalf of the petitioner that the Government of Rajasthan had terminated the services of respondent No. 3 on account of some discrepancies in executing the project.

36. On the other hand, learned Senior Counsel, Shri J.N. Mathur appearing for respondent No. 2 namely the Mission Director of Project under NRHM submitted that against the first tender advertisement dated 31.5.2011 only two tenders were received on due date i.e. 21.6.2011 as submitted by M/s GVK (EMRI) (respondent No. 3 herein) and one M/s ZIQITZA Health Care and the petitioner company had not participated. Thus, the Chief Secretary, Government of U.P. on 23.6.2011 directed the official respondents to go for re-tendering on the ground of financial propriety and fair competition. Therefore, the technical bids submitted in first tender by the aforesaid two tenderers were not evaluated and their sealed bids were returned as they were, to the bidders. Second tender was advertised on 24.6.2011 and a pre bid meeting was held on 30.6.2011 wherein the petitioner also participated. Till the due date, namely, 15.7.2011, three bids were received, one each from the earlier two bidders (M/s GVK (EMRI) and M/s ZIQITZA Health Care) and the third from petitioner M/s Falck India Pvt. Ltd. These technical bids were opened on the same day i.e. 15.7.2011, in the presence of representatives of bidders, by the Consultancy Monitoring Committee (the CMC). The technical bids were evaluated on 19.7.2011 by the consultants namely M/s Ernst and Young who submitted interim technical evaluation report

to the CMC which reviewed the report on the same date.

37. After review, the committee sought clarifications from two firms, namely, M/s ZIQITZA Health Care and petitioner. On 22.7.2011, letters of clarification were also issued to the third bidder M/s GVK (EMRI) which as well as the petitioner inter alia was asked to clarify about the pre-condition in the RFP regarding the experience. On 3.8.2011, the CMC met to deliberate and discuss the clarification furnished by bidders in response to letter dated 22.7.2011. The representatives of bidders were requested to remain present during the CMC meeting on 3.8.2011 to provide further clarification/explanation. Finally, the CMC referred the matter on the issue of lack of experience of petitioner's consortium to the executive committee. The findings of the CMC were also put up before the executive committee in its meeting held on 3.8.2011 for approval. The executive committee took a decision that the consortium Members of petitioner (M/s. Falck India Pvt. Ltd. and M/s. Goldrush Sales and Services Ltd.) were not technically qualified. After the evaluation of technical bids, only two bidders, namely, M/s GVK (EMRI) (respondent No. 3) and M/s ZIQITZA Health Care were found eligible and the technical bid of petitioner was rejected. The State Government, thus, again took decision that since only two bidders were found technically qualified, therefore, for the sake of fair competition, it would be proper to publish notice to invite fresh tenders. Thus, the sealed financial bids were returned to all three bidders. On 7.8.2011, a third tender notice was published for inviting tenders for the EMTS and the last date was fixed as 29.8.2011 till 11:00 a.m. for receiving bids. On 29.8.2011, against the re-tendered advertisement dated 7.8.2011, again only three bids were received from the same parties, namely, (a) M/s GVK (EMRI) (respondent No. 3), (b) Falck India Pvt. Ltd. (petitioner) and (c) M/s ZIQITZA Health Care.

38. The CMC constituted for opening of bids proposal, opened the sealed bids on the same day i.e. 29.8.2011 in the presence of representatives of bidders. On 1.9.2011, the technical bids were evaluated by the same consultants namely M/s. Ernst and Young and an interim technical evaluation report was submitted by them, which was reviewed by the CMC on 1.9.2011. The CMC was of the opinion that the petitioner Company was not technically qualified because it did not have the requisite experience, however, the issue of inclusion of experience of Falck Benelux NV, as claimed by petitioner was left by the CMC for decision of the executive committee. The executive committee on 12.9.2011 directed that an explanation be called for, from the petitioner regarding its experience and that is how the letter dated 12.9.2011 was issued to clarify the following:

- (1) Which of the FALCK entity were supporting FALCK Benelux NV in ERC/Call Centre, and
- (2) Nature of support extended to Falck Benelux NV in 2009 and 2010 with evidence.

39. In the said letter, it was also mentioned that the financial bids of technically

qualified bidders will be opened on 14.9.2011 at 16:30 hrs.

40. On 13.9.2011, the petitioner submitted its clarification as referred to hereinabove. However, it was for the first time, that the petitioner produced a document purporting to be the "Falck Call Centre Services Agreement", which was undated and unsigned by both the parties on the same pages of agreement supposedly entered into, sometime in June 2011. On 14.9.2011, a CMC meeting was held to discuss and deliberate on the clarifications submitted by petitioner and a detailed presentation was also made before the CMC by senior representatives of the consultants M/s Ernst and Young. The issue was discussed in detail and it was found that the petitioner Company did not fulfill the technical criteria because of the following reasons :

(i) Agreement was entered in June, 2011 and there is no proof that the formal agreement existed, either in form of Agreement or otherwise, during the period from January 2009 to December 2010, which is the mandatory requirement of the tender;

(ii) The Call Centre Service Agreement" executed by FALCK Denmark A/S and FALCK Benelux NV is not properly executed, and

(iii) The specific date of execution is not mentioned on the Agreement provided by M/s FALCK India Pvt. Ltd.

41. On 14.9.2011 itself, the findings of the CMC were put before the executive committee, and the executive committee took a decision that as per criteria given in the RFP, only two bidders were found qualified namely, M/s GVK EMRI (respondent No. 3) and M/s ZIQITZA Health Care and the petitioner was found unsuccessful in its technical bid. The committee also decided to open the financial bids and the same day it started further proceedings to open them in the presence of representatives of technically qualified bidders. Thereafter, the executive committee accorded its approval in principle to give contract to "L1" bidder i.e. M/s GVK EMRI (respondent No. 3). On 11.11.2011, a Government Order was issued after Cabinet approval which contained the details of considerations that weighed in the mind of Government while awarding the contract to M/s GVK (EMRI) (respondent No. 3). On that day itself, the letter of intent was also issued to M/s GVK (EMRI) (respondent No. 3), which besides being technically qualified in all respects, offered the lowest costs. The letter of intent recorded the following note :

With a note that your declaration as "Selected Bidder" is subject to the final decision of the writ petition No. 9481 (MB) of 2011 M/s Falck India Pvt. Ltd. v. State of U.P. and Others, pending before Lucknow Bench of Hon"ble High Court of Judicature at Allahabad.

42. On 29.12.2011, an agreement was executed between the State Government and M/s GVK EMRI (respondent No. 3) again with the aforesaid note. Thus, according to Shri Mathur, learned Senior Counsel, the petitioner was granted

enough opportunity at every stage and after careful scrutiny of all three bids, he was found to be technically disqualified in both the subsequent tenders. Shri Mathur also submitted that the petitioner company is an Indian company with no experience of its own. It had entered into a consortium agreement with two foreign concerns just in order to use their experience for the purpose of getting the contract in question. Thus, looking to their experience, the Government was not satisfied to award the contract. The petitioner company was not qualified to apply for the first tender, and as a calculated move, after going through the requirements of the first tender, it had entered into the agreement with foreign companies. Shri Mathur also submitted that the consortium agreement of petitioner with Falck Benelux NV was only for two years whereas in respect of instant case, it was required for five years. There was no signature of CEO of Falck Denmark A/S and this agreement was only for limited purpose. Falck Benelux NV is not the holding company of two others members of the consortium and only Falck Denmark A/S is the holding company and Falck India Pvt. Ltd. is its subsidiary. The letter of comfort was not issued by Falck Denmark A/S but by Falck Benelux NV. In this case, Falck Benelux NV only has the experience and its experience is not the experience of the holding company or the Indian subsidiary. In the emergency response centre of the company, as per Statutory Auditor's Certificate, Falck Benelux NV has 61 Call Operators including 50 additional Call Operators. However, the CMC had found after examining the relevant details that Falck Benelux NV has only 11 seats and for extra 50 seats, they are supported by other Falck entities. Besides, the agreement with the Indian subsidiary as well as the experience should have been for two years prior to submitting the bid, whereas the call centre agreement is only of June, 2011. According to Shri Mathur, learned Senior Counsel, the allegation of petitioner that the technical bid conditions were changed is also not correct.

43. Vide condition No. 2.3.9 of the RFP, a bidder was required to furnish all its information and certification with reference to two years period preceding its latest financial year. As per the report of the CMC on respondent No. 3, the two preceding financial years supported by audited annual reports have been counted as 2009-2010 and 2008-2009 for the evaluation of financial capability which were in terms of the clarification provided in the minutes of Pre-Bid meeting held on 30.6.2011 at Lucknow.

44. Shri S.K. Kalia, learned Senior Counsel appearing for respondent No. 3 submitted that the petitioner Company has been found not qualified as per clause 2.3.2 as well as 2.3.7 of the RFP. The said clauses are reproduced as under :

2.3.2 (a) Technical capacity: The Bidder should have at least 2 (two) years experience of running a minimum fleet of 100 ambulances supported by a control room of at least 35 seats set up by the Bidder.

2.3.2(b) Financial Capacity: The Bidder should have annual turnover/gross receipts for the last two financial years of at least Rs. 50 crores for each financial

year.

For the purpose of evaluation of a Consortium, the combined technical and financial capacity of those Members, who have and shall continue to have an equity share of at least 26 % (twenty six per cent) each in the SPV, should satisfy the above conditions of eligibility; provided that each Member shall, for entire Management Agreement period, commit to hold equity share capital not less than 26% (twenty six per cent) of the subscribed and paid up equity of the SPV.

2.3.7 In computing the Technical Capacity and Financial Capacity of the Bidder/Consortium Members under Clauses 2.3.2, the Technical Capacity and Financial Capacity of their respective Associates will also be considered, provided the Bidder/Consortium Member furnishes alongwith the Bid a letter of Comfort and Undertaking from such Associate as per the format at FORMAT 15 and FORMAT 16, alongwith certified copy of the Board resolution of the Associates authorizing execution of the Letter of Comfort and Undertaking.

For purposes of this RFP, Associate means, in relation to the Bidder/Consortium Member, a person who controls, is controlled by, or is under the common control with such Bidder/Consortium Member (the "Associate"). As used in this definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (Fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law.

For avoidance of doubt it is made clear that in the case of indirect shareholding, the intervening companies in the chain of ownership shall also be associate but the shareholding in each such company should be more than 50%.

45. The technical bid of petitioner was deliberated and discussed elaborately in the Consultancy Monitoring Committee (the CMC) meeting dated 1.9.2011. As per the requirement of the RFP, the petitioner company submitted the Letter of Comfort of Falck Benelux NV, one of its consortium members, thus, the experience of that Company was considered but it was found that even Falck Benelux NV did not possess requisite two years experience of control room of at least 35 seats. If the petitioner company wanted to claim the experience of its holding company Falck Denmark A/S, it should have submitted the Letter of Comfort of that Company in format 15 as envisaged in the RFP instead of Falck Benelux NV. The certificate of Statutory Auditor submitted in support of the experience of Falck Benelux NV mentioned that Falck Benelux NV has 61 call operators including 50 additional call operators, who are supporting Falck Benelux NV from other Falck entities. Thus the petitioner did not possess any technical experience in this field. Even the member of its consortium namely Falck Benelux NV has only 11 seats and they were being supported for extra 50 seats by other entity namely Falck Denmark A/S. Thus the petitioner Company

was not technically eligible and for that matter even its associate Companies also did not possess the requisite experience as envisaged under the RFP. Therefore, the experience being claimed by Falck Benelux NV of a control room of 61 seats, out of which in fact it has only 11 seats, is not adequate and thus does not meet the requirement of experience. It has been claiming experience of additional 50 seats on the basis of agreement entered into between Falck Denmark A/S (the holding Company) and Falck Benelux NV. The Falck Call Centre Services Agreement has not been found legally binding as a valid document by the CMC. 47. It is also evident that the said agreement was entered into in June, 2011 only for a period of two years whereas the present tender was floated for a period of five years, and thus, on that ground also, the petitioner Company has been rendered ineligible. Besides, the said agreement between Falck Denmark A/S and Falck Benelux NV has been signed on its two different copies by the parties which clearly shows that the document cannot be held to be legally binding as a valid document in the absence of signatures of both parties on the same copy as per standard practice being followed in India and also internationally.

46. It is also contended that the Falck Call Centre Services Agreement vide clause 4.2 states that Falck Denmark A/S shall not be liable for any breach committed by licensed subsidiary, thereby, making it very clear that in case the petitioner Company defaulted or failed to perform its part of contract, then its holding Company Falck Denmark A/S would not be liable, whatsoever, irrespective of being a Member of the consortium of petitioner. According to learned Senior Counsel, in addition to the aforesaid grounds of ineligibility, though the tender was submitted by the consortium of Falck India Pvt. Ltd. and Gold Rush but the present petition has been filed by only Falck India Pvt. Ltd. (and not by Gold Rush). In view of all the aforesaid facts, it was vehemently argued that the petitioner Company does not have any experience of its own nor does it possess the financial capacity to participate in the present tender. It is partly relying on Gold Rush for its financial eligibility, and completely relying on Falck Benelux NV for technical eligibility. The present Consortium was incorporated in the year 2011 and both Indian members of the consortium namely Falck India Pvt. Ltd. and Gold Rush did not possess any experience for providing the EMTS and they have only tried to seek the benefit of experience of one of their associates namely Benelux NV. However, that also does not help the petitioner for the reason that Benelux NV itself did not possess the technical experience as they did not have minimum number of seats namely 35 as envisaged under the RFP. That apart, the last para of Format 15 namely the letter of comfort categorically states that the person issuing letter of comfort shall be jointly and severally liable for the consequences of any breach in the present project and respondent No. 2 shall have the right to take action against the party as it is deemed fit. However, it is only in order to specifically avoid this liability that Falck Denmark A/S on whose experience Falck Benelux NV is counting upon, did not wish to give the letter of comfort and on the contrary the said letter of comfort was issued by Falck Benelux NV which did not possess

requisite technical qualification. For counting experience of Falck Denmark A/S it was necessary for it to give a letter of comfort as per terms of the RFP (the tender document) but it has failed to do so. It was precisely under these circumstances that the CMC and the Executive Committee finally held the petitioner ineligible which was justified on the touchstone of terms of the tender. There was no iota of arbitrariness and that the reason given for the rejection of technical bid is very much justified. The answering respondent submitted that in the light of the above, there is no ground to call for interference by this Court.

47. On the other hand, respondent No. 3 was found to be fully qualified, technically as well as financially, as per the conditions of the RFP. Regarding the allegation of petitioner that respondent No. 3 was ineligible to participate in the present tender, for, it was directly hit by clause 2.3.6 of the RFP, because the Government of Rajasthan in 2009 had terminated its contract with this the respondent, from the perusal of aforesaid conditions of tender, it would appear that any entity which has been barred by the Government of U.P. or any other State Government or the Government of India and if such bar subsists as on the date of proposal, then that entity would not be eligible to submit the proposal. However, respondent No. 3 was never black-listed/debarred by any State Government nor did any bar subsist on the due date of proposal as is obvious from the fact that even as late as on 19.2.2010 the Government of Rajasthan had found respondent No. 3 to be technically eligible for its project, and had invited it for opening of its financial bid.

48. In the meeting dated 1.9.2011 the issue regarding the eligibility of respondent No. 3 was discussed at length and finally the said respondent was found to be eligible for evaluation of the financial bid. Further, a plea was raised for the first time in the counter-affidavit filed in reply to application for vacation of stay on behalf of respondent No. 3 that the said respondent was not qualified, for, it was granted relaxation in respect of supply of its audited balance sheets. Respondent No. 3 should have submitted its balance sheets for the year 2009-10 and 2010-11 whereas the balance sheets submitted by it only related to the year 2008-09 and 2009-10. In answer to this submission, Sri Kalia, learned Senior Counsel, urged that this issue has not been raised in the writ petition. Moreover, in the pre-bid meeting held on 30.6.2011, which was also attended to by the petitioner, the tendering authority had clarified the queries as per Point No. 12 that for the purpose of financial capacity, if any bidder is not able to provide the annual reports for the period ending on 31st March, 2011 as required by the RFP, in that case, two consecutive financial years preceding the latest financial year can also be considered for the purpose of determining the financial capability and such bidder would be allowed to submit the said annual reports. Thus if the financial year is ending on 31.3.2011 and the audit is yet to be concluded, then the annual reports of financial years ending on 31.3.2010 and 31.3.2009 would be relevant for consideration. Respondent No. 3 also submitted the requisite reports of Statutory Auditor as required in the pre-bid meeting. Thus the CMC found respondent No. 3 to be financially eligible while recording its view as

under :

The Bidder has provided the Undertaking from Statutory Auditor for non availability of Audited Annual Report for FY 2010-2011, thus year 1 has been considered as 2009-2010 and year 2 as 2008-2009 for the Evaluation of Financial capability, as per the clarifications provided in the Pre bid Minutes of Meeting held on 30th June 2011 in Lucknow. The Audited Annual Reports for FY 2009-2010 and FY 2008-2009 have been submitted.

49. Learned Senior Counsel Sri Kalia thus contended that it is strange that the petitioner Company has raked up this issue after itself having availed of such relaxation in the second tender bid which is evident from the perusal of the minutes of meeting of the CMC dated 3.8.2011. The issue was also clarified in the pre-bid meeting held on 30.6.2011. Regarding the question that respondent No. 3-Company was incorporated in the year 2009 only, therefore, it was not eligible to participate in the tender, from the averments in counter-affidavit filed by the said respondent it is obvious that only the name of Company from Emergency Management and Research Institute was changed to GVK Emergency Management and Research Institute. Even the old registration number of 2005 (187 of 2005 dated 17.2.2005) is still continuing. Besides, the Company has been successfully operating its services in 11 States in India, therefore, it has sufficient experience to perform the obligation under the tender agreement.

50. On due consideration of rival submissions, we are of the view that the one and only important point that may require our anxious consideration is: whether the experience of consortium members of the petitioner company was sufficient to meet the requirements of Clause 2.3.2 as well as 2.3.7 of the RFP. The experience of consortium members of the petitioner company as required under the conditions of tender was for two years prior to the date of submitting the bid whereas their agreement, namely the "Falck Call Centre Services Agreement", itself had been entered into, in the month of June, 2011 and that too, only for a period of two years, although the tender requirement was for an agreement for a period of five years. The validity of agreement is questionable also on the ground that it is signed on two different copies of the same pages of agreement by the parties. The agreement is not free from the shade of doubt also for the reason that vide Clause 4.2 thereof the holding company namely Falck Denmark A/S has not issued the letter of comfort and thus is not to be held liable for any breach committed by the licensed subsidiary. Therefore, in case of any default by the petitioner company in performing its part of contract, its holding company Falck Denmark A/S would not be liable irrespective of its membership of the consortium. The petitioner company has relied upon the experience of its consortium member Falck Benelux NV, which is not the holding company of other Falck entities. Besides, though the statutory auditor's certificate suggested that Falck Benelux NV has 61 call operators including 50 other call operators, however, the CMC after examining all the relevant details found that Falck Benelux NV has only 11 seats and for extra 50 seats, they are supported by

other Falck entities.

51. Even Falck Benelux NV did not possess the requisite two years' experience of control room of at least 35 seats. If the petitioner company wanted to claim the experience of its holding company Falck Denmark A/S it should have submitted the letter of comfort of that company in format 15 as envisaged in the RFP instead of submitting such letter of Falck Benelux NV. Thus, neither the petitioner company nor its associate Falck Benelux NV possessed the requisite technical experience for claiming grant of the tender under the RFP. Moreover, the petitioner company produced the document purporting to be the "Falck Call Centre Services Agreement" for the first time in its clarification on 13.9.2011. But that document is undated and even unsigned by both the parties on the same pages of agreement. Thus in rejecting the technical bid of the petitioner company on the ground of lacking requisite experience, the respondents have carefully considered the tender documents and meticulously followed the procedure as prescribed for inviting as well as opening of the tenders, and in the process, had also asked for clarification from the petitioner company vide letter dated 12.9.2011 which was replied to on 13.9.2011. The said clarifications were examined by the consultants namely M/s Ernst and Young. Thereafter, the CMC held its meeting on 14.9.2011 to examine the clarifications and supporting documents submitted by the petitioner company and the technical bid report given by the consultants M/s Ernst and Young, New Delhi, for all three bids. In this meeting the senior representatives of the consultants firm made a detailed presentation before the CMC and only then the CMC was satisfied, in particular, on examination of the "Call Centre Services Agreement", that the petitioner company was found not fulfilling the requirements of technical criteria. The reasons also weighed in the mind of CMC were that the said agreement was entered into in June, 2011 and that there was no proof to suggest that prior there to, for the period from January, 2009-December, 2010 there was any formal arrangement in the form of agreement or otherwise to meet the mandatory requirements of the tender. Secondly, the agreement was not found to be properly executed as both the parties namely Falck Denmark A/S and Falck Benelux NV have not signed on the same pages of agreement. And thirdly, the specific date of execution of the agreement was not mentioned on the copy of agreement. Thus, the CMC passed a resolution that the executive committee be requested to take a decision on the recommendation and declare the list, of qualified bidders for opening of their financial bids. Finally, two bidders namely respondent No. 3, and the consortium of M/s ZIQITZA Health Care Ltd. and M/s Mather Projects Pvt. Ltd. were found to be fulfilling the requirements of the tender in respect of the technical bid. Thus, in compliance of the decision of executive committee held on 14.9.2011 at 4.00 pm, the CMC started proceedings of opening of the financial bids in presence of the representatives of technically qualified bidders and after the process was completed, the executive committee was requested to accord its approval to respondent No. 3 being the lowest number one (L-1) bidder. The executive committee in its meeting of the same

date accorded its approval in principle to give contract to the first lowest bidder (L-1) and sent the proposal to the State Government for its consent.

52. Regarding the submission on behalf of the petitioner that the experience of one member of consortium should be counted as the experience of all members of consortium, it is noticeable that none of the consortium members of petitioner company possessed the requisite technical experience to fulfill the requirements of conditions of tender in respect of the technical bid as discussed herein above.

53. Respondent No. 2 vide the letter dated 24.9.2011 did not agree with the clarifications of the petitioner company for the reason that the agreement between Falck Denmark A/S and Falck Benelux NV was not legally binding and thus the same could not be considered for treating the petitioner company technically qualified. The agreement was entered into, only in June, 2011 and the same was otherwise undated. There is no proof whatsoever that any formal arrangement existed either in the form of agreement or otherwise during the period from January 2009-December 2010 for the purpose of counting the experience. The agreement was not signed by both the parties and in fact both the parties have signed on different copies of the same pages of agreement, hence, the financial bid of the petitioner Company was not considered. Besides, the experience of Falck Benelux NV was not found sufficient enough to meet the requirement of the tender conditions.

54. Insofar as the argument regarding the date of incorporation of Respondent No. 3 is concerned, learned Senior Counsel has clarified that there was no change in its old Registration Number.

55. In view of the aforesaid reasons, we also do not find any element of mala fide in the conduct as well as the procedure adopted by the respondents. We are not satisfied with the explanation given by the petitioner for not signing on the same pages of agreement by both the parties of petitioner's consortium namely Falck Denmark A/S and Falck Benelux NV, apart from the fact that neither of them possessed the requisite experience and Falck Demark A/S being the holding company, did not issue the letter of comfort.

56. In view of all the aforesaid and also for the fact that respondent No. 3 has successfully undertaken the project in as many as 11 States we do not find any ground to interfere with the tender process as also the grant of tender in favour of the petitioner. In addition to above, in order to ensure the transparency and fair competition, the State Government issued three advertisements in respect of the tender and the petitioner company came into picture only in advertisement Nos. 2 and 3 as it did not possess the requisite technical experience as well as the financial capability earlier, so as to participate in first tender. Respondent No. 3 submitted its audited annual reports for the years 2009-10 and 2008-09 for evaluation of its financial capability which were submitted only in terms of clarification provided in the minutes of pre-bid meeting held on 30.6.2011. Respondent No. 3 was never black-listed/debarred by any State Government nor

did any bar exist on due date of proposal as is obvious from the fact that even on 19.2.2010 the Government of Rajasthan had found respondent No. 3 to be technically eligible for its project, and had invited it for opening of its financial bid.

57. We also notice that for the first time in counter-affidavit filed in reply to application for vacation of stay on behalf of respondent No: 3, the petitioner company took such a plea that respondent No. 3 was not qualified. The CMC with reference to format Nos. 1 and 4, has recorded the following findings on the controversy.

58. It is also note worthy that Hon''ble the Apex Court in a catena of decisions on the scope of judicial review in the matter of Government contract/tender has consistently held that the Court can only examine as to whether the procedure adopted is in consonance with Article 14 of the Constitution but the merits of decision of the tendering authority is not reviewable, for, the Court would not sit as appellate Court while exercising the powers of judicial review. It is only where the Government decision or action is vitiated by arbitrariness, unfairness, illegality, irrationality or Wednesbury unreasonableness" that the Court is supposed to interfere. Thus, unless the decision is such that no reasonable person on proper application of mind could take or there is procedural impropriety, the Court's intervention is not required. It would not substitute its opinion for that of experts unless the Government power is used for collateral purpose. Moreover, the Government will, ordinarily, select the best of tenders. Hon''ble the Apex Court has taken the aforesaid view in a judgment in Tata Cellular Vs. Union of India, .

59. Besides in the judgment rendered by Hon''ble the Apex Court in Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, , it is held that discretionary powers under Article 226 of the Constitution has to be exercised with great caution and only in furtherance of public interest and not merely on the making out of a legal point. In respect of Government contracts and tenders, while exercising judicial review when the Courts come to a conclusion that there is overwhelming public interest which requires interference by the Court, only then it should do.

60. It is also held by Hon''ble the Apex Court in the judgment in Siemens Public Communication Networks Private Limited and another v. Union of India and others, (2008) 16 SCC 215, that if the decision is bona fide and in public interest, Court will not interfere in exercise of power of judicial review even if there is procedural lacuna.

61. Similarly, in the judgment in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , Hon''ble the Apex Court has observed that even in the case where some relaxation is granted to a party in bona fide and fair manner, after considering all the materials, it would not be appropriate for the Courts to interfere in the matter.

62. In the instant case, after examining the factual matrix and the procedures

which were followed, we are of the considered view that the State has proceeded in a transparent manner, and has recorded sustainable reasons for rejecting the technical bid of the petitioner Company.

63. On the other hand, respondent No. 3, which fulfilled all the requirements to qualify for the opening of technical bid as well as financial bid and has also run such projects successfully in other States has been rightly granted the contract. In the premises discussed herein above, the writ petition being devoid of merits is dismissed.