

(2024) 11 GUJ CK 0003

In the Gujarat High Court

Case No : Special Civil Application No. 13327 of 2024

M/s Stork Medi-Tek Private Limited Versus

APPELLANT

Vs

Deendayal Port Authority & Anr.

RESPONDENT

Date of Decision : 18-11-2024

Acts Referred:

Indian Contract Act, 1872 — Section 7
Constitution of India, 1950 — Articles 14, 19(1)(g), 226

Citation : (2024) 11 GUJ CK 0003

Hon'ble Judges : Umesh A. Trivedi, J; Cheekati Manavendranath Roy, J

Bench : Division Bench

Advocate : Harshit S. Tolia, Suraj A Shukla, Dhaval Vyas, Yukta Pandey, M/s.Vyas Associates

Final Decision : Dismissed

Judgement

Umesh A. Trivedi, J

1. By way of this petition under Article 226 of the Constitution of India, the petitioner is challenging communication dated 13.08.2024 issued by the respondent authority as being illegal and with a further direction to respondent authority to enter into agreement with the petitioner in accordance with clause 32 of the tender notice, whereby petitioner was informed that the documents submitted with the bid revealed that none of the functioning retail outlets are operating since last five years as against the requirement of at least 05 numbers of functioning outlet, seeking clarification from the petitioner.

2. While petition was filed, a further prayer was made to restrain the respondents from canceling the tender bearing Tender Notice No. MH/SP/127/2024-25 till the pendency and final outcome of the present petition. In the alternative, it was prayed that respondent authority may be restrained from taking any coercive steps against the petitioner without prior adjudication of the detailed representation put forth by the petitioner dated 05.09.2024 after affording an opportunity of hearing to the petitioner.

2.1 When petition came up for hearing, a draft amendment was filed and it was allowed by the Court. The Court issued notice making it returnable after amendment is carried out. Pursuant thereto, not only few grounds are added to the petition but prayer clauses (BB),(BBB) are also added, whereby notice dated 11.09.2024, whereby it was communicated that tender has been discharged as no bidder fulfilled the eligibility criteria, as also notice for Expression Of Interest (hereinafter referred to as "EOI" for short) for supply of medicine dated 04.09.2024 at page 91 of the petition, is also challenged, which provided for a stop-gap arrangement for the supply of medicines for the benefit of respondent authority, and even Union of India, through Secretary, Ministry of Ports, Shipping and Waterways is also joined as party respondent No.2.

2.2 Considering the necessity of the supply of medicines vide order dated 27.09.2024, pursuant to advertisement being "EOI" for supplying medicines published dated 05.09.2024, was permitted by the Court to proceed ahead for a period of 1 month from that date. By the said order, the authorities were free to get the supply for the aforesaid period, which came to be further extended for 1 more month vide order dated 24.10.2024, as matter was in the midst of hearing on that day.

2.3 On conclusion of submissions as also learned advocates tendered notes of submissions, case is posted for dictation of judgment and order on 30.10.2024. However, it being the last working day before Diwali holidays, since it was not possible to conclude on that day, it has been again posted for dictation of judgment and order today i.e. on 18.11.2024.

However, during Diwali vacation, since we could find some time for dictation of this judgment, we have devoted some time for it during the Diwali holidays.

3. Heard Mr. Harshit S. Tolia, Senior advocate, learned Counsel assisted by Mr. Suraj A. Shukla, learned advocate for the petitioner as also Mr. Dhaval Vyas, Senior advocate, learned Counsel assisted by Ms. Yukta Pandey for M/s. Vyas Associates, learned advocate for the respondent No.1.

3.1 Mr. Harshit S. Tolia, Senior advocate, learned Counsel for the petitioner, vehemently submitted that petitioner fulfills the qualification criteria mentioned in the Notice Inviting Tender online (hereinafter referred to as "NIT", for short).

3.2 Drawing attention of the Court to the qualification criteria mentioned in the notice inviting online tender where under the head of "Experience", it is submitted that the bidder should have minimum five years' experience ending last day of month previous to the one in which applications are invited of owning and operating at least 08 numbers of functioning outlets (subsequently it was by corrigendum reduced to 05 numbers of outlets) of allopathic medicines in India under applicant's name.

3.3 Drawing attention of the Court to certificate of turnover issued by the Chartered Accountant under Unique Document Identification Number (UDIN)

dated April 15th, 2023, it is submitted that in all total 10 retail outlets are owned and operated by the petitioner where year-wise turnover is mentioned.

3.4 He has submitted that as per the tender notice itself, only requirement appears to be having experience of five years for running at least 05 numbers of retail outlets and not continuous running retail outlets for five years, that too, 05 in numbers.

3.5 He has further submitted that if at all the requirement of owning and operating 05 numbers of functioning outlets is to be seen, petitioner qualifies for having experience of owning and operating more than 05 numbers of functioning outlets, and therefore, he could not have been held to be not fulfilling the eligibility criteria.

3.6 He has further submitted that the interpretation put forth by the respondent authority to own and operate 05 numbers retail outlets continuously for a period of five years cannot be read from the criteria mentioned in the notice inviting tender. Therefore, it is submitted that when the interpretation put to the terms of tender is possible and plausible interpretation from a bare reading of the qualification criteria, the authority could not have held that no bidder fulfilled the eligibility criteria on the ground that it did not owned and operate 05 numbers of retail outlets for a period of continuous five years.

3.7 He has further submitted that it is not the condition that each of the outlets must have functioned at the same place for five years. Therefore, it is submitted that purposive interpretation, if applied, that the participant must have owned and operated at least 5 outlets substantially for each year continuously for a preceding five years, bidder cannot be said to be not fulfilling the qualification criteria.

3.8 It is further submitted that after explanation and clarifying, as before holding that none of the bidder fulfilling the eligibility criteria, having been satisfied, the respondent authority has issued Letter of Intent (hereinafter referred to as "LoI", for short), dated 05.08.2024 to the petitioner, as stated in para 6 of the affidavit-in-reply filed by the respondent authority, which starts at page 91/A of the reply. Therefore, it is submitted that even according to the respondent authority, "LoI" is issued after being satisfied with the answers to all the queries raised by the respondent authority.

3.9 It is submitted that such queries were raised by the respondent authority vide communications dated 25.05.2024 and 29.05.2024, which were communicated by reply and documents as attachments vide communications dated 27.05.2024 and 05.06.2024.

3.10 It is further submitted that after having being satisfied with regard to the clarification offered, "LoI" dated 05.08.2024 was signed by Chief Medical Officer (hereinafter referred to as "CMO", for short) and sent to the petitioner, knowing fully well about clause No. 33.2 of the terms and conditions of the "NIT" at page

31.

3.11 Drawing attention of the Court to clause 24 of the terms and conditions of the "NIT", since the petitioner qualified in technical bid, which includes the conditions with regard to owning and operating 05 outlets, financial bid of the petitioner came to be opened.

Therefore, it is submitted that the impugned action and order of respondent is arbitrary, suffering from procedural impropriety, without application of mind, unreasonable on the part of the State and violative of Articles 14 and 19(1)(g) of the Constitution of India, suffering from violation of principles of natural justice.

3.12 It is next submitted that without any prior intimation of discontinuation/cancellation of the tender of the petitioner, wherein the petitioner is already granted "LoI", the respondent authority issued "EOI" for supplying medicines, which was uploaded on 04.09.2024.

3.13 It is further submitted that after filing of the petition, for the first time, the impugned communication dated 11.09.2024 was issued, whereby the entire tender was canceled.

3.14 It is submitted that despite repeated reminders by the petitioner, the respondent authority has yet not communicated the decision for disqualifying the petitioner and as on date, the decision taken by the Committee dated 28.08.2024 is also not placed on record or served upon the petitioner.

3.15 It is further submitted that the petitioner was declared as L1 bidder not because any of the other bidders were not qualified but in fact because the petitioner accorded the highest discounts in the sale of medicines, and therefore, petitioner having a most techno-commercially responsive bid, it was accorded the "LoI".

4. Mr. Harshit S. Tolia, Senior advocate, learned Counsel next submitted that issuance of "LoI" dated 05.08.2024 by the "CMO", Deendayal Port Trust, is nothing but a binding contract in view of clauses 31, 32 and 33.2 of the "NIT".

4.1 Referring to clause 33.2 of the "NIT", it is submitted that "LoI" would constitute the formation of contract subject to furnishing of a performance security in accordance with the provisions of tender condition.

4.2 Referring to the "LoI" at page 74, it is submitted that it is worded in such a manner that it constituted a binding contract because it contains a request to sign the contract agreement within 14 days of the receipt of "LoI", failing which the action as stated in the tender document will be taken against the petitioner. It is further communicated by "LoI" to set up and commence the outlets within 60 days of receipt of "LoI". Thus, according to the submission of learned Counsel, signing of the contract agreement is only a condition subsequent and not condition precedent. By any stretch of imagination, "LoI" is constituting a binding contract.

4.3 In support of his aforesaid submission, he relied on a decision in the case of *Jawahar Lal Burman v. Union of India*, reported in 1961 SCC OnLine SC 352, more particularly para 15 and 16 thereof and on a decision in the case of *Great Offshore Ltd. v. Iranian Offshore Eng & Constn. Co.*, reported in (2008) 14 SCC 240, more particularly para 38 thereof, for a proposition that from the contents of "LoI", it can be construed as a letter of acceptance if such intention is evident from its terms in which a decision of the Supreme Court in the case of *Dresser Rand S.A. v. Bindal Agro Chem Ltd and K. G. Khosla Compressors Ltd.*, reported in (2006) 1 SCC 755 quoted para 40 of that decision in the aforesaid Supreme Court decision.

4.4 Further, he has relied on a decision in the case of *Unitech Limited and others v. Telangana State Industrial Infrastructure Corporation (TSIIC) and others*, reported in (2021) 16 SCC 35 for a proposition that, recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual manner.

For the very same proposition, he has further relied on a decision in the case of *Subodh Kumar Singh Rathour v. The Chief Executive Officer & Ors.*, reported in 2024 SCC OnLine SC 1682, wherein the Supreme Court held that even after the contract comes into existence, an action may lie by way of a writ to either (I) Obviate an arbitrary or unreasonable action on part of the State or (II) To call upon it to honour its obligations unless there is a serious or genuine dispute as regards the liability of the State from honouring such obligation.

4.5 It is further submitted that "LoI" dated 05.08.2024 is communicated through e-mail to the petitioner, which is in accordance with the provisions of Section 7 of the Contract Act as well as reading with the terms of "NIT", it shall tantamount to be acceptance of tender in the facts and circumstances of the present case.

In short, it is submitted that the act of the respondent authority is arbitrary, suffering from procedural impropriety, without application of mind, unreasonable on the part of the State and violative of Articles 14 and 19(1)(g) of the Constitution of India, suffering from violation of principle of natural justice.

The principle of natural justice is pressed into service because as per the submission of the petitioner, "LoI" constitutes a binding contract between the parties. Thus, it is prayed that the petition be allowed.

5. As against that, respondent No. 1 – authority filed affidavit-in-reply, wherein it is contended that the principle eligibility, which a bidder had to possess was for being considered eligible to be awarded the tender, was the experience for it to own 08 outlets, which had to be operated for five years prior to the tender, for which a certificate from Chartered Accountant was to be placed along with it. The said requirement was thereafter reduced to 05 outlets by the corrigendum. The said tender was however, discharged on 07.02.2024 with the approval of the competent authority, as none of the bidders, who had applied, were eligible as per tender conditions.

5.1 Thereafter, the tender came to be published on 04.03.2024 prescribing the essential eligibility for a bidder to have experience of it to have owned 05 outlets, which should have been operated for a period of five years prior to the tender. Considering the nature of contract to be awarded, the experience for a bidder to have owned 05 outlets, which should have been operated for a period of five years was of absolute relevance for the respondent authority to repose confidence and handover a contract to a party.

5.2 It is further stated in the affidavit-in-reply that three parties had shown interest for being considered for being awarded the contract. Out of the three parties, the price bids of two parties were opened as bid of the third party was non-responsive/ineligible.

5.3 It is further contended that since the bid of the petitioner was the highest in terms of discount rates, and therefore, a "LoI" in terms of clause 31 of the tender conditions came to be issued on 05.08.2024 requiring the said invitee to sign the said agreement for culminating an offer under the "LoI" into a concluded and binding contract.

5.4 It is further asserted that the offer thereunder pertinently was conditional and subjected to conditions. Admittedly, the performance security has not been accepted by the respondent. The issue was then being scrutinized by the authority, whereas multiple complaints had been received concerning the tender and the bidders.

5.5 It is further asserted in the reply that on scrutiny of the procedure undertaken in the present contract with regard to the eligibility of both the bidders, the respondent authority by its decision dated 28.08.2024 has accepted the recommendation of tender committee and directed the discharge of the tender, as neither of the bidders were eligible as per the conditions of tender albeit neither of the bidders owned 05 outlets, which had operated for five years.

5.6 The petition appears to have been filed on or after 05.09.2024, then curiously challenging the communication dated 13.8.2024. It is further asserted in the reply that prior to handing over the "LoI" and opening of the price bid of the petitioner, by a communication on 29.05.2024, the respondent authority had flagged the issue that the petitioner was not eligible since none of the 05 outlets owned by the petitioner was operated for five years, which was an essential eligibility requirement under the tender. In the reply, it is denied that the response dated 29.05.2024 and 05.06.2024 of the petitioner reflected the compliance to and the eligibility of the petitioner as per the conditions of the tender.

5.7 It is further not admitted that the petitioner had remained present before the respondent authority to sign the contract within 14 days as per the terms and conditions of the contract, for the reason alleged or otherwise. It is further denied that the respondent did not pay heed to the request of the petitioner, without a cause. It is asserted that the petitioner was well aware that it was not

eligible as per the conditions of tender, however, making of representation by the petitioner coincided with the authority reviewing on the steps further to issuance of "LoI", inter-alia for entering into a binding contract with the petitioner. It is further denied that the representation dated 5.9.2024 of the petitioner clarified or reflected for it being eligible as per the conditions of the tender.

5.8 It is asserted in the reply that a non-responsive bid cannot be made responsive by seeking further clarification. The acts of the respondent, which according to the petitioner were under clause 25, would not impede the respondent from scrutinizing, verifying or reassuring the eligibility of the petitioner, whose price bid had been opened.

5.9 It is further asserted that the respondent, on analysis of record and considering the replies and representations made by the petitioner, has taken an informed decision to discharge the tender, particularly as all shortlisted bidders were ineligible as per the conditions of the tender. Assuming the innuendo, even if there is an alleged procedural lacuna, the Court would not interfere with the decision taken by an authority relating to a contract, which inter-alia, would be aligned with the constitutional mandate.

5.10 It is further asserted that opening of the price bid or issuance of "LoI" would not confer a special right, much less a right for the petitioner or casts an obligation upon the respondent, that too, to consider the petitioner as eligible and enter into a binding contract; more so, by ignoring the requirements and qualifications as per the tender which were quintessential to the work credibility of a bidder.

5.11 It is further asserted that it cannot be disputed that the respondent, which has issued the tender for supply of medicines and medical services to the Port employees, would be in the best position to provide and construe the requirements as per the terms of the tender, but also would be in the best position to evaluate if the bidder satisfies or is eligible as per the requirements of the tender document.

5.12 In para 12 of the reply, it is asserted that under a communication dated 13.08.2024, which was sent to the petitioner, seeking clarification on the discrepancies concerning the functioning of the retail outlets of the petitioner, as no satisfactory reply came forth, a further communication dated 16.8.2024 came to be issued to the petitioner. A copy of the communications dated 13.08.2024 and 16.08.2024 were annexed to the reply. After considering the records and the representations made by the petitioner, the tender committee on 22.08.2024 had recommended the discharge of tender to the competent authority, which by its decision dated 28.08.2024 had accepted and approved the recommendation of discharge of tender.

5.13 According to the affidavit-in-reply and submission of the learned Counsel for the respondent authority, the petitioner is not fulfilling the eligibility criteria. The allegation made by the petitioner that the cancellation of the tender process is

with a view to aid 'some third party', is emphatically denied in the reply. It is further asserted in the reply that the allegation has been made only with a view to divert the focus from the core issue of the ineligibility of the petitioner as per the terms of tender.

5.14 So far as expression of interest for supplying of medicines is concerned, it being stop-gap arrangement until the tender with properly formulated conditions are decided and published for supply of medicines and medical services on long-term basis, in view of the past experience that limited number of bidders have shown interest for the said supplies due to the conditions attached in the previous tenders, like condition No.4.1.2.

5.15 It is asserted in the reply in para 16 that the decision discharging the tender was within the knowledge of the petitioner since prior to the filing of the petition.

5.16 Mr. Dhaval Vyas, Senior advocate, learned Counsel empathically submitted that "LoI", as claimed by the petitioner, is issued under clause 31 of the "NIT", which will not constitute a binding contract, as claimed by the petitioner.

5.17 In response to the submission that the communication dated 11.09.2024 discharging the tender is vitiated, having been issued after filing of the petition, has no substance, on the following facts:-

i) Communication dated 16.08.2024, which is annexed with the reply, clearly conveys to the petitioner that its clarification in support of its eligibility was not satisfactory.

(ii) The recommendation of the tender Committee dated 22.08.2024 to discharge the tender was accepted by the competent authority on 28.08.2024.

(iii) In para 3.8 of the petition, the petitioner has admitted its knowledge that the respondent authority was in process of cancelling the entire tender process.

(iv) The decision of the authority came to be communicated formally to the petitioner under the communication dated 11.09.2024.

(v) The Honourable Court was pleased to issue notice to the respondents on 13.08.2024 on the petition carrying clear pleading that 'The petitioner has received oral information that the respondent authority is in process of cancelling the entire tender process, and therefore, the petitioner is constrained to approach this Honourable Court'.

The aforesaid facts clearly shows that the petitioner was conveyed with the decision to discharge the tender, which had already been taken by the respondent authority (on 28.08.2024), much prior to the filing of the present petition.

The communication dated 11.09.2024, which though may have been issued after filing of the petition, however, the communication conveyed the decision of the

competent authority taken on 28.08.2024 to discharge the tender as no bidder fulfilled the eligibility criteria, which was much prior to the filing of the petition.

5.18 Discharge of tender being violative of principles of natural justice, as contended by the petitioner, is again not correct. Dealing with the said submission, it is asserted that in absence of a concluded and binding contract, no right whatsoever was recorded in favor of the petitioner, and therefore, there was no requirement for the respondent to offer a hearing before the discharge of the tender, more so when there have been multiple prior exchanges between the parties concerning the issue.

5.19 It is humbly submitted that, it being an indisputable fact that the petitioner (as also another shortlisted bidder, who has accepted the decision) was not eligible as per clause 4.1.2, and therefore, no other view was possible in the facts of the present case.

5.20 It is further submitted that as per clause 30 of the "NIT", the respondent authority has reserved his right to cancel the bidding process and reject all bids without assigning any reasons prior to the award of a contract. The present tender, as per the submission of the learned Counsel for the respondent authority, encompasses a contractual relationship which is commercial transaction while evaluation of tender and awarding contracts are essentially commercial functions. Therefore, it is submitted that principles of equity and natural justice stay at a distance, relying on a decision in the case of Siemens Public Communication Networks Pvt. Ltd. & Anr. v. Union of India & Ors., reported in (2008) 16 SCC 215, more particularly para 40 thereof.

5.21 Replying to the contention that "LoI" dated 05.08.2024 is in the nature of a concluded contract, and therefore, tender could not have been discharged, it is submitted that the issues considering the issuance of the copy of "LoI" dated 05.08.2024 is being presently inquired into by the respondent. However, it is admitted fact that the original copy of "LoI" issued as per clause 31 of "NIT" had never been handed over to the petitioner. However, it is submitted that "LoI" herein would not partake the character of a concluded and binding contract. Communication dated 05.08.2024 would be a "LoI" under clause 31 of the "NIT" and the respondent authority seriously disputes that the said letter would be a concluded contract of a binding nature.

It is further submitted that, in law, an "LoI" is merely an "EOI" to enter into a contract. "LoI" does not create a right to contract to a party to whom it is issued. There is no binding legal relationship between the party issuing "LoI" and the party to whom such "LoI" is issued.

It is further submitted that a detailed agreement/contract is required to be drawn up between the parties after the "LoI" is received to bring into a concluded and binding contractual relationship between the parties. For the said assertion, Mr. Dhaval Vyas, learned Counsel, relied on a decision of the Supreme Court in the case of Level 9 Biz Pvt. Ltd. v. Himachal Pradesh Housing and Urban

Development Authority & Anr., rendered in Civil Appeal No. 4626 of 2024 by the Supreme Court, more particularly para 10 and 11 thereof.

5.22 It is further submitted that the understanding of clause 4.1.2 of the petitioner would not merit acceptance, more so, as though it was available for the bidders/petitioner to seek clarification on the interpretation appended to clauses 4.1.2 and 31 of the tender conditions, it chose not to, and the petitioner proceeded to bid on its own understanding of the terms. The tender has been discharged as both shortlisted bidders were ineligible as per the clause 4.1.2. The authority, right from initial stages of tender, has maintained its interpretation to eligibility clause 4.1.2 for a bidder to have owned 05 outlets, which should have been operated for a period of five years for it to repose and handover the contract concerning supply of medicines and medical services to more than 15,000 beneficiaries for a period of 3 years, which was extendable further for a period of 24 months.

5.23 It is further submitted that clause 4.1.2 is clear and unambiguous that a bidder should have experience of owning and operating each such functioning outlet, at least 05 in numbers, for minimum five years. It is further submitted that Form-8 appended to the tender also supports the interpretation that each outlet should be owned by the bidder and should have operated for a minimum five years prior to ending last day of the month previous to the one in which applications are invited.

5.24 It is further submitted that the respondent authority would be the best person to understand and appreciate its requirement and interpret its documents, and this Honourable Court, in the humble submission, would defer to this understanding and appreciation of the document by the authority. For the said submission, learned Counsel for the respondent relied on a decision in the case of Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. & Anr., reported in 2016(16) SCC 818 as also a decision of the Supreme Court in the case of M/s. Om Gurusai Construction Company v. M/s. V.N. Reddy & Ors., rendered in Civil Appeal No. 5375 of 2023, more particularly in 2023 Live-law (SC) 694. It is trite that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids as the authorities are aware of expectations from the tenderers, while Court would refrain from interfering with such assessment of eligibility of a bidder by the author/issuer of the tender. For the said proposition, learned Counsel for the respondent has relied on a decision in the case of M/s. N.G. Projects Limited vs M/s. Vinod Kumar Jain, reported in AIR 2022 SC 1531, more particularly para 22 and 23 thereof.

On the aforesaid submissions, it is submitted that since for putting up interpretation to a clause of "NIT" in respect of eligibility criteria, respondent authority has applied to all the bidders the same criteria, merely because petitioner is offering highest discount but since he is also not fulfilling the eligibility criteria, issuance of "LoI" under clause 31 of "NIT" is of no help to the

petitioner.

5.25 He has further submitted that even since beginning, petitioner is being informed that he is not fulfilling that criteria, though clarification and explanations offered, the same yardstick of eligibility criteria is applied to two of the shortlisted bidders, one has already accepted the same. The said contention of the petitioner should not be entertained when eligibility criteria considering the clause in the "NIT" as also Form-8 makes it clear that minimum 05 functioning outlets should have been owned and operated for the last five years. Though, according to the submission of learned Counsel for the respondent authority, petitioner has more than 05 outlets but it has not owned and operated, functioning outlets for five years continuous, and that too, 05 numbers of outlets. Therefore, according to his submission, since he is not meeting with the eligibility criteria, a decision on recommendation of the tender committee to discharge the tender is accepted and approved.

5.26 It is further submitted that as per the further affidavit filed by the petitioner, the "LoI" is communicated to the petitioner through e-mail, that too, from the private e-mail address of the "CMO".

It is further submitted that for official work and official communication, no one is permitted to communicate anything through private e-mail address, more particularly when official e-mail address and the website is available of the respondent authority. Though there is a separate inquiry going on for the said issue, it would not be in the fitness of things to divulge on the other facts leading to it. At any rate, "LoI" issued is under clause 31 of the "NIT", which would be "LoI" in Form-9, intimating the successful bidder about proposed pre-acceptance of tender. Therefore, he has submitted that even if communication dated 05.08.2024 is communicated through e-mail, it cannot be termed as "LoI" accepting the tender of the petitioner.

5.27 Therefore, he has submitted that the petition is without any merit and decision of the respondent authority in discharging the whole tender process, as shortlisted bidders are not fulfilling eligibility criteria, is passed on recommendation of tender committee, which is accepted by the authority, cannot be found fault with. Therefore, petition is required to be rejected.

6. Having heard the learned advocates for the appearing parties and going through the averments made in the petition, documents annexed, affidavit-in-reply filed by the respondent authority and the annexures annexed with it, let us examine the terms of the "NIT", whether contentions raised by the petitioner merits acceptance or contentions raised by the respondent authority requires to be accepted or not.

6.1 Coming to the first contention of the petitioner in respect of eligibility criteria, if clause 4.1.2 is examined, it appears that for supply of medicines to large number of beneficiaries to respondent authorities uninterruptedly for a period of 3 years, owning and operating 05 outlets for last five years appears to be a must.

6.2 Closing down any outlet and starting new maybe at nearby place or a different city or State is not the purpose for prescribing the eligibility criteria. To seek uninterrupted supply from a stable bidder, owning and operated 05 functioning retail outlets for five years appears to be bare minimum requirement and not owning and operating more than 05 outlets for a few years or months, as in the case of the petitioner. The interpretation put to the said clause keeping in mind the purpose for which tender is floated, no other interpretation is possible and not the interpretation which is sought to be put forth by the petitioner. According to the petitioner, despite he is having 10 outlets, though each one or more than 05 outlets would not have functioned for five years continuously, the requirement, as enumerated in the "NIT" is with regard to experience of owning and functioning retail outlets for medicines for five years. According to him, since 2017, as on date of submitting tender document, he has the experience of more than five years and running more than 05 retail outlets. However, if the tender document furnished along with the petition be examined, more particularly Form-8, for each outlet period from and period to is mentioned. If it is examined, petitioner is not fulfilling the criteria of owning and operating 05 functioning retail outlets for a period of five years. The supply of medicine is regulated under a license and for each outlet, there has to be different drug license for storage as also retail sale as also other requirements to be placed are specific under different laws as well. Experience in terms of functioning retail outlets for five years and 05 outlets in addition is must, according to the terms of the "NIT".

6.3 At any rate, the interpretation put forward by the petitioner appears to be not in consonance with the purpose for which tender is floated for supply of medicines. Interpretation put forward by the petitioner, which suits him, cannot be an interpretation to be applied to the clause in the "NIT". The employer, having authored the tender document would be the best person to understand and appreciate its requirements and interpret that clause in case of any ambiguity. As such, from a plain reading of that clause, which reads as under:-

"4.1 The Tenderers shall fulfill the following Pre – Qualification Criteria;

4. 1.2 Experience

The bidder should have minimum five years experience ending last day of the month previous to the one in which applications are invited of owning and operating atleast 08 nos., of functioning outlets of allopathic medicines in India under applicant's name. Letter from practicing CA certifying the no. of years of experience is to be submitted and the bidder is required to submit valid Municipality Shop Act License for each outlets mentioned above. (Details may be given as per Form 8 duly notarized.) "

Therefore, it is clear that the employer being the best person to prescribe eligibility criteria as per his requirement and his interpretation to the said clause is to be accepted. The petitioner has no functioning retail outlet, that too, 05 in

numbers for five years or more, which is evident from his information supplied in Form-8. It revealed that at some cities, he has not run the said retail outlet even in the same city for more than 4 years. Even if he has other outlets in different areas or different city, even continued, petitioner appears to be not having the consistent owning and functioning 05 retail outlets of last preceding five years.

6.4 Any clarification, more particularly when it is repeatedly conveyed to the petitioner its clarification is not satisfactory and letting them know about 05 functioning outlets for the last five years. Therefore, contention raised on behalf of the respondent authority that the owner or the employer of the project having authored the tender document is the best person to interpret and appreciate its requirements and interpret its documents, merits acceptance.

6.5 Not only that, clause 4.1.2 defining eligibility criteria is also unambiguous. Even if it is open to different interpretation, the interpretation put forth by the respondent authority while providing such experience as per the requirement and interpretation given to it by the respondent authority should be accepted. The Supreme Court in the case of Afcons Infrastructure Ltd. (supra) has cautioned that the constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is malafide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. There is no averment at all that the interpretation put forth by the respondent authority that their action is malafide or perverse in the understanding or in the appreciation and more particularly, when the very same yardstick is applied to all the bidders even while discharging the whole tender process.

It is further held by the Supreme Court, more particularly in para 15 of the decision in the case of Afcons Infrastructure Ltd. (supra):-

"It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given. "

Following aforesaid binding decision, there appears no merit in the submission that the petitioner fulfills the eligibility criteria as per interpretation given by the petitioner.

6.6 Coming to the second issue in respect of "LoI", petitioner has vehemently submitted that once "LoI" is issued and terms mentioned in the letter appears to be a binding contract with the respondent authority, appears to be very attractive submission.

6.7 Referring to the "LoI", petitioner has submitted that under the said "LoI" petitioner is asked to sign the contract agreement within 14 days from the receipt of "LoI", failing which action as stated in the tender document will be taken, to be existence of a binding contract with a further direction to setup and commence the outlets within 60 days of the receipt of the "LoI".

However, though "LoI", as mentioned in clause 31 to be issued by "CMO" in Form No. 9 intimating the successful bidder about the proposed pre-acceptance of tender, "LoI", which is claimed to be sent to the petitioner through his personal e-mail address by "CMO" instead of official e-mail address containing certain more conditions as found in clause 32, which is the notification of award, which is again called "LoI", is nothing but an overdoing by the "CMO". "LoI", as mentioned in clause 31, it is the intimation to the successful bidder about the proposed pre-acceptance of tender, whereas "LoI" intimating acceptance of the tender is required to be notified for the award under clause 32, that too, by the employer prior to the expiry of bid validity period by facsimile confirmed by registered letter.

6.8 Clause 32 states about notification of award of contract which will constitute the formation of the contract subject to the furnishing of a performance security in accordance with the provisions of tender condition.

Here in the present case, no performance security is ever given by the petitioner on the "LoI" mentioned in clause 32, which is different than the "LoI" mentioned in clause 31. "LoI" mentioned in clause 31 of the "NIT" is an intimation about proposed pre-acceptance of tender, that too, by "CMO", whereas acceptance of that tender, which is to be notified for the award of contract, that too, prior to expiration of the bid validity period by facsimile confirmed by registered letter, and that too, by the employer. So "LoI", to become a formation of contract, should be by a notification of award by the employer by facsimile confirmed by registered letter notifying it to the bidder whose bid has been accepted. The "LoI", as mentioned in clause 31, which is prior to acceptance of a tender, is required to be communicated by the "CMO". Even if mode for intimating the successful bidder in clause 31 is not mentioned, clause 32 is very clear about notifying the bidder, whose bid has been accepted, for the award of contract by the employer by registered letter. Therefore, unless and until the employer, and not the "CMO", by a registered letter notifies the award of contract to the successful bidder, there exists no contract at all, that too, binding contract.

6.9 At the same time, the intimation given by the "CMO" of "LoI" under clause 31 to the petitioner is also under the cloud. The said communication sent by e-mail, that too, from a personal e-mail address of "CMO" and not of the employer or even from the official website of the employer, who is also having his own official e-mail address. While hearing the case, the original file was seen by the Court and there was difference in the place of signature, even if presuming it to be of "CMO", in the original "LoI" as per clause 31 found in the file and the communication which is sent through e-mail. If we are not to compare the signatures, the place where signature is put in both the letters i.e. the communication through e-mail and the original found in the file, that also differs. When an inquiry is going on in respect thereof, we are not going deep into the same and we rest it there.

6.10 However, for being a binding contract, "LoI" should be issued under clause

32 and agreement should be entered into pursuant to "LoI" issued under clause 32 and contract agreement entered into clause 33.2 of the "NIT" Even if clause 33.2 of the "NIT" is pressed into service, notification of award of contract, that too, by the employer by facsimile confirmed by registered letter is a must. As asserted in the affidavit-in-reply and by the learned Counsel for the respondent authority, no such registered letter and acceptance is notified for award of contract to the bidder i.e. the petitioner. Therefore, there exists no binding contract at all as submitted by the learned advocate for the petitioner. If there is no binding contract at all, before discharging the entire tender, there appears no room for contention that the petitioner should have been heard following the principle of natural justice. However, clause 30 of the "NIT" specifically reserves the right to accept or reject any bid and to cancel bidding process and to reject all bids without assigning any reasons, at any time prior to the award of contract, without thereby incurring any liability to the affected bidder or bidders on the grounds for employer's action. If that clause is invoked by the respondent authority, petitioner cannot successfully argue that discharge of a tender is without any intimation to the petitioner and without any reasons.

6.11 As such, as held in para 10 of the Level 9 Biz (Supra), the "LoI" is merely an expression of interest to enter into a contract. It does not grant any right in favor of the party to whom it is issued. There is no binding legal relationship between the party issuing the "LoI" and the party to whom such "LoI" is issued, as detailed agreement/contract is required to be drawn up between the parties after the "LoI" is issued by the other party. Therefore, in the aforesaid decision, the Supreme Court approved the action of the authority cancelling the tender on recommendation of the committee appointed by the High Court pursuant to an order passed by it.

6.12 Over and above that, Section-I of the "NIT" under the head of 'Instructions to Bidders' specifically refers Deendayal Port Authority as the 'employer'. If that is so, it is mentioned in clause 32, requiring employer to notify for the award to the bidder whose bid is accepted by facsimile confirmed by registered letter. Thus, it should be by the employer and not by the "CMO". Therefore, it is submitted that what is communicated, maybe through personal e-mail of the "CMO" as "LoI", as enumerated in clause 31 of the "NIT", which is nothing but intimation to the successful bidder about the proposed pre-acceptance of tender, which creates no right in favor of the party, who is being informed.

6.13 The decision relied on by the learned advocate for the petitioner in the case of Jawahar Lal Burman (Supra) is of no help to the petitioner as "LoI", which creates right in favor of any party is as enumerated in clause 32 of the "NIT" and not the "LoI" enumerated in clause 31 of the "NIT". Both the "LoI"s are operating in different fields. "LoI", as enumerated in clause 31 is with regard to pre-acceptance of a tender. Therefore, even if anything is stated in it, that too, signed by "CMO", as required under clause 31, is not a formation of a contract at all. It is only and only the "LoI" issued under clause 32, that too, by the

employer notifying for the award of contract by facsimile confirmed by registered letter to the bidder whose bid has been accepted may constitute even formation of a contract. As such, in the present case, employer has not issued any "LoI" as per clause 32 of the "NIT", and therefore, there is no binding contract existing between the parties. Therefore, action of the respondent authority of discharging the tender process cannot be found fault with, more particularly when several complaints were received by it and finding shortlisted bidders not fulfilling the eligibility criteria.

6.14 The decisions cited by the learned advocate for the petitioner in respect of maintainability of a petition is of no help to him as presuming the present petition to be maintainable in the facts of the present case, as stated hereinabove, it cannot be entertained when whole tender is discharged as none of the shortlisted bidders fulfilled the eligibility criteria, where other bidder, who is held to be ineligible has accepted the decision and he is not made a party in the present proceeding. Even if he is to be made a party in the present proceedings, it is of no use when this Court has come to a conclusion that the decision of the respondent authority, even after obtaining the price bid of the shortlisted bidders on analysis of the record and considering the reply to the representations made by the petitioners, has taken an informed decision to discharge the tender, particularly as all shortlisted bidders were ineligible as per the conditions of the tender, we find no illegality in the process of taking decision in the present tender process.

6.15 At any rate, petitioner was well aware even when he filed the petition that tender process is being discharged or they are going to put off the whole tender process when petitioner affirmed the petition, though date is not mentioned in the affirmation, he challenged the communication dated 13.08.2024, whereby petitioner is informed that representations have been received and on review, certain inconsistencies have been observed. Petitioner is informed that none of the functioning retail outlets are operating since last five years as against the requirement of at least five years, of retail outlets.

6.16 The communication dated 11.09.2024 refers about discharge of whole tender, as approved by the competent authority on 28.08.2024, returning original bank guarantee towards the Earnest Money Deposit. However, when petition is affirmed, as mentioned in the memo date to be 05.09.2024, petitioner received oral information that respondent authority is in process of cancelling the entire tender process. However, decision was already taken to discharge the tender on 28.08.2024 and that decision was not even challenged by the petitioner but only the communication dated 13.08.2024 came to be challenged while filing the petition, though it is thereafter amended.

7. On perusal of the original file as also hearing the learned advocates for the appearing parties and documents annexed with the petition and the reply, we are satisfied with the decision of the respondent authority in discharging the tender in question as no bidders fulfilled the eligibility criteria, we see no reason to

entertain this petition.

Hence, this petition is rejected.

No orders as to costs.