

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 15.10.2012

Date of Decision: 01.11.2012

+ W.P.(C) 6110/2012

FLEMINGO DUTY FREE SHOP PVT. LTD. AND ANR. ... Petitioners

Through : Mr. Ashok Desai and Mr. Arvind Nigam,
Sr. Advs. with Mr. Arunabh Chowdhury,
Mr. Parthiv Goswami, Mr. Raktim Gogoi,
Mr. Vaibhav Tomar and
Mr. Gainilung Panmei, Advs.

versus

UNION OF INDIA & ORS. ... Respondents

Through : Mr. Sumeet Pushkarna, CGSC with
Mr. Varun Dubey, Adv. for R-1/UOI.
Mr. Rajiv Nayar, Sr. Adv. with
Mr. Digvijay Rai, Adv. for Rs-2 & 3/AAI.
Mr. Sandeep Sethi, Sr. Adv. with
Mr. Rishi Agarwala and
Mr. Akshay Ringe, Advs.
for R - 4 / IL&FS.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J.

1. Respondent No. 2, namely, Airports Authority of India (hereinafter referred to as, 'AAI') was desirous of developing, operating and maintaining duty-free outlets at Chennai and

Kolkata Airports and, thus, floated a Request for Qualification (for short, 'RFQ') in the month of August, 2012. Petitioner No. 1, namely, M/s. Fleming Duty Free Shop Pvt. Ltd., who is operating outlets at other airports, are aggrieved by the qualifications prescribed for the said RFQ as they seek to oust petitioner No. 1. The case of the petitioners is that, in fact, all Indian players will be ousted in view of the terms and conditions of the RFQ.

2. We may note that another aspect impugned in the present writ petition is the action of respondent No. 2 / AAI in not issuing No Dues Certificate(s) after reconciliation of accounts at existing airports where petitioner No. 1 is operating, which is a mandatory qualification requirement and such No Dues Certificate(s) are stated to have been issued only for 4 airports out of 12 airports where petitioner No. 1 is currently carrying out operations. However, this issue has been sorted out during pendency of the petition.
3. The petitioners claim that the impugned clauses are *ex facie* illegal and illogical and are in teeth of the criteria set forth in the previous tenders floated for Kolkata Airport in the year 2006 and Chennai Airport in the year 2009. The petitioners are aggrieved by the following clauses contained in the RFQ:

(a) The definition of an 'Associate' in the definition clauses, which reads as under:

"Associate" shall mean, in relation to the Applicant / Consortium Member, a person who controls, is controlled by, or is under the common control with such Applicant / consortium Member (the "Associate"). As used in this definition, the expression "control" means, with respect to any

person which is a company or corporation, the ownership directly or indirectly, of at least 75% (Seventy Five 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.”

(b) The condition (ii) of sub-clause (A) dealing with technical capacity of clause 2.2.2 providing eligibility for pre-qualification and short-listing, which reads as under:

“2.2.2. To be eligible for pre-qualification and short-listing, an Applicant shall fulfill the following conditions of eligibility (“Threshold Eligibility Criteria”):

(A) Technical Capacity : For demonstrating technical capacity and experience (“Technical Capacity”) the Applicant shall satisfy each of the following criteria:-

... ..

(ii) The Applicant (in the case of a Consortium, the Lead Member and its Associates), shall have presence in 3 International Airports (Indian or overseas), each handling an international passenger traffic of 5 million in each year during the last 3 years.

... ..”

(c) The financial capacity sub-clause (B) of clause 2.2.2, which reads as under:

“2.2.2.

(B) Financial Capacity : For demonstrating financial capacity (“Financial Capacity”) the Applicant shall satisfy each of the following criteria:

(i) The Applicant (in the case of a Consortium, the Lead Member and its Associates), claiming

the experience in Duty-Free Business shall have, a sales turnover from the said business of operating Duty-Free business in India or overseas equivalent of at least INR 500 crores during each of the last 3 years period ending 31.03.2012 (as per the last audited / certified copy from statutory auditor);

The Applicant shall furnish in its Application, certificate(s) from its statutory auditors certifying the sales turnover and proof from the respective airport operator for operating experience.”

(d) In Evaluation of Applications, clause 3.1 prescribes “Evaluation Parameters” and the grievance is against clause 3.1.3, which reads as under:

“3.1 Evaluation parameters

... ..

3.1.3 In evaluating the Technical Capacity and Financial Capacity under clauses 2.2.2, the experience and turnover of the Applicant (in the case of a Consortium, the Lead Member and its Associates) would also be eligible.”

(e) Appendix I is the format for ‘*Letter Comprising the Application for Pre-Qualification*’ as per clause 2.13.2. The grievance is against clause 14, which reads as under:

“14. I/We further certify that no investigation by a regulatory authority is pending either against us / any Member of the Consortium or against our / its Associates or against our CEO or any of our directors / managers / employees.”

4. The clauses are identical for Chennai and Kolkata Airports except clause 2.2.2(B) whereby the turnover has to be at least INR 250 crores during each of the last 3 years period ending 31.03.2012 in case of Kolkata instead of INR 500 crores in case of Chennai.

5. The petitioners, thus, addressed communications dated 06.09.2012 and 07.09.2012 seeking clarification in changes in respect of the RFQ qua Chennai and Kolkata Airports respectively. A pre-bid conference is stated to have been held at Kolkata on 13.09.2012, which was attended to by the representatives of petitioner No. 1. A similar conference qua Chennai Airport was held on 20.09.2012. In the interregnum period, there were various communications on the same lines, but in the absence of any favourable response, the present writ petition under Article 226 of the Constitution of India (hereinafter referred to as, 'the Constitution') has been filed.
6. In the short affidavit filed by respondents No. 2 and 3 / AAI affirmed on 03.10.2012, it has been averred that the AAI has upgraded the Airports at Chennai and Kolkata to make them world class airports and the eligibility criteria was framed as set out in the RFQ keeping this in mind. The Ministry of Civil Aviation had directed AAI vide its letter dated 23.10.2009 to appoint a consultant for suggesting measures with detailed plans and marketing strategies to maximize the revenue from rentals from terminal buildings for spaces given for various purposes. M/s. IL&FS Infrastructure Development Corporation Ltd. / respondent No. 4 was appointed as a consultant vide letter dated 12.08.2011, which is stated to have advised AAI on commercial potential of airports and designing layout plan, developing and implementing marketing strategy for optimizing the revenue generation and preparing tender documents for the award of licence / concessionaire.

7. The affidavit states that qua clause 2.2.2(B) relating to financial capacity, a clarification has already been issued that instead of the requirement of handling international passenger traffic of 5 million in each year during the last 3 years, the same would stand substituted by handling total passenger traffic of 5 million in each year during the last 3 years, thus diluting the stringency of the norms. The financial capacity of turnover is, however, defended on the basis of volume of business and the passenger movement, which was likely to be generated and the players existing in different airports. The passenger traffic data has been annexed. The affidavit emphasizing that in pre-bid meeting, 7 intended bidders participated which shows that there is sufficient competition in respect of the RFQ floated. The criteria is also sought to be supported by the fact that for Mumbai International Airport, the RFQ conditions framed recently provided for INR 2,000 crores (400 million dollars) as eligibility criteria, which had at present an international traffic of 10 million and if the same proportion is applied, then for 4.5 million traffic for Chennai Airport, the turnover should have been fixed at INR 800 crores, but has actually been fixed at INR 500 crores and for Kolkata Airport, this is even lower at INR 250 crores. Another aspect emphasized is that AAI has permitted a Consortium to bid and, thus, nothing prevents petitioner No. 1 forming a Consortium and participating in the tender process. In this context, the definition of 'Associate' incorporates the requirement of 75% so as to have an effective majority, which is the benchmark for passing special resolution under The Companies Act, 1956. In the end, it is emphasized that the tender conditions have been framed not to

eliminate existing licensees, but to get world class players at international airports.

8. In the rejoinder affidavit filed by the petitioners, the reasons cited by AAI are sought to be denied as there cannot be any justification for imposing extra stringent qualifying criteria. The most important averment made in the rejoinder is that the opinion of the consultant qua the rationale behind imposition of stringent qualification had not been placed on record, which would have a definite bearing on the present proceedings.
9. We had put to learned senior counsel for the petitioners at the inception of the hearing itself that this Court is not to act as an authority to re-write the conditions of the RFQ, which fall within the commercial domain of AAI. It is, thus, for AAI to frame the norms. Learned senior counsel did not dispute this proposition, but sought to develop the legal principle on the basis that the doctrine of '*Wednesbury unreasonableness*' would apply and if the conditions are arbitrary, unreasonable, irrational, then it would be open for this Court to interfere. The ousting of competition of Indian players is stated to be the basis for the unreasonableness of the criteria. In support of this proposition, various judgments were referred to.
10. A Division Bench of this Court in Gharda Chemicals Limited v. Central Warehousing Corpn., 118 (2005) DLT 159 (DB) after perusing the material found that the insertion of a pre-qualification condition of at least 3 years manufacturing experience of ISI marked chemical was irrational and arbitrary having no nexus with the stated object of maintaining quality and consistency of

supplies, which was sought to be achieved qua tender for supply of CWC diary, chemical and technical equipments.

11. In Meerut Development Authority v. Association of Management Studies and Anr., (2009) 6 SCC 171, the nature of rights of bidders participating in tender process have been discussed and a limited judicial review has been held to be available where a tender is tailor-made to suit the convenience of a particular person.

Para 26 reads as under:

“26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.”

(emphasis supplied)

12. A Division Bench of this Court (of which one of us, Sanjay Kishan Kaul, J. was a Member) in Medical Point (I) Ltd. v. Union of India and Ors., IV (2011) BC 622 = MANU/DE/3055/2011 considered the aforesaid principle. In the said case, the concept of DOSA, i.e., a decision oriented system analysis has been explained as where the terms and conditions are made in such a way as to obtain a particular decision as the final outcome.
13. In Reliance Energy Ltd. and Anr. v. Maharashtra State Road Development Corpn. Ltd. and Ors., (2007) 8 SCC 1, more particularly para 36, ‘*level playing field*’ has been stated to be an important concept while construing Article 19(1)(g) of the

Constitution. This doctrine has, however, been held subject to public interest, but in the world of globalization and competition, it has been observed to be an important factor to be kept in mind. This is because the doctrine provides space within which equally-placed bidders are allowed to bid so as to sub-serve the larger public interest. Since globalization in essence is liberalization of trade, decisions or acts, which result in unequal or discriminatory treatment, have been held to violate the doctrine of '*level playing field*'.

14. Respondents No. 2 and 3 have relied upon a Division Bench judgment of this Court in WP (C) No. 20185-87/2005 titled 'Visa Steel Ltd. & Ors. v. Union of India & Ors.' decided on 08.12.2005, which has emphasized the limited scope of judicial review over administrative actions as held in Tata Cellular v. Union of India, AIR 1996 SC 11. In the same context, ordinarily, non-interference of courts with the tender conditions in a contract, unless it is purely illegal or shockingly arbitrary has been emphasized by referring to the authoritative pronouncements of the Apex Court in Global Energy Ltd. and Anr. V. Adani Exports Ltd. and Ors., (2005) 4 SCC 435; Association of Registration Plates v. Union of India, (2005) 1 SCC 679; Master Marine Service Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd. & Anr., (2005) 6 SCC 138. Reason for this is stated to be that the courts ordinarily cannot interfere in administrative matters since the administrative authorities are specialized in matters relating to administration and the courts does not have expertise in such matters. It is in real exceptional matters where the *Wednesbury principle* applies. The courts do not sit as a court of appeal over

administrative decisions, but merely reviews the manner in which the decision was made.

15. An important aspect examined in Visa Steel Ltd.'s case (supra) is qua the stringency of norms, which were held to be within the rights of the respondent to so prescribe and it was not for the courts to sit in appeal over these conditions. Even if the court may feel that a better decision could have been taken or some other action could have been adopted by the Executive would be no ground to strike down the administrative decision.
16. If we analyse the terms and conditions prescribed by AAI, we are of the view that it is difficult to state that they would fit within the parameters of a '*shockingly arbitrary*' or '*outrageous*' conditions incorporated. What has been provided is actually benchmarks, which are more stringent and the rationale for this has already been explained in the affidavit filed by respondents No. 2 and 3 / AAI that keeping in mind the upgradation of the airports to international levels, it was deemed appropriate that the best quality may be obtained, which may be possible from the larger player in the field. It would really not be in the nature of judicial scrutiny by the Court to say whether the benchmark should be X crores or Y crores turnover. This is a matter, which is completely within the technical domain and it would be wholly unjustifiable for this Court to sit in appeal over these parameters. In fact, the common thread, which runs through all the clauses, which have been impugned in the present petition, is that it is petitioners, who want clauses tailor-made to suit the requirements of petitioner No. 1 so that petitioner No. 1 can participate. It is the DOSA principle in reverse! The fact that petitioner No. 1 is serving a number of

airports today and there is no complaint against it is no ground why the parameters should be made to fit petitioner No. 1. It is not as if AAI is having a prejudice or bias against petitioner No. 1 as is apparent from the existing contracts already with it. We cannot be expected to compare passenger traffics, segregate international and national traffic, look into projections for the future and then prescribe lower standards than what are prescribed in the RFQ.

17. The aforesaid should have brought the matter to an end, but for the one peculiar fact. This was the production in Court of a copy of what was stated to be a letter dated 11.09.2012 addressed by the Chief Executive Officer of the consultant / IL&FS to Shri L.L. Krishnan, Executive Director (Commercial) of AAI. The purport of this letter was that the consultant had opined that the conditions ought not to be made so stringent and suggesting amendments in the RFQ document for Duty Free Retail Concessions at Chennai and Kolkata Terminals. Learned senior counsel for the petitioners contended that AAI was, thus, going contrary to the opinion of their own consultant and though he could not seriously contend that adherence to those recommendations was mandatory, due weightage must be given to the opinion of the consultant and this Court must also peruse the records as to why the recommendations have not been accepted. The production of this letter before the Court occurred on 04.10.2012, when learned counsel for respondents No. 2 and 3 produced the records stating that Corrigendum No. 2 had been issued, which reads as under:

“CORRIGENDUM No. 2

1. Reference is invited to the Request for Qualification

(RFQ) published by Airports Authority of India on 01.09.2012.

2. Following amendments are made to Clause 1.3 (Schedule of Bidding Process) of the RFQ document.

“Qualification Stage

Event Description		Date
1.	Last date for sale of tender	12.10.2012 (1700 hrs IST)
2.	Application Due Date	19.10.2012 (1100 hrs IST)
	Online opening	19.10.2012 (1200 hrs IST)

3. 2.2.2 (A) Technical Capacity Clause (ii) may be read as under:

“The Applicant (in the case of a Consortium, the Lead Member) and its Associate (s) shall have presence in 3 International Airports (Indian or Overseas), each handling a total passenger traffic of 5 million in each year during the last 3 years.”

4. The tender can be procured only by making online payment through the payment gateway. For details, please see the guidelines to the bidders given on the home page of the e-tender portal. No other mode of payment will be accepted.
5. Further clarifications/corrigendum in regard to this RFQ, if any, shall be posted only on the website of AAI (www.airportsindia.org.in, www.aai.aero).
6. This RFQ is global.”

18. Learned counsel for respondents No. 2 and 3 / AAI submitted that now, the tender being a global one, there can be no doubt that petitioner No. 1 can apply through a Consortium as was being proposed in their rejoinder. However, learned senior counsel for the petitioners submitted that the crucial issue is the extent of the turnover as provided, which had no co-relation with the estimated

sale and would impede competition, which was the opinion of the consultant vide letter dated 11.09.2012. We, thus, called upon respondents No. 2 and 3 / AAI to produce the records where this letter had been dealt with and if the advice had not been adhered to, reasons recorded for not adhering to the advice and the final decision taken in the matter.

19. In the next proceedings of 08.10.2012, learned counsel for respondents No. 2 and 3 / AAI stated that the complete records of respondents had been examined and the letter dated 11.09.2012 had not been received by them from their consultant ever. The letter dated 11.09.2012 was, thus, alleged to have been created for purposes of this writ petition possibly in tandem with the consultant. This allegation was made by learned counsel for respondents No. 2 and 3 / AAI on account of the records available with the respondents as compared with the letter dated 11.09.2012. The submissions made in this behalf as recorded in the Order dated 08.10.2012 are being reproduced for convenience as under:

“Learned counsel points out that the letter dated 11.9.2012 under the heading of ‘Definition of Associate’ refers to the advice of keeping the threshold shareholding for being qualified as associate at 50 per cent while in the final proposed RFQ e-mailed on 28.7.2012 to respondents 2 & 3 and referred in the letter dated 3.8.2012 the consultants themselves have proposed it at 75 per cent. Similarly so far as the minimum eligibility criteria conditions detailed in letter dated 11.9.2012 are concerned, as per the same final proposed RFQ the recommendation is Rs.250.00 crore while in the letter dated 11.9.2012 the advice is to have it at Rs.140.00 crore. In this behalf learned counsel has produced the original letter dated 3.8.2012 and the final proposed RFQ sent on 28.7.2012. Learned counsel submits that the consultants in their purported letter dated 11.9.2012 are conveniently silent on

the communication dated 3.8.2012 while referring to their presentations made during the meeting held on 2.4.2012 and 9.5.2012. The final picture which emanated from the consultant is stated to be as reflected in the proposed RFQ sent on 28.7.2012 and referred to in the letter dated 3.8.2012.

Learned senior counsel further submits that a three member Expert Committee had, in fact, been constituted by respondents 2 & 3 on 1.8.2012 which examined recommendations made by the consultant on 3.8.2012 and then made its own recommendations which were sent to the Commercial Advisory Board on 27.8.2012 and the finalized terms were, in fact, put on the website of respondents 2 & 3 on 1.9.2012. It is, thus, submitted that there can be no occasion for the letter dated 11.9.2012 to emanate from the consultants. He further submits that it is no part of the job of the consultants to comment on the final picture as is sought to be done vide letter dated 11.9.2012 with reference to the RFQ published on the website on 1.9.2012.”

20. On having recorded the aforesaid submissions, we opined that normally the issue between the consultant and the principal has to be sorted out at their end, but since something more had been said before us alleging that the consultant appears to have acted contrary to the interest of respondents No. 2 and 3 / AAI by handing over copies of communication to the petitioners subsequently and that too without the communication actually being addressed to respondents No. 2 and 3 / AAI, we would implead the consultant as respondent No. 4. Notice was consequently issued to respondent No. 4 whereafter respondent No. 4 entered appearance and filed their affidavit.
21. In the reply on behalf of M/s. IL&FS Infrastructure Development Corporation Ltd. / respondent No. 4 supported by an affidavit of its President affirmed on 15.10.2012, it has been stated that the

letter dated 11.09.2012 was not an exact copy of the letter written by respondent No. 4 to the Executive Director of AAI. It was pleaded that all correspondence addressed between the consultant and AAI are privilege and confidential and that all correspondence in writing or suggestions made orally to AAI are mere suggestions and the final authority to accept or reject the suggestion lies exclusively with AAI. The authenticated letter dated 11.09.2012, a copy of which was annexed to the reply, was stated to have been handed over to the Executive Director of AAI by hand during a pre-bid meeting on 13.09.2012. We may, however, note that the difference between the copy of the letter produced before us and the authenticated copy is not a major one, but that where the turnover is referred to, the expression '*during each of the last three years*' does not appear in the unauthenticated copy. In effect, what has been stated is that possibly copy of the letter at a draft stage may have been procured by the petitioners.

22. In the context of production of this letter, learned senior counsel for the petitioners relied upon the Division Bench judgment of this Court in Surgical Electronics and Anr. v. Union of India and Ors., 60 (1995) DLT 359 (DB) where a copy of a letter had been produced and such a letter was taken into account. However, in view of the present scenario, especially with the enactment of The Right to Information Act, 2005, we are of the view that not much can be made out from any objection to the production of the letter other than the fact that the letter is not a copy of the original document in its absolute sense.
23. We had in our Order dated 08.10.2012, in view of the controversy over the letter, called upon the petitioners to file an affidavit as to

how they came into possession of the copy of the letter dated 11.09.2012 as it had become necessary in view of the stand of respondents No. 2 and 3 / AAI. An affidavit in this behalf was filed by Mr. P.K. Thimmayya, Director (Operations) of petitioner No. 1. In this affidavit, it is stated that the deponent had attended the pre-bid meeting(s) at Kolkata on 13.09.2012 and at Chennai on 20.09.2012 when more than 15 persons including the representatives of the prospective bidders, representatives of the consultant and Officers of AAI were present. The deponent and several other bidders had complained about the restrictive and steep tender conditions. The deponent has also stated that on 01.10.2012 when he was at Mumbai Office at around 12 hours, one of the office boys came in and handed over an envelope addressed to him, which contained the typed copy of the letter dated 11.09.2012. On enquiry, office boy informed him that the said letter was found inside the mail drop box of the Mumbai Office of petitioner No. 1 company.

24. All we would like to say is that this explanation is difficult to swallow! The interested persons were the petitioners. Without the endeavours of the petitioners, why would a third-party or any one from the consultant pitch in with assistance by sending a copy of the letter and that too of apparently a draft letter in view of the inconsistency between that letter and the authenticated copy *albeit* not a major one. We are, however, not required to go further into this aspect.
25. The submissions on behalf of respondents No. 2 and 3 reiterated that the letter dated 11.09.2012 presented by the petitioners was never received in the office of AAI and even as per the affidavit of

the consultant / respondent No. 4 is alleged to have been given personally to the Executive Director (Commercial), who actually stands suspended w.e.f. 05.10.2012. The document had not come through any normal course as per procedure. In the written synopsis filed, each of the grounds raised by the petitioners has been responded to. An independent consultant had been appointed to suggest the RFQ conditions. Regarding certain aspects, clarifications had already been issued, i.e., the pre-requisite of handling of requisite passenger traffic had been diluted from international passengers to the total passengers for the airport. The financial capacity requirements had been defended. The projections for international passenger for Chennai and Kolkata over the next 10 years had been analysed. No other bidder is stated to have raised any grievance and there is sufficient competition available, especially with Consortium bids being made permissible. The object is stated to be not to eliminate Indian players, but to bring in world class players. It had already been clarified that the tender was a global tender.

26. The original records had been produced and copies thereof had been filed with the written synopsis annexing the relevant minutes of the meeting through which the final decision has been reached. These minutes show that the consultant made presentations in the various meetings where the very parameters, which have been incorporated in the RFQ, have been presented. The minutes filed, in fact, support what had been contended before this Court on 08.10.2012, which has been extracted aforesaid.
27. In our considered view, respondents No. 2 and 3 / AAI have been able to show from records the discussions on various aspects of

the RFQ and the presentations made by the consultant. Respondents No. 2 and 3 / AAI have also rightly pointed out that even if the authenticated copy of the letter dated 11.09.2012 is taken into account, there are matters stated therein, which are contrary to the earlier recommendations of the consultant. The important aspects are as under:

- (i) In the definition of 'Associate', the letter dated 11.09.2012 opines to keep the threshold shareholding for being qualified as 'Associate' at 50 per cent, while in the proposed RFQ sent through e-mail on 27.08.2012 to respondents No. 2 and 3 / AAI and referred to in the letter dated 03.08.2012, the consultant itself had proposed it at 75 per cent.
- (ii) The minimum eligibility criteria conditions as per the same final proposed RFQ was recommended at INR 250 crores for Kolkata, while in the letter dated 11.09.2012, it has been advised as INR 140 crores.
- (iii) In the letter dated 11.09.2012, there is silence of the consultant qua the communication dated 03.08.2012 while referring to their presentation(s) made during the meeting(s) held on 02.04.2012 and 09.05.2012.
- (iv) The final picture, which emanated from the consultant, is as per the proposed RFQ sent on 28.07.2012 and referred to in the letter dated 03.08.2012.
- (v) The Expert Committee constituted by respondents No. 2 and 3 / AAI on 01.08.2012 examined the recommendations made by the consultant on 03.08.2012 and then made its own recommendations, which were sent to the Commercial

Advisory Board on 27.08.2012 and the final terms were, in fact, put on the website by respondents No. 2 and 3 / AAI on 01.09.2012. The advisory role of the consultant was, thus, practically over and, thus, the occasion for sending the letter dated 11.09.2012 is not understood more so in view of the aforesaid inconsistency.

(vi) The task of a consultant is to advise the principal and not really to comment on the final picture, which emerged as put on the website, after the Expert Committee had already considered their recommendations made by the consultant.

28. In our view, there are important aspects, which clearly throw doubt on both the existence and purpose of the letter dated 11.09.2012, which is alleged to have been handed over '*by hand*' to an Officer of respondent No. 2 / AAI, who stands suspended subsequently. In any case, the final call is of the principal being respondent No. 2 / AAI and it is not as if the advice of the consultant has not been examined. The projection of difference between the view of the consultant as reflected in the letter dated 11.09.2012 vis-à-vis the RFQ is not correct as the letter dated 11.09.2012, in fact, states some aspects including of minimum turnover, which are in dilution of the standards sent vide the proposed RFQ by the consultant itself and e-mailed on 28.07.2012 to respondents No. 2 and 3 / AAI, which documents have also been produced for our perusal. The letter dated 11.09.2012 creates a doubt and the purpose with which it has been issued and the manner in which it has found itself in the hands of the petitioners *albeit* an unauthenticated copy, which to some extent differs from the authenticated copy.

29. We are, thus, unequivocally of the view that the legal parameters for scrutiny of the RFQ cannot convert this Court into an appellate authority for the terms and conditions of the tender. The terms and conditions are not completely irrational or arbitrary nor are they tailor-made to fit any third-party. In fact, there is not even a specific allegation in that behalf. It also does not satisfy the test of Reliance Energy Ltd. and Anr.'s case (supra) of there being any violation of '*level playing field*'. The provisions for minimum turnover and satisfaction of essential parameters are part of the process of laying down norms in the RFQ and keeping in mind the nature of the tender, they cannot be labeled as irrelevant or irrational. These are not conditions, which fall within the test of '*clearly illegal*' or '*shockingly arbitrary*' and respondents No. 2 and 3 / AAI are well within their rights to insist on more stringent conditions keeping in mind the objective of having a world class international airport facility. These are not conditions, which no sensible person can be said to have made.
30. We find the writ petition completely devoid of any merit and dismiss the same with costs quantified at Rs.50,000/- payable to respondents No. 2 and 3 / AAI.

SANJAY KISHAN KAUL, J.

NOVEMBER 01, 2012
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VIPIN SANGHI, J.